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TABLE OF CONTENTS

PAPER 1

Pension Rights by Legal Separation or Divorce in Denmark 3

Gitte Meldgaard Abrahamsen, Assistant Professor, University of Aalborg, Denmark

PAPER 2

Gender Inequalities and Family Solidarity in Times of Crisis
(deContractualisation of Family Law) 9

Prof. dr. E. Alofs (Faculty of law, Free University of Brussels)

Prof. dr. A.-L Verbeke (Faculty of law, University of Leuven)

Prof. dr. D. Mortelmans (Faculty of sociology, University of Antwerp)

C. Defever (Faculty of sociology, University of Antwerp)

PAPER 3

Upheaval in the Family Court of New Zealand: “User Pays” and Privatization 38

Bill Atkin

PAPER 4

Shared Parenting Laws: Mistakes of Pooling? 49

Margaret F. Brinig, Notre Dame Law School

PAPER 5

Marriage for Immigration in the Republic of Korea..... 101

LEE, Dongjin

PAPER 6

Children's Voices: Centre-stage or Side-lined in Out-of-Court Dispute Resolution in England
and Wales? 126

Jan Ewing, Research Associate at the University of Kent on the ERSC funded 'Mapping Paths to Family Justice' project. The project is led by Anne Barlow at the University of Exeter. The CIs are Anne Barlow, Rosemary Hunter (University of Kent) and Janet Smithson (University of Exeter)

PAPER 7

The Structural Integrity of Marriages Following Major breaches of Trust in the
First Four Years 143

Jan Ewing, University of Cambridge

PAPER 8

Delegalizing Family Law..... 160

Marsha Garrison, Suzanne J. and Norman Miles Professor of Law, Brooklyn Law School
Secretary-General of the International Society of Family Law
Advisory Board of the *Journal of Law and Family Studies* and the International Advisory Board
of the *Child and Family Law Quarterly*

PAPER 9

Adoption and International Adoption: The Czech Republic Experience 176

Zdeňka Králíčková, Associate Professor, Faculty of Law, Masaryk University, Brno, the Czech
Republic

PAPER 10

The Challenge of Affordable Family Law 189

Patrick Parkinson, University of Sydney, Australia
President of the International Society of Family Law (2011-2014)

PAPER 11

As the Family Goes: Achieving Moral and Legal Pluralism by Prioritizing Marriage 215

Lynn D. Wardle, BYU Law
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Pension Rights by Legal Separation or Divorce in Denmark.

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Every year thousands of marriages are terminated in Denmark. In 2013, 18.872 couples were divorced¹ and the divorce rate is on the rise — 46.5 percent of all marriages in Denmark today end in a divorce.² The division of property in a divorce or legal separation proceeding is, therefore, of great importance. This paper deals with pension rights by legal separation or divorce. It examines pension rights and to what extent those rights are a part of the division of property in Denmark. It includes a short introduction to the legal framework in Denmark and to the present state of law. Some reflections on economic inequalities within the family will also be made.³

According to the Danish Act on Legal Effects of Marriage, the statutory basis for Danish family law is the concept of community property (see s. 15 (2)). Community property includes all property acquired by either spouse during the marriage as well as all property owned by either spouse at the time of the marriage. Each spouse can – as the main rule – deal freely with his or her own property within the community property assets. The main legal effect of community property is only evident when one of three things occurs: one of the spouses dies, they have a legal separation, or go through a divorce. When the marriage is terminated, community property must – as the main rule – be divided into equal shares. However, in Denmark this rule does not apply to pension rights even though pension rights are one of the biggest – if not the biggest – assets within the community of marriage today.

In 2007, a new set of rules became law in Denmark.⁴ In framing these rules, the question was whether or not pension rights should be considered a form of capital and, therefore, be included in the division of property in case of a divorce just like other assets. Alternatively, pension rights could be excluded from the division in case of divorce due to their purpose and *personal* character.⁵ Since the emphasis in the rules was on the purpose of the pension, the general rule

¹ “News”, number 144, Statistics Denmark (*Nyt*”, nr. 144, Danmarks Statistik), 18.th of March, 2014.

² “News”, number 139, Statistics Denmark (“*Nyt*”, nr. 139, Danmarks Statistik), 18.th of March, 2014.

³ The paper is a product of my PhD thesis. For more see Abrahamsen, Gitte Meldgaard. “*Pensionsudlignende regler ved separation og skilsmisse*” (*Pension equalizing rules by legal separation or divorce*), Jurist- og Økonomforbundets Forlag, 1. edition 2014

⁴ Act number 483 of June 7th 2006.

⁵ See Report number 1466 of 2005 “*Spouses pension rights – in the division of community property*” (Betænkning nr. 1466 af 2005, “*Ægtefællers pensionsrettigheder – behandling på skifte af fællesbo*”), p. 185 and p. 20.

in Danish family law today is, as the predominant rule, that pension rights are not included in the division of matrimonial property in a divorce or legal separation. Therefore, the spouses as a main rule retain their own pension rights after the divorce.

This legal position differs much from general family law and is, consequently, modified by different rules that can lead to a degree of equalization of the pensions. There are three possible ways to modify the legal position on retaining their own pension right after the divorce. Firstly, if the pension right in question is *not reasonable*, then the value of the pension has to be included in the division.⁶ This follows from the fact, that in order to exclude pension rights from the equal division of property, the pension right in question has to be *reasonable*.

However, when is a pension right regarded as reasonable? That is both in practice and theory a difficult question. Some of the answer can be found when examining whether the pension right in question corresponds to the spouse's educational and professional background. For instance, if the spouse is a doctor, the reasonable pension right for this spouse will be the same level as for other doctors in the same type of job. A reasonable pension is thus basically what follows from a collective agreement in that specific area. If the doctor has a larger pension than this, then these "extra" contributions will be regarded as not reasonable and must be included in the equal division of property in case of divorce or legal separation. An extra contribution may be for example if the doctor, for tax reasons, pays larger contributions or creates a voluntary pension alongside his occupational pension right. [Since all normal occupational pension rights are reasonable, it follows that most pension rights in Denmark will be characterised as reasonable.⁷

Secondly, there is a possibility that a spouse can be allocated compensation due to the pension situation. Two different types of compensation are possible.

The first one is called "*fællesskabskompensation*" which here is freely translated into joint-effort compensation. As the name suggests, this is a compensation that may be allocated as a result of a joint effort for the family. The joint effort, in this context, is when one spouse has been absent from the labour market in order to take care of the family due to a maternity or paternity leave or part-time employment. It could also be because of the other spouse's employment situation. The absence from the labour market may result in lack of – or smaller – pension savings for the caretaking spouse. Compensation is then possible when the sacrifices due to the marriage are the reason for a loss in pension contributions. This also means that compensation is ruled out if the

⁶ If the marriage has been short, which means less than five years, all pension rights can be excluded from community property (see cf. the Danish Act on Legal Effects of Marriage, s. 16 c.)

⁷ See Report number 1466 of 2005 "*Spouses pension rights – in the division of community property*", p. 179.

reduction in the pension savings is due to illness or unemployment. But there are several other conditions that are to be met before compensation can be allocated. An example of this: the absence from the labour market must have taken place *during the marriage* – not in a prior cohabitation – and compensation should not be given if the loss in pension savings does not amount to what would be two years of contributions for a person in full-time employment.⁸ If these requirements are met, then compensation can in theory be granted. However, the compensation may not be larger than half of the difference between the values of the pension savings which each of the spouses has contributed during the marriage, (see cf. the Danish Act on Legal Effects of Marriage, s. 16 d (2)). This is also a very complex rule to apply. For example, it requires exact calculations of how much the spouse has lost in pension contributions because of the absence from the labour market, which is a very difficult calculation that often requires expert knowledge. Furthermore, it may also be difficult to prove what the reason for the absence was, especially if the absence took place several years ago.

The other possible compensation scenario is called “*rimelighedskompensation*” – reasonable compensation (see cf. the Danish Act on Legal Effects of Marriage, s. 16 e). The court may – according to this rule – order a spouse to make a financial compensation to his or her former spouse to ensure that this spouse is not at an *unreasonable disadvantage* with regard to pension rights. Compensation is only possible in cases of long-term marriages. A long-term marriage is a marriage that has lasted over 15 years. When assessing the length of the marriage, cohabitation prior to the marriage can here be taken into account. It is also a requirement that there is a *large* difference in the values of the spouses’ pension rights. The comments on the draft law also contain several conditions – such as some thresholds for when compensation can be granted – that must be met before compensation can be allocated. The many requirements make this rule difficult to apply in practice. It requires great actuarial knowledge to determine if the conditions for compensation are met.

The rules of compensation are generally very difficult to apply and often require specialist knowledge on pension rights and valuation. The rules contain so many restrictions and requirements that they are often inapplicable. This combined with the fact that most pension rights will be regarded as reasonable (all occupational pension rights) leads to my conclusion that an equalization of pensions rarely occurs. It can, therefore, be questioned whether the rules are applied as intended.

⁸ Several of these conditions are only mentioned in the comments on the draft law – and not in the law itself – which is very inappropriate as spouses can fail to predict their legal position when only reading the law and not the preparatory work.

Notably, all of these modifying rules have played a relatively minor role in Danish legal practice with only three published court cases during the last eight years. There may be several reasons for this. As mentioned, the rules are very complicated within an already complex legal area, so that lawyers find it difficult to apply them. In addition, there are some procedural difficulties related to the rules and legal action can be very costly. In preparation of the Act it was assumed that within a few years, a number of court cases would have clarified the many discretionary concepts in the law.⁹ Nevertheless, the rules have only played a minor role. The lack of reported cases makes it difficult for the lawyers to predict the outcome in future cases, which may incentivize to a voluntary settlement on less favourable terms.

An equalization of pensions rarely occurs in Denmark and the conclusion that can be drawn is that the present legal situation in Denmark is, in reality, closer to an unequal division of pension rights in a legal separation or divorce.

This can lead to possible economical inequalities within the family. If no adjustment of the pensions is made because the modifying rules are not being applied as intended, the spouse with the smaller pension may risk ending up in a poorer position with regards to pension rights after a legal separation or divorce. This may indirectly affect *women* due to the fact that there is a gender gap in pensions. A 2013 expert study by the European Commission highlighted the gender gap of pensions within the EU. The study shows that men in Europe, on average, have 39 percent larger pensions than women. The difference in Denmark, according to the study, is somewhat smaller, at 19 percent.¹⁰ Statistically, an unequal division of pension rights will therefore most often be to the disadvantage of the wife since men, on average, have larger pension savings. There are several reasons for this. One reason is fewer women than men are employed. In 2012, the employment rate for men in Denmark was 76.7 percent while for women it was 72.7 percent.¹¹

Furthermore, women retire earlier than men. In 2011, the average retirement age for women was 61.7 while for men it was 62.6 years.¹² The number of part-time workers is higher for women

⁹ The Minister of Family- and Consumer affairs answer to the Legal Affairs Committee of the Folketing, question nr. 10, REU L 146. (Ministeren for familie- og forbrugeranliggenders svar til Folketingets Retsudvalg, spørgsmål 10, REU L 146)

¹⁰ European Commission, “*The Gender Gap in Pensions in the EU*”, 2013, p. 34.

¹¹ The Ministry of Labour, “*Women and men in the Labour Market 2013*”, (Beskæftigelsesministeriet, “*Kvinder og Mænd på arbejdsmarkedet 2013*”), 2014, p. 9.

¹² The Ministry of Labour, “*Women and men in the Labour Market 2013*”, 2014, p. 29.

than for men. The numbers show that 36 percent of female employees are part-time while the figure for men is just 15 percent.¹³

A third reason is that women generally still are paid less. According to a study by the Ministry of Labour in 2014, the pay gap in the private sector was 16 percent in favour of men while it was 9 percent in the state sector and 13 percent in the municipal sector.¹⁴ The pay gap may partly be explained by education, work experience and work in different sectors. Adjusted for these factors, the unexplained wage gap between women and men is reduced to 9-12 percent in the private sector, 3-6 percent in the state sector, and 0-4 percent in the municipal sector¹⁵ [?]

In addition, women's pensions and labour force involvement are closely related to the family status of women. The work women do is quite often influenced more by family relationships. This is particularly evident in relation to maternity leave. The men who fathered a child in 2011 and who shared maternity leave with the mother had an average of 36 days of maternity leave. In stark contrast to that number, women in the same situation held 295 days.¹⁶

All these factors lead to the conclusion that women in Denmark more often accumulate the lowest pension within the couple.

If no adjustment of the pension is made in a legal separation or divorce proceeding, it can indirectly lead to economic inequality within the family as it does not take into account the way people structure their family lives.

A case from the Danish High Court may illustrate this:¹⁷

In 1986, a nurse and an army pilot met, fell in love, and moved in together. They eventually had two children in 1987 and 1988, respectively. In 1999, they decided to get married and then nine years later (in 2008) they divorced.

The wife had a much smaller pension savings than the husband. This was partly due to the fact that she had been absent from the labour market and worked part-time for several periods that were related to family decisions. The husband had been stationed abroad several times during their cohabitation, and the family had moved several times due to his training. For those reasons she had not been able to fully maintain employment throughout those time periods. The court

¹³ The Ministry of Labour, "Women and men in the Labour Market 2013", 2014, p. 11.

¹⁴ The Ministry of Labour, "Women and men in the Labour Market 2013", 2014, p. 35.

¹⁵ The Ministry of Labour, "Women and men in the Labour Market 2013", 2014, p. 6.

¹⁶ "News", number 124, Statistics Denmark, ("Nyt", nr. 124, Danmarks Statistik), 12th of March 2013.

¹⁷ Cf. The Danish weekly law reports, 2013, p. 1951. (Ugeskrift for Retsvæsen 2012, s. 1951).

held that each spouse was entitled to their own pension rights because they were all considered *reasonable pensions*.

The question then became whether a joint-effort compensation should be allocated to the wife. The majority of the wife's pension loss was during the cohabitation (when they had the children), and not during the marriage, consequently, this loss could not lead to any compensation from the husband. The lost contributions during the marriage could not lead to compensation as the loss did not amount to what would be two years' worth of contributions for a person in full-time employment. The last opportunity for the wife was then reasonable compensation. Although they had only been married for about 9 years, their marriage was considered a long-term marriage because of prior cohabitation. The court found that even though there was a great difference between the spouses' pension rights, she was not in an unreasonable situation with regards to pension rights. The court emphasized her pension and the statutory share of community property after division?] Consequently, she was not compensated in this case.

It is clear that this wife ended up in an unfavourable situation with regard to pensions because of the way they established their family life. It is, therefore, important that women are more aware of saving for retirement and aware of what consequences may occur from not being employed for periods of time.

In conclusion, the legal status in Denmark today is that pension rights are most often excluded from the division of community property. Pension rights are one of the biggest assets for individuals in marriage in Denmark, and the general rule of equal sharing has largely receded in Danish family law.

