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Alternative Family Structures and the Law*

D. KELLY WEISBERG**

The view that the protection of the family unit is essential for the public welfare has generated much of family law. The family unit, to be accorded a legal status, has generally been restricted to the biological/legal unit initiated by a formal ceremonial marriage. Family units which deviate from this family norm have often met with discriminatory treatment by the legal order. This paper attempts to examine the legal consequences which ensue from some alternative types of family formation.

The past decade has witnessed a proliferation of variant and experimental marriage styles and family forms. This growing pluralism in family structures has been characterized by ever-increasing numbers of Americans seeking fulfillment through the implementation of alternative life styles. These individuals have turned their backs on the conventional family unit and have gone in search of more meaningful social relationships in new family structures. The search for alternatives to the existing social structure is based on a fundamental questioning of society's values. The underlying belief of many of these individuals is that our present form of marriage and family organization is fundamentally inadequate to meet human needs.

The Counter Culture and women's liberation are two social movements which have greatly contributed to the recent proliferation of alternative family styles. Alternative family forms appear to offer members of the Counter Culture a more ecological use of resources, a rejection of materialistic consumption, and an opportunity to explore more meaningful relationships. For today's feminists, marriage is a sexist institution (cf. Firestone, 1972). Marriage for the woman is equated with giving up her identity—giving up her name and the right to choose her domicile. As Kanter (1973) points out, some alternative family structures such as urban communes attract many women because they offer freedom from women's traditional roles.

The growing pluralism of marriage styles and family forms, in conjunction with the pervasive belief that love relationships should not be subject to external regulation by the state, has resulted in increased interest in how the legal order affects alternative family styles. In fact, the pluralism theme of the 1970's may be viewed as generating both the concern with, and much of the opposition to, legal discrimination which faces members of variant family forms today.

Importance of the Family

The traditional family unit has long been subject to state intervention in many aspects of family life because of the importance of the family for the survival of the state. As Bradway (1948, 567) maintains:

> The state. . . is interested in the development of stable and enduring families because they have definite functions to perform in connection with the ownership of property, the orderly adjustment of the relations between the sexes and the rearing of children. . . .

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The family unit from its creation until its dissolution is affected by a body of rules of law. The legal order not only governs family formation and the interaction of family members with each other and with outsiders, but also controls the termination of that legal status.

However, with the formation of variant family forms, familial social relationships are created which are not legally sanctioned and which are not subject to the same degree of state control. The types of alternative family units under discussion here include unmarried heterosexual cohabiting couples,[1] homosexual cohabiting couples, and communes. These family units, which are often termed "nonlegal de facto families," have received little attention by the field of family law (Clark, 1968; Foote, Levy, and Sander, 1966; Ploscowe and Freed, 1972) which has been predominantly concerned with the rights and duties of the traditional family unit.[2] This paper will examine the legal consequences which ensue from the family formation of these alternative family styles.

A thread which runs through the development of family law in America from its Puritan beginnings has been the long standing concern of the judicial system with preserving and promoting the integrity of the family. The Puritans held that well-ordered families produced order in society and believed that the family was "the root whence church and Commonwealth Cometh" (Morgan, 1966, 143). The family in colonial America was not only the basic unit of society; it was also the primary unit of social control. The family was responsible for holding a "watchfulle eye" over the conduct of every individual and for enforcing the laws of God. The Puritans believed that religion, morality, obedience to laws, deference to authority, and good conduct originated in the home.

The family was so important a unit that the Puritan legal order viewed with disfavor those individuals who, by choice or circumstance, did not reside in traditional families, and was quick to censure any social relationships which deviated even slightly from the norm. For example, legislation was replete with regulations governing the conduct of single persons. Unmarried men were not permitted to dine or lodge alone and were often taxed for their solitary living. Single women and wives whose husbands were away were subject to supervision by the legal order. They were prohibited from entertaining lodgers or overnight guests "lest they give the appearance of sin" (Miller, 1966, 59). Similarly, married men who had preceded their wives to the new continent were subject to legal restrictions.

The Puritans believed that individuals who were not living in traditional family units were subject to sin and iniquity "the companions and consequences of a solitary life" (Morgan, 1966, 145). It was felt that such persons were in need of supervision by the legal order until such time as they located or relocated themselves in proper family units.

