The ALI Principles and the Economics of Family Dissolutions

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Summary

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In May 2000 the American Law Institute (ALI) approved a document entitled “The Principles of Family Dissolution: Analysis and Recommendations.” The American Law Institute is perhaps the most prestigious private law institution in the United States. It is a national organization of judges, lawyers and legal academics, founded in 1923, for the purpose of improving the law. Its restatements of the law and model codifications of the law have been enormously influential in the development of the law in the United States.¹

The approval of the Principles of Family Dissolution was an historic event for both the ALI and Family Law. For the ALI it marked the first venture by that body into the subject matter of Family Law and, therefore, focused the attention of that prestigious body away from the kinds of issues that traditionally it has dealt with – issues of wealth and power – to the kinds of problems that affect the lives of everyday people. For Family Law which historically has been an intellectual stepchild in the law – a messy area that the bench and bar have tried to keep away from – it was important because it brought that subject to the agenda of one of the most prestigious organizations of American law and subjected it to the process of examination and rationalization which has been the great contribution of the ALI.

This paper gives a brief general description of the Principles, discusses some themes important to understanding them and then explores in more detail the economics of family dissolution as handled in the Principles.

As a preliminary matter, it should be remembered that there is no Family Law of the United States. There are 51 family laws, one for each state and the District of Columbia. Family law under the United States Constitution is a matter within the jurisdiction of the states and references to a national rule refer only to a consensus of a majority of the states. However, in one area, that of child support, the federal government has had a major impact by conditioning the payment of federal funds for certain social welfare programs on the enactment of standards set by the federal government.

First of all – why Principles rather than a Restatement of the Law? The concept of Principles is more flexible than a restatement and given the state of disarray of family law in the United States – the unparalleled volume of litigation and legislation – a more flexible approach seemed appropriate. More importantly the use of “Principles” provides the opportunity to choose an emerging principle that may not have had time to gain much legislative or judicial support. In fact, some of the most important rules proposed by the Principles are innovative new rules that have no history of judicial or legislative acceptance.

Secondly, why family dissolution rather than divorce? Family dissolution is used because the Principles deal with informal as well as formal relationships. In the last quarter century there has been a significant increase in the number of adults who have formed informal intimate relationships. Although public policy is still somewhat
ambivalent about cohabitation of unmarried persons, the courts are called on to deal with the problems growing out of the termination of these relationships, particularly when there are children. There is a developing body of legislation and case law in response to the termination of these informal families that merits treatment in any overall picture. In fact, nonmarital children are covered along with marital children in the chapters on child support and child custody.

At the outset it should be understood that the Principles do not deal with the grounds for divorce. They are limited to issues of property division, post-dissolution support and child custody. These are usually referred to as the “incidents” of dissolution, i.e., the problems of terminating a family relationship other than the divorce itself. Historically, the law has seen the decision whether to grant a divorce as the most important part of the dissolution process; hence the term “incidents.” But, today, in the United States, all states provide access in some way to divorce without regard to proof of fault. Therefore, the grounds for divorce are rarely, if ever, an issue. Thus the “incidental” aspects of the family dissolution process now constitute the overwhelming mass of family law litigation. They also present problems of great consequence for public policy because they shape the terms of the future for the partners and their children.

There are several themes that shape the approach taken in the Principles and that should be mentioned by way of introduction.

One is that the law ought to achieve a more equitable sharing of the economic gains and losses of the family relationship. This objective reflects a recognition that, if as a society we are to tolerate a high rate of divorce — a matter on which there seems to be almost universal agreement —, we ought not to accept a public policy that makes dependent spouses (those who have devoted their major energies to homemaking and child caring) and the children who are in their custody bear the economic brunt of that policy. Yet, that is clearly what has been happening. Studies continue to find mothers and children in more straightened circumstances than the fathers post-divorce.

Therefore, one of the main concerns of the Principles is to try to increase the share of the family enterprise that dependent spouses and children receive on dissolution and to distribute the economic losses of family dissolution more fairly. For example, the Principles include a provision for a presumption of a fifty-fifty property division, provisions for post-divorce economic support for long-term dependent spouses and child carers based on length of marriage and income disparity and for an additional child support amount to provide a minimum decent standard of living for children where the income of the residential parent is significantly less than that of the other parent.

Another theme underlying the Principles grows out of a recognition that family dissolution is, in the vast majority of cases, a negotiated process not a litigated one. In the past rules assumed a judge is the decision maker but the reality is that judges review and approve the decisions negotiated by the parties. Most estimates are that settlements by parties constitute 90% or more of all cases. A main objective of the Principles is to acknowledge and control this negotiation.