PAPER ISFL

GENDER INEQUALITIES AND FAMILY SOLIDARITY IN TIMES OF CRISIS (DECONTRACTUALISATION OF FAMILY LAW)

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Introduction

1. Besides sociological, demographic and cultural determinants, economic conditions also induce a shift in the social responsibilities of an individual, his family and society. Due to the current poor economic situation of most of the European countries, public funds are scarcer and the financial sustainability of public safety nets for those in precarious situations is at risk. That's why the financial crisis has raised questions about which risks should still be covered by society and which risks could be covered via solidarity in private relationships and family law. Focusing on the socio-economic situation of women as one of the vulnerable groups, this paper tackles the question of whether a shift from public to private law protection can provide a solution for the limited public funds in times of economic crisis.

2. It is without doubt essential to our modern western society and identity, ever since the emancipation movements in the twentieth century, to consider men and women as of equal value. This core value has been embedded in numerous legal documents, national legislation, and international treaties.¹ Today's society, however, demonstrates some hypocrisy on two counts.

3. First of all, there are foreign cultures where women do not enjoy an equal legal position to that of men and are not entitled to equal opportunities in education, work, career, leisure time, etc. Nevertheless, many European countries have accepted in their midst the existence and flourishing of such cultures that are fundamentally and conceptually discriminating against women. The mere fact that we accept such views to co-exist in our society, often for reasons of political correctness, is a denial of the very essence and core values of our culture and identity. Multiculturalism and integration cannot be achieved if we fail to claim respect for essential values such as the equal treatment of men and women. How respectful can a European culture be when it is too shy or cowardly to fight for one of its most fundamental values? The respect for women starts with banning all rules and practices of female discrimination on our territory.

4. Secondly, although in our own western culture legal equality between men and women has been promoted as essential, western societies fail to operationalize that value in every-day-life. In the first part of this paper, sociological data was presented that demonstrated that *de facto* equality has not been achieved. For biological, social, psychological, traditional and other reasons, in the concrete day-to-day experience, women continue to be 'second rate citizens'. The 'glass ceiling' is a permanent challenge for women, in the labour market, in boards, and in politics. Even more staggering is the weak position of women in their most intimate context: their relationship with a love partner. This precarious situation of women particularly causes problems when the relationship is disrupted by divorce or break-up, which is currently the case in more than fifty percent of the relationships. The data demonstrate that the socio-economic position after a break-up is far more disadvantageous for women compared to the former male partners.

5. Notwithstanding those data, the law, particularly family law, erroneously starts from the premise of equality between the sexes. This dogma of formal equality, together with emancipatory ideas, has led to family law being de-institutionalised, individualised and liberalised over the past decades. As will be described in the second Part of this paper, these trends have led to the abolishment of financial responsibilities within the family and a lack of solidarity within family law. As mentioned before, this lack of solidarity mainly causes a problem when the family is disrupted by divorce or relationship break-up.

6. Given the persisting disparities between men and women in everyday life, the absence of responsibilities and solidarity in family law is questionable. Couldn't, or indeed shouldn't, family law return to a protective role, which aims at compensating the actual differences between men and women which all too often lead to individual poverty, especially for women? As mentioned above, this question is even more urgent in times of economic crisis, now that the sustainability of public safety nets is queried. In the third part of this paper, we therefore advocate for a more inclusive and equitable family law, which recognises the existing differences between individuals, particularly between men and women. We aim to create a family law that tackles and adjusts the pernicious consequences of these inequalities.

Part 1. Gendered socio-economic inequality

7. The increased standard living conditions in nearly all western societies after World War II resulted in an enormous increase of female participation in the labour market. As a consequence, the dominant male breadwinner model of the fifties and sixties was slowly replaced by the dual-earner family, which became the golden standard for contemporary families.² Yet, the relative dominance of these dual-earner families cannot conceal the fundamental gender disparities in paid labour and care within these households.

8. This first Part starts with an overview of the socio-economic inequalities between men and women on the labour market and in the household (§1.). Next, we will look at the consequences of these inequalities when the family is disrupted by divorce or relationship break-up (§2.). We will see that the socio-economic position before and after a break-up is far more disadvantageous for women compared to the male partners.

§1. Socio-economic inequalities between men and women

9. In this paragraph an overview of the labour force participation (A.), wage and position (B.) and career (C.) inequalities between men and women will be presented. Subsequently, we will look at their position and responsibilities in the family and tackle imbalances in the division of household tasks and care between men and women (D.).

A. Inequality in labour force participation

10. In general, women are less active on the labour market. Table 1 shows the percentage of women and men aged 15 to 64 years in Belgium who are working in paid employment. The difference in employment rate between men and women decreased over the years but still remains substantial. In 2012, almost 67% of the men (aged 15-64 years) were working compared to merely 57% of the women.

Table 1. Evolution of employment rate in Belgium, by gender, 2000-2012, in %

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Men	69,3	68,8	68,3	67,3	67,9	68,3	67,9	68,7	68,6	67,2	67,4	67,1	66,9
Women	50,8	51,0	51,4	51,8	52,6	53,8	54,0	55,3	56,2	56,0	56,5	56,7	56,8

Source: ADSEI, Labour Force survey

11. More striking are the gender disparities when looking at the part-time employment rate. Although part-time working has increased considerably over the past decade, there continues to be a major difference between women and men. In 2012, 43,5% of the women who were active on the labour market worked part-time. In the case of men, this was only 9%.

Table 2. Evolution of part-time employment rate in Belgium, by gender, 2000-2012, in %

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Men	4,3	4,7	5,1	5,8	6,3	7,1	7,0	7,1	7,5	8,2	8,4	9,2	9,0
Women	34,9	35,8	36,4	38,0	39,3	40,4	41,0	40,5	40,8	41,4	42,1	43,3	43,5

Source: ADSEI, Labour Force survey

12. Apart from the plain percentages, there is also a major difference in the reasons why people work part-time. An analysis of a Belgian sample from the Survey on Income and Living Conditions (SILC) conducted in 2005,³ shows that only a small minority (1%) of men working less than 30 hours a week, mention household tasks or care as a reason to work part-time. This percentage is considerably higher among part-time working women (30%).

B. Inequality in wage and position

13. On average in 2013, a woman earns 10% less per hour worked compared to a man. Due to a large share of part-time working women, the pay gap rises to 23% on an annual basis. This raw gender pay gap can be attributed to a number of external factors. Only 26% of the gap is due to individual characteristics of the worker such as education, work experience, and years of service in the company. A dominant part of the gap can be brought back to gender segregation on the labour market (52% of the explained part of the gender pay gap).⁴ Women turn out to be over-represented in sectors, professions and positions that pay less well. To a large extent, unequal pay is a question of unequal work.

14. Indeed, within the labour market, differences between 'female' and 'male' professions and industries can be observed. So-called 'female' professions systematically pay less in comparison with 'male' professions and industries. A major explanation for this difference lies in the perception society has of certain professions. Being a construction worker for example, is considered as having a 'tough profession' meriting a higher wage. A geriatric assistant, on the other hand, is not considered to have a 'heavy profession' and therefore tends to be paid considerably less. Industries with higher ranked positions are frequently more male-dominated than lower (or 'softer') perceived industries. Studies have shown that the gender segregation on the labour market begins when adolescents make their subject choice during secondary school. Girls select themselves into lower ranked sectors with worse payment and status.⁵

15. In addition, compared to men, the share of women in higher positions on the Flemish labour market is significantly lower to their overall share on the labour market.⁶ Not only are there fewer women in executive positions, their relative share according to positions in the labour market, is also decreasing along the corporate ladder. Baerts et al.⁷ conclude from a large collection of studies that leading positions and promotions are far less often held by women than by men. Women face the so-called 'glass ceiling' preventing them to achieve the higher positions on the labour market, despite their abilities. When looking at the Belgian figures for 2010, only 34,1% of the executive and higher management positions are occupied by women (ADSEI).

16. Not only are the positions on the labour market gendered, but also within a similar position, women face inequalities. Within the same profession, women have fewer extra-legal advantages, cost deductions, daily allowances, bonuses or double holiday allowances. Men also receive more flexible wage arrangements or sickness and hospitalisation insurances.⁸

C. Inequalities during the career

17. As shown above, women work more part-time than men. But during their life course, they also use career breaks (maternity leave, time credit) more often. More than 66% of the people taking a career break are women. This hegemony of women becomes even more apparent among the full-time breaks and thematic leaves, such as parental leave, leave for medical assistance or leave for palliative care (respectively 77% and

72% women). This woman-dominated percentage is lower among the part-time breaks (63%), where the part-time options are gradually finding their way to men.⁹ The household and specifically the care for (young) children is the predominant motivation for these career decisions among women.¹⁰ For men, ending the career in a part-time schedule is clearly the most prevalent reason. Alternatively, more men use the time-out to try a new job or to start a business.¹¹

18. The only reverse gender gap is found in research on the wage penalty of career breaks. In general, wage differentials between men with and without a break are much higher than between women with and without a break.¹² Men experience a larger drop in income (starting from a higher income) after returning from a career break compared to women.¹³ Also the wage growth for men is slower after they return from an interruption. In other words, the penalty for a career break in terms of wages is higher for men.

19. Apart from career breaks, women show greater variability and less stability in their careers, often resulting in more vulnerable positions. The entry in the labour market is often more difficult for women, causing a longer unemployment period before finding their first full-time position. [even with equal credentials?] They also switch more often between part-time and full-time jobs (often between different jobs). Men, on the other hand, have careers that show less variability and that are more stable and traditional, characterised by full-time jobs and easy job market entries.¹⁴

D. Inequalities within the households

20. The inequality on the labour market and in career trajectories finds its origin in the traditional division of labour in households. Different studies find that even when women work an equal share at the labour market, they still are confronted with a larger share of the responsibilities at home.¹⁵ In addition, part-time working women have a higher chance of being responsible for a dominant share of the household work, while the opposite is not true for households with part-time working men.¹⁶

21. The division of household work in families with children is even more unequal compared to childless households.¹⁷ Time-use research shows that, in a week, men spend seven hours more time on paid labour than women. Women spend 8h35' more on household work and an additional 1h35' more on parenting and care for children. In sum, the weekly work load of women in the household is three hours higher than that of men.¹⁸ In general, young, highly educated men with higher professional positions participate more in the household work. Married men and men who work longer hours in paid labour are helping less. The most egalitarian division of household work can be found in childless households where both partners work, where the woman brings in a significant share of the household income, and where both partners have a positive attitude towards equal gender roles.¹⁹

22. When families choose to decrease the working hours of one of the parents, women are usually the ones who step forward, as it is predominantly women who face the dilemma of combining work and life.²⁰ Indeed, the labour market participation of a family with children is 6,4% lower compared to a household without

children. This difference is completely due to a reduction in working hours for women. A majority of working women decrease labour force activity after the birth of the first child. This reduction in working hours is a rarity among new fathers.²¹

This is not a value-free choice. The choice is inspired by traditional gender roles and societal expectations of the position of men and women in a family.²² [also by the fact that she earns less, right? Would it be useful for you to put it in here even though you get to it at the end of the paragraph?] Even among women themselves, the idea lives that it is the responsibility of women to take care of (young) children. [Source for this?] Society legitimizes reserving the caring role for women. There are signs that the classic breadwinner model is fading or at least revealing its pitfall²³ but research from the Panel Study of Belgian Households shows only a tiny percent of families breaking the ruling social convention.²⁴ Moreover, these decisions are not only value-driven. Another important incentive to tip the balance towards women is the wages of the partners.²⁵ The one earning less income has less bargaining power in the couple. The loss of income by reducing one's working hours is less for the one with the lowest income. Referring to the discussion of the gendered labour market above, men have higher positions and higher wages than their partners, even though the educational level of women has risen enormously.

§2. Socio-economic inequalities between men and women after a relationship break-up

23. The previous paragraph (§1.) showed huge gender differences in caring for children. As a consequence, women are less active on the labour market. They work more part-time and less in managerial functions. Women are working in less well-paid industries and interrupt their career more often to combine work and life. The result is that they have less social [or do you mean human capital?] and economic capital, and during the course of their life, accumulate less pension rights than their partners.

24. The issue of these inequalities becomes apparent when the relationship ends in a divorce or a break-up. In this paragraph (§2.), the consequences of relationship and labour market inequalities after the dissolution of the relationship will be analysed. Many findings show that women, again, are most disadvantaged, particularly when they end up as a single mother.

A. Inequalities in the division of care

25. A longitudinal study on register data [? Not everyone will know what you mean by the term "register data"] revealed that the odds that women ultimately become the head of a single-parent household are four times higher compared to men. Other data shows that 13,1% of fathers finally head single-father households one year after the break-up while 50,6% of divorced men are single without children one year after. The opposite is true for women: single-mother households are found in 54,8% of the cases while only 10,4% of women is single with no kids after the break-up. Therefore, women with children prior to divorce have a much higher chance of becoming single parents.²⁶ [Is this all women or only married women?]

26. Not only do women have a higher chance of heading a single-parent household, but they also stay longer in this household type. It is found that 73,1% of the women who were single mothers at the end of the first year after divorce are still in this position one year later. For single fathers, this is only 62,9%. Four years after divorce the single mother percentage drops to 45,9% (but down to only 31,4% for single fathers).²⁷

27. Moreover, women also have more children in their household compared to single fathers (mean of 1,3 children for women vs. 0,4 children among men). Also the age of the children is lower when they live with their mother (mean age of the youngest child is 9,5 year compared to 14 years when living with the father).²⁸

B. Inequalities in the financial consequences

28. Different longitudinal studies have shown that the financial situation of men is relatively stable or even improves after relationship break-up. For women, the evolution shows a negative trend in all studies. Their situation after a break-up is only slow improvement, taking a considerable number of years to overcome the financial consequences of divorce. Based on the Belgian Panel data from 1992 to 2002, men would see their OECD equivalised income (i.e. household income that takes into account the size of the household, and the number and age of children to allow for comparison over different household types) increase by almost 5%. Women, on the other hand, face a decrease in equivalised income of 18,8%. When faced with a loss in income, it takes at least 5 years for 45% of the women to reach their pre-divorce income level.²⁹ [Is it worth saying that although they are financially worse off, the women with children may be psychologically better off?]