Individuals dissatisfied with the institution of the family and who espoused alternatives to the family can be found, of course, throughout American history. Religious communes existed as early in American history as the late 1600's and flourished throughout the nineteenth century (Bestor, 1970). However, today's groups are different in many respects. Whereas members of experimental family forms traditionally lived "underground" or in geographically isolated areas,

[1]The law makes the distinction between putative and meretricious relationships among the unmarried. A putative spouse is any person who cohabits with another to whom he or she is not legally married in the good faith belief that he or she is married to that person (as in instances where one of the parties is still legally married to another). A meretricious spouse is any person who cohabits with another with the knowledge that the relationship does *not* constitute a valid marriage. Most alternative family units of unmarried couples today would be classified as meretricious relationships. Unlike meretricious spouses, putative spouses have acquired many of the rights conferred upon a legal spouse. (See Coolidge, 1962.) Another type of relationship, common law marriage, which is a valid marital relationship in jurisdictions which recognize it, is explained *infra* n. 6.

[2]An important contribution to the field from the sex-discrimination casebook, however, is the discussion of alternative family structures in Davidson, Ginsburg, and Kay (1974).

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members of alternative family structures today are increasingly visible on the American scene. Moreover, representatives of these groups cross-cut all social classes and all age groups; they include the hip and the professional, the young and the aged. Today alternative families may be found in cities and towns dotting the American landscape—in rural America, urban America, and affluent suburbia.

Legal Status

Although members of alternative family styles reject the traditional family unit, it is interesting to note that many members lead lives remarkably similar to those of the traditionally married. Many work at traditional jobs; some individual family members support others; many share expenses, furnish homes, have or consider having children, own possessions and perhaps, even own real property. Unlike the traditionally married, however, members of alternative families have a questionable legal status. Because they do not fit the legal definition of the biologically-defined ceremonially initiated marital unit, members of alternative families are not subject to the same legal duties nor entitled to the same legal rights of the traditionally married. Because of this lack of fit, members of such alternative family units often face legal problems.

Legal problems incurred by individuals living in alternative families range from those which are irritating or inconveniencing to those with civil and criminal sanctions. Individuals may be refused apartments or homes by landlords, refused automobile or home coverage (fire, theft) by insurance companies or charged higher rates, refused employee's family health care or group insurance coverage, denied United States citizenship, food stamps, or Social Security survivor's benefits. They are denied such rights of the legally wed as the right to sue for wrongful death of a spouse, alimony, and the right of interspousal protection so important in criminal cases. This right specifies that: "Neither a husband nor a wife may be compelled to testify as to any confidential matters between them, unless the other spouse agrees. . . This privilege even survives death and divorce" (Jessup, 1971, 9).

In addition, individuals participating in alternative family styles may be held in violation of state statutes on adultery, sodomy, cohabitation, and fornication. Adultery is voluntary sexual intercourse between a married man or woman and a partner other than a spouse. Sodomy includes anal or oral intercourse between human beings, either heterosexual or homosexual. Cohabitation is the crime of living together openly as man and wife though unmarried. And, fornication laws prohibit sexual intercourse between men and women not married to each other. As Goldstein notes (1974, 34):

> Morality laws are aimed at the oppression of nonconforming minorities. . . (They are likely to be enforced) against mothers on welfare, homosexuals, students, young people and poor people in general, and, of course, communes, where you get all varieties at once. . .

Morality laws against adultery, sodomy, cohabitation, and fornication are generally infrequently and randomly enforced. However, such laws represent a *potential* legal difficulty for members of alternative family styles. Each of the jurisdictions within the United States has enacted a complex set of statutes which regulate the sexual behavior of its citizens. Consequently, in theory, many members of alternative family styles are liable to arrest, conviction, and punishment under these laws.

