

Asia
KF
329.5,
F418
C56
1996

21世紀の民法

小野幸二教授還暦記念論集

THE CIVIL LAW IN THE 21ST CENTURY

FESTSCHRIFT IN HONOR OF KOJI ONO
ON THE OCCASION OF HIS 60TH BIRTHDAY

法学書院

enacted, the California courts will have to decide whether the measure should be interpreted to apply to Hawaii same-sex couples married in Hawaii.

- (49) See Robert Jackson, "Full Faith and Credit -- The Lawyer's Clause of the Constitution," 45 *Columb. L. Rev.* 1 (1945).
- (50) Jun'ichi Akiba and Minoru Ishikawa, "Marriage and Divorce Regulation and Recognition in Japan," 29 *Fam. L. Q.* 589, 596-97 (1995) [footnote omitted].

Current Controversies in American Family Law

by Stephen D. Sugarman

It is a pleasure to contribute to the celebration in honor of Professor Koji Ono. Professor Ono has made several visits to the University of California at Berkeley where I teach in order to carry out comparative law research on family law and other subjects. Because of that, I have decided to discuss three current American family law controversies.

Divorce Law

In the United States, family law is primarily a matter of state law, and in 1970 the state of California adopted what might be called a pure no-fault divorce law. Soon, every other American state enacted some form of no-fault.

The California model differs from that of Japan and most European nations. Not only are couples permitted to agree to divorce without proof of fault on either side, but also either spouse can demand and obtain a divorce without a showing of fault. In short, in California we have unilateral no-fault divorce. Moreover, whether the divorce is agreed upon or not, the division of the couple's marital property and the award of spousal support (alimony), if any, are also supposed to be made without reference to fault. Simplifying, marital property is divided equally and alimony is typically ordered for a relatively short period of time, during which the recipient spouse (usually the wife) is meant to achieve her financial independence. The custody of children is usually agreed upon by

the divorcing couple, but if there is a dispute the judge makes the decision on the basis of the "child's best interest." Only here might consideration of fault officially slip back into the legal system.

In other American states, divorce law is not so completely fault free. For example, many states still consider fault in making the financial award. Moreover, in a handful of the fifty states, prompt unilateral no-fault divorce is not available. Instead, a waiting period is required of perhaps a year or possibly two.

Conservative critics of the current system now argue that parents with young children have too easy access to divorce. They claim that liberal divorce law allows selfish parents to put their own interests ahead of those of their children, and they point to studies that show how poorly many children from divorced families are doing in terms of their education, psychological well being, employment, and future marital stability. (Of course, one cannot tell from these studies how well those children would do if the couple had not divorced, but the critics imagine they would do better.)

Some of these critics have gone so far as to argue that divorce should simply be unavailable to parents with minor children. This solution seems rather unacceptable, however, where one spouse is the victim of domestic violence or has been abandoned. Hence, more moderate reformers are suggesting that, unless the couple agrees to divorce, or unless there is serious wrong-doing by one of the spouses, divorce should not be allowed where the children are still at home. Or at least that divorce should not be allowed until after the party seeking the divorce waits three or more years and, perhaps, agrees to participate in marriage counselling. Reform of this sort would bring American law more in line with that of most

industrialized nations.

Nevertheless, there is reason to doubt that legal change of this sort in the United States would actually have much positive impact today. The typical picture the reformers have in mind is that of a husband who has found a new lover and wants out of his existing marriage, but his current wife does not want a divorce — perhaps for the sake of the children. Their reform would allow innocent wives in that situation block the divorce.

Yet, in a country like the United States, where living together outside of marriage is increasingly common and increasingly socially acceptable, restrictions on divorce are really only restrictions on remarriage. As a result, there is little ground to be confident that a three year waiting period, for example, will do much more than cause the husband who is seeking a divorce to cohabit with, instead of marry, his new lover during those three years. That is unlikely to be beneficial to his wife and children and might even be detrimental to new children born to him and his new lover during the waiting period.

For reforms of no-fault divorce law to work, they would have to bring about, or accompany, a change in culture. In this area, however, it appears more likely that law follows cultural change, rather than leading it. After all, the relatively low rate of marital dissolution in Japan is probably much more a result of Japanese culture than of Japanese family law.

Spousal Emotional Abuse as a Tort

Some spouses who are unhappy with no-fault divorce have begun to bring civil liability actions (tort claims) against their spouses along with the divorce case. Their hope is to bring fault — and punishment —

back in to family dissolution through tort law. They seek to obtain a disproportionate share of the family's income and assets by winning a civil judgment, and at the same time use the legal system to demonstrate what an abusive marriage they had.