If divorce is understood as a process of party negotiation with the possibility of judicial review, rather than one of judicial decision-making, the substantive standards expressing public policy must be tailored to that process. Historically, substantive rules in family dissolution have been based on the assumption that they are applied through judicial decision-making. Therefore, they seek to guide judicial discretion in “the best interest of the child” or on equitable principles or in terms of a list of multiple factors to consider. Such standards may be appropriate to inform decision-making by a third party, such as a judge, but may be useless or dysfunctional in channelling negotiation by parties and their lawyers.

The Principles fashion workable public constraints for the negotiation process through the use of appropriate presumptions and formulas. Such mechanisms perform multiple functions. In addition to informing negotiators of permissible limits, they also provide benchmarks against which reviewing courts, with limited time and information, may scrutinize the desirability of bargained settlements. Finally, in the cases that are litigated, they assist the courts in making decisions that are more predictable.

A third theme that shapes the Principles is the relationship between fault and family dissolution. The Principles do not deal with the grounds for divorce but assume that divorce is available without regard to, and in spite of, fault in all American jurisdictions. No-fault divorce laws not only allow consent divorce — a possibility that would have been unthinkable as late as the 1960s — but also unilateral divorce, i.e., divorce at the request of the guilty party. In the Principles, no attempt is made to assess the substantive grounds on which the divorce is granted.

Building on the no-fault divorce concept, the Principles exclude marital fault from the economic considerations on dissolution. This, by the way, is the approach of more than half the states which exclude consideration of fault from property division and maintenance. The basis for this view is the same as in the grounds for divorce. Marital fault is, in the vast majority of cases, impossible to assess. It is, to an extent, in the eye of the beholder.
The Principles cover six subjects: (1) the Allocation and Custodial and Decisionmaking Responsibility for Children; (2) Child Support; (3) Division of Property; (4) Compensatory Spousal Support; (5) Domestic Partners; and (6) Agreements. Only the first topic, Responsibility for Children does not deal with the economics of family dissolution which is the focus of this paper. Therefore, it will be described briefly before the economic areas are addressed.

I. Custodial and Decisionmaking Responsibility for Children

Chapter 2 of the Principles is entitled “The Allocation of Custodial and Decisionmaking Responsibility for Children.” It deals with the bundle of issues usually referred to as “custody”.

As the title to the chapter implies, the ALI has done what a number of American jurisdictions have done: divided the concept of custody into (1) the decisionmaking authority of parents and (2) the residential arrangements for the child. Therefore, parents may share equally the decisionmaking authority for their children, often called joint legal custody, but the child may live primarily with one parent, usually the mother, where this custodial arrangement is the fastest growing post-dissolution arrangement in the United States. The use of shared decisionmaking is encouraged by the Principles which provide that if each of the child’s legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents is in the child’s best interest. (§2.08)

The ALI Principles on Responsibility for Children promote another important value for the process of family dissolution: parental agreement and planning. Although historically — as pointed out earlier — the law has seen the judge as the decision maker on issues of post-divorce living arrangements for children, the fact is that most arrangements are negotiated by the parents. That is an approach that makes sense. The parents should be the ones most likely to know what is best for the child. The ALI Principles honour this truth by requiring that the court approve a parenting plan agreed to by the parents unless it finds that the plan would be harmful to the child.

This is a considerable departure from the rhetoric of child custody law in the United States in the past when the guiding principle has been the best interest of the child. Even though most post-dissolution child custody arrangements are negotiated and agreed upon by the parties, the court’s approval has always been predicated on finding that the arrangement was in the best interest of the child. When parents cannot agree on a custodial arrangement, the Principles provide that the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing care-taking functions for the child prior to the parents’ separation. (§2.08) This is known as the approximation rule and is one of the more controversial of the Principles.

II. Property Division

In the United States there are two types of matrimonial property regimes: community property and separate property. In the community property states property acquired during the marriage belongs jointly to the couple and, on dissolution, it is to be divided between them. But most American jurisdictions, growing out of their common-law heritage, follow separate property rules so that property acquired during marriage is owned by the party whose income purchased it. Historically, this was a source of unfairness on dissolution because the spouse who was primarily the homemaker and child-carer was entitled to very little of the property acquired during the marriage. Today, however, these separate property jurisdictions follow a rule of equitable distribution on dissolution, often with a presumption that the property will be divided equally between the parties. As a result the division of property on divorce is quite similar in most of the American states.

