

Family laws and access to justice

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Introduction

The purpose of this paper is to provide a brief overview of some trends in family life and family law internationally, with a focus on North America, Europe and Australasia. As a shorthand, this will be referred to as ‘the western world’. These countries share a common legal tradition which has its origins in Roman, Greek and Judaeo-Christian thought.

This overview of trends then leads to some consideration of how family law systems can cope with the pressures that various demographic and social changes are creating.

The focus on countries with legal systems rooted in the western legal tradition necessarily offers only a very partial picture of family law internationally. Family law systems are profoundly influenced by religious and cultural factors, and so differences around the world are only to be expected. For example, family law in Islamic majority countries typically reflects Muslim traditions, values and religious precepts. Some countries allow adherents of different faiths or cultural backgrounds to have their own personal laws which govern their family life. This is so in India, Malaysia, and South Africa for example.

The trends identified in this paper concerning the western world are by no means universal; but at least some trends are evident in certain other parts of the world also. The decline in the importance of marriage is as much a feature of South American nations as of the post-Christian nations of Northern Europe; and divorce rates are beginning to climb significantly in some Asian countries such as Singapore.

Marriage, divorce and custody laws

In the last thirty-five years, profound changes have occurred in family law all around the western world, particularly in relation to parenting after separation.¹ This may be seen in

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¹ These international trends are reviewed in Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge UP, New York, 2011).

comparing the current situation with the model on which divorce reform was predicated in the late 1960s and early 1970s.

a) *Divorce as the dissolution of the family*

The no-fault divorce model of that period was built upon a consensus that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start afresh once decisions had been made about financial matters and custody. In the divorce law at that time, issues about property and custody were dealt with by a once-for-all process of allocation. If the parties could not reach their own agreement, then the court allocated the property. The court also allocated the children.² Typically, the courts would award “custody” to one parent, usually the mother, and grant “access” or “visitation” to the other. There was little difference in this respect between common law countries and the civil law countries of Western Europe. “Custody” included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child’s education and religion.³

Custody law was thus binary in character. The assumption that was universally held at that time was that custody decisions involved a definitive choice between one home and another.

In this traditional conceptualization of what was involved in custody decision-making, visitation (or “access”) was simply a “legal concession to the loser.”⁴ Once this allocation had occurred, then people could get on with their lives with the past behind them and with only residual ties to their former spouses. Those ties were through child support obligations—which were poorly enforced—spousal maintenance where ordered, and ongoing access time with the children. The consequence of this view of custody decision-making was that divorce involved a clean break in terms of parental responsibility.

In a perceptive article written in 1986, Irène Théry, the French sociologist, characterized the original divorce reform model as the substitution model of post-divorce parenting.⁵ Under the substitute family model, the parents’ legal divorce necessarily required a divorce between them not only as partners but also as parents. Only one of the two parents could continue in that role after the divorce, and the other’s role would be no more than a visiting one in most cases. It followed that the marriage breakdown marked the dissolution of the nuclear family.⁶ Parental

² Andrew I. Schepard, *Children, Courts and Custody* (2004), at 3–4.

³ See, e.g. *Lerner v. Superior Court of San Mateo Cnty*, 242 P. 2d 321, 323 (Cal. 1952).

⁴ Lynne Halem, *Divorce Reform: Changing Legal And Social Perspectives* 213–14 (1980).

⁵ Irène Théry, “‘The Interest of the Child’ and the Regulation of the Post-Divorce Family”, (1986) 14 *Int'l. J. Soc. L.* 34.

⁶ *Braiman v. Braiman*, 378 N.E.2d 1019, 1022 (N.Y. 1978) (“Divorce dissolves the family as well as the marriage”).

authority was awarded to the sole custodial parent and there was a strong differentiation between the role of the custodial and non-custodial parent.

b) The emergence of the enduring family

It was not long after the first flush of the divorce revolution that this idea of post-separation parenting began to change. Théry argued, in her 1986 article, that the substitution model of the post-separation family was gradually being displaced and that a new concept of post-separation parenting was emerging. This, she called the idea of the “enduring family”. In this conceptualization, divorce is a “transition between the original family unit and the re-organisation of the family which remains a unit, but a bipolar one.”⁷ She noted that this conceptualization of post-separation parenting implies the refusal of a choice between parents in favour of joint parental authority.

Change has occurred only very gradually in family law around the western world, but the relentless march of progress has been in the direction that Théry anticipated. A major theme in the history of family law reform in the last 40 years in Europe, North America and in other common law jurisdictions such as Australia and New Zealand has been the abandonment of the assumption that divorce could dissolve the family as well as the marriage when there are children. As Emeritus Prof. Margo Melli has written: “Today, divorce is not the end of a relationship but a restructuring of a continuing relationship.”⁸ Marriage may be freely dissoluble, but parenthood is not.

c) The transformation in custody law

Reforms began in a relatively mild and largely semantic way with the shift in the USA in particular from the notion of sole custody to joint legal custody.⁹ In Europe, the law reform process took a different form. Rather than making joint custody (in the sense of joint legal responsibility) an option, or even establishing a presumption in favour of this, many European countries made joint parental responsibility the default position in the absence of a court order to the contrary.

This was the position in England and Wales, for example, following the implementation of the Children Act 1989. Both parents retained parental responsibility after divorce, and the decision about what used to be called ‘custody’ and ‘access’ became, not a decision about the

⁷ Théry, *supra* note 5, at 356.

⁸ Marygold S. Melli, ‘Whatever Happened to Divorce?’, [2000] *Wis. L. Rev.* 637, 638; see also Bren Neale & Carol Smart, ‘In Whose Best Interests? Theorising Family Life Following Parental Separation or Divorce’, in *Undercurrents Of Divorce* 33, 35–37 (Shelley Day Sclater & Christine Piper eds., 1999).

⁹ Andrew Schepard, ‘The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management’, (2000) 22 *University of Arkansas at Little Rock Law Review* 395.

allocation of a bundle of rights, but about such practical issues as where the child would live and how much time he or she would spend with the other parent. When a child is living primarily with one parent, that diminishes the non-resident parent's rights, powers, and responsibilities in a practical sense, to the extent that those rights, powers and responsibilities depend on the child living physically with that parent, but they are in all other respects unaffected by the parental separation. The philosophy of the Children Act 1989 is that parental responsibility continues after separation as it existed before the relationship breakdown, subject to any orders to the contrary by the Court.¹⁰

In different ways, similar ideas came into the law throughout much of Europe within a decade. In France, for example, the law of parenting after separation was based upon the principle of coparentalité from 1993.¹¹ A common legislative approach which has had the effect of encouraging joint custody has been one of non-intervention. Instead of allocating custody as one of the matters to be dealt with in granting a divorce, joint custody is deemed to continue after separation unless one parent seeks a court order to the contrary. This was how joint custody became the norm in Sweden¹² and Finland¹³ from the early 1980s onwards,¹⁴ and is now the position in the other Scandinavian countries as well.¹⁵ A similar approach was adopted in Germany by the Gesetz zur Reform des Kindschaftrechtes, 1997,¹⁶ which amended the Civil Code to provide that the parents have joint parental responsibility during the marriage and unmarried parents may agree to joint parental responsibility by formal declaration.¹⁷ This joint

¹⁰ Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy', (1997) 26 *J. Soc. Policy* 301, 315. Minor changes were made to the Children Act by the *Children and Families Act 2014* which have further strengthened the idea that ordinarily, both parents ought to be able to remain involved in their children's lives following separation.

¹¹ Frédéric Vauvillé, 'Du Principe de Coparentalité', (2002) 209 *Les Petites Affiches* 4; Hugues Fulchiron, 'L' Autorité Parentale Renovée', (2002) *Répertoire Du Notariat DeFrénois* 959.

¹² Föräldrabalken [FB] [Code Relating to Parents, Guardians, and Children] (Swed.) .

¹³ *Custody of Children and Rights of Access Act 1983* (Lag angående vårdnad av barn och umgängesrätt 8.4 1983/361).

¹⁴ Kirsti Kurki-Suonio, 'Joint Custody as an Interpretation of the Best Interest of the Child in a Critical and Comparative Perspective', (2000) 14 *Int'l J. L. Pol'y & Fam.* 183, 188.

¹⁵ For Denmark, see the *Custody and Access Act 1995*, Lov nr 387 af 14 juni 1995 om forældremyndighed og samvær. For Norway, see the *Children and Parents Act 1981*, Lov 1981-04-08 nr. 7 om barn og foreldre.

¹⁶ This legislation came into force on July 1, 1998. The provisions on parental responsibility are found in Book 4, chapter 5 of the BGB.

¹⁷ Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1626 (Ger.). This article provides that the declaration needs to be publicly recorded, either before the Youth Welfare Department (Jugendamt) or a notary, subpara (d)(I). Id.

responsibility continues after separation unless the court orders otherwise on the application of one of the parties.¹⁸

Australia adopted similar reforms to England in 1995.¹⁹ The language of ‘custody’ was replaced with the language of residence and contact orders, and parental separation or divorce did not, of itself, result in any changes to parental responsibility except to the extent that the court so ordered. The position evolved further with the 2006 amendments to the Act. Now courts may make orders concerning with whom the child will live and how much time the other parent will spend with the child.²⁰

The demise of the concept of sole custody was, however, only the beginning of the transition that has occurred in the law of parenting after separation in countries which share the western legal tradition. Increasingly, legislation around the western world is emphasising the importance of both parents being involved in children’s lives. Whereas previously there had been a choice between the mother and the father as the custodial parent, now a spectrum of choices is on offer to the courts. In most cases, there will still be a primary custodian, a parent with whom the child lives for the majority of the time. However, the significance of that allocation to one parent or the other is not as great as it once was. Contact, visitation or access, howsoever it is described, is no longer the order a parent receives as a consolation if he or she loses the prize of custody. Fathers, in particular, are no longer to be marginalised by post-separation parenting arrangements. Rather, the assumption is that the time that the secondary parent has with the child will be such as to allow him or her a meaningful, continuing involvement in the life of the child.

