

Avoiding unnecessary divorce and restoring justice in marital separations: Review of the Family Law Act 1975 (FLA)

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Introduction

1. The concept of no-fault divorce which became law in Australia in 1975² 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.*”³
2. However, many countries, Australia included, became part of the revolution without properly considering the financial consequences.⁴ 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?⁵
3. Further, a philosophical underpinning of the no-fault divorce 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.⁶
4. 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

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² 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.

³ Law Commission, Reform of the Grounds of Divorce: The Field of Choice¹⁰, CMND 3123 (1966).

⁴ 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 accessed 21 July 2014.

⁵ P. Symes, Indissolubility and the Clean Break, 48 Modern L. Rev. 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 accessed 21 July 2014.

⁶ Parkinson, note 5 above at 4.

indissoluble. The idea of the “enduring family” has emerged.⁷ 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.

5. 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.

The Costs of Divorce

6. 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.
7. According to Professor 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.”⁸
 No doubt the same order of costs, *per capita*, will apply in Australia.
8. 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.
9. This paper examines 3 areas where costs are imposed on the public purse by divorces: the areas are aged care, health and youth affairs.
10. **Aged Care:**
 10.1. The Australian Institute of Family Studies paper entitled “*The Consequences of Divorce for Financial Living Standards in Later Life*”⁹ found that;

⁷ 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, note 5 above at 5.

⁸ Parkinson note 4 above at 23.

⁹ David de Vaus, Matthew Gray, Lixia Qu and David Stanton RESEARCH PAPER NO. 38, FEBRUARY 2007.

“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.”¹⁰

- 10.2. However, as the rates of re-marriage have fallen significantly,¹¹ the ameliorative impact of remarriage may not be available to many divorced people.
- 10.3. 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...*”¹² 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.*”¹³
- 10.4. 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.
- 10.5. These findings are unsurprising, as the inevitable effect of divorce is that two households are created when before there was one:
 “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.”¹⁴
- 10.6. Professor Parkinson 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 the 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.*”¹⁵
- 10.7. This burden of care for the elderly has often fallen on women.¹⁶ 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 elderly parents has decreased.

¹⁰ Ibid at (ix).

¹¹ Kevin Andrews, *Maybe I do*, Connor Court Publishing 2012 at 171-172.

¹² Note 7 at (xi).

¹³ Ibid.

¹⁴ Parkinson note 4 above at 11-12.

¹⁵ Ibid at 19.

¹⁶ L. Brewer, *Gender Socialization and the Cultural Construction of Elder Caregivers*, 15 J, Aging Stud. 217 (2001).

Further, divorce also removes much of the sense of obligation one party may have had to care for their parents-in-law.¹⁷

10.8. 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.

10.9. At a time when the costs of aged care including the pension are one of the largest items in the budget,¹⁸ it is imperative that efforts be made to reduce the number of divorces and so stem this aspect of budgetary pressure.

11. Health:

11.1. 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.¹⁹ The latter have greater mortality rates, more acute symptoms and mental health problems than the former.²⁰

11.2. 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.”²¹

No doubt this operates *vice-versa*.

11.3. This differential is particularly evident in suicide rates. Kate Fairweather-Schmidt *et al* in their study ‘*Baseline factors predictive of serious suicidality at follow-up: findings focussing on age and gender from a community based study*’²² 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 and “*Relationship breakdown is one of the major causes of suicide worldwide.*”²³

11.4. A 2009 study has even linked lower blood pressure readings to being married, compared to those who are not married.²⁴

11.5. Again, these findings are unsurprising. The emotional trauma associated with divorce means that the parties are often under severe distress. The adverse

¹⁷ Parkinson, note 4 above at 20-21.

¹⁸ 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-zqyaq.html> accessed 21 July 2014.

¹⁹ ‘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.

²⁰ *Ibid.*

²¹ Scott M Stanley (2005) What is it with men and commitment anyway’ *Threshold* 83:4-11; noted in Andrews note 11 above at 36.

²² (2010) BioMed Central Psychiatry 12:41 referred to in Andrews note 311 above at p37.

²³ F McAllister (ed) (1995) *Marital breakdown and the Health of the Nation* [London, One plus One] referred to in Andrews note 11 above at 36.

²⁴ ‘Aisle lowers the blood pressure’ (2009) *Threshold* 97:4; referred to in Andrews note 11 above at p34.

financial impacts divorce causes means that those involved have less to spend on health and related matters.

12. Youth Affairs:

12.1. There is now no doubt 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 said:

“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 negligible. The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.”²⁵

12.2. Professor Paul Amato, a leader in this field of research has said:

“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. ... Although 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.”²⁶

12.3. 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.”²⁷

12.4. In a 2005 study entitled “*The Impact of family formation change on the social, cognitive and emotional well-being of the next generation*”, Professor Amato opined:

²⁵ S.Brown, *Marriage and Child Well-Being: Research and Policy Perspectives* 72 *J. Marriage and Family* 1059, 1062 (2010) (references omitted).

²⁶ P. Amato, *Research on Divorce: Continuing Trends and New Developments*, 72 *J. Marriage and Family* 650, 653 (2010).

²⁷ 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 note 4 above at 27.

“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 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.”(emphasis added).²⁸

- 12.5. As with the other issues discussed above, these findings should not surprise. They are the result of legal and sociological theories coming into conflict with the irreducible realities of our make-up- or the natural law. In such a conflict the natural law must win.
- 12.6. Efforts to ease these consequences by coerced child support regimes, while ameliorative to some extent, do not address the issue. Firstly, 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),²⁹ secondly, because most of those who have to pay child support are on moderate to low incomes and often cannot contribute much if anything,³⁰ thirdly 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 Professor Parkinson says, “*The economics of separation inevitably dictate loss.*”³¹ *A fortiori*, the human trauma of separation.