The rules set out in the Principles in Chapter 4 on “Division of Property” adopt the approach of the community property jurisdictions. They distinguish between “separate property”, which is property acquired by a spouse prior to marriage or by inheritance, and “marital property” which is property acquired during the marriage and is to be divided on dissolution. The Principles draw heavily on community property concepts for equitable considerations, such as spousal contributions to the separate property of the other spouse which become marital property. The object of the property division rules is to treat both partners equally and fairly.

III. Compensatory Spousal Payments

Chapter 5 of the Principles is entitled “Compensating Spousal Payments” and is probably the most innovative of the rules proposed by the ALI Principles.

Historically, the divorce laws have provided for the payment of alimony or maintenance by the spouse with the greater income, usually the husband, to the spouse who was the child-carer and homemaker because that spouse was in need of support after divorce. However, as the commentary in the Principles points out the courts had great
difficulty determining need – and should it be an issue of preventing a spouse from falling into poverty or, if the parties had lived at a lavish standard, should the need be based on that standard?

The Principles propose that the case law in the United States suggests that the issue should be compensation for loss, not relief of need. The Principles determine the amount of compensation by (1) the length of the marriage – longer term marriages entitle the spouse to larger amounts of compensation and (2) the disparity in income between the spouses. They provide that there should be a rule of state-wide application under which a presumption of entitlement arises when spousal-income disparity and a marital duration each exceed a value specified in the rule.

A rule of state-wide application may be adopted by the legislature or by the court. In order to be of state-wide application, a judicial adoption would presumably require that it be adopted by an appellate court, preferably the highest appellate court in the state. An example given in the Principles of an appropriate formula is a 10 year marriage and an income disparity of 25 percent.

IV. Child Support

Chapter 3 on the “Principles Governing Child Support” builds upon one of the most successful programs in Family Law in the United States. In the 1980's some American states, in particular my state of Wisconsin, reformed their child support law to require that child support be set by a formula that determined the amount of child support by a percentage of the obligor’s income that depended on the number of children to be supported. The Federal Government adopted this approach and required the states to promulgate state-wide Child Support Guidelines setting child support with a formula as a condition for the receipt of federal child support funds. The Principles adopt this approach to setting child support.

The Principles apply the child support formula to support by both married and unmarried parents. (§3.03) They also apply it to children of same sex relationships where the parties have agreed to share the responsibility of raising the child and that each would parent the child. (§3.03).

V. Domestic Partners

In the United States – as in Europe – there has been a significant increase in the numbers of unmarried heterosexual couples. At the same time, cohabiting same sex couples have become much more visible.

Many of these couples have children. Historically, the legal relationship of these children to their fathers was problematic but today the rights and duties of these unmarried parents to their children are, in general, governed by the same rules as married parents. Therefore, in the Principles, the rules governing the relationship of unmarried parents to their children are spelled out in Chapter 2 on Custodial and Decisionmaking Responsibility for Children and Chapter 3 on Child Support.

The law governing the termination of the relationship of cohabiting couples is not well developed. American law has come a long way from the days when the courts would not entertain a claim for economic loss by a cohabiting partner because the relationship was “meretricious” and the courts could not grant equitable relief under those circumstances, but there is a lingering shadow of that attitude as the courts face the claims of unmarried partners when the relationship ends. The most common approach used by the courts is to apply contract rules -- did the parties agree to share the property they acquired during their cohabitation?

Chapter 6 of the Principles, entitled "Domestic Partners" deals with the financial claims of cohabiting partners at the termination of their relationship. But the Principles take a different approach from that of the majority of American courts which ground the result in contract. The Principles establish the status of Domestic Partner with rights to property and compensation dependent on that status. The status of Domestic Partner has many of the characteristics of common-law marriage which has been abolished in all but a handful of American states, in particular a requirement that the parties share a primary residence and life together for a significant period of time. The Principles differ from common law marriage in that they accord Domestic Partner status to same sex couples.

The Principles provide that the period of time of cohabitation to trigger Domestic Partner status is to be set by a rule of state-wide application. Given the political climate in the United States, it seems doubtful that any state legislature will adopt such a rule in the near future. Therefore, the implementation of the Principles will be left to the courts where current doctrine relies on contract and the concept of a domestic partner status will not be a central issue.

VI. Conclusion
The Principles of Family Dissolution contain a mixture of existing rules -- the kind of statement that the ALI makes in its Restatements -- and innovative ideas that still require implementation to determine how well they may work. But, in any event, the Principles of Family Dissolution will have a major impact on the law relating to family dissolution.