With the changes in legislative language about custody has come a profound change also in the nature of the question that courts are asked to decide in custody disputes. This new approach towards post-separation parenting would have seemed radical to the family lawyers of previous generations, who assumed that divorce required a clear differentiation between the rights of the custodial and non-custodial parent. The consequence of this major shift in the focus of family law is that the promise of freedom to begin afresh that was held out as the meaning of divorce in the divorce reform movements of the late 1960s and 1970s has proved to be somewhat empty where children are involved.

a) Encouraging the involvement of both parents

The demise of the concept of sole custody was, however, only the beginning of the transition that has occurred in the law of parenting after separation. Whereas under the old substitution

¹⁸ Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1671. The applicant may seek that only part of the parental responsibility be conferred on them alone. Id. The change from joint parental responsibility to sole parental responsibility must be in the best interest of the child. Id.

¹⁹ *Family Law Reform Act 1995*.

²⁰ Other aspects of the 2006 reforms are explained below at pp. 7-8.

model of custody decision-making, the choice was typically a binary one—a choice between the mother and the father as the custodial parent—now a spectrum of choices is on offer to the courts. In most cases, there will still be a primary custodian, a parent with whom the child lives for the majority of the time. However, the significance of that allocation to one parent or the other is not as great as it once was. The question has changed from being about which parent the child will live with to being about how the child’s time will be shared between the parents. One way that involvement of non-resident parents has been supported has been by giving content to the notion of the “best interests of the child” by legislative findings or directions, or the statement of principles. An example of such a legislative direction is in the law in Missouri:²¹

The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child . . .

The formula of “frequent, continuing and meaningful contact” has echoes in the laws of a number of other jurisdictions in the United States, and is a recurring theme in statements of objects and principles.²²

In most jurisdictions, legislatures have resisted the temptation to be too prescriptive about what time allocation between the parents will promote meaningful involvement. Courts have retained the flexibility to try to discern what will be in the best interests of the child in each case. Nonetheless, a common thread in legislation across America, and in other parts of the western world, has been towards the encouragement of shared parenting after divorce. A number of jurisdictions now have legislation which gives some encouragement to consider shared parenting arrangements, and the trend in terms of law reform is strongly in that direction in situations where there are no issues of violence or abuse.

France offers one example. The principle of “coparentalité,” established in 1993, was strengthened by legislation enacted in 2002.²³ In particular, this legislation made clear that alternating residence (where the child spends an approximately equal amount of time with each parent) is an option. The background to this reform is that while amendments made in 1993 established the principle of joint parental authority after separation, the legislature, at that time, rejected the idea of alternating residence.²⁴ However, some judges were persuaded to fix a

²¹ Mo. Ann. Stat. §452.375.

²² See, e.g., Cal. Fam. Code § 3020.

²³ Loi 2002-305, relative à l'autorité parentale [Parental Authority Act, 2002], available at www.legifrance.gouv.fr.

²⁴ This was implicit in the text, since the principle of a primary or usual residence was maintained, but explicit in the legislative debates: Hugues Fulchiron, in *L'autorité Parentale Renovée, Répertoire du Notariat Deffrénois* 959 (2002).

primary residence, while allowing contact with the non-resident parent so extensive that the arrangements were equivalent, in practice, to an alternating residence system.²⁵

Two commissions were established to advise the Government concerning possible reforms to the law of parental authority in the 1990s. One took a sociological view, under the presidency of Irène Théry.²⁶ The other focused more on legal issues under the presidency of Françoise Dekeuwer-Défossez.²⁷ The consequence of their proposals for reform, and subsequent governmental consideration, was legislation on parental authority passed in 2002. Article 373-2-9 of the Civil Code now provides that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option.

In Belgium, the law was amended in 2006 to provide encouragement for alternating residence. Indeed that emphasis was expressed in the title of the legislation.²⁸ The law provides that when parents are in dispute about residency, the court is required to examine “as a matter of priority”, the possibility of ordering equal residency if one of the parents requests it to do so. The proviso is that if the court considers that equal residency is not the most appropriate arrangement, it may decide to order unequal residency.

This is not the same as saying that there is a presumption in favour of equal time. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless, according to Belgian law, it is the first option that ought to be considered when parents cannot agree on the arrangements.

The 2006 legislation in Australia reflected these international trends. One of the objectives of the Family Law Act, as amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, is to ensure that “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.” This is importantly balanced by another object of the legislation, the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent.

²⁵ See Hugues Fulchiron & Adeline Gouttenoire-Cornut, ‘Réformes Législatives et Permanence des Pratiques: à Propos de la Généralisation de L'exercice en Commun de L'autorité Parentale par la Loi du 8 Janvier 1993’, [1997] *Recueil Dalloz Chroniques* 363 and the cases cited therein.

²⁶ Irène Théry, *Couple, Filiation et Parenté Aujourd'hui: Le Droit Face aux Mutations de la Famille et de la Vie Privée* (1998).

²⁷ Françoise Dekeuwer-Défossez, *Rénover le Droit de la Famille: Propositions pour un Droit Adapté aux Réalités et aux Aspirations de Notre Temps* (1999).

²⁸ The Act of 18 July 2006 is entitled “Loi tendant à privilégier l'hébergement égalitaire de l'enfant dont les parents sont séparés et réglementant l'exécution forcée en matière d'hébergement d'enfant.” (“Law tending to favour equal residency for children of separated parents and regulating enforcement in child residency matters”).

Although this was not always understood by the general public, the emphasis on the meaningful involvement of both parents in the absence of violence or abuse does not translate into a presumption of shared care, and still less, equal time. The most that the legislation imposes by way of presumed outcome is a presumption in favour of equal shared parental responsibility. While equal shared parental responsibility says nothing, per se, about how time is allocated between parents—because the circumstances of separated families are so varied—there is at least strong encouragement in the legislation to consider shared care, and to do so positively. First of all, the court has a duty to consider whether an equal time arrangement is in the best interests of the child and reasonably practicable. If equal time is not appropriate, then the court must consider what is termed “substantial and significant time”.²⁹

Amendments to the Act in 2011 modify this emphasis only a little. The requirement to consider equal time and substantial and significant time remains, but in the evaluation of what arrangements are in the best interests of the child, greater weight is to be given to the need to protect children from harm than to the benefit to the child of a meaningful relationship with both parents.³⁰

This revolution in thinking about parenting after separation is also reflected in New Zealand’s *Care of Children Act 2004*, which emphasises the importance of children’s continuing relationships after parental separation not only in the nuclear family but beyond it.³¹ The principles relevant to children’s welfare and best interests (s.5) include the ideal that “there should be continuity in arrangements for the child’s care, development, and upbringing, and the child’s relationships with his or her family, family group, whānau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents)”. Furthermore, “relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child’s care, development, and upbringing”. This is a radically different understanding of divorce from its meaning 40 years ago.

Rights of women & gender equality

In many parts of the world, promoting the rights of women in family life remains a key human rights objective because family law systems are structurally patriarchal – that is, women are subordinated to men in terms of rights both as partners and parents. Typically, the subordination of women in the family reflects their subordination in the wider society.

²⁹ This is defined as time that the child spends with the parent which includes both days that fall on weekends and holidays; and days that do not fall on weekends or holidays, and which allows the parent to be involved in the child’s daily routine: *Family Law Act 1975* s.65DAA.

³⁰ *Family Law Act 1975* s.60CC(2A).

³¹ See further, Bill Atkin, ‘Landmark Family Legislation’ in Andrew Bainham (ed), *The International Survey of Family Law 2006 Edition* (Jordan Publishing Ltd, Bristol, 2006) 305.

English folklore has it that “the hand which rocks the cradle rules the world”; but in reality, in countries of the western legal tradition as well as elsewhere, these have in the past been two quite distinct roles and were assigned to different genders. Women were seen as the custodians of the hearth, and the notion that they could, or should, also play a role in public life was a quite alien one. While the western legal tradition emphasised the importance of the individual, the individuality of women and children was often hidden within the family unit, headed by the husband and father. The family was regarded largely as a private domain free from the law’s intrusion, while the law reinforced male headship of the domestic unit.³²

While structural patriarchy has been all but eliminated from the law in countries which derive their heritage from the Judaeo-Christian tradition, cultural patriarchy remains an issue, and finds its most negative outworking in terms of coercive and controlling domestic violence.³³ Dealing appropriately with the issue of domestic violence is one of the major challenges for countries, whatever their cultural history. The balance between an emphasis upon the continuing role of both parents, and the protection of women and children from family violence, has been at the heart of debates about shared parenting laws.³⁴

To find solutions to the issues arising from violence in family relationships, it is first necessary to have an accurate understanding of the problem. There has been a very strong tendency in the past, to define domestic violence in a homogenous way as being perpetrated mainly or entirely by men, and characterised by a desire to control and oppress women. Undoubtedly, some male violence is characterised by desire for patriarchal domination, and is sometimes accompanied by other forms of abuse such as sexual abuse, verbal abuse, financial abuse and social isolation which together have the effect of subjugating and controlling women. Nonetheless, the statistics on the prevalence of violence, and the extent to which men report assaults upon them (albeit that the violence tends to be less serious) do not sit comfortably with such a one-size-fits-all characterization.³⁵ Domestic violence cannot be understood only in terms of male control or patriarchal attitudes.