Child Custody

Especially serious are the legal problems which face members of alternative family styles in relation to children, inheritance, and taxes. A major legal issue involving children, when parents choose to live in alternative family styles, is child custody. If an unmarried couple has a child or children, the custody issue may arise when the parents separate or when one parent dies. A recent Illinois case is illustrative of the possible legal consequences. Joan

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Stanley lived with Peter Stanley intermittently for eighteen years. They never married. Three children were born to their union. When Joan Stanley died, Peter Stanley lost custody of his three children. Under Illinois law, the children of unwed fathers became wards of the State upon the mother's death. Without a hearing to determine fitness as a parent, the presumption under Illinois law was that all unwed fathers are 'unfit' to raise their children.[3]

Child custody rights are also an issue in situations involving homosexual couples. Preference in child custody cases is generally given by the courts to the biological mother (cf. Davidson, Ginsburg, and Kay, 1974, 271), except in instances where the mother seeking custody is a practicing lesbian who desires to reside with her sexual partner. In Seattle recently, two men sought to remove their children from the custody of their former wives who were living together in a lesbian relationship. The judge awarded custody to the women on the condition that the two separate and ordered each to establish a home with her own children because the present arrangement placed the children in a "potentially destructive environment" (*Seattle Times*). This case is similar to other cases in California in which a lesbian mother's custody rights have been questioned when she chose to reside with the partner of her sexual preference.

A common prejudice which is often revealed in such custody battles is that the homosexual parent is promiscuous, incapable of long-term relationships, and unfit as a parent. Klein (1973, 107) describes an acrimonious custody suit after which a lesbian mother bitterly commented on the view that "what I do in bed determines what kind of mother I am and that my homosexual friends are going to do anything to my children that friends of my husband's wouldn't do."

Child custody may also be a problem for individuals engaged in communal lifestyles. Such was the case with Alice Hughes. After leaving her husband, Alice moved into Synanon in 1970 with her seven-month-old daughter. Synanon, a community based on efforts to rehabilitate former heroin addicts, also includes many non-drug addict residents. Alice, one of these residents, was an elementary school teacher for six years with a bachelor of science degree in child development who preferred, for ideological reasons, to raise her daughter in a communal situation. When she later filed for divorce, her husband ordered that she leave Synanon or have custody remanded. In the custody battle that followed, Alice lost custody of her daughter. As long as she continued to live in that communal situation, the court ruled that the father would provide a better home environment.[4]

Inheritance

Another major legal issue which affects members of alternative family styles is inheritance. When a family is confronted with death, the legal repercussions are generally in the area of property. Who gets what property after a family member dies becomes a very important question. The property which a person owns at the time of death is his or her estate. If the individual leaves a will, he or she is "testate." If there is no will, the person is said to die "intestate." An estate consists of real estate, tangible personal property, and certain other valuables such as uncollected debts, which the law calls "choses in action." As Bradway (1948, 580) further explains:

> Land and the house on it is an example of real estate. Furniture, clothing, jewelry are examples of personal property. Among the other kinds of valuables are the right to money in a a bank, to the property represented by stocks, bonds, life insurance policies.

[3]This state statute was later held unconstitutional by the United States Supreme Court. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972).

[4]*In re the Marriage of Alice Hughes v. Kevin Hughes*, California Superior Court, Alameda County, No. 409493 (from reporter's transcript on appeal).

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The right to dispose of property at death by will is a right granted by law. However, married partners have certain legal rights in regard to inheritance which are not applicable to members of de facto families. A legal spouse is automatically entitled to inherit between one-half to one-third of the other's estate. Generally speaking, a husband or a wife cannot, even by will, cut off a surviving spouse.[5] A husband or wife have what is termed the "right of election" against a will. This right of election derives from common law rights of dower and curtesy, rights in the deceased spouse's real property. At common law, the wife enjoyed the right of dower, which entitled her to a life estate in one-third of the real estate which the husband owned during the marriage (cf. Foote, Levy, and Sander, 1966, 312). In recent times a number of jurisdictions have substituted for dower a statutory forced share which entitles the wife to so much of the husband's property (both real and personal) as she would have been entitled to if he had died intestate. The husband had a comparable right of curtesy at common law, and is also entitled to a statutory forced share in the same states. These rights of inheritance are applicable only to couples which are legally wed.

It is in instances of intestate succession, where a partner dies without leaving a will, where more serious problems may arise for members of alternative families. If an individual fails to make proper provision for the distribution of his or her estate after death, the law provides the disposition which should be made of the property. Statutory disposition regulations generally dictate that the legally wed husband or wife of the deceased and the deceased's children are the prime beneficiaries.