29. The evolution of income is determined by many factors. The height of the pre-divorce income determines the drop in income afterwards.³⁰ Also the relative contribution of the partners to the household income before the divorce is important for the post-divorce trajectory. When there are inequalities during the marriage, the financial consequences show one clear winner and one loser. Since men often earn a larger share of the household income, the drop in income for women is usually much greater. Suddenly, women need to run a household without the (higher) income of the partner. For a divorced man, being a single breadwinner in a household, a divorce implies a financial gain. The more hours he works, the bigger the gain.³¹

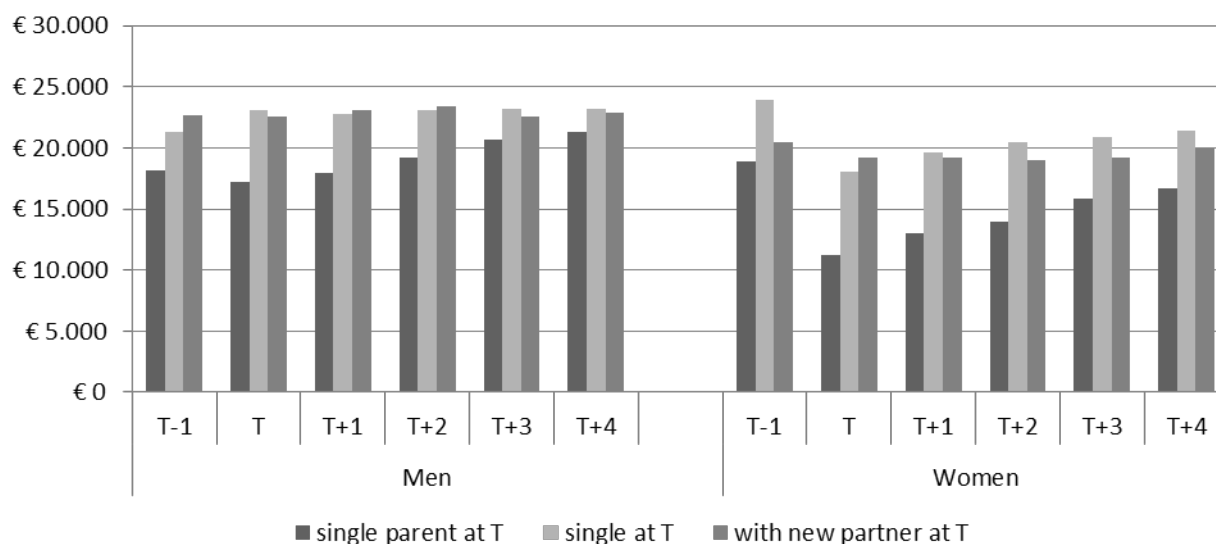
30. When children are involved, the custody arrangements determine to a large extent the financial consequences for the parents. The parent residing with the children is financially worse-off. Especially a higher total number of children and more young children increase the financial drawback. More children and younger children are factors that have already influenced the pre-divorce income (being lower) but the effect continues to be negative after the break-up. Having children has an effect on the family income of about 9% compared to households without children. Additionally, the wage gap increases with about 50%. [What about child support, either from the father or public?]

31. Re-partnering is held out as a successful strategy for women to counterbalance the negative financial consequences. For men, finding a new partner is shown as being less successful. One explanation for this difference is the labour market position of the new partners. The wage gap turns out to be negative for

women. When a woman re-partners, the odds are higher that this will be accompanied by an increase in her total household income. For men, the odds are greater that a lower-earning partner will be found, which leads to a decrease in his total available income.³²

32. The results from panel data were recently confirmed by a large-scale study on register data:³³ the financial drawback is biggest among women heading single-parent households after divorce. This is illustrated in figure 1. Stressing the financial consequences for women, we should not forget that there are also a considerable number of men who see a dramatic financial decline after divorce. Moreover, the subjective experience can also differ between divorcees. Transfers from one partner to the other ex-partner can trigger a more negative impression of the actual financial evolution.³⁴ One situation where this happens is when one partner is supposed to pay child support for the children or alimony to the ex-partner. The Belgian divorce law of 2007 restricts the duration of alimony payment (maximally to the duration of the broken marriage).³⁵ As a consequence, the most vulnerable group – mothers with young children from a short marriage [why more vulnerable than those with relatively young children who’ve stayed out of the labor force longer?] – are allowed the least amount of alimony. The child support payments are freed from a time constraint. In literature, there is a disagreement about whether or not alimony and child support payments help people stay out of poverty.³⁶ A crucial question is also whether or not child support and alimony are actually paid (or can be paid).³⁷ Paying alimony seems to be closely related to the degree of initiative in breaking up the relationship and the degree of contact with the children afterwards.³⁸ Therefore, we might expect a positive effect of shared co-residence with children to be more full payment of transfers between former partners.

Figure 1 Evolution of the total gross yearly household (OECD and inflation corrected) for different family types in the year of the divorce (T, 2004), 2003-2008



Source: Data warehouse ‘Labour market and social protection’ – Crossroads bank Social Security, own calculations.

Part 2. Absence of social responsibilities and solidarity in family law

33. The law, particularly family law, is dogmatically premised on the equality between men and women despite the existence within today's society of undeniable gender differences. Because of this 'formal' equality, and together with the emancipation of women, family law has been subjected to trends promoting the individual. The disappearance of responsibilities and solidarity in family law is particularly noticeable in the form and content of intimate relationships (§1.), in the limited protection of the weaker spouse, often the wife, after divorce (§2.) and in the limited, almost absent, protection of unmarried partners, in particular when their relationship breaks down.

§1. Format of intimate relationships

34. Last century's emancipation of women has radically impacted the form and content of intimate relationships.

First, over the course of the last century, [in the US it began well before then: is this time frame accurate for Belgium?] marriage has been transformed from a strategic alliance for family power and property interests into a private bond of love between two individuals who want to share their lives together. Whereas previously emphasis lay on the societal roles that marriage fulfilled - to wit procreation, raising children, provision of material security to the family, protection of family property -,³⁹ marriage is now seen as a private agreement based on love. And this 'agreement' must be able to be dissolved when such love ends.⁴⁰ This concept of marriage seems to return to some of the basic principles of the French Revolution, when the law relating to marriage was also based on affection, love and autonomy rather than on legal obligations and coercion.⁴¹ This change in the concept of marriage is characterised by a strong orientation toward self-determination and by an individual pursuit of satisfaction and inner harmony.⁴² This 'de-institutionalisation' of marriage goes hand in hand with a liberalisation and contractualisation of the law of divorce. Those defending marriage as an unassailable institution⁴³ have had to concede to those defending marriage as a revocable contract.⁴⁴

Secondly, over the course of the last two decades, marriage has rapidly lost its monopoly as the only possible format for a durable relationship. Secularisation brought the acceptance of many other models to organise one's love life. Unmarried cohabitation has become the norm in many societies. At some junctures, legislators have intervened and offered a model of legally organised unmarried cohabitation. Often this was as an answer to the demands of same-sex couples. Fortunately, in many jurisdictions, same-sex couples now enjoy a fully equal treatment and can make their choice also for marriage.⁴⁵

35. Autonomy and the freedom of choice have become the credo for many couples in organising their intimate relationships. However, this claim for autonomy may come with severe inconveniences in case of break-up, at least for the weaker party, who is usually the woman as shown in Part 1.

§2. No effective protection for married women upon divorce

36. The liberalisation of divorce law has reinforced the fragility of marriage. Love as the binding factor between spouses has many times led to less sustainable marriages than those based on property and social objectives.⁴⁶ The liberalisation of divorce law and the introduction of a 'right to divorce' in many European jurisdictions have increased the instability of marriage. This has led to the arrival of a new social risk, connected to the vulnerable family situation of one person.⁴⁷ The freedom to choose – in this case whether or not to remain married – creates today's divorce risk.⁴⁸

37. In most continental jurisdictions, matrimonial property law does not offer any protection for the weaker party upon divorce. Although the default system (the legal regime) in principle offers some protection and solidarity (e.g. community property or compensation mechanisms), spouses may contract out of this regime. [I think you need some source for this to benefit those of us who aren't from the EU. The US treats community property pretty much the same at divorce or death and there's very little actual contracting around it.] They can do this by concluding a marital contract, pre- or post-marital, such as a contract of separation of property. In such cases, the title principle rules in its full glory. Each spouse owns the assets in his or her name, or keeps only his or her designated share in the joint assets. An entitlement to maintenance still exists for the weaker party upon divorce, when matrimonial property law fails to create a reasonable protection, but this entitlement was often reduced in time or in extent by the latest divorce reforms (e.g. the Belgian divorce reform in 2007).

38. Although this freedom of choice, the contractualisation of matrimonial property law and the right to divorce may nicely fit our modern society's need for autonomy of both spouses, acting as independent and free individuals, it does ignore the consequences of day-to-day reality of how many couples and households are organised. Although the argument is gender-neutral and applies to men and women, social reality teaches us that there is a greater risk of women being treated unfairly-[right word if it's her choice? Or would "being disadvantaged" work for you?]. Whatever one's moral opinion may be, one cannot deny after reading the data shown in Part 1 that many couples do make a choice where the husband may fully invest in his professional career and the wife, in order to combine with children and household, does not realise her full career potential.⁴⁹ She rather seeks for a balance with the family tasks. She then chooses for another less demanding career (also less rewarding financially), or a nine-to-five job, a part-time job, a temporary career stop, etc. The situation of women nowadays is often much more complex than in the old black-and-white days of housewives without any activity whatsoever on the job market. Today women juggle to keep all balls in the air simultaneously. And very often it is the woman who adjusts career ambitions, picking a less demanding job and hence not fully realising her potential. Not surprisingly, marriage for a professionally active woman in today's society has been qualified as a *Doppelbelastungsehe*,⁵⁰ for she bears twice the burden, both at home and at her job.⁵¹ In addition to all of this, it seems to be common that women spend their income on consumer goods while men tend to invest.⁵²

39. The choices women make in balancing work and family may be perfectly valid and sound during the marriage, in order for the couple and the family unit to find its private equilibrium, optimize their joint venture and realise their common dreams. A family policy that allows partners to agree on the division between income generating labour on the one hand and care for the household and the children on the other can therefore be approved.⁵³ If the most necessary or efficient division of tasks would be to allow one type of task to be undertaken solely or mostly by one of the spouses, such a choice must be possible. Although economic independence may be stimulated by government, it need not be. After all, there are limits to the outsourcing of caring activities (the so-called *marketisation* of care), and parents often cherish a deserved [? Laudable? Deep? Perfectly acceptable?] desire to provide some of that care themselves.

40. Such choices may, however, come with devastating consequences upon divorce, resulting in one of the spouses receiving all of the assets and benefits and the other spouse sent away with virtually no assets and the loss of a career and earning capacity.⁵⁴ In corporate law, regarding the relationship between business partners, many jurisdictions know the forbidden *societas leonina* where one partner takes all the profits and the other one just the losses [and what happens legally?]. However when the partners are not business partners (corporate law) but lovers (family law), this fundamental principle does not apply.

41. Given the adverse risks linked to a divorce, the introduction of a 'right to divorce' must not lead to the removal of responsibilities between spouses. On the contrary, it can be argued that the existence of a 'right to divorce' and an efficient and flexible divorce procedure justify a strengthened post-marriage solidarity. Whatever the decision of the spouses about the division of labour during the marriage, the consequences thereof must be borne by both when the marriage ends.⁵⁵ After the dissolution of the marriage, the economic self-reliance of each spouse will once again be the starting point, but this does not prevent the division of the economic advantages and disadvantages resulting from the division of tasks during marriage. Where the income of the former spouses is insufficient, an appeal may be made to communal solidarity in the form of social security or social support. Communal solidarity must nonetheless remain subsidiary to the solidarity between the former spouses within private law to compensate the economic inequalities caused by the relationship break-up.⁵⁶

42. In Anglo-American jurisdictions, this unfair situation is corrected through imperative law [I'm not sure what this is. People can still contract around it (and do). Do you mean case law and legislation?]. The tradition of strict title principle has been mitigated, as early as in the seventies of last century, by devices of equitable distribution of all sorts.⁵⁷ [It's a bit more complicated than you indicate since the 8 community property states never had the title principle. And some states (Md.) only allow a percentage allocation of the entire marital estate because they aren't free to transfer title from one to the other. Three of these community property states always divide equally.] The judge can decide according to equity, as he thinks fit, to reallocate property and ignore title of assets. Moreover the judge must take into account a long list of statutory factors to justify such decision.⁵⁸ Although the weaker or poorer spouse does not enjoy a vested or secure entitlement [not true in the community property states, where there is an undivided interest in the community—you'd do better by just saying that in the US, states are trending toward a secure entitlement to somewhere in the vicinity of 50%

of the marital estate.] but merely a possibility to participate in the marital wealth, the evolution in most US jurisdictions is towards a presumption of sharing 50/50 of the marital gains.⁵⁹ And in England the recent case law of the House of Lords also points in this direction.⁶⁰ Continental legal systems as well seem to need a similar hard core protection through imperative legal provisions.

§3. No protection for unmarried cohabitants

43. Another major flaw of traditional family law is that it does not take enough into account the social reality that many people live together unmarried.

44. In some jurisdictions unmarried cohabitants may register and enjoy a treatment similar to marriage. In other jurisdictions a semi-system [? Semi-protective? Quasi-marital treatment?] may exist. This is the case in Belgium with the rather peculiar system of legal cohabitation (articles 1475-1479 Belgian civil code), offering a limited set of rules.

45. Quite a number of unmarried partners are living together in a de facto cohabitation that is not officially registered (although they may be domiciled at the same address and therefore enjoy several fiscal and social security benefits). For them no solidarity protection whatsoever is available. Matrimonial property law and inheritance law do not apply. All couples who have an intimate conjugal relationship, but did not decide to enter into marriage are subject to the common rules of contract and property, and contractual freedom. It is quite easy to picture the situation of the wife in the break-up of a seventeen-year-long cohabitation, with three children. As to the property aspects, the strict separation of property rule applies, with all the consequences as described above. Very often, even a right to maintenance or alimony is not available. [You've said this is limited for married spouses above. Should you say here that right to limited maintenance or alimony...?]

Part 3. Creating a fair family law

46. Taking into account the established gender inequalities, the question arises whether there is justification to de-institutionalise and remove solidarity from family law as has been done over the past decades. Couldn't, or indeed shouldn't, family law return to a protective role, based on compensating for the actual socio-economic differences between man and wife which all too often give rise to endangered livelihoods and individual poverty after the break-up of the relationship? As already mentioned, the necessity of private solidarity is a hot topic in times of crisis when public finances are scarce and the financial sustainability of public safety nets is called into question. In the following Part, we debunk first the arguments that underlie liberal family law, namely the autonomy of will and the freedom of choice. We then make a number of suggestions to come to a more solidarity-based and fair family law; a family law that takes the existing gender inequalities as its starting point and strives to reduce the pernicious financial consequences that these inequalities lead to.

§1. Fallacy of autonomy and choice⁶¹

47. The factual situations of married couples under strict separation of property (in jurisdictions without imperative corrections), and of unmarried cohabitants without contractual arrangements establishing property solidarity, are very similar in case of break-up of the relationship. For many, scholars and courts alike, the situation of spouses under separation of property or unmarried partners does not present a case for discrimination, since they supposedly have opted for this regime and not for the system of marriage or the legal regime in marriage with its focus on solidarity and all its protective rules.⁶² It is a free and deliberate choice, so goes the argument, so please accept the consequences of your choice. Do not claim rules you did not opt for. And certainly do not complain about discrimination.

48. In the following these arguments will be refuted. We will first consider the situation of the unmarried cohabitants (A) and then expand the analysis to those married under separation of property (B).

