15 Preserving the Family Through Change for the Sake of Future Generations

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Résumé :
Depuis ces cinquante dernières années, la loi américaine s'est transformée. Avant cela, les relations familiales, comme la relation parent-enfant, étaient clairement définies par la biologie ou l'adoption. Le mariage était défini par le genre. Les actes de mariage et les actes de naissance étaient la preuve d'un statut juridique. La transformation observée est née de la reconnaissance par la loi de la réalité selon laquelle les relations familiales peuvent se développer sans formalités. Aujourd'hui, il n'est plus possible de dire si l'on se trouve dans un certain statut juridique ou pas. Des relations semblables au mariage ont été reconnues, comme les unions civiles, de la même manière que s'est développée, avec les familles recomposées la condition de « parent *de facto* ».
La loi américaine reconnaît maintenant que le mariage est en pleine évolution et pas une institution statique. Elle reconnaît également que l'adoption est aussi une institution en évolution n'excluant plus les parents biologiques de la relation. Par essence, dans la loi américaine il y a eu une reconnaissance des changements qui ont eu lieu tant au niveau de la société qu'au niveau de la science. Cette reconnaissance se concentre toujours sur la famille, définie de façons multiples. C'est la famille qui est l'unité dans la société, conçue pour assurer la continuité de la civilisation.

Summary :
Within the last fifty years, a transformation has taken place in American law. Before then, family relationships, like parent-child relationship, were clearly defined by biology or adoption. Marriage was defined by gender. Marriage certificates and birth certificates evidenced one's legal status. The transformation that has occurred was the legal recognition that took reality into account that relationships can develop without formalities. No longer can it be said that either one is in a certain status or one is not. Marriage-like relationships have been recognized, like civil unions, as well as de facto parenthood.
American law has now recognized that marriage is an evolving, not a static institution with some jurisdictions no longer defining the status in terms of gender, that adoption is also an evolving institution, no longer excluding birth parents from the relationship. In essence, in American law there has been a recognition of the changes that have taken place both in society and science. This recognition still focuses on the family, defined in a multiple ways. It is the family which is the unit in society designed to insure the continuation of the civilization.

1 - In American law, the family is not considered a legal unit like a corporation or a labor union, but a constellation of relationships like spouse and spouse, parent (whether *de facto* or *de jure*, birth or adoptive) and child, grandparent and grandchild, and sibling and sibling. For many years, both the study of and the legal practice that affected those relationships were called domestic relations, which was a more accurate description of the area than the present label of family law. At the close of the twentieth century and the beginning of the twenty-first century, a great transformation took place in American family law. Traditional approaches to establishing, maintaining and reorganizing husband and wife and parent and child relationships were examined and in some instances replaced with new ways of thinking and new laws. These new laws have taken into account changes in social mores and the lessening of taboos of certain subjects, like illegitimacy and cohabitation without marriage, as well as developments in science, especially in the area of assisted reproduction technology.

2 - Perhaps the most important case to be decided during that period was *Goodridge v. Department of Public Health* [1], in which the Supreme Judicial Court, the highest court in the Commonwealth of Massachusetts and the oldest state supreme court, sanctioned same-sex marriage. In his concurring opinion in that case, Justice Greany stated that " the right to marry is not a privilege conferred by the State, but a fundamental right that

1. *798 NE 2d 941 (Mass. 2003).*

is protected against unwarranted State interference " [2]. The court defined marriage as a " vital social institution " representing the " exclusive commitment of two individuals to each other " that " nurtures love ", " mutual support ", and " brings stability to our society " [3]. The government's position on limiting marriage to a man and a woman included the argument that procreation within marriage is a desirable social goal and a same-sex couple could not further that goal. A majority of the justices on the court found that rationale for limiting marriage to opposite-sex couples unjustifiable because " the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children,... is the sine qua non of civil marriage " [4]. In addition, same-sex couples may achieve the goal of establishing a parent-child relationship through adoption and new techniques in assisted reproduction. Also, two individuals over the age of fertility are not restricted from obtaining a marriage license.