A hypothetical example will illustrate the potential difficulties for members of alternative family styles. Suppose John had been previously married before moving in with Elizabeth, whom he lived with for ten years. John never obtained a divorce from his former wife. When John died, if he did not leave a will, the law would dictate that disposition of John's property would go to his former wife. It would not go to Elizabeth, although that may have been his wish. Or, suppose John had never married prior to living with Elizabeth. Upon his death, according to the law of intestate succession, his estate would go to his next of kin—his parents, if they were living, or to other members of his family. And if no relatives were found, the property would go to the state. Thus, the rights of alternative family members in cases of intestate succession are not protected as are the rights of members of the traditional family.

Other benefits which affect a spouse after the death of a marriage partner include the homestead exemption which protects the spouse's residence up to certain statutory limits against attachment by creditors. And, in addition, some jurisdictions also provide for temporary allowances to the legal widow while the estate is in administration (cf. Foote, Levy, and Sander, 1966, 313). Such rights, of course, do not hold for members of de facto families.

Division of property is also problematic in instances of dissolution of the alternative family unit. Case law traditionally has established that in meretricious relationships (i.e., among the unmarried), an individual only has an interest in the property jointly accumulated if an express agreement was made to that effect. Courts have generally held that cohabitation alone does not create an interest in property acquired during a meretricious relationship.[6]

[5]The exception is in community property states where half the community property is subject to the spouse's testamentary disposition in addition to all of the spouse's separate property (cf. Davidson, Ginsburg, and Kay, 1974, 162). Eight states have property regimes based on the community property concept of ownership. They include: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

[6]However, cohabitation is an indispensable element in determining whether a common law marriage existed. Some states recognize as valid marriages what are known as "common law marriages" in which a man and woman consent to marry without a ceremony and without witnesses. Consent must be followed by subsequent cohabitation.

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In a California case, *Keene v. Keene,*[7] a man and woman lived together for eighteen years. During the first eight years of their relationship they worked a ranch together. The woman did much of the farm labor and helped to raise animals, clear the land, grow vegetables, and harvest the grain and nut crops. The husband later sold the ranch and had dealings in the real estate and furniture businesses in which the woman often assisted him. When the union was later dissolved and the courts were asked to rule on the division of the community property, the California Supreme Court held (in a decision of six to one) that the meretricious wife of eighteen years had no interest whatsoever in the property accumulated during their relationship. The holding was based on two grounds: no express agreement to share in the acquired property had been made and the woman had not contributed any funds (services not constituting "funds") to the acquisition of the property. In his dissent, Justice Peters (the single dissenting judge) criticized the majority for enforcing an immoral double standard which punished the meretricious wife for her "sin" but rewarded the equally meretricious husband with the fruits of their joint efforts.

Taxation

Taxation is also an issue which may put members of alternative families at a disadvantage. Married individuals enjoy substantial tax benefits unavailable to alternative family members. Two types of taxation where inequities result include income taxes and inheritance taxes.

Income tax laws may discriminate against people engaged in alternative family lifestyles. Unmarried couples, gay couples, or individuals in communal situations, regardless of whether they pool their incomes or contribute to each other's support, may not file joint income tax returns to benefit from tax advantages unless they are legally wed. (It is recognized, of course, that the option of legal marriage is unavailable to homosexual couples—constituting in itself an instance of discrimination).[8]

As Perkins (1973, 579, n. 28) explains, in addition to the general advantages of factoring two incomes of different amounts into a single tax return, joint returns are given other preferential treatment. With regard to additional first year depreciation allowances for small businesses, the ordinary limitation of $10,000 is raised to $20,000 for a husband and wife filing jointly. With regard to losses on small business stock, loss from the sale or exchange of an asset which is not a capital asset may not exceed $25,000, but the amount is $50,000 in case of husband and wife filing joint returns. Another tax provision states that if the taxpayer has attained the age of 65, gross income does not include gain from the sale or exchange of property. For a husband and wife filing a joint return, even though only one spouse satisfies the age requirement, both are treated as satisfying it. Spouses are also allowed deductions for each other as dependents if one is incapacitated, or institutionalized, or blind, and for medical expenses not compensated by insurance. If it is discovered that single people filed such joint returns, they may be charged with civil fraud and, in addition to paying any back taxes, may be fined up to 50 percent of the deficient amount.[9]

Inheritance tax laws also favor the

In jurisdictions where such marriages are recognized, the man and woman are subject to the same rights and duties as the traditionally married. The number of states recognizing such marriages as valid has been declining steadily. In the past forty years a dozen states have abolished this form of marriage (cf. Foote, Levy, and Sander, 1966, 270).