A. Unfairness for the weaker partner in unmarried cohabitation

49. The unmarried couple has made a choice of not being bound to each other. The choice was made not to be protected, to remain free. They had the choice to opt into the protective format of marriage. Yet they freely decided not to do so. Therefore, they should not get such protection. The general principles of the common law of contracts and property should be applied. This was their choice. Not applying specific principles of matrimonial property law, alimony law and inheritance law is the evident consequence of that choice. Hence this cannot be discriminative, as it is commonly said.⁶³

50. This emphasis and rather formal focus on marriage may surprise. Indeed, it has been argued that in most international human rights instruments, it is not so much marriage as an institution that is protected but rather the family as the basic unit of society.⁶⁴ In Australia, the consequences of a relationship are not based on the ceremony of marriage but rather on the relationship of interdependence between the parties⁶⁵ (see also the concept of the 'common law marriage'). Both elements invalidate the traditional choice argument: choice for marriage as such is not relevant and choice in itself is not an adequate frame because of the interdependence between the parties. We will formulate some arguments why the autonomy and choice argument in the context of marriage and matrimonial contracts is an inadequate and even erroneous frame.

1. No fully and adequately informed consent

51. First of all, for a choice to be binding in its legal consequences, it should be made with a fully informed consent. It is very doubtful that married people have clear and sound knowledge about most legal regulations that govern the marriage. As it is equally doubtful that unmarried couples would have explicit knowledge about the absence of such regulations in their case. It is naïve and unrealistic to assume that unmarried partners and spouses have a decent grasp of all of the legal consequences of living together or marrying.⁶⁶

52. In a case of the Canadian Supreme Court, Justice L'Heureux Dubé has put it elegantly in her dissenting opinion:

'Most people are not lawyers. They are often not aware of the state of the law. Worse, many maintain positive misconceptions as to what obligations and rights exist in association with marriage and other relationships.'⁶⁷

'The fact that marriage gives rise to legal obligations does not, by itself, signal that the source of those obligations is a bargained-for exchange or the product of a consensus. While the price of a haircut is known in advance and can be contracted for (with a higher price for perms than for brushcuts), the same cannot be said about marriage.'⁶⁸

'If I am incorrect in concluding that the source of the obligations in the MPA (Matrimonial Property Act of Nova Scotia) is not based on the choice of marriage, it does not follow that heterosexual unmarried cohabitants enter into their relationships specifically to avoid those legal obligations. In other words, the choice argument fails from both sides: many unmarried partners do not choose to cohabit or remain unmarried so as to avoid the legal consequences of marriage.'⁶⁹

53. It therefore remains to be seen and proven that spouses and partners have made one or the other choice with an informed consent that is sufficient to qualify for a binding contract and to be bound by all of its consequences.

2. 'Will-deficiency' in love

54. Secondly, even with such full and complete information, one can doubt whether in fact a *free and autonomous choice* has been made at all. This is the point of interdependence of the parties as mentioned earlier. Picture the woman who has been informed on all the legal consequences and after four years of living together with a man and having his child, kindly requests him to marry her. The man however does not like the idea. He does not like the formalities. It is an old-fashioned establishment relic. 'And honey, we don't need this. Our love is all that matters'. What can this woman do? It takes two to marry. So she cannot make the choice for marriage if he does not join her in that choice. Therefore she did not make the choice to avoid marriage, and she should not be held liable for the choice which she did not make.

55. The counterargument could be that the woman effectively did make such choice not to marry, because she decided to stay in the relationship. It is her autonomy and decision to stay in the relationship or to quit. It is true that a rational actor could argue that given the wish of the woman to marry, at the moment the man refuses to fulfil this wish, she should stop the relationship. Since she did not decide so, one could argue that she deliberately has joined the choice of the man, which was not to marry. Therefore she as well did make the choice not to marry, and is bound by its legal consequences.

56. Here the reply might be that the choice to stay in the relationship and therefore not to marry, is not a free and autonomous choice. Given the intimate conjugal relationship and the fact that the woman loves the man,

she has not made a free and deliberate choice. Her consent to that particular choice is ‘poisoned’, ‘contaminated’, or ‘hindered’ by her love. Maybe we should introduce a new *will-deficiency in love and romance* in concluding valid contracts.⁷⁰

Furthermore, her choice may also have been influenced by the presence of the child they have together. Would it not be in the interest of the child that the parents stay together as a couple? So the autonomy and will of the woman may have been impacted by the child’s interest and fate. Her free will is deficient, as it is the case when a contract is made by mistake or under duress such as threat or force.⁷¹ She therefore did not make the free choice not to marry and cannot be bound by the legal consequences of such choice not made.

3. Not words but behaviour and actions count

57. How can we reconcile this with the perspective of the man? On his side, one can argue that he did make a free choice not to marry. Suppose he knew very well what he was doing. He was fully informed on all the legal ins and outs and the consequences of marriage, legal cohabitation and de facto cohabitation. [There’s some evidence (US) that men and women view cohabitation differently—men as a “test run”, women as a transition to marriage. Does this make a difference?] Based on this information he made up his mind and with informed consent he decided the best choice was not to marry. He made a choice in favour of freedom, not being bound, being able to escape and getting out whenever he wishes to, with as low and cheap consequences as possible. Therefore his choice should be respected and legal consequences that are not those of his choice should not be imposed on him. This sounds like a strong argument, does it not?

58. Not really. It is correct that his words may have said: ‘I want freedom. I do not want to marry. I want to be able to end this relationship whenever I wish with no strings attached and with no responsibilities or liabilities’. And his actions may have been in line with his words in the very first months or even years of the relationship. However, at some point in time, his words have been overruled by his actions and behaviour.⁷² The longer he stays in the relationship, the more he commits to the common project, dreams, hopes and lives together, the more his behaviour goes into another direction than his words. At some point, he reaches a tilting point: a point where his behaviour is so clearly and explicitly in contradiction with the words he once pronounced, that he cannot return to the freedom of his words anymore.

4. Point of no return

59. There is a wide margin of discretion and appreciation to define this tilting point of no return. It can be a multitude of elements, such as three years of living together, or having a child together or the fact that a substantial contribution is made by one or by both partners to the relationship or in the sole interest of the other partner.⁷³ The concrete determination or defining criteria of the point of no return must be made in specific legislation. It will depend on the political process and it is an arbitrary choice. Hereafter we refer to unmarried cohabitation that has passed the point of no return according to a set of legal criteria to be agreed upon as *durable cohabitation* or *conjugal cohabitation*.

60. What is not arbitrary but certain is that the point of no return is out there. We may debate its conditions, but not the principle itself. And once it is reached, there is no way back. Once the man has said A, but is overwhelmingly doing B, he should not be held to the consequences of A, but to the consequences of B.⁷⁴ This is not contradicting his choice. For it is his behaviour, it is his own pattern of actions, that constitute his choice. It is the choice of actions, the choice of life, which is determining his responsibilities, not the choice pronounced in cheap words, one day, a long time ago.

61. From this point of no return, a protective format similar to the one of marriage and the legal regime with its focus on solidarity and all its protective rules (namely principles of matrimonial property law, alimony law and inheritance law) must be applied. Consequently the harsh principles of the common law of contracts and property will be corrected through imperative rules with a protective role. [This is the position of the ALI, in Principles of Marital Dissolution, ch. 7. It's also the rule by caselaw in the State of Washington (*Connell v. Francisco*).

B. Unfairness of matrimonial contracts of strict separation of property

62. At the moment of conclusion of the matrimonial contract, often through a pre-nuptial agreement, both spouses agree on the words of a contract for full autonomy and independence. Upon divorce, even after fifteen or twenty years of marriage and two or three children, the property relationship between the spouses is governed by these strict words. The inequities and unfairness of the title principle, typically leaving the vast majority of the assets to the husband, do not seem to overrule, for Belgian and many continental Courts, the words of the original contract. The situation is very different from the Anglo-American approach. [This is very complicated in the US, and varies by jurisdiction, sometimes by caselaw and sometimes by statute. In some states, couples cannot contract out of maintenance, especially when to do so would put one on public assistance. Some (Pennsylvania and Iowa, for example) do interpret the contracts in a very strict way.]

63. The defenders of contractual autonomy and legal certainty produce again the choice argument. Both spouses made a choice for separation of property and they should respect it.

64. It is striking to observe such vigorous defence of contractual autonomy while in other areas of law, such as labour law or consumer law, numerous imperative rules to protect the weaker parties allow the overruling of contractual arrangements.⁷⁵ It is difficult to understand why the development of contract law for consumers into a protective format whereby a signed contract may even be revoked unilaterally within a fixed period, would not be equally applicable in long term contracts between intimate partners. For the advocates of contractual autonomy, apparently employees and consumers deserve more protection than spouses.

1. Fully and adequately informed consent

65. The choice fallacy claims that the spouses were fully informed, by the notary, about the consequences and risks of the separation of property. With that knowledge they made the choice for that contract and now, upon divorce, they must just live by the consequences of that choice and accept them.

66. We can challenge this choice dictate with the same arguments as above. Even with full information about the legal rules, did they really understand the concrete consequences of all these rules? Could they imagine the impact of the arrival of children and the ensuing effect on the organisation model, responsibilities and task divisions in the family? As for all long term contracts, it is difficult to predict all events coming up and all surprises of life. People may lose their jobs, a spouse may get sick, children may have social or psychological problems, etc.

67. The minority opinion of Justice L'Heureux Dubé in the quoted Canadian decision, is again illuminating:

‘The marital relationship changes over time. Houses and other assets are bought and sold, one of the partners is promoted or loses their job, children are born, accidents occur, or a member of the family becomes ill. These and other events are rarely anticipated at the outset and appropriately bargained for. Further, neither spouse can anticipate who will contribute what to the marriage. As a consequence, even the most intelligent of adults lacks the capacity to evaluate the commitments involved in any agreement dealing with the consequences of a dissolution that will only come after great change occurs in the relationship.’⁷⁶

68. A fully informed consent to agree with a contract of strict separation of property requires information.⁷⁷

First of all, the information must be complete and comprise the full picture of the legal rules, including the alternatives. A common reason for spouses under Belgian law to choose for a separation of property is the overkill creditor protection of the community regime in case of professional debts.⁷⁸ Offering the strict separation of property as the solution for this creditor risk is not giving full information.⁷⁹ The full picture includes explaining that one indeed needs a contract of separation of property to counter that risk, yet not a contract of strict separation. One can perfectly mitigate the creditor risk with a contract of separation with a 50/50 participation clause in the marital gains.

Secondly, the information should not merely be about the legal rules but also explain the very concrete consequences and possible risks of these rules in different scenarios. Therefore it is vital to ask the wife whether she understands that such contract and its principles of autonomy may result in a scenario where she is depending on maintenance upon divorce after twenty years. So the story goes:⁸⁰

A woman, a successful lawyer, quits her job and the junior partner track in her law firm, only after three years of marriage because of the work with their two children. She would work part-time in a

notary's office, earning about ten times less. All her time would be devoted to raising the children, organising the household and supporting her husband. He would need that, being an internist at the local hospital with the ambition of becoming head of department. Many evenings of listening to him, [Is this a direct quote? Otherwise this isn't a complete sentence.] reassuring and helping him, hosting dinners for the hospital's Board of Directors. Feeling independent she would be using her small salary to pay the groceries and the kids' stuff. The house in Brussels and later the house at the beach in Knokke would be bought with the husband's management company. All would go rather well for a couple of years, however she would not be able to continue working at the notary's office because of the youngest son's learning disorder. He would need all the help and assistance of mom. But she would be happy, knowing that she and her husband would be in it together, for better and for worse. And then she would be so surprised, after twenty years, to learn that her husband needed some space, and that a new young and beautiful doctor of 27 at the hospital was helpful in giving him some extra oxygen. And then he would ask her to live by the rules of their contract of autonomy and independence, and apply the title principle. The house and apartment would be his, also the stock portfolio and the Porsche. The VW Golf and one small banking account would be hers. And of course he would pay maintenance for the children and also for her, for a couple of years until she finds a new job.

If the wife receives this kind of full and realistic information, chances are high that she will not make the choice for the strict separation of property.

69. This is why we need to stimulate much more open communication and negotiation before the marriage about the possible matrimonial contracts.⁸¹ Such negotiation may and should empower the weaker party, often the woman, helping her to discover and assert her own legitimate interests. She must overcome the romantic idea that, although he insists on strict separation of property, he means so well.

70. And even if the [financially?] weaker party does agree with the strict separation of property, the question remains whether it has been a free and autonomous choice, as explained above concerning the choice to marry or not. Also for a marital contract, it takes two to agree.

2. Not words but behaviour and actions count from the point of no return

71. The fundamental idea of freedom to act but being held responsible for those acts, also counts in the context of matrimonial contracts of strict and pure separation of property. How can a civilised society accept only looking at the words of twenty years ago? Here too, the reasoning should be that both spouses thought and assumed they would organise their partnership in full equality, autonomy and independence and therefore opted for these words. However, over the years they may have shaped their joint venture in a totally different way with a role and task division that became much more complicated than ever assumed and often with a huge contribution of one of the partners, most often the wife, to the household and the children. Thereby, she is sacrificing, at least partially, her own earning capacity and career potential. The couple's behaviour and actions in that case have overruled the words of the contract. Although they agreed to A in words, the choices

they have made over the years through their actions were for B, and it is to B they should be held. As long as both spouses have contributed equally to the partnership, in all kinds of relevant ways, they should share equally in the marital gains or partnership assets. Why would one contribution, working on the labour market, be exclusively decisive? Therefore, also for married couples who have chosen for strict separation of property, there should be a point of no return where [full] contractual autonomy is replaced by a protective format of imperative rules with a focus on solidarity.

Conclusion

72. A discrepancy exists between the ideal image of an emancipated and individualised society where each individual is financially independent, on the one hand, and the socio-economic reality on the other. Even if complete financial dependence between spouses is no longer the starting point when living together, a certain level of income dependency remains. Upon entry into a relationship, whether or not within a marriage, an economic unit is created which leads to a dependency between the partners caused by the division of tasks and income within the couple. Women in particular remain dependent on a degree of 'income sharing' in a relationship, because they – more often than men – work part-time, make use of the system of career breaks or continue to work full-time but curtail their career prospects and choose a so-called nine-to-five job so that they can take on caring tasks. This division of activities and choices within a relationship still leads to inequalities between men and women in the labour market as well as in their respective earning capacities. As a result, divorce or relationship break up continue to go hand in hand with a loss of prosperity and higher risk of poverty, especially for women. The legal protection of a partner upon the dissolution of a relationship, seems to be insufficiently attuned to today's society. Due to the economic crisis, public funds to cover this risk are scarce. We advocate that a shift from public to private law protection is needed.