³² Katherine O’Donovan, *Sexual Divisions in the Law* (Weidenfeld and Nicolson, London, 1985).

³³ Mary Ann Dutton & Lisa Goodman, ‘Coercion in Intimate Partner Violence: Toward a New Conceptualization’ (2005) 52 *Sex Roles* 743; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007).

³⁴ See Patrick Parkinson, ‘The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience’ (2014) 37 *Dalhousie Law Journal* 301.

³⁵ The research evidence from general population studies make it clear that both women and men engage in physically aggressive altercations in intimate relationships. In a meta-analysis of 82 studies, it was found that women were slightly more aggressive than men. John Archer, ‘Sex Differences in Aggression Between Heterosexual Partners: A Meta-analytic Review’, (2000) 126 *Psychol. Bull.* 651. While many of these studies rely on use of the Conflict Tactics Scale (Murray Straus, ‘Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales’, (1979) 41 *J. Marriage & Fam.* 75), the same patterns are discerned using other measures. This research has proven highly controversial for those committed to a single causal factor theory of domestic violence centred in patriarchy and male control. For a discussion of this topic, see Murray

Even still, male violence remains the most serious issue from a public health perspective. Work on the typologies of family violence has begun to bridge the gulf between different perspectives,³⁶ leading to more nuanced and sophisticated assessments of how a history of violence should be considered relevant to post-separation parenting arrangements.³⁷

Rights of children

There has been near universal acceptance of the UN Convention on the Rights of the Child. Article 12(1) of the Convention provides that States should “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Article 12(2) specifically concerns court proceedings. It provides that the “child shall in particular be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body.” This has been identified as one of four general principles which underpin the more specific rights provided by the Convention.³⁸

Article 12 does not specify *how* it is that children’s voices should be heard in proceedings that affect them. It does not dictate that children should give evidence, nor that they be separately represented – although those are possible ways in which Article 12 may be given effect. There is nothing inconsistent with Article 12 that the child’s voice should be heard through an appropriate social science trained professional, preparing a report for the Court. Nonetheless, Article 12 has acted as a stimulus to evaluate practices in those jurisdictions that have not hitherto given proper voice to children in parenting disputes as a matter of routine procedure. It has also acted as a rallying cry for children’s rights advocates who have been promoting children’s participation in various fora in any event, and who have been able to use this provision of international law to build a bridge to the lawmakers, judges and policy experts.

Straus, ‘Future Research on Gender Symmetry in Physical Assaults on Partners’, (2006) 12 *Violence Against Women* 1086. A single causal factor theory of domestic violence also does not take account of the perspectives of women from positions of difference, including indigenous women and lesbians. See Rosemary Hunter, ‘Narratives of Domestic Violence’, (2006) 28 *Syd. L. Rev.* 733, 744–49.

³⁶ Michael Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women’ (1995) 57 *Journal of Marriage & Family* 283; Michael Johnson, ‘Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence’ (2006) 12 *Violence Against Women* 1003.

³⁷ Peter Jaffe, Janet Johnston, Claire Crooks & Nicholas Bala, “Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans” (2008) 46 *Fam. Ct. Rev.* 500; Joan Kelly & Michael Johnson, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions’, (2008) 46 *Fam. Ct. Rev.* 476; Nancy Ver Steegh, ‘Differentiating Types of Domestic Violence: Implications for Child Custody’, (2005) 65 *Louisiana. L. Rev.* 1379.

³⁸ Ursula Kilkelly, ‘Operationalising Children’s Rights: Lessons from Research’ (2006) 1 *Journal of Children’s Services* 35 at 40-41.

The focus on children's participation rights in recent years is a consequence not only of the UN Convention but also a result of a distinct shift over the last few decades in thinking about children in both psychology and sociology.³⁹ Children are no longer seen as the passive recipients of parental influence, the targets of socialization within and outside the family nor as 'objects of concern'⁴⁰ in relation to outside intervention. They are now seen as social actors who are shaping their own lives, and influencing the lives of those around them, particularly their parents and siblings.

In Europe, the issue of children's participation has been given further momentum by the European Convention on the Exercise of Children's Rights (ECECR).⁴¹ This Convention applies to family proceedings, and in particular to those proceedings involving the exercise of parental responsibilities such as residence and access to children. Article 3 of this Convention provides that a child of sufficient understanding shall be granted the right to receive all relevant information, to be consulted, to express his or her views and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.⁴² Article 4 provides that the child shall have the right to apply for a special representative where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter. Article 5 requires Parties to the Convention to "consider granting" children additional procedural rights including the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; the right to appoint their own representative; and the right to exercise some or all of the rights of parties to such proceedings. Other provisions of the Convention concern the roles of judges and separate representatives for children.

This has been operationalised in the domestic laws of numerous European countries. In France, for example, legislation was passed in 2007 which gives children the right to be heard by the judge if they so choose.⁴³ This is intended to be the normal way in which a child will be heard, with an interview by another professional such as a child psychologist being utilised only

³⁹ Jeanette Lawrence, 'The Developing Child and the Law' in G Monahan and L Young (eds), *Children and the Law in Australia* (Lexis Nexis, 2008) p. 83.

⁴⁰ Carol Smart, Amanda Wade and Bren Neale, 'Objects of Concern'? - Children and Divorce' (1999) 11 *Child and Family Law Quarterly* 365.

⁴¹ ETS 160. The Convention was made at Strasbourg on 25.1.1996. It is in force in 20 jurisdictions.

⁴² Caroline Sawyer, 'One Step Forward, Two Steps Back – The European Convention on the Exercise of Children's Rights' (1999) 11 *Child and Family Law Quarterly* 151 argues that rather than being a step forward towards implementation of Article 12, the ECECR back-pedals on Article 12 because the rights are only secured to those who are considered by internal law to have sufficient understanding. This could be set at a very high age. See also Jane Fortin, *Children's Rights and the Developing Law* (Lexis-Nexis, 2003; 2nd ed) pp. 200-202.

⁴³ Loi n° 2007-293 of 5 March 2007.

if it is in the best interests of the child to be heard this way. The judge must also examine whether a refusal by the child to be heard is well founded.⁴⁴

Family law jurisdictions in other parts of the world are also now exploring how children's voices can better be heard in the legal process.⁴⁵ In Australia, a variety of approaches have been trialled.⁴⁶ In particular, there has been great interest in the practice of child-inclusive mediation, in which the views of the children, interviewed separately, are fed back to the parents.⁴⁷ In an evaluation of a pilot project, McIntosh and colleagues showed that child inclusive mediation has greater benefits for parents and children than mediation in which the children's voices were not heard.⁴⁸ However, the cohort in that study were of a higher educational level than in the general population. Child inclusive mediation is in its infancy still in Australia and further research is needed on how well it works when operationalised in the resource-constrained environment of publicly subsidised mediation services and across the population. A small qualitative study of child-inclusive mediation in New South Wales has produced less encouraging findings than in the McIntosh et al pilot study.⁴⁹

Rights and obligations in non-marital cohabitation

⁴⁴ Article 388-1 of the Civil Code now provides following these amendments: "In all proceedings relating to him, a minor capable of discernment may, without prejudice to the provisions as to his intervention or consent, be heard by the judge or, where his welfare requires, by the person appointed by the judge for that purpose.

This hearing is by way of right where the minor so requests. Where the minor refuses to be heard, the judge must determine whether such refusal is well founded. He may be heard alone, with a lawyer or a person of his choice. Where that choice does not appear to be consonant with the welfare of the child, the judge may appoint another person."

⁴⁵ There are a number of such provisions in European law. For an overview, see Andrew Moylan, 'Children's Participation in Proceedings- The View from Europe' in Mathew Thorpe Justine Cadbury, and Elizabeth Butler-Sloss (eds), *Hearing the Children* pp. 171-185 (Family Law, 2004).

⁴⁶ Lawrie Moloney and Jenn McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Journal of Family Studies* 71; Diana Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127.

⁴⁷ Jenn McIntosh, 'Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study' (2000) 18 *Mediation Quarterly* 55; Anthony Grimes and Jenn McIntosh, 'Emerging Practice in Child-Inclusive Divorce Mediation' (2004) 10 *Journal of Family Studies* 113.

⁴⁸ Jenn McIntosh, and Caroline Long, *Children Beyond Dispute: A Prospective Study Of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution* (Final Report to the Attorney-General's Department, 2006). Jenn McIntosh, Yvonne Wells, Bruce Smyth, and Caroline Long, 'Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment' (2008) 46 *Family Court Review* 105; Jenn McIntosh, Caroline Long and Yvonne Wells, *Children Beyond Dispute. A four year follow up study of outcomes from Child Focused and Child Inclusive Post-separation Family Dispute Resolution* (Report to the Australian Government Attorney General's Department, Canberra, 2009).