²⁸ (2005) *The future of Children* 15:88-89

<http://www.princeton.edu/futureofchildren/publications/journals/article/index.xml?journalid=37&articleid=107§ionid=693> accessed 22 July 2014.

²⁹ CHILD SUPPORT AGENCY, FACTS AND FIGURES, 2008-09, 1 (2009) referred to in Parkinson note 4 above at p18.

³⁰ “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 at note 4 above p17.

³¹ Parkinson note 4 above at p12.

13. As Justice Paul Coleridge, a senior Family Division Judge in the United Kingdom has said: “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.”³²

The Enduring Family and the Indissolubility of Parenthood

14. 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, “*Today, divorce is not the end of a relationship but a restructuring of a continuing relationship.*”³³ Marriage may be dissoluble by law but family is indissoluble in fact.
15. 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.³⁴ 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.³⁵ This movement towards some form of shared care has also occurred (or is being debated) across the western world.³⁶
16. As Professor Parkinson has said:
 “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.”³⁷

³² 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.

³³ Marygold S. Melli, *Whatever Happened to Divorce?*, WIS. L. REV. 637, 638 (2000) referred to in Parkinson

³⁴ 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.

³⁵ *Ibid* at 5.

³⁶ *Ibid* at 1 and 6-8.

³⁷ Parkinson note 5 at p36.

17. 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.

Suggestions for Reform

18. Why should the law deal attempt to reduce the number of divorces and keep families together? This paper has shown that the impact on 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 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.”³⁸
19. 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.
20. As a matter of public policy, legislative efforts will yield most benefit by supporting marriage. Unmarried cohabiting relationships break up at a far higher rate than marriages. 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.³⁹ Where same-sex couples may ‘marry’ the rates of those relationships breaking up are significantly higher than for than for married couples.⁴⁰ Accordingly, the benefits to the public purse flow from supporting marriage rather than any variant thereof.
21. Three propositions for reform are suggested:
- 21.1. Revisiting the 1 year period of separation as proof of an irretrievable breakdown of the marriage:

³⁸ See note 9 above at p3.

³⁹ P. BUTTERWORTH, T. OZ, B. RODGERS, & 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 note 4 above p8.

⁴⁰ Andersson G1, Noack T, Seierstad A, Weedon-Fekjaer H, The demographics of same-sex marriages in Norway and Sweden *Demography* (2006) Feb 43(1):79-98 <http://www.ncbi.nlm.nih.gov/pubmed/16579209> accessed 22 July 2014.

21.1.1. The period was selected arbitrarily. Some European countries require a 3 year waiting period.⁴¹ Requiring a greater period of separation, say 2 years, will force couples to give greater consideration to 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:

“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;”⁴²

may assist.

21.1.2. The evidence suggests that longer waiting periods are associated with lower divorce rates.⁴³ This complements the other evidence that nearly half of divorcing couples are from low conflict relationships, which could survive with help.⁴⁴ 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.⁴⁵ There is therefore good evidence to consider extending the period before parties may obtain a divorce.

21.2. Mandatory reconciliation counselling:

21.2.1. Australia has already legislated for mandatory mediation to resolve issues such as parenting orders before an application may be filed.⁴⁶ This proposal would entail refining these provisions to require counselling specifically directed at the possibility of reconciliation. Matter to be addressed may be:

⁴¹ 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.

⁴² Ibid at 42.

⁴³ Ibid at 23.

⁴⁴ Ibid at 19.

⁴⁵ 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 at note 41 above p14.

⁴⁶ Parkinson note 34 above at p21.

- 21.2.1.1. “Questions to help individual spouses reflect on their potential interest in reconciliation;
- 21.2.1.2. The potential benefits of avoiding divorce for children and adults
- 21.2.1.3. Resources to assist with reconciliation
- 21.2.1.4. Information on when the risk of domestic violence should rule out working on reconciliation at this time.”⁴⁷
- 21.2.2. 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.⁴⁸ Such a procedure may overcome the common situation that one party first knows that there are issues in the marriage when the other announces they are leaving.
- 21.3. Providing the right for a court to award damages for a breach of the marriage contract:
 - 21.3.1. Marriage is a 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. It is clear 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;
 - 21.3.2. The courts could 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;⁴⁹
 - 21.3.3. 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;
 - 21.3.4. 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 by the marriage contract. Such a coercive tool is a well-used legislative method to bring about social change.⁵⁰

⁴⁷ Doherty *et al* note 41 above at p33.

⁴⁸ *Ibid* at 28-30.

⁴⁹ *Marriage Act 1961* section 5.

⁵⁰ The increase in the strictness of drink driving laws is a paradigm example.

21.3.5. Such a reform is likely to find community support.⁵¹

Conclusion

22. 39 years after the no-fault divorce revolution gave Australia the FLA, our society has experienced the massive financial and human costs of a legislative reform that was enacted without adequate forethought.
23. The cost of fragile families that has ensued is now significant. As Professor Parkinson has said:
“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.”⁵²
24. Now is the time to start.

⁵¹ Barry Maley Reforming Divorce Law (2012) *AFA Journal* 33 (1) at page 7
<http://www.family.org.au/afa-journal/114-afa-journal-vol-33-no-1-2012/190-reforming-divorce-law> accessed 17 July 2014. .

⁵² Parkinson note 4 above at p30.