73. In most western legal systems, family policy and family law legislators have, with some success, focussed on realising the ideals of freedom and equality. In contrast, the ideal of fraternity has been neglected. The role of solidarity in provisions relating to co-habitation has been eroded. Yet a balance between these three revolutionary ideals is essential. The neglect of one of the three principles (in this case fraternity or solidarity) will in the longer term be detrimental to the other two (that is equality and freedom). The legislator too often assumes the economic self-reliance and equality of the partners, and pays too little attention to the financial consequences of the breakdown of a relationship. It is remarkable how little importance the legislator attaches to the economic impact that co-habitation, and marriage in particular, has on some people, primarily women and children.

74. Moreover, we must emphasise the advantages that the government gets from promoting and supporting relationships, such as marriage, at times of economic crisis. A relationship between partners is the 'cheapest' and most efficient way to guarantee the livelihood of an individual, namely by placing the responsibility for that economic security with another individual, the partner. In a partnership the social and other risks that may befall an individual are dealt with communally. Given the financial limits of the social security system and the welfare state, the benefit of such private partnerships should not be underestimated. At the peak of the

welfare state, a reduction of family solidarity was forecasted, but we must now realise, at a time of ever-increasing economic and financial difficulties, that the opposite is true. The family must be once again held responsible for guaranteeing the livelihood of the individual. Family law needs to shape this solidarity and make it a reality.

75. In this paper some suggestions have been made that would arrive at a more solidarity-based and fair family law, one that takes the existing gender inequalities as its starting point and strives to compensate for the pernicious financial consequences that these inequalities lead to. We had a particular focus on the precarious situation of unmarried cohabitants and spouses married under separation of property regimes.

First, the necessity of more open communication and transparent and informed negotiation about the consequences of the choice to marry or not, and under which regime, was emphasised. Such negotiation should empower the weaker party, often the woman, helping her to discover and assert her own legitimate interests.

Secondly, the idea of freedom to act yet being held responsible for those acts was promoted. On each relationship with a certain degree of interdependence, a protective format with a focus on solidarity should be applied. From the so-called 'point of no return', the autonomy of will and the freedom of choice of the partners not to be in a relationship characterised by solidarity could be overruled by imperative corrections to protect the weakest party. Criteria to define the point of no return, can be: three years of living together, or having a child together or the fact that a substantial contribution is made by one or by both partners to the relationship or in the sole interest of the other partner. An example of such an imperative correction to the autonomy of will and the freedom of choice, is the equal division of the marital gains or partnership assets when both spouses have contributed equally to the partnership, in any relevant way.

¹ See: art. 10, § 3 Belgian Constitution; art. 14 European Convention on Human Rights and Protocol 12; art. 2.2. et seq. International Covenant on Economic, Social and Cultural Rights 1966; art. 26 International Covenant on Civil and Political Rights 1966; Convention on the Political Rights of Women 1953; Convention on the Elimination of All Forms of Discrimination Against Women 1979; art. 10, 19 and 157 Consolidated version of the Treaty on the Functioning of the European Union; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed

capacity, and on the protection of self-employed women during pregnancy and motherhood; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

² L. SNOECKX, B. DEHERTOGH and D. MORTELMANS, 'The Distribution of Household Tasks in First-Marriage Families and Stepfamilies across Europe' in J. PRYOR (ed.), *The International Handbook of Stepfamilies: Policy and Practice in Legal, Research, and Clinical Environments*, (New Jersey: John Wiley & Sons, 2008), 277-298.

³ C. DEFEVER and D. MORTELMANS, *De Socio-Economische Positie van Vrouwen en Mannen na de Transitie Echtscheiding en Verweduwing. Een Longitudinale Studie op de Kruispuntbank Sociale Zekerheid*, (Antwerpen - Hasselt: Steunpunt Gelijkekansenbeleid, 2011).

⁴ H. VAN HOVE, *The Gender Pay Gap in Belgium. Report 2013*, (Brussel: Institute for the Equality of Women and Men, 2013).

⁵ A. LEYMAN and N. STEEGMANS, *Het Vlaamse Onderwijs in Genderstatistieken*, (Antwerpen - Hasselt: Steunpunt Gelijkekansenbeleid, 2006).

⁶ A. VAN WOENSEL, *Genderjaarboek 2007 MV United: in Cijfers*, (Brussel: ESF-Agentschap-Departement Werk en Sociale Economie, 2007).

⁷ A. BAERTS, N. DESCHACHT and M.-A. GUERRY, *Carrières van Vrouwen en Mannen: een Literatuurstudie*, (Brussel: VUB, 2008).

⁸ A. BAERTS, N. DESCHACHT and M.-A. GUERRY, *Carrières van Vrouwen en Mannen: een Literatuurstudie*, (Brussel: VUB, 2008).

⁹ D. FRANS, D. MORTELMANS and C. MASQUILLIER, *Financial Consequences of Career Breaks: a Latent Growth Model on Register Data*, (Antwerpen: Steunpunt WSE, 2011).

-
- ¹⁰ B. DESMET, I. GLORIEUX and J. VANDEWEYER, *Wie zijn de Loopbaanonderbrekers? Socio-demografische Kenmerken, Motivaties en Arbeidsverhouding van Loopbaanonderbrekers*, (Brussel: TOR, Vrije Universiteit Brussel, 2007).
- ¹¹ D. FRANS, D. MORTELMANS and C. MASQUILLIER, *Financial Consequences of Career Breaks: A Latent Growth Model on Register Data*, (Antwerpen: Steunpunt WSE, 2011).
- ¹² D. FRANS, D. MORTELMANS and C. MASQUILLIER, *Financial Consequences of Career Breaks: A Latent Growth Model on Register Data*, (Antwerpen: Steunpunt WSE, 2011).
- ¹³ D. FRANS and D. MORTELMANS, *Longitudinale Gevolgen van Loopbaanonderbrekingen*, (Antwerpen: Steunpunt WSE, 2009).
- ¹⁴ N. SOENS, A. DE VOS, D. BUYENS, L. HEYLEN, A. KUPPENS, I. VAN PUYVELDE and D. MORTELMANS, 'Belgische Loopbanen in Kaart: Traditioneel of Transitioneel?', in *Reeks Actuele Problemen met betrekking tot de Sociale Cohesie* (Gent: Academia Press, 2005).
- ¹⁵ M. KREMER, *How Welfare States Care: Culture, Gender and Parenting in Europe*, (Amsterdam: University Press, 2007).
- ¹⁶ K. VANDERWEYDEN, 'Van Huisman tot Carrièrevrouw. Over Minder Werken en Sociale Integratie bij Mannen en Vrouwen', in H.I.V. GEZINSWETENSCHAPPEN (ed.), *Vaders in Soorten*, (Tielt: Lannoo, 2002).
- ¹⁷ M. JANSEN and A. LIEFBROER, 'Samen Kiezen, Samen Delen? De Invloed van Waardenoriëntaties van Levenspartners op de Geboorte van Kinderen en de Taakverdeling', (2002) 1 *Tijdschrift Sociale Wetenschappen*, 2-22; I. GLORIEUX and J. MINNEN, 'Kinderen Maken het Verschil. Over de Invloed van Kinderen op het Tijdsbestedingspatroon van Ouders', (2004) 1 *Tijdschrift van de Gezinsbond - Studiedienst*, 2-10.
- ¹⁸ I. GLORIEUX, J. MINNEN, and T.-P. VAN TIENOVEN, *Een Weekje België. Resultaten van het Belgisch Tijdsbestedingsonderzoek 2005*, (Brussel: TOR, Vrije Universiteit Brussel, 2008).
- ¹⁹ D. MORTELMANS, W. OTTOY and M. VERSTREKEN, 'Een Longitudinale Kijk op de Gender-Verdeling van Huishoudelijke Taken', (2003) 24 *Tijdschrift voor Sociologie*, 2-3.
- ²⁰ G. BEETS, 'De Timing van het Eerste Kind: een Overzicht', (2004) 1 *Bevolking en gezin*, 115-142.
- ²¹ D. MORTELMANS, S. VAN OURTI and M. VERSTREKEN, 'De Transformatie van een Man in een Vader. De Gevolgen van het Eerste Kind op het Leven van een Man', in H.I.V. GEZINSWETENSCHAPPEN (ed.), *Vaders in Soorten*, (Tielt: Lanoo, 2002).

-
- ²² J. VLASBLOM, DIRK and J. SCHIPPERS, 'Changing Dynamics in Female Employment around Childbirth: Evidence from Germany, the Netherlands and the UK', (2006) 2 *Work, employment and society*, 329-347.
- ²³ K. VANDERWEYDEN, 'Van Huisman tot Carrièrevrouw. Over Minder Werken en Sociale Integratie bij Mannen en Vrouwen', in H.I.V. GEZINSWETENSCHAPPEN (ed.), *Vaders in Soorten*, (Tielt: Lannoo, 2002).
- ²⁴ D. MORTELMANS, S. VAN OURTI and M. VERSTREKEN, 'De Transformatie van een Man in een Vader. De Gevolgen van het Eerste Kind op het Leven van een Man' in H.I.V. GEZINSWETENSCHAPPEN (ed.), *Vaders in Soorten*, (Tielt: Lannoo, 2002).
- ²⁵ K. VANDERWEYDEN, 'Van Huisman tot Carrièrevrouw. Over Minder Werken en Sociale Integratie bij Mannen en Vrouwen', in H.I.V. GEZINSWETENSCHAPPEN (ed.), *Vaders in Soorten*, (Tielt: Lannoo, 2002).
- ²⁶ C. DEFEVER, W. VAN LANCKER, T. HUFKENS, D. MORTELMANS and B. CANTILLON, 'De Inkomenspositie en het Armoederisico van Alleenstaande Ouders in Vlaanderen', in J. NOPPE, L. VANDERLEYDEN and M. CALLENS (eds), *De Sociale Staat van Vlaanderen 2013* (Brussel: Studiedienst Vlaamse Regering, 2013).
- ²⁷ C. DEFEVER, W. VAN LANCKER, T. HUFKENS, D. MORTELMANS and B. CANTILLON, 'De Inkomenspositie en het Armoederisico van Alleenstaande Ouders in Vlaanderen' in J. NOPPE, L. VANDERLEYDEN and M. CALLENS (eds), *De Sociale Staat van Vlaanderen 2013*, (Brussel: Studiedienst Vlaamse Regering, 2013).
- ²⁸ C. DEFEVER and D. MORTELMANS, *De Socio-Economische Positie van Vrouwen en Mannen na de Transitie Echtscheiding en Verweduwing. Een Longitudinale Studie op de Kruispuntbank Sociale Zekerheid*, (Antwerpen - Hasselt: Steunpunt Gelijkekansenbeleid, 2011).
- ²⁹ E. SPELTINCX and T. JACOBS, *Gezinsontbinding in Vlaanderen. Boek 2: Gevolgen van Echtscheiding*, (Antwerpen: Panelstudie van de Belgische huishoudens, 2000); D. MORTELMANS, M. T. CASMAN and R. DOUTRELEPONT, *Elf Jaar uit het Leven in België: Socio-Economische Analyses op het Gezinsdemografisch Panel Psbh*, (Gent: Academia Press, 2004); M. CORIJN, 'Impact op de Sociaal-Economische Positie van Ex-Partners' in C. VAN PEER (ed.), *De Impact van een (Echt)Scheiding op Kinderen en Ex-Partners*, (Brussel: Studiedienst van de Vlaamse Gemeenschap, 2007); M. JANSEN, 'De Financiële Gevolgen van Relatiebreuken: Terugval en Herstel bij Mannen en Vrouwen', in D. CUYPERS, D. MORTELMANS and N. TORFS (eds), *Is Echtscheiding Werkelijk Win for Life?*, (Brugge: Die Keure, 2008); D. MORTELMANS, L. SNOECKX, and P. RAEYMAECKERS, 'Belgium: Economic Hardship Despite Elaborate Childcar and Leave Time Programmes' in H. ANDEB and D. HUMMELSHEIM (eds), *When Marriage Ends. Economic and Social Consequences of Partnership Dissolution*, (Cheltenham: Edward Elgar Publishing Limited, 2009).

-
- ³⁰ D. MORTELMANS, L. SNOECKX and P. RAEYMAECKERS, 'Belgium: Economic Hardship Despite Elaborate Childcar and Leave Time Programmes' in H. ANDEB and D. HUMMELSHEIM (eds), *When Marriage Ends. Economic and Social Consequences of Partnership Dissolution*, (Cheltenham: Edward Elgar Publishing Limited, 2009).
- ³¹ M. CORIJN, 'Impact op de Sociaal-Economische Positie van Ex-Partners' in C. VAN PEER (ed), *De Impact van een (Echt)Scheiding op Kinderen en Ex-Partners*, (Brussel: Studiedienst van de Vlaamse Gemeenschap, 2007); M. JANSEN, 'De Financiële Gevolgen van Relatiebreuken: Terugval en Herstel bij Mannen en Vrouwen', in D. CUYPERS, D. MORTELMANS and N. TORFS (eds), *Is Echtscheiding Werkelijk Win for Life?*, (Brugge: Die Keure, 2008); T. JACOBS, A. BAUWENS and E. SPELTINCX, *Gezinsontbinding in Vlaanderen. Boek 1: Persoonlijke relaties in beweging*, (Antwerpen: Panelstudie van de Belgische huishoudens, 2000).
- ³² M. JANSEN, 'De Financiële Gevolgen van Relatiebreuken: Terugval en Herstel bij Mannen en Vrouwen', in D. CUYPERS, D. MORTELMANS and N. TORFS (eds), *Is Echtscheiding Werkelijk Win for Life?*, (Brugge: Die Keure, 2008).
- ³³ C. DEFEVER and D. MORTELMANS, *De Socio-Economische Positie van Vrouwen en Mannen na de Transitie Echtscheiding en Verweduwing. Een Longitudinale Studie op de Kruispuntbank Sociale Zekerheid*, (Antwerpen - Hasselt: Steunpunt Gelijkekansenbeleid, 2011); C. DEFEVER, W. VAN LANCKER, T. HUFKENS, D. MORTELMANS and B. CANTILLON, 'De Inkomenspositie en het Armoederisico van Alleenstaande Ouders in Vlaanderen' in J. NOPPE, L. VANDERLEYDEN and M. CALLENS (eds), *De Sociale Staat Van Vlaanderen 2013*, (Brussel: Studiedienst Vlaamse Regering, 2013).
- ³⁴ D. MORTELMANS, *Copingstrategieën En Beleving Van Sociaal-Economische Gevolgen Bij Gescheiden Vaders*, (Antwerpen: Universiteit Antwerpen, 2007).
- ³⁵ Art. 301, §4 of the Belgian civil code. See also: D. MORTELMANS, F. SWENNEN, and E. ALOFS, 'De Echtscheiding en haar Gevolgen: een Vervlochten Evolutie van Recht en Samenleving' in D. CUYPERS, D. MORTELMANS and N. TORFS (eds), *Is Echtscheiding Werkelijk Win for Life?*, (Brugge: Die Keure, 2008).
- ³⁶ C. DEWILDE, 'The Financial Consequences of Relationship Dissolution for Women in Western Europe' in E. RUSPINI and A. DALE (eds), *The Gender Dimension of Social Change. The Contribution of Dynamic Research to the Study of Women's Life Courses*, (Bristol: The Policy Press, 2002); B. CANTILLON, G. VERBIST, and V. DE MAESSCHALCK, *Sociaal-Economische Levensomstandigheden Van Eenoudergezinnen in België*, (Antwerpen: Centrum voor Sociaal Beleid, 2003).
- ³⁷ T. BOELAERT (eds), *Alimentatie: tussen Theorie en Praktijk. Enkele Beschouwingen over de Tegemoetkoming van de Dienst voor Alimentatievorderingen*, (Brugge: Die Keure, 2008); S. PETIT, 'Gebruik Van Psbh-Gegevens om een Beter Beeld te Krijgen van Nieuw Samengestelde Gezinnen in België' in K. BOUDEWIJNSTICHTING (eds), *Het Kind in een Nieuw Samengesteld Gezin*, (Brussel: Konink Boudewijnstichting, 2008).