⁴⁹ Felicity Bell, Judy Cashmore, Patrick Parkinson, and Judi Single, 'Outcomes of child-inclusive mediation', (2013) 27 *International Journal of Law, Policy and the Family* 116.

One of the most difficult issues that governments around the world have had to consider is whether and how to recognise non-marital cohabitation. In some countries of Western Europe, marriage and cohabitation have now become almost interchangeable in terms of socially accepted forms of family formation.⁵⁰ In some South American countries, more people of child-bearing age are living in cohabiting relationships than are married.⁵¹ In Peru for example, in 2012, 38 percent of all adults between the ages of 18 and 49 were living in cohabiting relationships; only 24 percent were married. In Columbia in 2009-10, the rates were 35 percent cohabiting and 20 percent married.⁵²

Marriage remains the most common form of couple relationship within Western Europe, but the gap between marriage and cohabitation as a family form is narrowing. For example figures from 2006 show that in France, 26 percent of adults in the 18 to 49 age range were cohabiting, while 39 percent were married. In Sweden, 25 percent were cohabiting and 37 percent were married.⁵³

If the growth in cohabitation were confined to childless couples it would not represent a major transformation in family life. Cohabitation could be seen then as a form of trial marriage or precursor to marriage. However increasingly, cohabitation is a context for childrearing. This can be seen in the increase in ex-nuptial births. In Britain, 47.5% of all births occurred outside of marriage in 2012.⁵⁴ Half or more of all births are ex-nuptial in Belgium, Bulgaria, Estonia, France, Iceland, Slovenia, Norway, and Sweden. The highest rate is in Iceland at 65% of all births.⁵⁵ More than half of these births across Europe are in cohabiting unions, although there are significant variations between countries.⁵⁶

Rates of ex-nuptial births are particularly high in certain South American countries. According to one comparative study, 84% of births in Columbia occur outside marriage. In Peru, it is 76%, Nicaragua, 72% and in Brazil, 66%.⁵⁷ Some cohabiting couples who have children will go on to marry (as the capstone to their committed relationship rather than the foundation stone); but many see no need to do so.

⁵⁰ Kathleen Kiernan, 'The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe' (2001) 15 *Int J Law Policy Family* 1; Anne Barlow, Simon Duncan, Grace James & Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart, 2005).

⁵¹ *World Family Map, 2014: Mapping Family Change and Child Wellbeing Outcomes* (ChildTrends, Washington DC, p.15, at <http://worldfamilymap.org/2014/wp-content/uploads/2014/04/WFM-2014-Final-LoResWeb.pdf>).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Office of National Statistics, *Births in England and Wales, 2012*, (2013).

⁵⁵ Carl Haub, 'Rising Trend of Births Outside Marriage', Population Reference Bureau (2013) at <http://www.prb.org/Publications/Articles/2013/nonmarital-births.aspx>

⁵⁶ Ibid.

⁵⁷ *World Family Map, 2014*, above n.51 at 19.

These demographic changes create challenges for many jurisdictions because marriage has traditionally provided the structural framework for the family law system. Marital property and spousal maintenance rights are premised upon marriage, and remedies become available upon separation and divorce. Spousal maintenance, while it has more than one rationale, has traditionally been conceived as a remedy available to an innocent party in the event of a divorce for fault. Typically the guilty husband was held to his promise of lifelong support for his wife, a promise which was given effect through lifelong maintenance.

Cohabiting couples make no such promises of lifelong support to each other, and moving in with someone does not create the same kind of legal commitment as standing before a religious or civil celebrant and taking solemn vows in the presence of witnesses. Nor is there, in cohabitation, necessarily any justification for treating property acquired in the course of the parties' cohabitation as shared, in the way that we understand marriage to be a socio-economic partnership.

Typically, jurisdictions have responded in three ways to this conundrum. The first is to adopt an assimilationist approach in which informal heterosexual and same-sex relationships are treated as equivalent to marriage after a certain time. This is the position, for example, in Australia and New Zealand. In Australia, with one or two minor exceptions, there are essentially no differences between marriage and informal cohabitation in any area of law, once the parties have lived together for more than two years or have a child. That means that the property and maintenance consequences of marriage apply to both heterosexual and same-sex cohabiting relationships.

The second approach is to allow people to register their partnerships without getting married. In the Netherlands for example, marriage is open to both heterosexual and homosexual couples, and registered partnerships have almost the same effects as marriages. They provide an option for both heterosexual and homosexual couples as well.⁵⁸ The consequence of choosing neither to marry nor to register one's partnership is that the relationship does not attract marriage-like consequences.

The third approach is to recognise cohabiting relationships for some purposes but to leave property rights on the breakdown of the relationship to the general law. Recognition of cohabiting relationships has long been a feature of social security law in many jurisdictions, for example. Governments have taken the view, understandably, that a person should not be able to claim unemployment or sickness benefits without taking account of the income of a cohabiting partner, just as would be the case if the couple were married. To do otherwise is to impose a

⁵⁸ Wendy Schrama, 'Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity,' in *International Survey of Family Law 2002*, 277 (Andrew Baiham ed., 2002); *Family Law Legislation of the Netherlands* (Ian Sumner & Hans Warendorf eds., 2003).

marriage penalty. Such jurisdictions have ad hoc recognition for cohabiting relationships across a range of other areas of law, but stop well short of full assimilation.

Family instability

One of the greatest problems for family law systems is the growth in the numbers of children whose parents live apart. This is not obvious from divorce statistics, because in many jurisdictions divorce rates are either stable or falling, in part due to the decline in the popularity of marriage. However, as more and more couples have children in the context of non-marital cohabitation, the divorce statistics become less and less relevant as a marker of relationship breakdown.

People cohabit outside marriage for a range of different reasons. Some people live together with the intention of getting married.⁵⁹ Others may enter a cohabiting relationship with a hope or intention on the part of at least one of them,⁶⁰ that they will marry, but the relationship does not survive long enough for this to occur. Others reject the idea of formal marriage entirely,⁶¹ but see themselves as being in a committed and ongoing relationship.⁶²

Whatever the reason for entering into a cohabiting relationship, the evidence from many parts of the world is that cohabiting relationships which do not result in marriage break down at a very much faster rate than do marriages.⁶³ This is not particularly surprising as regards childless

⁵⁹ The Australian Bureau of Statistics reported that 42% of those in a de facto marriage in 2006-07, stated that they expected to enter into a registered marriage with their current partner: Australian Bureau of Statistics, *Family Characteristics and Transitions, Australia, 2006-07* (26 May 2011).

⁶⁰ On gender differences concerning cohabitation with a view to eventual marriage, see Penelope Huang, Pamela Smock, Wendy Manning, & Cara Bergstrom-Lynch, 'He Says, She Says: Gender and Cohabitation', (2011) 32 *J. Fam. Issues* 876; Sharon Sassier & James McNally, 'Cohabiting Couples' Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques', (2003) 32 *Social Science Research* 553; Susan Brown, 'Union Transitions among Cohabitors: The Significance of Relationship Assessment and Expectations', (2000) 62 *J. Marriage & Fam.* 833.

⁶¹ For Australian evidence, see Sandra Buchler, Janeen Baxter, Michelle Haynes, & Mark Western, 'The Social and Demographic Characteristics of Cohabitors in Australia: Towards a Typology of Cohabiting Couples', (2009) *Fam. Matters* no 82, 22.

⁶² On the different meanings of commitment, see Jan Pryor & Josie Roberts, 'What is Commitment? How Married and Cohabiting Parents Talk About Their Relationships', (2005) *Family Matters* No 71, 24. Australian research indicates that people who are cohabiting but intend to marry (either as a first or subsequent marriage) are significantly less likely to separate compared to those who cohabit without having marriage plans. Sandra Buchler, Michelle Haynes, Janeen Baxter, & Mark Western, 'Cohabitation Outcomes: The Effect of Fertility Intentions, Relationship Satisfaction and Union Length on Cohabitation Transitions', Paper given at the HILDA Survey Research Conference, Melbourne, 14 (2009).

⁶³ Renata Forste, 'Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.', (2002) 4 *J. L. & Fam. Stud.* 91; Helen Glezer, 'Cohabitation and Marriage Relationships in the 1990s', (1997) *Fam. Matters* no 47, 5; Steve Nock, 'A Comparison of Marriages and Cohabiting Relationships', (1995) 16 *J. Fam. Issues* 53. In a study of 11 European countries, Kiernan found that cohabiting relationships which did

couples, for the nature of much non-marital cohabitation is that either it is an intimate relationship for the time being, or a stage on the way to making a decision about marriage. Yet the pattern of instability persists even when there are children.

Findings from the Millennium Cohort Study in Britain, initially comprising a cohort of more than 18,500 mothers who gave birth during 2000 or 2001, indicate that children born to cohabiting parents were almost three times as likely as those born to married parents to be no longer living with both these parents by the time they were 5 years old.⁶⁴ In an Australian study, the odds of a cohabiting couple with children breaking up was more than seven times as high as a married couple who had not lived together before marriage, and more than four times as high as those who had lived together but went on to marry.⁶⁵

Data from the Fragile Families study in the US (a major study of a cohort of unmarried and married mothers in 20 large cities⁶⁶) found that parental separation by the time the child was 3 was five times greater for children born to cohabiting than married parents. Differences in financial wellbeing and family characteristics between cohabiting and married parents explained this to some extent, but after controlling for race, ethnicity, education, economic factors, family characteristics and an extensive set of other covariates, parents who were cohabiting at their

not result in marriage were much more fragile than marriages either preceded by a period of cohabitation or without a prior period of cohabitation. In Britain, only 18% of such relationships survived for ten years. The levels of stability of cohabitation were higher in other countries, but in no country other than East Germany did the majority of cohabiting partnerships survive for ten years: Kathleen Kiernan, 'Cohabitation in Western Europe', 96 *Population Trends* 25 (1999).