The right to sue a spouse for physical battery is now widely recognized in the United States. Previously, the doctrine of inter-spousal immunity blocked such legal claims. But that doctrine is now abandoned in nearly every state. As a result, since you can sue strangers for money damages who physically attack you, you can sue your spouse as well.

The new development here involves claims between spouses for emotional abuse, not physical abuse. In lawsuits between strangers, most American states permit actions for "intentional infliction of emotional distress" where the conduct by the defendant has been "outrageous." Most cases that have been brought under this doctrine are in the commercial setting, for example, by employees against employers, tenants against landlords, debtors against creditors, and so on. But now a few states have recognized the right of an emotionally abused spouse to bring such an action where the other spouse has behaved in an outrageous manner.

So far, merely having an extramarital love affair has by itself not qualified as outrageous, even though for many couples and in many communities, this is considered about as awful a thing a spouse can do. However, some spouses have won cases where the other spouse has carried on a course of conduct that belittled, demeaned, chastised, berated, and/or embarrassed the suing spouse in ways that American juries have found to be outrageous. Most, but not all, of these cases have been brought by women.

In one case a wife lied to her husband that he was the father of her child and a year later admitted that the real father was her lover with whom she was now going to live. That husband's tort claim failed. A different husband was successful in his lawsuit, however, when his wife falsely accused him of beating her and had him arrested and temporarily jailed.

There is good reason to be fearful that this new development could be seriously detrimental to the ideology of no-fault divorce. If this development goes very far, tort claims could routinely be attached to divorce claims. This is primarily because there is no socially agreed upon standard of marital misconduct that is readily understood to be outrageous.

Many couples tolerate conduct between themselves that would have led other couples to have divorced long ago. Many marriages are unhappy. Yet, it is all too easy, once a claim for divorce has been filed, to exaggerate the wrongfulness of the other spouse's behavior and to characterize it very differently than you would when you were still hoping to keep the marriage together. This is in sharp contrast to physical domestic violence which is universally abhorred — even though it continues to be carried on in a distressingly large number of cases.

As a result, several other states have rejected outright these new tort claims for emotional abuse. At this point, it is too early to tell which way the majority of American states will come down on this issue.

Child-Support

All too many non-custodial parents in America (primarily fathers) fail to pay the child support they should pay. These include divorced men as well as men who have fathered children but have never married the mother and now do not live with the mother and child. They are all now

commonly called "deadbeat dads."

Typically, the man simply pays less than he has been ordered to pay, and sometimes he pays nothing at all. Furthermore, in many cases of unmarried fathers there is not even a child support order in place, perhaps not even a legal determination of paternity.

With the support and encouragement of national legislation, in recent years states have made increased efforts to impose and collect child support from absent fathers. A commonly used legal tool today is to obtain a withholding order that requires employers to take the support payment out of the man's paycheck and send it directly to the mother.

Two further problems have been the low level of support awarded and the inconsistent amount awarded in similar cases. So, in recent years many states have increased the obligations of absent fathers, requiring judges to determine those obligations largely by formula. Moreover, some states automatically modify child support awards to account for inflation.

Nevertheless, some men resist paying because, in the end, the money goes not to benefit their children but rather the state. This is because many poor single mothers and their children are receiving public assistance payments from the state, and as part of that program are required to assign their right to support to the public welfare department. When the man pays the support he owes, it goes almost completely to reimburse the welfare department and not to improve the child's standard of living. Sometimes men in these settings secretly pay sums to the mother of their children that the welfare department does not know about.

Some officials now want to trap these men in the maternity wards of hospitals at the moment their children are born and immediately slap

support and withholding orders on them. Others fear that this will drive many unmarried fathers away from taking any responsibility for the children they produce.

Other men are so angry with their former wives that they resist paying. Some have been denied visitation rights with their children. Many have taken on new family responsibilities and do not want to lower the standard of living of their new households. If they are sought out by public officials trying to enforce child support obligations, these men may quit their jobs, move to a new state, take up employment in the all-cash underground and perhaps illegal economy to avoid making payments. Although jailing of non-payers is still sparingly used in some states, it is generally believed that the widespread threat and use of imprisonment is a very bad idea.

In sum, many people are concerned about the state of American family life. Yet it is not at all clear that we in the United States know how to improve American family law in order to deal helpfully with the situation. Perhaps through the research of Professor Ono and other comparative law scholars, we in the United States and elsewhere can learn about successful legal reforms of other nations and can sensibly adapt them for use in our own.