³⁸ D. MORTELMANS, *Copingstrategieën en Beleving van Sociaal-Economische Gevolgen bij Gescheiden Vaders*, (Antwerpen: Universiteit Antwerpen, 2007); M. CANCIAN and D. MEYER, 'Who Gets Custody?', (1998) 2 *Demography*, 147-157.

³⁹ H. DE PAGE, *Traité Élémentaire de Droit Civil Belge*, I, (Brussel : Bruylant, 1939), nr. 564, 565, 567; G. BAETEMAN, *Overzicht van het Personen- en Gezinsrecht*, (Deurne: Kluwer, 1993), 383-385; B. POELEMANS, *Scheiden op Maat. Pleidooi voor een Gematigde Hervorming van het Echtscheidingsrecht*, (Gent: Mys & Breesch, 1994), 4; J.-L. RENCHON, 'La Nouvelle Réforme (précipitée) du Droit Belge du Divorce: le 'Droit' au Divorce', (2007) *RTDF (Revue trimestrielle de droit familial)*, 927 et seq., 934 et seq., 1059 et seq.

⁴⁰ See also: M. ANTOKOLSKAIA, 'Objectives and Values of Substantive Family Law' in J. MEEUSEN, M. PERTEGAS, G. STRAETMANS and F. SWENNEN (eds), *International Family Law of the European Union*, (Antwerpen: Intersentia, 2007), 54 et seq.; B. CANTILLON, *Nieuwe Behoeften naar Zekerheid. Vrouw, Gezin en Inkomensverdeling*, (Leuven: Acco, 1990), 340; D. DANDROY, 'Plaidoyer en faveur de mécanismes juridiques plus cohérents pour appréhender au moment de la rupture du couple, la problématique de l'économie conjugale', (2013) *Familie & Recht*, 1 et seq. (free download at <http://www.familieenrecht.nl>); J.-L. RENCHON, 'Le Droit de la Personne et de la Famille: de l'Indisponibilité à l'Autodétermination' in D. HEIRBAUT and G. MARTYN (eds), *Napoleons Nalatenschap*, (Mechelen: Kluwer, 2005), 101 en 132 et seq.

⁴¹ E. ALOFS, 'Het Echtscheidingsrecht en -Risico in Historisch Perspectief' in D. DE RUYSSCHER, P. DE HERT and M. DE METSENAERE (eds), *Een Leven van Inzet. Liber Amicorum Michel Magits*, (Mechelen: Kluwer, 2012), 89 et seq.

⁴² Criticizing the new concept of marriage: C. DE WULF, 'Slotbeschouwingen bij de Cyclus 'Familiale Vermogensplanning in de 21ste Eeuw'' in X. (eds), *Familiale Vermogensplanning*, (Mechelen: Kluwer, 2004), 757 et seq.; J.-L. RENCHON, 'La Nouvelle Réforme (Précipitée) du Droit Belge du Divorce: le 'Droit' au Divorce', (2007) *RTDF (Revue trimestrielle de droit familial)*, 927 et seq., 934 et seq., 1058 et seq.

⁴³ H. DE PAGE, *Traité Élémentaire de Droit Civil Belge*, I, (Brussel: Bruylant, 1939), nr. 567.

⁴⁴ See: J. FIERENS, 'La Quadrature de la Faute dans le Cercle du Divorce', (2007) *JT (Journal des tribunaux)*, 336; J. FIERENS, 'La Figure Contractuelle dans la Formation du Lien Matrimonial, le Divorce et l'Etablissement de la Filiation' in Y. POULET, P. WERY and P. WYNANTS (eds), *Liber Amicorum Michel Coipel*, (Brussel: Kluwer, 2004), 283, 287-288, 298-299; G.P. HOEFNAGELS, 'Liberalisering, Humanisering en de Echtscheiding door Onderlinge Toestemming', *FJR* 1984, 52; G.B. HOEFNAGELS, 'Het Huwelijk als Relatie en als Instituut' in X. (eds), *Het Huwelijk*, (Zwolle: Tjeenk Willink, 1984), 15 et seq.; B. POELEMANS, *Scheiden op Maat. Pleidooi voor een Gematigde Hervorming van het Echtscheidingsrecht*, (Gent: Mys & Breesch, 1994), 12; J.-L. RENCHON, 'Le Droit de la Personne et de la Famille: de l'Indisponibilité à l'Autodétermination' in D. HEIRBAUT and G. MARTYN (eds), *Napoleons Nalatenschap*, (Mechelen: Kluwer, 2005), 132 et seq.; H.C.F. SCHOORDIJK, 'Iets over het Huwelijk als

Overeenkomst. Een Enkele Opmerking over Huwelijk en Vermogensrecht' in X. (eds), *Het Huwelijk*, (Zwolle: Tjeenk Willink, 1984), 94 et seq.

⁴⁵ See: K. BOELE-WOELKI and A. FUCHS (eds), *Legal Recognition of Same-Sex Relationships in Europe*, (Antwerpen: Intersentia, 2012), 312 p.

⁴⁶ B. POELEMANS, *Scheiden op Maat. Pleidooi voor een Gematigde Hervorming van het Echtscheidingsrecht*, (Gent: Mys & Breesch, 1994), 4; A. WYLLEMAN, 'De Ontwikkeling van het Patrimoniaal Familierecht in het Belgisch Burgerlijk Wetboek' in D. HEIRBAUT and G. MARTYN (eds), *Napoleons Nalatenschap*, (Mechelen: Kluwer, 2005), 232.

⁴⁷ See also: E. ALOFS, 'Het echtscheidingsrisico in België', (2013) *T.Fam. (Tijdschrift voor Familierecht)*, 24-29; E. ALOFS, 'Het echtscheidingsrecht en -risico in historisch perspectief' in D. DE RUYSSCHER, P. DE HERT and M. DE METSENAERE (eds), *Een leven van inzet. Liber amicorum Michel Magits*, (Mechelen: Kluwer, 2012), 77-117; G. BONOLI, *Modernising Post-War Welfare States. Explaining Diversity in Patterns of Adaption to New Social Risks*, paper prepared for presentation at the 2nd ESPANet annual conference, Oxford, 9-11 September 2004, www.spsw.ox.ac.uk/fileadmin/static/Espanet/espanetconference/papers/ppr%5B1%5D.6B.GB.pdf, 11-12.

⁴⁸ D. GELDOLF, *Niet Meer Maar Beter. Over Zelfbeperking in de Risicomaatschappij*, (Leuven: Acco, 1999), 63.

⁴⁹ See also: R. HOLTMAAT, *Met Zorg een Recht? Een Analyse van het Politiek-Juridisch Vertoog over Bijstandsrecht*, (Zwolle: W.E.J. Tjeenk Willink, 1992), 394 p.

⁵⁰ A. VERBEKE, *Goederenverdeling bij Echtscheiding (Property Division Upon Divorce)*, (Antwerp: Maklu, 1991 and 1994 second unrevised edition), 22-24 (free download at <http://ssrn.com/abstract=1751574>).

⁵¹ A. VERBEKE, *Goederenverdeling bij Echtscheiding (Property Division Upon Divorce)*, (Antwerp: Maklu, 1991 and 1994 second unrevised edition), 284-287 (free download at <http://ssrn.com/abstract=1751574>).

⁵² A. Verbeke, 'Gender-Ongelijkheid bij Zuivere Scheiding van Goederen. Pleidooi voor een Gedwongen én Onderhandelde Aanpak', (2010) *TEP (Tijdschrift Estate Planning)*, 104 (free download at <http://ssrn.com/abstract=1751029>).

⁵³ See also: Th.L.J. BOD, *Het Pensioenbegrip. Enige Beschouwingen over het Pensioen en zijn Rechtskarakter*, (Zwolle: W.E.J. Tjeenk Willink, 1994), 34; D.M. CAMPAGNE, *Alimentatie, Onderhoudsplicht tussen Voormalige Echtgenoten, Betalingen terzake van Echtscheiding, een Evolutie*, (Deventer: Kluwer, 1978), 210; L. DE WITTE and L. VAN DEN BOSSCHE, *Vermits het Recht niet tot Liefde kan Dwingen... Naar een Schuldloze Echtscheiding*, (Brussel: SEVI, 1986), 66, 73.

⁵⁴ See also: D. DANDOY, 'Playdoyer en faveur de mécanismes juridiques plus cohérents pour appréhender au moment de la rupture du couple, la problématique de l'économie conjugale', (2013) *Familie & Recht*, 17 et seq. (free download at <http://www.familieenrecht.nl>).

⁵⁵ See also: Th.L.J. BOD, *Het Pensioenbegrip. Enige Beschouwingen over het Pensioen en zijn Rechtskarakter*, (Zwolle: W.E.J. Tjeenk Willink, 1994), 34; L. DE WITTE and L. VAN DEN BOSSCHE, *Vermits het Recht niet tot Liefde kan Dwingen... Naar een Schuldloze Echtscheiding*, (Brussel: SEVI, 1986), 13, 67; M.J.A. VAN MOURIK, 'Het Huwelijk' in X. (eds), *Het Huwelijk*, (Zwolle: Tjeenk Willink, 1984), 10-11; A. VERBEKE, 'Weg met huwelijk en echtscheiding', (2004) *TPR (Tijdschrift voor Privaatrecht)*, 969 et seq.

⁵⁶ L. DE WITTE and L. VAN DEN BOSSCHE, *Vermits het Recht niet tot Liefde kan Dwingen... Naar een Schuldloze Echtscheiding*, (Brussel: SEVI, 1986), 73.

⁵⁷ A. VERBEKE, *Goederenverdeling bij Echtscheiding (Property Division Upon Divorce)*, (Antwerp: Maklu, 1991 and 1994 second unrevised edition), 240-270 (free download at <http://ssrn.com/abstract=1751574>); A. VERBEKE (General Reporter) and S. CRETNEY, F. GRAUERS, P. MALAURIE, H. OFNER, M. SAVOLAINEN, F. SKORINI and G. VAN DER BURGH (Country Reporters), 'European Marital Property Law. Survey 1988-1994, (1995) *ERPL*, 445-482 (free download at <http://ssrn.com/abstract=2178521>; 467-468).

⁵⁸ A. VERBEKE, 'Judicial Application of Statutory Factors for an Equitable Distribution of Marital Property upon Dissolution of the Marriage on Divorce in New York: An Illustration', (1998) *Zeitschrift für Rechtsvergleichung*, 170-214 (free download at <http://ssrn.com/abstract=2178522>).

⁵⁹ J. SCHERPE, 'Marital Agreements and Private Autonomy in Comparative Perspective' in J. SCHERPE (eds), *Marital Agreements and Private Autonomy in Comparative Perspective*, (Oxford: Hart, 2012), 461-472.

⁶⁰ *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24, §11 et seq.; §30 et seq. and §138 et seq.: 'needs, compensation of relationship generated economic disadvantage and equal sharing'. See also: J. EEKELAAR, 'Property and financial settlement on divorce - sharing and compensating', (2006) *Fam.Law.*, 754 et seq.; M. THORPE, 'Financial Consequences of Divorce: England versus the Rest of Europe' in K. BOELE-WOELKI, J. MILES and J. SCHERPE (eds), *The Future of Family Property in Europe*, (Cambridge: Intersentia, 2011), 5.

⁶¹ Largely based on A.L. VERBEKE, 'A New Deal for Belgian Marital Property Law' in E. ALOFS, K. BYTTEBIER, A. MICHELENS and A.L. VERBEKE (eds), *Liber amicorum Hélène Casman*, (Antwerp – Cambridge: Intersentia, 2013), 479-485.

⁶² C. FORDER and A. VERBEKE, 'Geen Woorden maar Daden. Algemene Rechtsvergelijkende Conclusies en Aanbevelingen' in C. FORDER and A. VERBEKE (eds), *Gehuwd of niet. Maakt het iets uit?*, (Antwerp: Intersentia, 2005), 503-511 (free download at <http://ssrn.com/abstract=1750883>).

⁶³ E.g.: Belgian Constitutional Court, no 28/2013, 7 March 2013, B.6.2. See the analysis of these arguments in C. FORDER and A. VERBEKE, 'Geen Woorden maar Daden. Algemene Rechtsvergelijkende Conclusies en Aanbevelingen' in C. FORDER and A. VERBEKE (eds), *Gehuwd of niet. Maakt het iets uit?*, (Antwerp: Intersentia, 2005), 503-538 (free download at <http://ssrn.com/abstract=1750883>).

⁶⁴ P. BAKKER, 'Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South-Africa', (2013) 16/3 *PER/PELJ*, 130.

⁶⁵ P. BAKKER, 'Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South-Africa', (2013) 16/3 *PER/PELJ*, 130, footnote 79.

⁶⁶ See also: D. DANDOY, 'Playdoyer en faveur de mécanismes juridiques plus cohérents pour appréhender au moment de la rupture du couple, la problématique de l'économie conjugale', (2013) *Familie & Recht*, 34 et seq. (free download at <http://www.familieenrecht.nl>).

⁶⁷ § 143 in Supreme Court of Canada, *Nova Scotia AG v. Walsh*, 2002 SCC 83; (2002) 221 *DLR* (4th) 1; 32 *RFL* (5th) 81.

⁶⁸ § 147 in Supreme Court of Canada, *Nova Scotia AG v. Walsh*, 2002 SCC 83; (2002) 221 *DLR* (4th) 1; 32 *RFL* (5th) 81.

⁶⁹ § 148 in Supreme Court of Canada, *Nova Scotia AG v. Walsh*, 2002 SCC 83; (2002) 221 *DLR* (4th) 1; 32 *RFL* (5th) 81.

⁷⁰ See also: D. DANDOY, 'Playdoyer en faveur de mécanismes juridiques plus cohérents pour appréhender au moment de la rupture du couple, la problématique de l'économie conjugale', (2013) *Familie & Recht*, 32 et seq. (free download at <http://www.familieenrecht.nl>).

⁷¹ Cf. CH. FRIED, *Contract as Promise*, (Cambridge MA: Harvard University Press, 1981), 58-59 and 92-102.