⁶⁴ Kathleen Kiernan & Fiona Mensah, 'Unmarried Parenthood, Family Trajectories, Parent and Child Well Being' in *Children of the 21st Century: From birth to age 5*, p. 77 (K. Hansen, H. Joshi, S. Dex, eds, 2010) (28 per cent of cohabitees had broken up compared with 10 per cent of married couples). See also Ann Berrington, 'Entry into Parenthood and the Outcome of Cohabiting Partnerships in Britain', (2001) 63 *J. Marriage & Fam.* 80 (26% of all cohabiting partnerships dissolved within 5 years, 16% continued and 59% resulted in marriage. For women, the presence of children born within the partnership had no effect on either the probability that the couple marry or the rate of separation, compared to women without children, although for men, the birth of a child had a stabilizing effect on the partnership); Kathleen Kiernan, 'Childbearing Outside Marriage in Western Europe', (1999) 98 *Population Trends* 11, tbl 11 (probability of relationship surviving 3 and 5 years after birth of first child among women aged 20-45 lower for cohabiting relationships than marriage in 9 countries studied).

⁶⁵ Peter Butterworth, Tamar Oz, Bryan Rodgers, & Helen Berry, 'Factors Associated with Relationship Dissolution of Australian Families with Children', Social Policy Research Paper No 37, 22 and 29, tbl 9 (2008).

⁶⁶ The term 'fragile-families' refers to families in which the parents are unmarried at the time of the child's birth, in order to 'underscore that they are families and that they are at greater risk of breaking up and living in poverty than more traditional families.' (The Fragile Families and Child Wellbeing Study, *About Fragile Families* at <http://www.fragilefamilies.princeton.edu/about.asp>).

child's birth still had over two and a half times the risk of separating as compared with parents who were married at their child's birth.⁶⁷

Increasingly, children are born outside of cohabiting relationships entirely. For example in Ireland, 35% of all births are outside marriage. Of these, nearly half (45%) are to single mothers without the other parent in the home, that is nearly 16% of all births.⁶⁸ The figure is the same in Britain.⁶⁹ In the USA, between 2006 and 2010, 24% of first births were to women who were neither married nor cohabiting.⁷⁰ From a family law perspective, these are children about whom there could be a parenting dispute from the day they are born.

Figures from Australia based upon population surveys provide clear evidence of the increase in family instability over time. The following Table charts the increase in the percentage of children born within certain years who experienced their parents living apart by the age of 15. Nearly three times as many children born in 1981-85 had experienced their parents' separation by that age as had been the case for the cohort born after World War Two.

Ever Living in Lone Mother Family: Australia			
Birth cohort	By age 15	At birth	Due to parental separation
1946-55	8.9	2.6	6.3
1956-62	11.0	3.2	7.8
1963-75	18.0	3.0	15.0
1976-80	22.2	3.8	18.4
1981-85	24.9	6.5	18.4

Source: D de Vaus and M Gray, 'The Changing Living Arrangements of Children, 1946-2001' (2004) 10 *Journal of Family Studies* 9.

⁶⁷ Cynthia Osborne, Wendy Manning, & Pamela Smock, 'Married and Cohabiting Parents' Relationship Stability: A Focus on Race and Ethnicity', (2007) 69 *J. Marriage & Fam.* 1345.

⁶⁸ Ibid.

⁶⁹ Office of National Statistics, *Statistical bulletin: Live Births in England and Wales by Characteristics of Mother*, 2012 at <http://www.ons.gov.uk>.

⁷⁰ Gladys Martinez, Kimberly Daniels & Anjani Chandra, *Fertility of Men and Women Aged 15-44 Years in the United States: National Survey of Family Growth, 2006-2010*, National Health Statistics Reports, no 51, April 12, 2012, p.9, National Center for Health Statistics (USA) at <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf>.

Data published earlier this year indicates how much family stability has deteriorated even since the 1980s. By the time that children in the latest study are 15-17 years old, 40% have parents living apart, up from 25% in the first half of the 1980s.⁷¹ The proportion of all adults in the population whose parents had divorced or separated before they turned 18 increased from 15% in 2006-07 to 18% in 2012-13. Across the population, that is a substantial increase in just 6 years.⁷²

About 13% were born into single mother households in 2005, double the rate in the first half of the 1980s.⁷³

It is quite likely that the position is the same in other nations across Europe, North America and South America which have seen similar dramatic rises in ex-nuptial births over the last two decades. As the ex-nuptial birthrate continues to climb, it is reasonable to expect that the percentage of children who experience their parents' separation before the age of 18 will keep climbing also, even if the divorce rate remains stable.

Pressures on the courts

Inevitably, a certain proportion of children whose parents live apart will have disputes which result in one parent filing court proceedings. Courts in many countries are overwhelmed by the number of cases that come before them. This is reflected in the available data on increases in litigation in a number of countries. In the United States, an indication of the increase in custody disputes can be seen in the data of the National Center for State Courts. Evidence from seven states indicates a 44% increase in custody filings between 1997 and 2006.⁷⁴ In the same period, divorces had decreased nationally by 3%. There had previously been a 43% increase in custody filings nationally between 1988 and 1995.⁷⁵ In Australia, the number of contact applications

⁷¹ ABS 4442.0 - Family Characteristics and Transitions, Australia, 2012-13 (released February 2015).

⁷² Ibid.

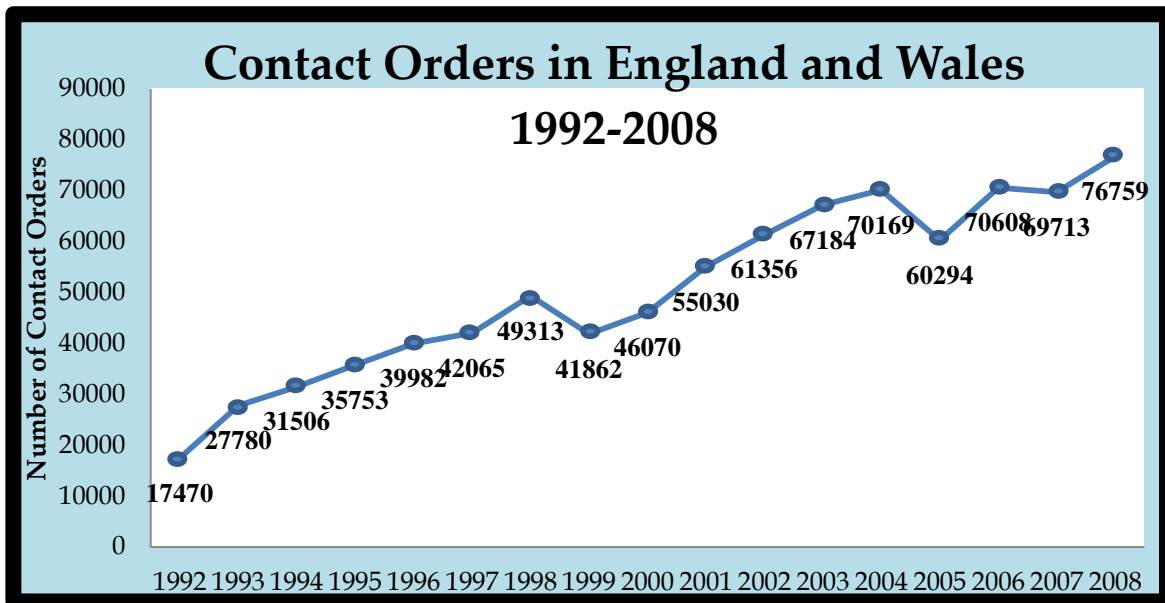
⁷³ Paula Laws, Samanthi Abeywardana, Jane Walker and Elizabeth Sullivan, *Australia's mothers and babies 2005*, National Perinatal Statistics No. 20, Australian Institute of Health and Welfare, Canberra, 2007.

⁷⁴ Nat'l Center for State Courts, *Examining the Work of State Courts* 29 (2007).

⁷⁵ Brian Ostrom & Neal Kauder, *Examining the Work of State Courts, 1995: A National Perspective From the Court Statistics Project* (1996); J. Pearson, 'A Forum for Every Fuss: The Growth of Court Services and ADR Treatments for Family Law Cases in the United States', in *Cross Currents: Family Law and Policy in the US and England* 513 (Sanford Katz, John Eekelaar & Mavis Maclean eds., 2000). See also Andrew I. Schepard, *Children, Courts and Custody* 38-40 (2004).

nearly doubled between 1994 and 2000,⁷⁶ although this upward trend was evident long before 1995.⁷⁷

In England and Wales, contact (visitation) orders increased more than fourfold between 1992 and 2008.⁷⁸



Nor are these increases confined to English-speaking countries. In France, new applications in relation to parenting and visitation arrangements following separation and divorce increased by 25% between 1996 and 2001.⁷⁹ In Denmark, the total number of visitation applications nearly

⁷⁶ In 1994-95, there were 14,144 applications in the Family Court of Australia. In 1999-2000, there were 27,307. *Family Court of Australia Statistics 1999/00* Table 4.10. No figures are available after 2000 because of changes to the court system.