3 - Two years earlier, in 2001, the Supreme Judicial Court of Massachusetts was confronted with the question of whose name should appear on a birth certificate when the woman who gave birth to the infant was not genetically related to that infant but merely a gestational carrier. In the case of *Culliton v. Beth Israel Deaconess Medical Centre* [5] the gestational carrier agreed to have implanted in her uterus embryos that were created from the sperm of Steven Culliton and the ova of Marla Culliton, to carry and deliver any child or children resulting from the embryo implantation and to permit Mr. and Mrs. Culliton to have sole physical and legal custody of the child or children born to the carrier. The question presented to the court was novel and the Supreme Judicial Court could not rely on any judicial precedent or legislation directly on point. It therefore decided on its own that Mr. and Mrs. Culliton, the genetically related parents of the twin children born to the gestational carrier were the children's legal parents and their names should appear on the birth certificates.

4 - A year before *Goodridge*, the same court was asked to decide a case, *Woodward v. Commissioner of Social Security* [6], which raised the question of whether posthumously born twin girls could qualify as dependents under the federal social security laws and thus receive benefits. The unusual aspect of the case was that the children's father had his sperm " banked " while he was undergoing treatment for cancer. He ultimately died and after his death his widow was artificially inseminated with his sperm. She became pregnant and gave birth to twins two years after her husband died. There was no question that the twins were the children of their mother's husband. Under federal law, the determination of inheritance rights is a state matter and, while originally the case was brought in the federal courts after the mother had exhausted her administrative remedy (the Social Security Administration had rejected her claim on the ground that the mother had not established that the twins were her husband's " children "), the case was transferred to the state's highest court. The Supreme Judicial Court stated the issue : " We have been asked to determine the inheritance rights under Massachusetts law of children conceived from the gametes of a deceased individual and his or her surviving spouse " [7]. The court held that the posthumously conceived twin girls were the children of the decedent and qualified as his issue. In her concluding statement, the Chief Justice wrote :

" [W]e conclude that limited circumstances may exist, consistent with the mandates of our Legislature, in which posthumously conceived children may enjoy the inheritance rights of « issue » under our intestacy law. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child. In any action brought to establish such inheritance rights, notice must be given to all interested parties " [8].

5 - What do these seemingly disparate cases have in common ? On one level each case represents the highest court in Massachusetts breaking new ground by recognizing changes in social attitudes and the developments in the science of artificial reproductive technology. On another level, the cases represent a judicial preference for establishing spousal and parental relationships even when this involves creating new law. In each case, the result of establishing those relationships was the formation of unconventional family units.

6 - The formation and recognition of a traditional family unit – husband and wife, and parent and child – has been a policy in the United States for years, although it may not always have been articulated. The reasons for the policy vary and may include the natural desire to mate and a desire to live in a closely knit unit with shared values, economic and/or emotional interdependency and as an appropriate setting for begetting and raising healthy children for the sake of future generations. But tradition has given way to changing social mores and that change has been reflected in the law.

1. Marriage-like and Marriage Relationships

7 - According to the latest data from the American government's Census Bureau, married couples represent less than 48 percent of American households in 2010. That figure represents a drop of 30 percent compared with the data in 1950 [9]. Thus 52 percent of American households are no longer comprised of the traditional model. For example, the households may be based on non-marital cohabitation or a single woman without a husband or a single man without a wife but with a child. There may be a variety of sociological explanations, for example, the decline in the reverence for marriage, the changing roles of men and women in society, the erratic nature of employment opportunities and the decline in incomes.