⁷² C. FORDER and A. VERBEKE, 'Geen Woorden maar Daden. Algemene Rechtsvergelijkende Conclusies en Aanbevelingen' in C. FORDER and A. VERBEKE (eds), *Gehuwd of niet. Maakt het iets uit?*, (Antwerp: Intersentia, 2005), 553-555 (free download at <http://ssrn.com/abstract=1750883>).

⁷³ Article 1.1., 2, a, b and c in I. SCHWENZER, *Model Family Code*, (Antwerp: Intersentia, 2006), 8-9.

⁷⁴ Not Words but Actions: 'Geen Woorden maar Daden'. See FORDER and A. VERBEKE, 'Geen Woorden maar Daden. Algemene Rechtsvergelijkende Conclusies en Aanbevelingen' in C. FORDER and A. VERBEKE (eds), *Gehuwd of niet. Maakt het iets uit?*, (Antwerp: Intersentia, 2005) (free download at <http://ssrn.com/abstract=1750883>).

⁷⁵ B. TILLEMANN and A. VERBEKE, '(Re-)codification du Droit des Contrats?' in *Droit des contrats. France, Belgique*, (Brussels: Larcier - Paris: L.G.D.J., 2005), 24-30.

⁷⁶ § 147 in Supreme Court of Canada, *Nova Scotia AG v. Walsh*, 2002 SCC 83; (2002) 221 DLR (4th) 1; 32 RFL (5th) 81.

⁷⁷ Belgian Constitutional Court, no 28/2013, 7 March 2013, B.6.2.

⁷⁸ A.L. VERBEKE, 'A New Deal for Belgian Marital Property Law' IN E. ALOFS, K. BYTTEBIER, A. MICHIELENS and A.L. VERBEKE (eds), *Liber amicorum Hélène Casman*, (Antwerp – Cambridge: Intersentia, 2013), 467.

⁷⁹ A. VERBEKE, 'Huwelijkscontract: de Sky is bijna the Limit' in B. TILLEMANN and A. VERBEKE (eds), *Liber alumnorum KULAK and Amicorum Macours*, (Brugge: Die Keure, 2005), 169-194 (free download at <http://ssrn.com/abstract=1794023>).

⁸⁰ Cf. 'The Story of Hannelore and David' in A. VERBEKE, 'Recht is Balans is een Werkwoord', (2000-2001) *RW (Rechtskundig Weekblad)*, 969-978.

⁸¹ A. VERBEKE, 'Gender-Ongelijkheid bij Zuivere Scheiding van Goederen. Pleidooi voor een Gedwongen én Onderhandelde Aanpak', (2010) *TEP (Tijdschrift Estate Planning)*, 114-116 (free download at <http://ssrn.com/abstract=1751029>).

Bill Atkin*

I THE ROLE OF THE STATE – A UNIVERSAL QUESTION?

The conference title is “Universalities and Singularities”. One way to understand this is to ask what lessons of universal significance can be asked about changes at the local level to the family law of one particular country. This paper focuses on changes to the New Zealand system of “family justice” that came into effect at the end of March 2014. Most of the changes relate not to the substantive law but to the procedures used to deal with family breakdown. They affect the Family Court, the role of lawyers and the place of other professionals in the system.

While other countries have made similar changes, the New Zealand version may be seen as extreme. Changes in the direction of “user pays”, privatisation and “secret justice” raise some significant questions about the jurisprudential basis of the new model. In part, the changes have been made because of financial pressures caused by the global financial crisis but New Zealand has actually weathered that crisis comparatively well. The real reasons for the changes in fact appear to be ideological. This is more fundamental because a country’s finances can improve; ideology remains. The ideology in question relates to the fundamental question of the role of the State: the position taken is that, while the State may provide a framework within which people can determine the best outcomes for their own circumstances, beyond this the State should take a back-seat role. To put it another way, the State should not interfere in our private lives.

The issues raised here have synergies with several other presentations at the conference. One such topic is affordability. Irrespective of the global financial crisis, governments have been asking how much of their budgets should be devoted to family justice. Another theme is de-legalisation. How much detail does the law need to provide in spelling out the rights and responsibilities of parties in family breakdown situations? Has the tendency been to over-prescribe? This is linked to “contractualisation” under which family law should be seen as much more a matter of contract between the parties than as an imposed regime. Yet, the conference has also heard about “de-contractualisation”. A contractual regime may fail to address all the questions and may provide answers that exploit one or other of the parties. Self-determination is not always the best approach.

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The New Zealand law has moved in the direction of greater self-determination, and a lesser role for the State. However, in so doing it has given rise to a number of question marks that relate to universal issues that can be explored at different levels.

II MORE ON THE STATE: UNDERLYING TENSIONS

The role of the State in the resolution of family disputes, as already touched on, is a basic issue that affects the way that specific policies are developed. Underlying this issue are some important tensions that need to be explored.

First, the opposite of State involvement is what we might call a privatisation approach. Put in a positive way, this allows former partners to work out for themselves the best way forward. If they reach an agreement that they are both happy with, then they are likely to stick with the arrangement and make sure that it works.¹ While the arrangement may include matters to do with property and finances, the crucial issues are often those relating to the children. Most separating couples will realise that they have to co-operate for the benefit of the children. Thus, an amicable scheme that the parents are committed to is likely to be beneficial for the children. So, private arrangements can be very positive. However, these are not the ones that family law tends to get involved with, unless it is to get a formal court order to reflect the parties' agreement. Family law's involvement arises where the parents fail to reach an agreement and where they may have taken up intractable positions. To what extent should the State take an active role in resolving the problems and to what extent should it take a back-seat and regard the issues as essentially ones for the parties to sort out privately?

This question is sometimes framed in another way. The classic distinction between public law and private law is invoked. In short, cases involving child abuse and vulnerable adults are regarded as part of public law and the State, historically as *parens patriae*, has a responsibility to protect those at risk. This responsibility arguably carries over into partner abuse, although in the not too distant past this was seen as part of the private sphere. In contrast, ordinary family breakdown, where a married or unmarried couple decides to separate, is seen as part of private law. The role of the law is to provide a vehicle for the resolution of a "private" dispute, not unlike a dispute over a contract. The State's interest is in providing an appropriate judicial framework so that business can function smoothly but beyond this the State has no particular interest in the outcome.

I return later to the public/private divide and I suggest that it is no longer a very helpful distinction to make in the family law context. It in effect sidesteps the crucial questions about the shape of family law and the proper role of the State.

Questions about the role of the State, and the private sphere, raise further sub-issues. Who should pay for what? To what extent should the State pay and to what extent should the individuals pay? Traditionally, the State pays for the court system while the parties will pay for

¹ See for example A Barlow "Out-of-court family dispute resolution: the lessons of experience" [2014] Family Law 620, commenting inter alia on lawyer-led negotiation.

their own negotiated settlements. Inevitably sharing of costs occurs. However, what if the State puts in place rules that force parties to undertake certain activities, such as mandatory mediation? What if the family law system also provides for lawyers for the child and reports from experts such as child psychologists? In New Zealand, these have largely been paid for by the State but since the changes in March 2014 a significant share of the costs has been shifted to the individuals concerned. New Zealand has thus added to the financial burdens of separating couples. As a matter of principle, is this appropriate? Does it turn on ideological positions about the role of the State?

Another issue is the place of legislation. If the role of the State is minimal and family breakdown is in essence seen as a private matter, then legislation should be as least prescriptive as possible. However, if the public/private divide is seen as unhelpful and the State's protective role is wider than conceived by that divide, then legislative policy should be more detailed in setting out key ground rules. The latest New Zealand system is somewhat equivocal in its approach to this issue. In some respects it is so excessively detailed that it is very hard to understand aspects of the system – even for lawyers to do so. In other important respects, including rules about the rights of children, it is silent. It forfeits policy-making to the contractual relationships between the parties and mediators – a form of “contractualisation” but going well beyond the “contracts” between the parties themselves. The legislative vacuum, explored further in the rest of this paper, could be aptly described as a version of “secret justice”.

III MORE UNIVERSAL QUESTIONS?

The universal question of the role of the State gives rise to several tensions, as we have seen. Some other universal questions of a more specific nature are raised by the New Zealand scheme. Three are mentioned here.

(a) Access of justice:

It is usually axiomatic that people should not be denied access to the courts except in extreme cases, such as abuse of process and where a litigant is vexatious. Yet, access to the courts can be made difficult in other ways. Where for example mediation is made a mandatory step before an application can be made to the court, is the principle of access to justice breached? Is this question rather more acute where mandatory mediation is not paid for by the State that mandates it? Or should parties pay for it just as they pay for lawyers whom they hire?

One immediate response to this question is to ask what “justice” means. Can “justice” not include various dispute mechanisms other than conventional adjudication? If so, access to mandatory mediation is sufficient. However, if mediation is mandatory, then by necessary implication people's choices are restricted. Mandatory mediation is putting most of the eggs into one basket rather than offering a range of options. The New Zealand scheme arguably does not deny access to justice but does impose restrictions that did not exist before, both in terms of the pre-conditions before an application can be made to the court and in terms of monetary barriers put in place by having to pay for the mandatory alternative.

(b) Right to legal representation:

As with access to justice, the New Zealand scheme imposes new restrictions on legal representation. Such representation is also usually regarded as axiomatic when a case goes to court. Whether that extends to alternative forms of dispute resolution is debateable but arguably, if an alternative form such as mediation is mandatory, then the case for representation is stronger, and even more so if the parties must pay for mediation.

Representation for children is a further issue. As discussed later, appointment of lawyer for a child has been mandatory in New Zealand in the past but this is no longer the law. New hurdles have been created. Does this breach the right to legal representation?

(c) The place of children:

The last point about legal representation for children is part of a wider issue about the place of children in a family justice system. If the dispute is seen as essentially one between two private citizens who happen to be parents, then children may have little claim to a place in the proceedings. However, this sounds contrary to contemporary jurisprudence given that the children are usually at the centre of the dispute. Should the children not have clearly defined rights in such situations? We return to this when we explore where children fit into the New Zealand system.

IV THE LATEST NEW ZEALAND SYSTEM

New Zealand has had a Family Court since 1981.² This followed recommendations by a Royal Commission on the court system.³ A key element in the system was the free use of counsellors, to whom people were referred by the Court. Key hallmarks of the system included:

- an integrated approach whereby counselling and other services were seen as clearly linked to the Court, even if carried out by independent professionals;
- ready access to justice and the Court;
- an endeavour to avoid a full adversarial hearing; and
- legal representation, in particular for children.

The latest system places overriding emphasis on the third of these and back-tracks on the other three. The changes were originally incorporated in the Family Court Proceedings Reform Bill. The Bill was enacted in 2013, at which point it was split into various separate Acts, the main ones being amendments to the Care of Children Act 2004 and the Family Courts Act 1980, and a new Act entitled the Family Dispute Resolution Act 2013. Important aspects of the new system are also found in other places, most notably the Family Courts Rules 2002 (as amended) but, for present purposes these will be ignored. Cutbacks to legal aid are found in the Legal Services Act 2011 and are also not covered in any detail here. Enough has already been said to

² Family Courts Act 1980, in force on 1 October 1981.

³ *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978) at paras [463]-[602].

indicate that the changed system is complex. The discussion here is inevitably a simplified version.

The two novel features of the new system are:

- (a) parenting information programmes (PIPs); and
- (b) private “family dispute resolution” (FDR).

These two steps are in most instances mandatory before the Court can be approached in relation to a disagreement about children. They are also separate from the Court, unlike the previous connections between the Court and counselling.

(a) The mandatory nature of PIPs is somewhat obscurely provided for in s 47B of the Care of Children Act 2004. An application for a parenting order or a variation of an order must contain a statement that the applicant has undertaken a PIP within the previous two years. Alternatively, the application can state that “the applicant is unable to participate effectively in a parenting information programme”⁴ and, thus, undertaking a PIP is not necessary. Just exactly what this means is unclear. However, the applicant must produce evidence of attendance or inability to participate, and, in the absence of adequate evidence, the Court Registrar can refuse to accept the application. Attendance at a PIP is not necessary where the application has been made without notice to the other party, typically in urgent circumstances.

Participation in a PIP is hardly demanding and the information received may be useful as parties endeavour to negotiate a settlement or else go on to FDR. Nevertheless it does constitute a formal legal barrier to accessing the courts. It is not a matter of choice but a pre-condition.

(b) Family dispute resolution, echoing the terminology used in Australia, is a long-winded way of referring to mediation. The principal rule that mandates mediation is found in s 46E of the Care of Children Act 2004, as amended in 2013: a person cannot apply for a parenting order or go to court over a guardianship dispute unless “a family dispute resolution form” accompanies the application. The form must have been obtained within the previous year: thus, for example, a form following mediation that occurred two years earlier will not suffice.

Although mediation is mandatory, several significant exceptions to the need for a “form” are provided for:

- where the other party has already applied for an order;
- where the application is “without notice”, that is, it has some urgency;
- where it is for a “consent order”, that is, one that both parties agree should be made;
- where it seeks to enforce an existing order;
- where separate proceedings about alleged abuse of the child are under way;

⁴ Care of Children Act 2004, s 47B(2)(i).

- where a party “is unable to participate effectively in family dispute resolution”, an echo of the exception that applies to PIPs; or
- where one party has subjected the other, or a child, to domestic violence.

Most of these are self-explanatory but the second is worth highlighting. Some anecdotal speculation has suggested that people can get around compulsory mediation quite easily by designating their claim as without notice.

The situation is further complicated by rules relating to the FDR forms themselves. Usually a form will be obtained either where FDR has been successful or where FDR has been tried but failed. However, mediators must undertake an initial process of filtering out certain cases that can go straight to court without FDR. This relies heavily on the mediator’s good judgment. So, mediation may be considered inappropriate because one or both of the parties cannot participate effectively in the process (duplicating the same point as mentioned above), one of the parties has been subjected to abuse, or the mediator decides on “reasonable grounds” that FDR “is inappropriate for the parties to the family dispute”.⁵ In these cases, a form is still provided but it will state that FDR is “inappropriate”.

Some aspects of the FDR system are governed by legislation. The rules on FDR forms are quite detailed. The appointment of mediators (“FDR providers”) is also dealt with by statute: mediators are approved by the Secretary for Justice or by an organisation that the Secretary has approved.⁶

However, other important aspects of the system are not legislated for. In short, they are determined by the contract between the parties and the mediator, ie by means of a form of secret justice. One of these is the cost. Unlike the previous system of counselling which was free and unlike the free PIP sessions, FDR must be paid for. The amount is not laid down but the common understanding is that FDR will cost the parties NZ\$ 897 (US\$780). The State will cover a person’s costs if they meet the strict legal aid tests – although this is not expressly provided for in legislation.