⁷⁷ As a result of a transfer of powers from state governments to the Federal Government in 1987, the Family Court gained jurisdiction over custody and access disputes involving ex-nuptial children. In 1988-89, the first full year in which this expanded jurisdiction existed, there were 10,619 contact applications in the Family Court of Australia. In 1993-94, there were 16,256. *Family Court of Australia Statistics 1989/90* Table 5 1999/00 Table 4.10. Indeed, the rise in the level of contact applications can be seen ever since 1981. In that year there were 4214 applications, and by 1986 it had risen to 7208. *Family Court of Australia Statistics 1989/90* Table 5.

⁷⁸ In 1992, there were 17,470 contact orders. In 2008, there were 76,759. This Table is derived from the statistics published annually by the Ministry of Justice and its predecessor departments. See eg. Ministry of Justice, *Judicial and Court Statistics 2008*, ch 5; Lord Chancellor's Dep't, *Judicial Statistics 1986-2000*. See also Gwynn Davis & Julia Pearce, *Privatising the Family?*, [1998] 28 *Family Law* 614. For discussion of the explanations for this rise in litigation, see Gwynn Davis, 'Love in a Cold Climate — Disputes about Children in the Aftermath of Parental Separation', in *Family Law: Essays for the New Millenium* 127, 128-29 (Stephen Cretney ed., 2000).

⁷⁹ Dep't of Justice, France, *Annuaire Statistique de la Justice*, 1996-2000 and 1997-2001. The increase in applications in relation to children born to unmarried parents was even greater. They rose from 42,005 in 1996 to

doubled between 1995 and 2000.⁸⁰ After that time, the numbers remained relatively stable, even falling in 2006 to 10,184 cases. However in 2008 the numbers rose sharply again, to 13,412. This followed the enactment of the Danish Act on Parental Responsibility with effect from October 1, 2007.⁸¹

These massive increases in litigation about parenting after separation have passed largely unnoticed even in the few jurisdictions that publish statistics, but their effects are certainly noticed in the courts. Family lawyers and judges in many countries bemoan the long delays in bringing the disputes that cannot be settled, to trial. Consequently, the call is for more resources; more judges, more courtrooms, more legal aid for poorer citizens to be able to litigate their claims. Children's advocates call for more lawyers to represent children.

Yet there is another feature of family law systems in these countries that might be observed: the call for more resources is increasingly falling on deaf ears. Indeed at a time when the demand for resources is ever more intense, governments are cutting, rather than increasing supply. This is so, for example, in England and Wales which has seen massive cuts to legal aid for family law cases, in Australia, where retiring judges are not being replaced, and in New Zealand which has seen significant reductions in resources for its family law system. A Family Justice Working Group in Canada made this observation in 2013:⁸²

Despite the pervasiveness of family justice problems, the general public, media and politicians are far more engaged with criminal law matters. This heightened interest fuels criminal law reform efforts and often translates into funding support for criminal justice as a priority over family law.

Three directions for reform may assist in reducing the pressures on the courts.⁸³

62,201 in 2001. By 2006 the figure was 78,986, almost a 100% increase within ten years: Dep't of Justice, France, *Annuaire Statistique de la Justice*, Édition 2008, p.49.

⁸⁰ CivilRetsDirektoratet, Samvær Børnesagkyndig Rådgivning Konfliktmægling, Statistik 2001 (2002). 6,384 in 1995, 11,560 in 2000. In Denmark, any parent may apply for contact. It used to be the case that contact rights would only arise if the parents had lived together for most of the first year of the child's life, usually at least 8 months in practice. This restriction was removed in 1995.

⁸¹ Personal communication from Mariam Khalil, Danish Department of Family Affairs, by email 15th December 2009.

⁸² Family Justice Working Group (2013). Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, p.3. Toronto: Canadian Forum on Civil Justice.

⁸³ See further Patrick Parkinson, 'The Challenge of Affordable Family Law' in M Brinig ed, *Selections from the Recife Congress* p. 189 (ISFL, 2015), available at www.isflhome.org.

a) *Rethinking the role of mediation*

The first is to see parenting disputes at least, is first and foremost a relationship problem which requires therapeutic intervention, and only secondarily as a legal problem. That is, the first port of call in family law disputes involving children should not be lawyers, for the reality is that talk of rights in the context of parenting disputes is an inadequate discourse for the resolution of conflicts about children. Most lawyers will admit, if pressed, that there is relatively little law involved in determining parenting disputes about children, and talk of rights (other than children's rights) is problematic. Certainly, there may be significant factual issues to be resolved in cases where the safety of parents or children would be significantly at risk unless protective court orders are made. Lawyers also pride themselves on their capacity for prediction: they are the keepers of the wisdom of "what the courts will do" if the matter is adjudicated, although in reality such confidence in knowing the minds of the judges is often misplaced.

Seeing parenting disputes as first and foremost a relationship problem obviously leads to exploration of the option of mediation as one way to resolve the dispute. However, it is not enough, to reduce the congestion in the courts, to encourage parties to go to mediation, as for example is the new strategy in England and Wales. It is important to develop a community understanding of alternative pathways to lawyers and courts in resolving family law disputes. This can be illustrated by recent research in the UK on Mediation Information and Assessment Meetings (MIAMs).⁸⁴ The researchers reported that before the cuts to legal aid, solicitors referred the clients they believed could benefit from mediation, and those who needed to attend as a prerequisite to obtain legal aid funding for court representation, to MIAMs. After the legal aid cuts, mediators reported a substantial fall in the number of solicitor referrals to MIAMs, which they attributed to solicitors' loss of incentive to refer publicly funded clients. It is important therefore to create alternative pathways to people to get the help they need if the known pathway – through lawyers – is no longer available to the same extent.

This requires a fundamental rethinking of the structural place of mediation within the family justice system. Mediation for families after separation developed first as an alternative to litigation.⁸⁵ However, because mediation is typically court-ordered and often court-annexed, the model still places lawyers and the courts at the centre of the process of dispute resolution about post-separation parenting, with pathways to settlement being created to divert people off the litigation pathway. Forty years on from the beginnings of the divorce revolution, this still

⁸⁴ Anna Bloch, Rosie McLeod & Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (London: Ministry of Justice, 2014).

⁸⁵ On the development of family mediation in North America, see Connie Beck & Bruce Sales, 'A Critical Reappraisal of Divorce Mediation Research and Policy', (2000) 6 *Psychology, Public Policy and the Law* 989.

remains the dominant paradigm for dispute resolution in family law in many parts of the western world.

What is needed is to create different pathways for parents who have separated, with litigation being just one of those pathways.⁸⁶

The creation of alternatives to the pathway of lawyers and courts in resolving disputes about children is however, not an easy one. It requires a new way of thinking about what it means to make decisions in the best interests of children and about the kinds of services that families need in the aftermath of parental separation.

This is the journey on which Australia has now embarked. In that country, there is now a coordinated approach led and funded by government, which has brought about a revolution in service provision to support families after separation. One of the key concepts is the availability of free, or heavily subsidised mediation in highly visible and accessible centres, known as Family Relationship Centres, located, for the most part, in the main business districts of urban and regional communities. Whereas the move in the United States has been in the direction of more in-court therapeutic services, with the court at the centre of a problem-solving team,⁸⁷ in Australia, the move has been away from the courts into community-based services which are nonetheless systemically integrated with the family law system in a cohesive framework for service provision to families after separation.

The Family Relationship Centres (FRCs) emerged as a strategy for reform of the family law system in Australia in the mid-2000s following major debates about the future of that system.⁸⁸ There are now 65 Centres all over the country, approximately one for every 300,000 of the population, in all the major population centres and regions. The first of them opened in July 2006.

FRCs are an early intervention initiative to help parents work out post-separation parenting arrangements in the aftermath of separation, managing the transition from parenting together to parenting apart. They are there to help resolve disputes not only in the aftermath of separation, but also in relation to ongoing conflicts and difficulties as circumstances change. The FRCs do not only have a role in helping parents after separation. They are not 'divorce shops'. They are meant also to play a role in strengthening intact relationships by offering an accessible source for

⁸⁶ In Australia, see Family Law Pathways Advisory Group, *Out Of The Maze: Pathways To The Future For Families Experiencing Separation* (2001).

⁸⁷ On American developments in court-annexed services, see e.g. James Bozzomo and Gregory Scolieri, 'A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models', (2004) 42 *Family Court Review* 12; Richard Boldt and Jana Singer, 'Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts', (2006) 65 *Maryland Law Review* 82.

⁸⁸ See further, Patrick Parkinson, 'The Idea of Family Relationship Centres' (2013) 51 *Family Court Review* 195.

information and referral on relationship and parenting issues, and providing a gateway to other government and non-government services to support families. The FRC cannot possibly provide all the services that people need; but it is designed as a gateway to those services.

Most of the work of FRCs is concerned with helping parents who have separated. The FRCs provide an educational, support and counselling role to parents going through separation with the goal of helping parents to understand and focus upon children's needs, and by giving initial information to them about such matters as child support and welfare benefits. They act as a gateway to a range of post-separation services, such as support programs for separated fathers. The FRCs are thus about organising post-separation parenting, but they are much more than this. They may be the gateway also to services which will help people cope with the emotional consequences of relationship breakdown.