8 - Non-marital cohabitation surely existed in 1950 but it did not have either the social or legal acceptance it now enjoys, mainly because of the radical change that occurred in 1976 when the California Supreme Court decided *Marvin v. Marvin* [10]. In that case the highest court in California decided that at the termination of a cohabitation arrangement, the aggrieved party, whether man or woman, had a remedy either in law or equity depending on the particular facts. For example, if the aggrieved party could prove that the couple had entered into a formal contract to regulate their relationship, he or she could sue for breach of contract. Or, if the conduct of the parties implied a

2. *Id. at 970.*
3. *Id. at 948.*
4. *Id. at 961.*
5. *756 NE 2 1133 (Mass. 2001).*
6. *760 NE 2d 257 (Mass. 2002).*
7. *Id. at 261.*
8. *Id. at 272.*
9. *Sabina Tavernise, Married Couples Are No Longer a Majority, Census Finds : The New York Times, May 26, 2011 at 22.*
10. *557 P.2d 106 (Cal. 1976).*

contract, he or she could sue for breach of an implied contract as well. Further, an equitable remedy like quantum merit, constructive trust, or resulting trust could be applied if the facts supported it.

9 - With the lifting of the social taboo against contract cohabitation and the availability of a legal remedy at termination, in a certain sense contract cohabitation has become an alternative to marriage. Indeed, registered domestic partnerships and civil unions that are available in some American jurisdictions, like Nevada, New Jersey, Oregon and Washington are predicated on the legal recognition of contract cohabitation. But contract cohabitation is an alternative to marriage – not a substitute for marriage – for people who do not want the kind of individual responsibilities and obligations marriage requires, and those imposed by the state [11].

10 - In a formal cohabitation contract, a couple may decide between themselves what role each will play and what kind of obligations will attach to their relationship. But the important limitation to such a contract is that it cannot bind third parties. For example, a couple may promise each other to be loyal and to refrain from revealing their secrets, but should one of the parties in a cohabitation contract be sued, that promise does not provide him or her with the same evidentiary protections enjoyed by a married couple.

11 - Studies have shown that there is a major difference between cohabiting couples and their married counterparts in terms of who they are and how they view their relationship [12]. These studies indicate that in terms of age, cohabitants tend to be younger ; in terms of economic stability, cohabitants tend to be less economically secure, perhaps because they tend to be less educated. Valuing independence and personal happiness, cohabiting couples tend to live separate economic lives and seem to be less committed to their relationship than a married couple. Those characteristics carry over to their attitude toward their children who seem to experience greater financial, physical and educational risks than children of married couples.

12 - A major difference between contract cohabitation and marriage is in the legal treatment of children. Unless there is a statute in the jurisdiction declaring all children legitimate, children born to a cohabiting couple, whether there is a formal contract or not, is not legitimate. That would mean that the father of the child would have to take some formal legal action to acquire paternal rights and the mother of the child would also have to take formal action to acquire a support obligation on the part of the father. For example, the father of the child would have to become a co-guardian of the child to secure custodial rights. Short of some legal action, the cohabitation arrangement would not create a secure family unit. Unless legislation that creates civil unions provides legal protection for children, civil unions fail as substitutes for marriage.

11. *For a full discussion of the legal aspects of nontraditional families, like contract cohabitation, civil unions and registered domestic partnerships, see Ira Mark Ellman, Paul M. Kurtz, Lois A. Weithorn, Brian H. Bix, Karen Czapanskiy and Maxine Eichner : Family Law : Cases, Text, Problems 917-1123(5th ed. 2010).*

12. *Professor Marsha Garrison has written extensively about the comparison between marriage and cohabitation, citing empirical studies to support her conclusions and the statements in this article. See Marsha Garrison, Is Consent Necessary ? An Evaluation of the Emerging Law of Cohabitant Obligations : 52 UCLA L. Rev. 815 (2005). – Marsha Garrison, Marriage Matters : What's Wrong with the ALI's Domestic Partnership Proposal in Reconceiving the Family : Critique on the American Law Institute's Principles of the Law of Family Dissolution 305 (Robin H. Wilson ed., 2006). – Marsha Garrison, Nonmarital Cohabitation : Social Revolution and Legal Regulation : 42 Fam. L. Q. 309 (2008).*

13 - Children are protected in marriage by the state laws that are designed to further the best interests of children in a variety of ways. And, where there are no specific laws, common law protections fill in the gaps. Perhaps the most important laws that protect children are found in state decedents estates statutes. American decedents estates statutes that regulate inheritance are based on the English model which were designed to respect and protect family ties, especially biological ties.

