FAMILY LAWS AND ACCESS TO JUSTICE

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UN Experts’ Group May 2015
THE PROBLEM

• Across much of the western world:
• Overwhelmed courts, long delays, stressed systems
• Cuts to government funding in many countries or funding not keeping pace with levels of demand
• Need to understand the nature of the problem
• Find effective public policy solutions
THE ENDURING FAMILY
FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD

- Breakdown of the model on which divorce reform was predicated in the late 1960s and early 1970s, which assumed that divorce could end the relationship between parents.

- Strong differentiation between custodial and non-custodial parent.
  - Théry and the idea of the “enduring family”: family remains a unit, but a bipolar one
  - Implies the refusal of a choice between parents in favor of joint parental authority
  - Multiple reasons – marriage may be dissoluble but parenthood is not.
THE DEMISE OF ‘CUSTODY’

- The joint legal custody movement (USA)
- The Children Act (England and Wales)
- The principle of “coparentalité” (France) - joint parental authority
- Joint parental responsibility as the default position (Scandinavia, Germany)
- Different approaches to unmarried fathers
- Australia: joint parental responsibility from birth
THE RISE AND RISE OF SHARED PARENTING

- Joint parental responsibility not enough
- ‘Joint physical custody’ and arguments about time
- Legislative encouragement of shared parenting
  - France
  - Australia
  - Belgium
  - Louisiana
- Shared parenting as aspirational law
THE FRAGILE FAMILY
CUMULATIVE PERCENT OF CHILDREN EVER LIVING IN LONE MOTHER FAMILY: AUSTRALIA

<table>
<thead>
<tr>
<th>Birth cohort</th>
<th>By age 15</th>
<th>At birth</th>
<th>Due to parental separation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1946-55</td>
<td>8.9</td>
<td>2.6</td>
<td>6.3</td>
</tr>
<tr>
<td>1956-62</td>
<td>11.0</td>
<td>3.2</td>
<td>7.8</td>
</tr>
<tr>
<td>1963-75</td>
<td>18.0</td>
<td>3.0</td>
<td>15.0</td>
</tr>
<tr>
<td>1976-80</td>
<td>22.2</td>
<td>3.8</td>
<td>18.4</td>
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<tr>
<td>1981-85</td>
<td>24.9</td>
<td>6.5</td>
<td>18.4</td>
</tr>
</tbody>
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THE CURRENT SITUATION: 2013 DATA

• Of families with children in which the youngest resident child was aged 0 to 4 years, only 81% were intact couple families

• By the time that children are 15-17 years old, only 60% are in intact families

• The proportion of adults whose parents had divorced or separated before they turned 18 increased from 15% in 2006-07 to 18% in 2012-13

• Source: ABS 4442.0 - Family Characteristics and Transitions, Australia, 2012-13
REASONS FOR FRAGILITY
RISE OF NON-MARITAL COHABITATION AS A SETTING FOR CHILD-REARING

- Marriage no longer seen as the predominant basis for childrearing
- In some South American countries, more people of child-bearing age are living in cohabiting relationships than married e.g. Peru, Columbia. Gap closing in Europe.
- Many of these couples having children
- Ex-nuptial birthrates: Columbia: 84% Peru: 76% Nicaragua: 72% Brazil: 66% Europe: see Olah Figure 7
- The proportion of first-born children who are ex-nuptial is much higher.
- More than half of ex-nuptial births across Europe are in cohabiting unions, although there are significant variations between countries
- International evidence: cohabitation much more unstable than marriage even when children
  - Australia: Infants living with two natural parents in 2004. By 2010, 12% of children in marriages and 27% of children born into cohabiting relationships were living with one natural parent
  - Not just selection effects – marriage makes a difference
INCREASE IN PROPORTION OF CHILDREN BORN TO SINGLE MOTHERS

• Ex-nuptial children not born to cohabiting couples are born to single mothers (may be in a romantic relationship with father at time of birth)
• 13% in Australia in 2005: double the rate in early 1980s
• Britain and Ireland: 16%
• USA: 24%
• These are children about whom there could be a parenting or child support dispute from birth
PRESSURES ON THE COURTS
THREE SOURCES OF PRESSURE

• The increase in the numbers of children living apart from one parent

• Fathers wanting to be more involved with non-resident children
  • Contrast with 25 years ago – research indicated the main problem with fathers after separation was one of ‘disappearance’

• The smorgasbord of options for post-separation parenting: Spectrum of choices on offer - abandonment of binary thinking about ‘custody’
CONTACT ORDERS MADE 1992 – 2007
ENGLAND AND WALES
Australia: Contact orders sought in Ancillary Applications 1977 – 1999/00
DENMARK – CONTACT APPLICATIONS
1993-2000

Applications per thousand
OTHER COUNTRIES

USA: 43% increase in custody filings between 1988 and 1995

44% increase in custody filings between 1997 and 2006 (7 states)

- France: 1996-2001 25% increase in parenting cases between divorced parents, more for unmarried parents.
- Germany: Very similar pattern to France between 1999 and 2005.
THREE DIRECTIONS FOR REFORM

• Rethinking the role of mediation
• Reducing discretion in family law cases
• Simplifying procedures for the more straightforward cases which require adjudication
RECOMMENDATIONS

• 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.

• 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.

• 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.

• That States reduce the level of judicial discretion in family justice systems in order to promote out of court resolution of disputes.

• 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.