[7] *Keene v. Keene,* 57 Cal. 2d 657, 371 P. 2d 329, 21 Cal. Rptr. 593 (1962).

[8] In the case of *Baker v. Nelson,* petitioners contended that the denial of marriage licenses to homosexuals violates the Equal Protection Clause of the Fourteenth Amendment. They also based their claim on other constitutional provisions, including the First, Eighth, and Ninth Amendments. *Baker v. Nelson,* 291 Minn. 310, 191 N.W. 2d 185, appeal dismissed 409 U.S. 810, 93 S. Ct. 37. (See Perkins and Silverstein 1973).

[9] *I.R.C.* (26 U.S.C.A. § 6553 (b)).

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legally wed. A husband or wife may inherit half of the other's estate, tax-free. This applies except in the community property states in the West and Southwest where the spouse is already considered to own half of the community property. In these states, should the spouse die intestate, the surviving partner would have to pay taxes on the half of the community property received, but would receive half of the spouse's separate property tax-free. These tax benefits do not hold for couples not legally married.

Zoning Restrictions

Individuals engaged in communal lifestyles face yet another legal problem. The legal weapon most frequently utilized against communes is the restrictive zoning ordinance which excludes communal residents from areas that are specifically zoned for "single family dwellings." This issue centers around whether a commune qualifies as a family under the particular code of a certain locale. As Goldstein (1974, 15) points out: "Since every city or county has a different zoning law, a commune might be a legal family in one municipality and not be one a mile away." If a commune does not fit the legal definition of a "single family" in the residential area in which it wishes to reside, its members are faced with the choices of moving from the chosen neighborhood, or in some cases, being classified as a boardinghouse and forced to meet more stringent zoning and building restrictions and to pay commercial rates for utilities.

The following case illustrates this problem. In 1972 in the village of Belle Terre on Long Island, six students at the State University of New York at Stony Brook rented a six bedroom house. The village maintained that the students were in violation of the local zoning ordinance restricting family size to no more than two unrelated people. When the students were served with an Order to Remedy Violations, they brought suit to declare the ordinance unconstitutional. When the case went before the United States Supreme Court this year,[10] the Court upheld the zoning ordinance as constitutional—that is, that the zoning restriction was a legitimate exercise of the village's power to restrict residence to either those individuals related by blood, marriage, or adoption or to "no more than two" unrelated persons. Although the decision may constitute a step forward in terms of legal recognition of unmarried couples ("two unrelated persons living together"), it appears to mark a serious legal setback for the communal alternative family.

Deterrent Aspect

Family law has long been concerned with the task of strengthening and preserving family life. In many instances when fundamental rights (rights guaranteed by the Constitution) have come into question, much of family law has rested on what is known as the "compelling interest" of the state to protect the traditional family unit. In its effort to accomplish this task, the legal order has looked askance at alternative family structures which deviate from the preferred familial norm. Indeed, one of the primary legal mechanisms utilized for the purpose of strengthening the traditional family has been to discriminate against alternative family structures in an attempt to discourage formation of these social structures and social relationships.

A decision of a New Jersey district court denying welfare services to illegitimate children is illustrative of precisely this type of reasoning running through much of the body of family law. A judge in that case stated:

> Marriage, by itself, is a permanent, or at least semi-permanent institution. The state has reinforced it with a great deal of protection in its statutory and case laws. Its whole domestic relations law is designed to protect marriage and the family. . . It all results from a recognition by the State of New Jersey and every other state in the United States that the family is the basic social unit, and provides much of the norms for a person's action in society. . .

[10] *Village of Belle Terre v. Boraas*, 94 S.Ct. 1536 (1974).