2. Parent-Child Relationship

14 - Parenthood within marriage has been the traditional model for the establishment of the family in American law. However, throughout history men have fathered children outside of marriage and both the father and the children have been discriminated against both socially and legally. As stated above, this discrimination was and is clearly manifested in decedents estates laws. Fathers of illegitimate children have also been discriminated against in custody disputes and adoption. In adoption, the father was often considered a shadow figure, often disregarded, and not notified when his child was relinquished for adoption. The discrimination was probably based on the social policy of discouraging out of wedlock births and promoting family units based on marriage.

15 - In 1972, the United States Supreme Court in *Stanley v. Illinois* [13] recognized that a family unit could be based on informal cohabitation, and a father of children born to an unmarried cohabiting couple could have certain rights. In *Stanley*, after the children's birth mother had died, the children automatically became wards of the State of Illinois and that state's protection agency removed the three children from Mr. Stanley's care. In Illinois an illegitimate father was presumed to be unfit without any previous hearing that had determined that fact. That Mr. Stanley had fathered the three children during the 18 years in which he had lived intermittently with the children's mother was irrelevant. Mr. Stanley's argument that a father of illegitimate children was presumed unfit because he had not married the children's mother deprived him of the equal protection of the laws guaranteed under the Due Process Clause of the U.S. Constitution. Mr. Stanley argued that fathers of illegitimate children should not be treated differently from fathers of legitimate children in terms of being notified and given an opportunity to be heard in any proceeding that would determine their children's custody. And he won his point.

16 - *Stanley v. Illinois* represents not only a victory for unwed fathers who seek to be heard in any custody dispute and adoption proceeding, but it also represents the United States Supreme Court's recognition of family ties even in a family not based on marriage. In a series of cases concerning unwed fathers, the United States Supreme Court affirmed its stand that the existence of a paternal relationship is the important element in an unwed father's claim to be legally recognized as a parent [14]. The pater-

13. *405 US 645 (1972).*

14. *Stanley v. Illinois and other United States Supreme Court cases dealing with the rights of unwed fathers is discussed in Sanford N. Katz : Family Law in America 153-54 (2003). – See also Walter O. Weyrauch, Sanford N. Katz, Frances Olsen : Cases and Materials on Family Law : Legal Concepts and Changing Human Relationships 78-83 (1994). – Nancy E. Dowd, Fathers and the Supreme Court : Founding Fathers and Nurturing Fathers : 54 Emory L.J. 127 (2005). – David D. Meyer, Parenthood in a Time of Transition : Tensions Between Legal, Biological, and Social Conceptions of Parenthood : 54 Am. J. Comp. L. 125, 128-29 (2006 Supp.). – David D. Meyer, The Constitutionalization of Family Law : 42 Fam. L. Q. 529, 542 (2008). – Although Stanley concerned providing an unwed father notice and an opportunity to be heard in a dependency hearing, the United States Supreme Court referred to the adoption proceeding as well in footnote 9.*

nal relationship is first based on biology, and secondly on the assumption of parental responsibilities either individually or shared with the child's mother [15].

17 - The United States Supreme Court has respected the existence of on-going families and has been reluctant to allow any legal interference with that family unit even where the family unit was not based on biology. In *Michael H. v. Gerald D.* [16], a plurality of the justices in a complex set of opinions protected the integrity of the marital family even where the child in that family was the result of the child's mother being impregnated not by her husband but by another man. The ultimate outcome of the case was to deprive the biological father of his privacy protection in his relationship with his child. He had failed to assert his paternity claim within two years of the child's birth, which was the law in California. The case resulted in a victory for the on-going family unit. In a certain sense, the *de facto* family trumped biology.

18 - However, in the context of child protection cases, the integrity of the biological parent-child relationship has been affirmed time and time again [17]. State intervention into the parent-child relationship can only occur when a court has determined that the parent is unfit. [18] Typically these cases involve proven allegations of abuse and neglect. In severe cases, the ultimate outcome is termination of parental rights, which ordinarily occurs after parents have been given the opportunity to rehabilitate themselves and they have failed to do so.