The FRCs are funded by the Government and operate in accordance with guidelines set by the Government. However, they are actually run by non-government organisations with experience in counselling and mediation, selected on a tender basis, and staffed by professional counsellors and mediators. Although actually run by different service providers in different localities, the FRCs have a common identity and logo for the public.

It is a legal requirement to attempt mediation before a case can even be filed, subject to exceptions in relation to allegations of family violence or child abuse. If, following an intake session, the mediator considers that mediation unsuitable for the parties, or if mediation does not resolve the dispute, then the parties will get a certificate allowing them to file in court.

The FRCs achieved measurable success very quickly. There has been a reduction of about 32% in court filings in children's cases in that five year period.⁸⁹ In the three years following the introduction of the reforms to the family law system in 2006, the use of counselling and mediation services by parents during and after separation increased from 67% to 73%, while recourse to lawyers diminished to a corresponding degree. Contact with courts dropped from 40% before the reforms to 29% afterwards.⁹⁰

The significant decline in the number of court applications over the five-year period since the introduction of the Family Relationship Centres shows how a well-organised and funded system of mediation and other family support, away from the court system, can have benefits for the courts. However, it would be a mistake to measure the success of the Family Relationship Centres only in these terms. It is apparent that they are meeting the needs of many people who would not have gone on to court at all, who would have given up, or joined the ranks of the disaffected. Many clients of FRCs would not have gone to court due to their lack of financial

⁸⁹ Patrick Parkinson, 'The Idea of Family Relationship Centres' (2013) 51 *Family Court Review* 195.

⁹⁰ Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu et al, *Evaluation of the 2006 Family Law Reforms* 50 (2009).

resources.⁹¹ This shows that the FRCs offer a means of assisting that large body of people who cannot realistically afford private lawyers but who also do not qualify for state-funded legal assistance or feel able to represent themselves in litigation. That is, for one group of people in the community, resources of this kind can provide affordable family law.

b) *Reducing discretion*

Mediation can only go so far. The pressures on governments, and the unaffordable costs for so many families, ought to cause some fundamental rethinking about the model of individualised, discretionary court-based family justice in common law countries.

While governments are increasingly encouraging people to settle their own disputes by alternative dispute resolution, and withdrawing legal aid for civil litigation, such efforts are likely to be of limited efficacy if laws remain centripetal. Centripetal laws are laws that have the effect of drawing parties inexorably towards a judicial resolution, rather than conferring upon them the clear bargaining endowments which would facilitate settlements.

Discretion is a particular feature of family law. The argument in favour of conferring broad discretions upon judges is that it gives them the necessary flexibility to tailor the relief awarded to the particular circumstances of each case, rather than being fettered by fixed rules. However, this presupposes that governments are willing to bear the costs of providing access to the courts so that judges are able to achieve fair outcomes in each case. The greater the degree of discretion, the more difficult it is to bargain in the shadow of the law,⁹² for where there is a broad discretion, the law casts only an uncertain shadow.

Centripetal laws assume that courts will make the decisions, and regulate the conduct and adjudication of cases within the court setting. Centrifugal laws send clear messages to people about their rights, obligations and entitlements, so that judicial resolution of disputes is made necessary only where the facts of the case or the scope of the rule are in dispute.⁹³

Centrifugal laws will usually require general rules or principles which may not be sensitively attuned to all the different circumstances that might arise, but they simplify the messages the law gives, thereby reducing the numbers of disputes and assisting in the resolution of disputes by conferring bargaining chips. They provide a framework within which alternative dispute resolution may operate successfully. An emphasis upon private ordering, combined with the

⁹¹ Australian National Audit Office, *Implementation of the Family Relationship Centres Initiative*. Auditor General Audit Report No 1, 2010-2011) (Canberra: Commonwealth of Australia, 2011), p. 68.

⁹² Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', (1979) 88 *Yale Law Journal* 950.

⁹³ The terminology of centripetal and centrifugal law is derived from Marc Galanter 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *J of Legal Pluralism & Unofficial Law* 1.

conferral of broad discretions on judges in the few cases which come to courts, is the worst of all worlds.

Moving from centripetal to centrifugal laws in family law is not straightforward. It is, perhaps, easiest in child support which is well-suited to fixed formulae and limited discretion. The costs of litigating over child support usually far exceeds the amounts of money at stake. Australia moved, many years ago, to an administrative system for assessing child support, with very limited options for recourse to the courts. Britain has not had a happy experience with administrative mechanisms for calculating and collecting child support, but the overall success of the Australian system shows it is possible if well-designed.

In Canada, some degree of predictability in terms of spousal maintenance has also been achieved through the Spousal Support Advisory Guidelines.⁹⁴

The division of family property on separation is also an area where there is limited need for discretion. The community property regimes, or deferred equal division systems such as in Germany, are at one end of the spectrum of certainty. Once it is determined whether the property is marital or non-marital, part of the community or separate, the issue of division or allocation is straightforward. That is not to deny the law's potential for complexity; but complex laws can still be predictable laws. In some cases there may also be significant factual issues that require resolution, but that is true of discretionary regimes as well.

On the other end of the spectrum of certainty are highly discretionary systems such as in England and Wales and Australia. All property is available for distribution, not just marital property. The Court has a broad discretion about how to divide the property, based upon consideration of multiple factors. While the uncertainty may be reduced if there is sophisticated appellate guidance, usually the cases which reach the highest courts involve parties with substantial wealth.⁹⁵ These cases are atypical. In Australia, the appeal division of the Family Court often stresses that each case turns on its own facts, and so strenuously avoids laying down guidelines for the exercise of discretion that ought to be followed by trial judges, or giving guidance on outcomes.⁹⁶ That perpetuates the extremely discretionary nature of the jurisdiction.

It is not as straightforward to promote certainty in children's cases as in financial matters. For

⁹⁴ Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice Canada, July 2008). See also Carol Rogerson & Rollie Thompson, 'The Canadian Experiment with Spousal Support Guidelines', (2011) 45 *Fam.L.Q.* 241. These guidelines distinguish between cases where the spousal support is in addition to child support (with child support payments being the first priority) and those where the recipient is not also in receipt of child support. They address all the bases for making awards, including non-compensatory spousal support, based upon what judges do in practice.

⁹⁵ In England and Wales, see e.g. *White v White* [2001] 1 AC 596; *Miller v Miller*; *McFarlane v McFarlane* [2006] 2 AC 618.

⁹⁶ See e.g. *Bishop & Bishop* [2013] FamCAFC 138 at [28]; *Bevan & Bevan* [2014] FamCAFC 19 at [92].

the cases that go to trial, the best interests of the child must be the paramount consideration. However, that does not mean that the legislature or courts cannot provide clear signalling to help parties without significant safety concerns to resolve their cases more easily. While some parents will make their own arrangements without reference to legal norms, others can be assisted to develop a well-functioning parenting arrangement if there is enough guidance in the legislation⁹⁷ supported by opportunities for education and dispute resolution.

Children's cases cannot be dealt with by rules, but there are general principles that can be articulated in legislation to provide a framework for discussions in mediation and negotiations between lawyers. Examples of general statements of principle that might usefully be included in legislation and which can also be referred to by the courts in deciding contested cases are that children have a right to maintain relationships with parents and other family members who are important to them, unless this is detrimental to their wellbeing; that children have a right to protection from harm; that children who have formed a close relationship with both parents prior to the parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, except when restrictions on contact are needed to protect them from abuse, violence or continuing high conflict; that parenting arrangements for children ought to be appropriate to their age and stage of development; and that parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.

Beyond these statements of general principle, having an affordable family law system probably means having a series of standardised parenting regimes that can act as a concrete foundation for negotiation between parents. It is likely to be too prescriptive to put this in legislation, but published advisory booklets or sample parenting plans can help provide people with formulae for working out their own parenting arrangements. One way, for example, is by sample court orders that may be adopted by consent. Where the parties have agreed that the non-resident parent will have the children to stay every other weekend, standard clauses could be made available specifying contact arrangements from after school on Friday to the commencement of school on Monday; providing for school holiday contact by stipulating when holidays are deemed to begin and end; dealing with handovers (non-resident parent collects at the beginning of the holiday period and resident parent collects the children at the end of their stay with the other parent); options for Christmas and other important holidays. Lawyers have these templates for agreements readily available in their precedent folders. There is no reason why they should not be made available by a public body for use by parents who are trying to organise arrangements for themselves.

Sample parenting plans could be used also by mediators. There are only so many variations on the theme of parenting after separation; and where the parents are having difficulty agreeing,

⁹⁷ In the US context, see Margaret Brinig, 'Substantive Parenting Arrangements: The Tragedy of the Snipe Hunt' (2013). Notre Dame Legal Studies Paper No. 1321. Available at SSRN: <http://ssrn.com/abstract=2233667>.

a rational response might be to get them just to try a suitable standardised package of parenting arrangements for a few months, and then to come back if it is not working well.