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The State has determined that it only wants to subsidize what it considers to be legitimate families, ones where the likelihood is greater for the instillment of proper social norms. It is certainly both a proper and a compelling state interest to refuse to subsidize a living unit which may lead to the state of anomie and which violates its laws against fornication and adultery.[11]

Generally, alternative forms of family organization have been viewed by the judicial system as unstable and incapable of fulfilling the functions of the traditional family. This bias can be seen both in the preceding decision and also in the following decision of a district court in California. In this case the judge held:

There is a long recognized value in the traditional family relationship which does not attach to the "voluntary family." The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary," is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. . . . The communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. . . . They do not have the biological links which characterize most families. Emotional ties between commune members may exist, but this is true of members of many groups. . . . [12]

Recent Developments

However, some recent auspicious developments have occurred in family law which affect alternative family styles. One important case was based on recent legislation in California, the Family Law Act of 1970. This Act provided for the elimination of fault or guilt as grounds in divorce, alimony, and the division of community property.

A recent court decision, the case of *Cary v. Cary* based on this Act, may mark a significant breakthrough in judicial recognition of the unmarried heterosexual family unit. The facts of this case are as follows: Paul Cary and Janet Forbes never married, but lived together for eight years. During this period they had four children. They purchased a home and other property, borrowed money, obtained credit, and filed joint income tax returns. When Paul petitioned to legally dissolve the relationship, the question arose as to Janet's rights in the property acquired during the relationship.

The trial court determined that the property should be equally divided. Paul appealed the decision. The Court of Appeals later upheld the decision on the grounds that the 1970 Family Law Act had eliminated the concept of fault or guilt which would have obliged the court to divide the property unequally. The appellate court went on to hold that the Cary property was "family property."

Prior to the 1970 Act, the California judicial system, similar to that of many states, was not overly concerned with protecting the rights of the non-legally married. In fact, as the judge in *Cary* stated, describing the pre-1970 judicial history:

. . . where unmarried persons knowingly lived together in a 'meretricious' or 'sinful' relationship the law of California had consistently shown no concern for vindication of property rights. . . [13]

[11] *New Jersey Welfare Rights Organization v. Cahill,* 349 F. Supp. 491. The U.S. Supreme Court later reversed this, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed. 2d 543. The trend generally has been toward greater recognition of the rights of illegitimate children, in tort particularly. In *Levy v. Louisiana,* 319 U.S. 68 (1968) the denial to illegitimate children of the right to sue under a state wrongful death statute was held unconstitutional and in *Glona v. American Guarantee and Liability Insurance Company,* 391 U.S. 73 (1968) a mother recovered for the wrongful death of her illegitimate children.

[12] *Palo Alto Tenants Union v. Morgan,* 321 F. Supp. 908 (N.D. Calif. 1970).

[13] *In re the Marriage of Paul A. and Janet E. Cary,* 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). California law has apparently remained unchanged, however, as to what constitutes a surviving spouse of a meretricious relationship in terms of certain benefits. A later case decided by a federal court in California held that a woman who had lived with a deceased man without benefit of a marriage ceremony was not a "surviving spouse" entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act. *Powell v. Rogers,* 496 F. 2d 1248 (1974).

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Generally, the courts held that equitable considerations were not present because of the "guilt" of the parties engaged in the relationship.

The significance of *Cary v. Cary* lies in the judicial recognition of this de facto family unit. Because the Cary's recognized the usual familial duties and obligations, the court here upheld their property as "family property"—thus protecting their familial rights.

Another recent favorable development, a case decided by the Washington Supreme Court, may also mark a trend toward legal recognition of the rights of the unmarried. In *Estate of Thornton*[14] an unmarried couple lived together for seventeen years until the death of the meretricious husband. During the period of cohabitation, the couple raised four children and managed a cattle ranch they acquired. In writing the majority opinion, Justice Finely expressed the view that the case could be determined on the basis of an implied partnership: that the surviving member of the meretricious relationship was able to show an implied partnership agreement. That is, the surviving meretricious spouse should be entitled to a share in the couple's property through an implied partnership agreement by a showing of a "relatively long-term, stable meretricious relationship in which the partners appear to hold themselves out as husband and wife." Significantly, the opinion held that this relationship created in the survivor "a right similar to that of a legal wife in the community property of the spousal unit."