19 - The difficulty of enacting the model mandatory child abuse reporting statute in all the American jurisdictions during the 1960s and 1970s was the result of the reluctance of state legislatures to endorse an act that interfered with the parent-child relationship. Ultimately, child abuse reporting statutes were enacted when legislators were convinced that a child's safety and well-being trumped the sanctity of family privacy [19].

3. Adoption of Children

20 - Historically, adoption of children under the age of 18 was considered an alternative method of establishing a family and thus providing for the continuation of the family's name [20]. In early American history, adoption was established by private contract and it was not until the mid-nineteenth century that the Commonwealth of Massachusetts made what was a private act a judicial proceeding where the adopted child's best interests were considered over the needs of the adoptive couple to have an heir. For over a century adoption has been the result of either the birth mother's voluntary relinquishment of her child, or the involuntary termination of the child's parents' rights and her placement with an adoptive couple. In the last quarter of a century adoption can be the result of the complicated process of assisted reproductive technologies.

15. *See Katharine K. Baker, Bargaining or Biology ? The History and Future of Paternity Law and Parental Status : 14 Cornell J.L. & Pub. Pol'y 1, 34-36(2004).*
16. *491 US 110 (1989).*
17. *See Katz, supra note 14, at 131-52.*
18. *See Sanford N. Katz, When Parents Fail (1971). – See also John E.B. Meyers, Child Protection in America (2006).*
19. *See Katz, supra note 14, at 140-143.*
20. *See Katz, supra note 14, at 153-82.*

21 - For over a century, adoption of children in America was a taboo subject and the fact that a child was adopted was rarely discussed even among family members. Standards for placing children for adoption were designed to imitate nature so that an adopted child would share similar external traits with her adopted mother or father. This perpetuated the myth that the adopted child was no different from a natural born child. Indeed, intestacy laws in most states reflected that myth by treating natural born children and adopted children alike. Both were considered heirs.

22 - It was not until late in the twentieth century that the cloak of secrecy was lifted and in certain instances and in some American jurisdictions adult adopted children were allowed access to their birth records. In addition, and of very recent origin is the phenomenon of " open adoption ", which allows a birth parent to maintain contact with her adopted child, thus removing the mystery of the identity of the birth parent. Allowing a birth parent visitation rights with the child she has relinquished may be accomplished by way of a contract or by judicial order. Open adoption introduces a new model of adoption, which expands the adopted child's relationships. It is an alternative to the traditional family model of one set of parents and their children. In a certain sense, it is like a family where the parents of the children are divorced but the birth father has visitation rights which he exercises.

23 - " Preserving the Family Through Change for the Sake of Future Generations », the title of this article, may seem contradictory. After all we tend to think of preservation as stasis and change its opposite. However, it is my thesis that the family unit has been preserved in its current vibrancy because it has been allowed to be transformed in response to changing times. The family, as it has been defined historically – consisting of two opposite sex parents, and a child or children either born to those parents or adopted by them – may be a thing of the past. The new family may consist of one parent and her child, either born to the mother through a sexual relationship with a man, or conceived by artificial insemination. It may consist of a man and his child or two men and their child born through the use of a surrogate, or two women and a child born to one of them through artificial insemination or obtained through adoption. But, as the now retired United States Supreme Court Justice Sandra Day O'Connor noted in *Troxel v. Granville* [21] when she was a sitting justice : " [D]emographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household " [22]. The variation among families Justice O'Connor was describing in 2000 has become even greater today. The cases discussed in this paper support Justice O'Connor's remarks, each receiving the protection of the law and the acceptance of society. Whatever the family model, it should provide for the welfare of children. The relationships that comprise the twenty-first century family can provide the continuity necessary for the survival of civilization. ■

Mots-Clés : Solidarité - Droit comparé - Droit américain - Définition de la famille

21. *530 US 57 (2000).*
22. *Id. at 63.*