The issues with infants and very young children are more complex, and not amenable to standardised packages or formulae. Yet even here, experts in the field have been able to offer some guidance. After a huge controversy in recent years concerning the issue of infants and young children staying overnight with non-resident parents,⁹⁸ a consensus statement has been written reflecting a large body of expert opinion in the field.⁹⁹ Researchers have put aside some of their differences to provide guidance on when it is contra-indicated for children under 4 to stay overnight with non-resident parents, based upon what is known from child development research.¹⁰⁰

Relocation cases are another area where a greater consensus is emerging based upon research findings and the wider body of research knowledge on children's wellbeing in the aftermath of parental separation. While there remain differences of view among researchers about how best to promote predictability in decision-making on relocation, that argument takes place within the context of much agreement on a range of issues.¹⁰¹

What about shared care? The evidence from much research is that equal time arrangements and other arrangements for substantially shared care can work well, but they are most likely to do so in the lower conflict cases where parents are able to co-operate and compromise, not the most high conflict cases characterised by rigid positions and proprietary notions of parenthood. Legislation can helpfully assist parents to work through the practicalities of shared care by

⁹⁸ See for example the Family Court Review special issue of 2011 edited by Jenn McIntosh and the responses published the following year: Michael Lamb, 'A wasted opportunity to engage with the literature on the implications of attachment research for family court professionals', (2012) 50 *Family Court Review* 481; Pamela Ludolph, 'The Special Issue On Attachment: Overreaching Theory And Data' (2012) 50 *Family Court Review*, 486. See also Pamela Ludolph & Milfred Dale, 'Attachment in child custody: An additive factor, not a determinative one' (2012) 46 *Family Law Quarterly*, 1; Linda Nielsen, 'Woozles: their role in custody law reform, parenting plans and family court' (2014) *Psychology, Public Policy, and Law*; Judy Cashmore and Patrick Parkinson,, 'The Use and Abuse of Social Science Research Evidence in Children's Cases' *Psychology, Public Policy and Law*.

⁹⁹ Richard Warshak, with the endorsement of 110 researchers and practitioners listed in the Appendix. 'Social science and parenting plans for young children: A consensus report'. (2014) 20 *Psychology, Public Policy, and Law*, 46.

¹⁰⁰ Marsha Pruett, Jenn McIntosh, & Joan Kelly, 'Parental separation and overnight care of young children, Part I: Consensus through theoretical and empirical integration' (2014) 52 *Family Court Review* 240; Jenn McIntosh, Marsha Pruett, & Joan Kelly, 'Parental Separation and Overnight Care of Young Children, Part II: Putting theory into practice' (2014) 52 *Family Court Review* 256.

¹⁰¹ See Patrick Parkinson and Judy Cashmore, 'Reforming Relocation Law – An Evidence-based Approach' (2015) 53 *Family Court Review* 23; Rollie Thompson, 'Presumptions, Burdens And Best Interests In Relocation Law' (2015) 53 *Family Court Review* 40; Patrick Parkinson, & Judy Cashmore, 'Reforming Relocation Law: A Reply To Prof. Thompson' (2015) 53 *Family Court Review* 56.

providing a checklist of factors for when such an arrangement is likely to work. In Australia, there is some encouragement for shared care in the law. However, the Australian legislation sought to address the issue of deterring inappropriate shared care arrangements by requiring that a shared care arrangement must be 'reasonably practicable' and providing guidance on when that might be so. Judges are required to consider the proximity of the parents' homes, the capacity of the parents to implement a shared care arrangement, their ability to communicate with one another, and the likely impact of the shared care arrangement on the child.¹⁰² This can be used by mediators and lawyers to 'reality test' the practicability of a proposed shared parenting arrangement.

What must be avoided is having any presumption about time. There are too many variables. Some legislatures have sought to encourage shared care, That might be an optimal arrangement for some families if it can be managed, but the logistics and expense of doing so may mean it is out of the reach of many separated parents. There are many other situations where it is unsuitable, not least if parents live too far apart or there are concerns about the competence of one parent to provide a safe and nurturing environment for the child. There can be no one-size-fits-all policy for post-separation parenting.

c) Simplified procedures

There are useful models in some jurisdictions for simplified processes in some kinds of parenting cases that are cost-effective both for parents and for the government. Where the dispute is essentially about levels of contact and details of the arrangement rather than the issue of who should be primary carer, the dispute ought to be able to be resolved without another full-blown trial in court. A model for quick and inexpensive resolution of contact disputes is the Danish system.

The system for resolving contact (visitation) disputes in Denmark illustrates the possibilities for developing new forms of adjudication other than the traditional adversarial trial that are quick and inexpensive. Contact disputes are an example of where the remedy will only be reasonably effective if it is speedy and affordable. Yet typically, courts in common law jurisdictions adopt the same adversarial processes and legal structures to the resolution of contact disputes as they do for the major allocation decision of custody or primary residence.

In Denmark and Norway, certain functions have traditionally been exercised by the County Governors' Offices. These are city/county administrative authorities. Their role in relation to family law is a historical one, which dates back hundreds of years to a time when the monarch was able to grant divorces as a matter of executive decision. That continued in Denmark and

¹⁰² Family Law Act 1975 (Cth) s.65DAA(5).

Norway into the modern age of divorce, so that the courts and the administrative authorities have a parallel jurisdiction in relation to divorce, and certain ancillary matters, e.g. child support.¹⁰³

In Denmark, the County Governors' Offices are given a lot of responsibility for resolving disputes and making orders.¹⁰⁴ Consensual divorces are almost always handled by the County Governors' Offices. They also deal with spousal maintenance, child support, contact arrangements and adoption. The courts resolve the major issue of who should have custodial responsibility, but cannot make contact orders. If there is a dispute about contact, it is left to the County Governors' Offices to deal with.

The procedure for initiating the involvement of the County Governor's Office in a contact problem is simple. If a father is having problems seeing his children, or is otherwise unhappy with the arrangements, he can write to the County Governor's Office asking for it to get involved. There are no forms to fill in or applications to file and there is no fee payable.

The matter will be dealt with initially by a lawyer in the County Governor's Office. He or she will contact the mother and seek her response. There will then be a meeting. The couple can be referred to counseling, paid for by the County Governor's office, or to mediation. It used to be the case that counseling was only offered if both parties were willing to participate. Counseling may now be offered to one party even if the other is not willing to join in.

If the problems cannot be resolved by counseling or informally, then the lawyer in the County Governor's office will proceed to make a determination. That takes effect as an order, which is enforceable in the courts.¹⁰⁵ Normally, matters are resolved within 6 weeks. There is a right of appeal to the Ministry of Justice, Department of Private Law (CivilRetsDirektoratet) in Copenhagen. Normally these are dealt with on the papers, but a parent will never be denied a personal meeting if that is requested.

Another example of innovative practice is the Oregon informal domestic relations trial in Deschutes County, Oregon. This involves a form of trial in which the rules of evidence are excluded and the parties engage directly with the judge. Only the judge asks questions of each person. No testimony from witnesses except from the parties directly, unless special permission is granted by court for expert testimony. The role of lawyers is limited essentially to defining the issues and then presenting closing arguments.

¹⁰³ Svend Danielsen, 'The Scandinavian Approach: Administrative and Judicial Resolutions of Family Conflicts', in Marie Thérèse Meulders-Klein (ed.), *Familles et Justice* 139 (1997).

¹⁰⁴ The description of the Danish system for resolving contact disputes is derived from the author's research in Denmark in 2002, and interviews with Prof. Svend Danielsen, a former senior family law judge in Denmark, senior members of the Ministry of Justice, and with a judge of the Sheriff's Court.

¹⁰⁵ The decisions of County Governors' Offices are enforceable, and that enforcement occurs through the court system. The Danish have a special enforcement court for all kinds of court orders, including contact orders. It can be translated as either the Bailiff's Court or the Sheriff's Court.

These different ways of adjudicating disputes concerning children that cannot be resolved by mediation or negotiation demonstrate what might be possible in other countries with the support of legislatures.

Conclusion

This brief overview of developments around the world in countries with a Judaeo-Christian tradition indicates not only the pace of change in families and family law systems but also the challenges that demographic changes in family life pose for governments and courts. To draw an analogy, justice systems built on delivering a few quality products each year are now having to be transformed to provide for a mass market. Those systems were not designed for volume, and they have adapted only slowly and with difficulty to the level of demand now placed upon them to adjudicate disputes. Nor is the task any more to make a once-off decision about ‘custody’. In an age when the expectation is that both parents will ordinarily remain involved in children’s lives despite living apart, parenting orders must be adjusted as circumstances change: by agreement preferably, but if not, by a new adjudication. A certain proportion of family law litigants will keep coming back, unable to sort out any disputes for themselves.

The new challenges require imagination. They also require increased public funding. That itself is a challenge when there are so many other demands for public funding arising from family breakdown.

From a public policy perspective, the decline in acceptance of marriage as a foundation for long-term relationships and child-rearing has been a negative development. The pressures that the rise and rise of non-marital cohabitation and ex-nuptial childbirth have brought will challenge us, if not overwhelm us, for many decades to come.

Recommendations

1. That States with high levels of family breakdown and births to single mothers actively develop policies and educational strategies to promote safe, stable and nurturing families.
2. That States recognise the need for economic justice to be available to the primary caregiver of children following the breakdown of non-marital relationships, in addition to the provision of child support.
3. That States develop community-based alternatives to the pathway of lawyers and courts in resolving disputes about children. These should include the development of highly visible and accessible sources of assistance to parents such as educational programs on parenting after separation and family mediation.
4. That States reduce the level of judicial discretion in family justice systems in order to promote out of court resolution of disputes.
5. That States with an adversarial tradition of civil litigation develop judicially managed short trials without the need for legal representation to resolve the disputes of impecunious litigants.