Definitional Question

Any discussion of alternative family structures and the law invariably comes back to the definitional question of what constitutes a family. In order to qualify for the legal definition, either descent from a common ancestor or a formal legal ceremony (adoption or marriage) is a prerequisite. Once accorded this legal status, the judicial system sets out the legal rights and duties concomitant with this status—many of the rights not being available to individuals who choose to live in alternative families.

Any family unit, legally sanctioned or not, serves important needs. It can create the protective environment required by children and provide for their education. It can furnish an economic support system for family members not engaged in remunerative labor. It can provide an outlet for sexual expression and provide psychological satisfactions from the social relationships that make up family life. However, the law, in its concern with serving as a deterrent to the creation of nonlegal de facto families, serves to grant advantages to traditional families which are denied to alternative families. The law thus penalizes participants of alternative families which fulfill the same needs and perform the same functions.

The central problem is one of cultural lag. When a difference between actual behavior and legally sanctioned behavior exists, the concept of lag applies to law. In such instances, as in the example of alternative family styles, social change has occurred in society; the norms, beliefs, and practices of a number of people have altered. Yet, no parallel adjustments have taken place within the legal process. That is, when society is confronted with social change in attitudes and life styles, these new conditions often necessitate changes in law.

An additional problem which complicates the issue is that judicial decisions are guided by two primary factors: past legal decisions and the personal element. In the administration of justice, judges follow rules and precedents; they make deliberate efforts to imitate the decisions of their predecessors. Consequently, specific cases of discrimination must not be viewed as occasional inequities affecting only a few members of variant family forms. Rather, they must be viewed as legal precedents. That is, the decision in a case involving

[14]*Estate of Thornton*, 81 Wash. 2d 72, 499 P. 2d 864 (1972). One author suggests, unfortunately, that the liberalization of the law of implied partnership may not benefit parties to a meretricious relationship who lack a partnership to operate a business for profit (cf. W.P.F. 1973, 640).

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Mr. X and Ms. Y (a couple) in Arizona may very likely affect the outcome of a case involving Mr. Z and Ms. Q in California.

However, the administration of justice is dictated not only by past decisions, but also by the "personal element." The school of American legal realism, the skeptical movement in recent jurisprudence, helped to dispel the Montesquieu phantasy that rules of law completely dictate the outcome of the decisional process. The skeptics minimized the influence of legal rules, influenced by a belief in what a leading legal sociologist, Ehrlich, termed the "personal element"—that the significance of law in daily life depends far more on the persons charged with its administration than on the principles according to which it is administered. Judicial discretion inevitably plays a large part in the administration of justice. The problem that presents itself is a gap in values and beliefs between members of alternative family styles and the primary agent of social change within the legal system, the judiciary. The values about variant family forms are held only by a minority. Many of these beliefs and values are not shared by those individuals most able to effect social change in the law.

These dilemmas serve to highlight the importance of several social policy implications. First, members of alternative families should be aware of potential legal discrimination which they face. The choice of personal lifestyle should be made in light of information now lacking to them—specifically, regulations at the federal, state, and local levels—which might have a future impact on them because of their lifestyle choice. With such information, members of alternative family forms would not only be able to anticipate problems, but they would be better able to respond to problems as they arise. Members of variant family styles might be able to avoid potential legal pitfalls by careful planning. That is, unmarried couples might make contracts concerning their property—how it should be held during the lifetime of the parties, how it should be administered upon the death of one of the parties, how it should be divided in case of separation. Such contracts would eliminate many subsequent instances of legal difficulty.

Members of the legal profession might also advise their clients who are members of alternative family styles of potential prejudice they may face in the event of legal suits. Such realities as the biases of certain judges, for example, in terms of child custody suits among homosexual parents, should be made clear to clients. Moreover, members of the legal profession who are simultaneously members of alternative family structures, as is increasingly the case, should be more vocal about espousing change. Such legal personnel are in an excellent position to influence the legal profession to effect social change on federal, state, and local levels.

