Family Choices

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Courtney G. Joslin, *Autonomy in the Family*, 66 **UCLA L. Rev.** 912 (2019), available at SSRN.

What is the role of autonomy (choice) in American marriage law, and what should it be? This question is salient for topics like the proper treatment of premarital and marital agreements, but, as Courtney Joslin points out in her article, *Autonomy in the Family,* it also has clear importance for the proper treatment of non-marital cohabitants.

As Joslin reports, the basic contemporary approach to the legal treatment of cohabitation follows some variation of the 1976 California case of *Marvin v. Marvin*. That case authorized the enforcement of express and implied agreements between cohabitants, no longer treating all such agreements as unenforceable because they contradict public policy.[1] However, as the author sums up, *Marvin* basically treated cohabitants as legal strangers, parties who *can* enter into agreements altering their rights and obligations to one another but are not *required* to do so. One justification offered for this approach centers on autonomy: because it is open to couples to marry, those who do not marry should be seen as having "chosen" to avoid the reciprocal duties that come with marriage, as well as the equitable sharing of property and the possible alimony claims that are available to spouses upon divorce, unless they agree otherwise.

As the article recounts, parentage law started on a similar path. Marriage provided the only sure means for a biological father to gain rights (and duties) relative to his children,[2] while adoption provided the path for adults who were not the biological parents of the children in question. Those parties who passed up the opportunity to marry a child's legal parent or to adopt the child were held to have "chosen" not to be a legal parent, and the courts felt justified in treating them as legal strangers to the child.

There were then a string of cases involving same-sex couples who had chosen to raise a child together,[3] but by law could not marry and by circumstances or legal restrictions never got around to having the non-biological parent adopt. In these cases, the courts allowed the biological parent to exclude the former partner from the child's life, even though the couple had earlier chosen to act as co-parents. Joslin shows how, partly in response to such cases, courts and legislators began to move away from a focus on formalities in determining parental rights and towards a more holistic, functional approach. This approach better reflects the family choices the parties had actually made as well as better serves the interests of the children.

Joslin argues that a similar move would be valuable in the legal treatment of non-marital cohabitants. *Marvin* had only moved the law part-way: cohabitants were treated, at best, like legal strangers; Joslin argues that they needed to be treated as *family*. Part of the problem with a focus on formalities for cohabitants (did they marry or not?) is that research shows that "the failure to transition to marriage often is not the result of an express, deliberate decision-making process." (P. 966.) Also, the "decision" is frequently not mutual; the veto on getting married is usually made by the man, expressing and exacerbating gender inequality. Even couples living together has been shown by recent research frequently to be more "'a slide into cohabitation'" than a deliberate decision by the couple. (P. 971).[4]

The article concludes that the legal treatment of family form, like the legal treatment of parental status, should move from form to function, to "how the parties viewed themselves as family members, and the degree to which the parties relied on each other." (P. 965.) Only in that way will the law begin to "recognize and respect the actual family formation choices people have made." (P. 987.)

As Joslin points out, models already exist for how this could be done—including examples from the State of Washington, some Canadian provinces, and some European countries. For instance, under Washington's "committed intimate relationship" status, long-term cohabitants hold a number of the same rights as married couples. In particular, the committed intimate relationship status presumes joint ownership over property acquired during the relationship and provides for equitable division of such property by the court upon dissolution.[5]

Joslin also voices openness to an intermediate legal status, giving non-marital cohabitants fewer protections and rights compared to marriage; she advocates for allowing couples to opt out through express agreement (thus protecting autonomy through "opt out" rather than the "opt in" approach of *Marvin*); and she encourages state experimentation so that there might be real-world tests of different legal approaches to see which ones work best.

1. As Joslin points out, states vary significantly in their application of *Marvin*, with some imposing important restrictions, *e.g.*, only enforcing express agreements or agreements that were evidenced by a writing. (Pp. 927-30.).
2. The article does not go into great detail regarding the treatment of non-marital children. The English common law and ecclesiastical treatment of non-marital children is substantially more complicated than the standard account credits. *See*, *e.g.*, John Witte, Jr, **The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered** (2009).
3. Joslin cites and discusses *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); and *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008) . (Pp. 949-52.) Another egregious case in this category, cited (P. 951 n. 233), but not discussed by Joslin, is *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).
4. Joslin here cites Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives From Qualitative Data*, 67 **Journal of Marriage and Family** 989, 995 (2005).
5. *See, e.g.*, *Connell v. Francisco*, 898 P.2d 831 (Wash. 1994). *Connell* sets out a five-factor test for determining whether a couple is in a "committed intimate relationship."

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