Future of the Family

Family organization in America has undergone tremendous changes since the days of the Puritans. What is the future of marriage and the traditional family unit as we now know it? Bernard believes (1973, 301) that the future of marriage is "as assured as any human social form can be," although the commitment it represents may change in form and in name—people may come to refer to themselves as "pairbound," rather than married. She states:

> The most characteristic aspect of marriage in the future will be precisely the array of options available to different people who want different things from their relationships with one another. . . . There will, in brief, be marriages in the future as different from conventional marriages of today as those of the present are from those of our forebears in the nineteenth century. . . . (1973, 303).

Certainly among the options of the future will be those alternatives to the family as we know them today. Each year brings an increasing number of college students and other young people living in arrangements that are non sex-segregated. Heterosexual cohabitation among the unmarried, in fact, has become "an

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increasingly common aspect of courtship" (Macklin, 1972, 470). In addition, an ever-growing number of people are collectively renting large houses and forming communal arrangements where expenses and tasks are shared and where members are emotionally committed to each other.

Family law, as was pointed out in an issue of the *American Trial Lawyers* journal devoted to the subject, is a field of law in evolution. It has been "forced to change with the liberalizing social values about marriage and the family. . . as American institutions" (Gordon, 1972, 12). However, an issue still to be reckoned with by the field of family law is judicial recognition of the alternative family and the protection of rights of members of these family units. With an ever-increasing number of Americans participating in alternative family structures, it has become a pressing problem for the field of family law to confer a legal identity on these family units.

REFERENCES

Bernard, Jessie. *The Future of Marriage.* New York: Bantam Books, 1973.

Bestor, Arthur. *Backwoods Utopias: The Sectarian Origins and the Owenite Phase of Communitarian Socialism in America, 1663-1829.* Philadelphia: University of Pennsylvania Press, 1970.

Bradway, John S. What Family Members Should Know About Law. In H. Becker and R. Hill (Eds.), *Family, Marriage and Parenthood.* Boston: D.C. Heath and Co., 1948.

Clark, Homer H. *The Law of Domestic Relations in the United States.* St. Paul: West Publishing Co., 1968.

Coolidge, Stanley. Rights of the Putative and Meretricious Spouse in California. *California Law Review,* 1962, **50,** 866-878.

Davidson, Kenneth, Ruth Bader Ginsburg, and Herma Kay. *Sex-Based Discrimination: Text, Cases and Materials.* St. Paul: West Publishing Co., 1974.

Firestone, Shulamith. *The Dialectic of Sex: The Case for Feminist Revolution.* New York: Bantam Books, 1972.

Foote, Caleb, Robert Levy, and Frank Sander. *Cases and Materials on Family Law.* Boston: Little, Brown and Co., 1966.

Goldstein, Lee. *Communes, Law and Common Sense: A Legal Manual for Communities.* Boston: New Communities Project, 1974.

Gordon, E. M. Law and the Family. *Trial,* 1972, **8,** 12-13.

Jessup, Libby. *New Life Styles and the Changing Law.* Dobbs Ferry, NY: Oceana Publications, 1971.

Kanter, Rosabeth M. and Marilyn Halter. The DeHousewifing of Women: Equality Between the Sexes in Urban Communes. Paper presented at the American Psychological Association meetings, August 1973.

Klein, Carole. *Single Parent Experience.* New York: Avon Books, 1973.

Macklin, Eleanor. Heterosexual Cohabitation Among Unmarried College Students. *The Family Coordinator,* 1972, **21,** 463-472.

Miller, John C. *The First Frontier: Life in Colonial America.* New York: Dell Publishing Co., 1966.

Morgan, Edmund S. *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England.* New York: Harper and Rowe, 1966.

Perkins, Samuel T. and Arthur J. Silverstein. The Legality of Homosexual Marriage. *Yale Law Journal,* 1973, **82,** 573-589.

Ploscowe, Morris and Doris Jonas Freed. *Family Law: Cases and Materials.* Boston: Little, Brown and Co., 1972.

Seattle Times, September 23, 1972, B4, col. 1-3.

W.P.F. Meretricious Relationships—Property Rights: A Meretricious Relationship May Create an Implied Partnership. *Washington Law Review,* 1973, **48,** 635-645.

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