The number of sessions is not stipulated, which is odd given that the cost would depend, one would think, on the amount of time that the process takes. Likewise, who can attend is not provided for – it depends on the secret contract. What if the parties both have lawyers who have been privy to prior negotiations? Should these lawyers be excluded? What if one of the parties has a lawyer? Again outside the legislative framework, the government is providing 4 hours legal advice to people who meet the legal aid threshold.⁷ Those hours will not equate to much work on behalf of the client but is that lawyer included in the process or excluded?

⁵ Family Dispute Resolution Act 2013, s 12. In regard to the third reason, s 12(1)(c) is distinctly circular in saying that FDR is “inappropriate” because it is “inappropriate”!

⁶ Family Dispute Resolution Act 2013, s 9. See also the Family Dispute Resolution Regulations 2013.

⁷ It is considered to be a “specified legal service” under s 68(2)(b) of the Legal Services Act 2011, which gives the Secretary for Justice wide powers in relation to legal aid. See more generally M O’Dwyer and C Doyle

What if one of the parties is inarticulate but has an articulate support person? What if the parties are Māori, for whom a communal approach rather than an individualistic one is preferred? Can family members (members of the “whānau”) participate?

Some flexibility in the way in which mediation is carried out is understandable. Perhaps the timing and number of sessions fall into this category. On the other hand, FDR is a legal barrier to proceedings in the Family Court. Although it is a privatised system, it is part of the official framework for dealing with family breakdown. Some matters such as who has a right to attend are matters of principle of sufficient importance that, arguably, should be determined by Parliament, not by secret contracts.

(c) Counselling

The previous system that provided for pre-hearing counselling, which was often successful in resolving issues, has gone. Counsellors nevertheless have residual roles. During a child-related hearing the Family Court can refer parties to counsellors.⁸ This will be rare.

Counsellors may also be used to help people prepare for mediation,⁹ a somewhat obscure role for counsellors. This is not actually legislated for and is provided for “operationally”, a further example of “secret justice”. If this sort of counselling is considered necessary for the success of FDR, why did Parliament not address it and lay down the ground rules?

(d) Lawyers

It has already been noted that the place of lawyers in FDR is not covered by legislation. Legislation does provide for the role of lawyers in the Family Court but, rather counter-intuitively, on a restrictive basis. Section 7A of the Care of Children Act 2004 as amended aims to keep lawyers out of court until a case goes to a full hearing. While some exceptions have been built in, the thrust of the new law is that the parties will have to represent themselves in many of the preliminary matters that arise in this kind of litigation.

The result of this is that “litigants in person” or “self-litigants” will increase in number not because they cannot afford lawyers but because of a conscious choice made by Parliament. Judges already despair of self-litigants because of the extra time they take and their frequent inability to address the relevant issues.

A further aspect of this policy is that it may exacerbate the inequalities that are already inherent in self-litigation. Some people will be able to represent their case better than others simply because of their innate talents. Further, under the new system, nothing stops a self-litigant who can afford it from getting advice from a lawyer. Such people will be at an advantage over the other party if that other party has not been schooled by a lawyer. The new rules raise many

“Family Court Reforms – The Nuts and Bolts” in *Family Law Conference – reclaiming the ground* (NZ Law Society CLE Ltd, Auckland, 2013) at 16-17.

⁸ Care of Children Act 2004, ss 46G-46N.

⁹ *Family Court Proceedings Reform Bill Departmental Report* (Ministry of Justice, Wellington, 2013) at para [160].

questions about the rationale for their existence. Is mandatory self-representation not taking the private/public distinction rather too far?

V WHERE DO CHILDREN FIT IN?

One of the most worrying features of the New Zealand scheme is uncertainty over where children fit in. This relates especially to mediation but the changes to the rules on lawyers for children are a signal that their status is now downgraded.

With respect to mediation, a range of options for child involvement can be considered:

- (1) a right to attend mediation, depending upon age and maturity;
- (2) a right to attend part of a mediation in order to be heard and questioned;
- (3) a right to have views presented, either by a legal or other representative, through discussion with the mediator, through a child-version of an affidavit, or by other means;
- (4) a right to be consulted after the conclusion of the mediation sessions but before an agreement is signed off;
- (5) a right to have the child's best interests independently presented to those at the mediation; and
- (6) a right to have the parties reminded of the need to keep the child's best interests paramount.

Variations on these themes are also possible, but they capture the key ideas.

The weakest option is the last one and it is the one that New Zealand has chosen. One of the two purposes of FDR is "ensuring that the parties' first and paramount consideration in reaching a resolution is the welfare and best interests of the children".¹⁰ Framed rather strangely in slightly different language, a mediator "must make every endeavour to ... assist the parties to reach an agreement on the resolution of those matters that best serves the welfare and best interests of all children involved in the dispute".¹¹

What exactly do these provisions mean? No one questions the need to focus on the child's welfare and best interests: this almost goes without saying. However, what role is the statute demanding of the mediator? Is the mediator to become an advocate for the child instead of being neutral, the usual function of a mediator? What does the mediator do, from the statutory point of view, if the parties appear to be heading for an agreement that is not in the child's interests? To do nothing appears to breach the legislative rubric. To do something positive appears to be taking sides.

Where do the views of the children fit in? When it comes to court hearings, the New Zealand law takes a very strong position. Children must be given reasonable opportunities to express their views, irrespective of their age and maturity, and these views must be taken into account.

¹⁰ Family Dispute Resolution Act 2013, s 4.

¹¹ Family Dispute Resolution Act 2013, s 11.

In contrast, with regard mediation and FDR, the New Zealand law is silent. The role that the children's views might play is left to the contract between the parties and the mediator. In other words, it is covered by secret justice. If legislation spells out obligations in relation to the views of the child in one context – in court cases – why is this not sufficiently important to be spelt out in the mandatory FDR context? Should such an important issue be left to private arrangements instead of being a matter of legislative policy? This is an important matter of universal significance that is highlighted by the inadequacies of New Zealand's scheme.

The position on representation for children has been weakened. In the past it was in effect mandatory for a lawyer to be appointed to represent the children once a case was heading to a court hearing.¹² Since the recent amendments came into force, two hurdles have been inserted into the law before an appointment can be made¹³

- (a) the court must have “concerns for the safety or well-being of the child”; and
- (b) the court must consider “an appointment necessary”.

These hurdles enshrine a movement away from mandatory child representation but what do they mean and how will they work out in practice? A judge may have concerns for a child's wellbeing whenever a dispute reaches the adjudication stage, but this is reading down the legislative language. What is meant by “necessary”? Many would argue that child representation is a child's right and is always necessary for a satisfactory hearing to occur. However, this is also reading down the language of the section. “Necessary” is surely something more than useful or desirable but less than absolutely essential. Parliament must surely have expected judges to deliberate with some care over the appointment and not treat it almost as automatic. A further new twist to this process is that, again in contrast to the past, the court must now make a supplementary order requiring the parties to pay for part of the costs of lawyer for the child.¹⁴ Thus, what was regarded as a community cost in the past is now, in part, the private responsibility of the parties to the dispute.

In summary, while the law makes reference to the welfare and best interests of the child in the mandatory mediation process, it otherwise ignores the place of children and the obtaining of their views. In disputes that reach the Family Court, legal representation for children has been watered down. Are all these changes good for the children involved?

VI RETURNING TO THE PUBLIC v PRIVATE DIVISION

As indicated above, one of the driving notions behind the New Zealand changes is the distinction drawn between public law and private law. The categorisation of family disputes not involving violence as “private” enables arguments to be made that the parties should participate in procedures that assist them reach their own solutions before they can go to court.

¹² Previous version of s 7, Care of Children Act 2004.

¹³ New version of s 7, Care of Children Act 2004. The role of the lawyer for the child is spelt out in s 9B, Family Courts Act 1980 (as amended in 2013).

¹⁴ Care of Children Act 2004, ss 131(4) and 135A: there is an exception for serious hardship. Similar orders are to be made where, for example, the court orders a report from a psychologist.

It also appears to justify expectations that the parties pay for both mediation and for lawyers appointed to represent the children. In court, the parties are now required to represent themselves rather than using lawyers, although the removal of lawyers from the courtroom is not so obviously a logical outcome of treating disputes as “private”. The indifferent provision of rules affecting children, most notably in the mediation process, is consistent with seeing the dispute as essentially between the parents.

The underlying ideology of the private law classification is that the role played by the State is wheeled back. The State still provides a legal structure for the resolution of disputes but leaves crucial questions to be determined in secret by way of contract with dispute resolution professionals. It minimises its involvement and its funding, in contrast to situations of child abuse and domestic violence, which are seen as part of public law and criminal law.

The use of the public/private division no longer has any real value in the family law context. Instead, we should simply ask what the proper role of family law or the State is in the context of family breakdown. I suggest that society has a significant interest in family breakdown, whether violence is present or not. This is because social cohesion and solidarity depend in part on the strength of our personal relationships. Where such relationships run into trouble, society has a real interest, for the common good, in easing the path to sorting out differences, in reducing the emotional and physical upset that may ensue, and in clearing the way for new beginnings. Many people will settle their own differences and the wider community can step back. In other situations, the community may have to be more active.

The community interest becomes even more obvious when the welfare and best interests of children are factored in. No contrary argument is raised when children are abused or neglected. Nor should there be when children are caught up in the separation of their parents. The protective role of the community is surely not restricted to situations of defined peril: it is much more extensive than this. An emphasis on “private law” risks leaving children in a state of vulnerability.

Yet, this same point can be made of the adults caught up in relationship breakdown. Some will survive the situation largely unscathed, but others will face real uncertainties – financial, emotional, physical, etc. In ordinary cases of separation, we find vulnerable people. The New Zealand Ministry of Justice’s own discussion paper that preceded the latest changes made the point tellingly enough. A survey that the Ministry did revealed that most cases that reached the Family Court had factors at work other than the relationship breakdown itself: mental health, alcohol, abuse and other matters of considerable public concern.¹⁵ To treat these cases as essentially “private” is to miss the point.

¹⁵ Ministry of Justice *Reviewing the Family Court A public consultation paper* (Wellington, 2011) at paras [69]-[70].

VII CONCLUSION

The recent changes to the family justice system in New Zealand are controversial. They greatly affect the Family Court, judges, lawyers, mediators, counsellors and the parties, including children. They place much more emphasis on mediation. This in itself is not objectionable but when it is made mandatory and when it is combined with a range of other changes, then some fundamental or universal questions are raised. Does the cutting back of the role of the State jeopardise our children? How much family policy should be left to alternative systems and how much should be determined by legislation? Does greater “privatisation” and “user pays” fulfil the wider common good? Ultimately, what is the interest of society in family breakdown and how should it be implemented in practice? In these days of cutbacks, are there fresh issues that people interested in family policy should be alert to?

Shared Parenting Laws: Mistakes of Pooling?

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In their recent paper “Anti-Herding Regulation,” forthcoming in the *Harvard Business Review*,¹ Ian Ayres and Joshua Mitts argue that many well-intentioned public policy regulations potentially harm rather than help situations. That is, because the rules seek to pool—or herd—groups of people, treating them as equal, they miss or mask important differences among the regulated, thus magnifying systematic risk. Anti-herding regulation, on the other hand, can produce socially beneficial information, in their words steering “both private and public actors toward better evidence-based outcomes.” Left to their own, or with various carrot-and-stick incentives, some groups, anyway, would instead fare better if allowed to separate or diverge.

Ayres and Mitts buttress their case with examples from engineering (bridges collapsing because soldiers crossed them in cadences matched to the structures’ oscillations), finance (mandating only low percentages down for real estate purchasers), biodiversity and ecosystem stability, and genetic variation itself. They conclude with various suggestions based on menu approaches and systems design theory.

The need to be concerned about herding might also extend to certain common law/judicial contexts – including, this article argues, child custody decisions. Typically and for separation of powers considerations, courts and the court process conduct a structurally different role from administrative agencies. However, when the legislature or a higher court devises a presumption that regulates conduct, judges are not as free to use their discretion in interpreting the law as they usually are, particularly as they would be with an opened-ended goal like deciding custody “in the best interests of the child.” What child custody statutes with presumptions do is to assume that the road to the “best interests” of each child is the same: that is, that a single solution will prove to be best for all children. In the law and economics framework of Ayres and Mitts, the statutes promote a “pooling” rather than a “separating” equilibrium.²

In purely financial or commercial settings, this sort of forcing may not be inappropriate, and may in fact be constitutionally necessary. Under the equal protection clause, for example, historically disadvantaged groups cannot without good and permissible

¹ Anti-Herding Regulation, John M. Olin Center for Studies in Law, Economics, and Public Policy, Research Paper No. 490 (Yale Law School, 2014), forthcoming 4 HARVARD BUS. L. REV. – (2014).

² In contrast, something like a lottery or randomized solution would produce separation, though a much better solution focusing on individual children would produce still better results. See NEIL DUXBURY, RANDOM JUSTICE; ON LOTTERIES AND LEGAL DECISION-MAKING 93 (2002) (“Whatever other advantages or drawbacks might attach to determining child custody by the flipping of a coin, there seems to be no doubt that the idea brings with it...a negative symbolic resonance”); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1,5 (1987). In fiction, see HENRY JAMES, WHAT MAISIE KNEW (1897).

reason be treated differently.³ It is less easy to justify herding legislation in family law. With very few exceptions (such as for Native Americans under the Indian Child Welfare Act),⁴ received wisdom suggests whole groups of children cannot be forced into similar parenting situations⁵ as long as parents are acting within the quite broad variance given to “fitness.”⁶ It is this type of pooling that may in fact threaten systematic risk for those children least likely to have resources to cope with them—those whose parents cannot get along even to the extent of co-parenting well, or where there are the barriers to trust posed by such conditions as substance abuse,⁷ mental illness⁸ or coercive-control intimate partner violence,⁹ or even where the parents struggled to maintain a viable financial life when living in a single household, now divided into two. A stronger objection, perhaps, is both that the presumption denies information about what might be best to other separating parents (according to the

³ See, e.g., Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1970).

⁴ The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963. Section 1901 (5) recognizes that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”

⁵ See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), in which Justice Brennan, writing for the majority, noted that “Tribal jurisdiction under § 1911(1) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians...” *Id.* at 49. “It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community.” *Id.* at 54. ICWA gives preference to tribal or Indian families, but operates primarily by vesting jurisdiction in tribal rather than state courts.

⁶ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”). The Supreme Court also moved away from state educational patterns designed to create more uniform children in *Meyer v. Nebraska*, 262 U.S. 390 (1923) finding unconstitutional a law prohibiting the instruction of elementary school students in modern languages other than English) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating an attempt to make public school education compulsory).

⁷ See, e.g., Nancy Suchman et al., *Substance-Abusing Mothers and Disruptions in Child Custody: An Attachment Perspective*, 30 J. SUBSTANCE ABUSE TREAT. 197 (2008).

⁸ See, e.g., Minn. Stat. § 518.17 provides for the court to consider “the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child.”

⁹ See AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION § 2.13 (2002 (presuming that domestic violence situations are detrimental to being custodial parents). Section 2.13 provides that the court shall limit or deny access and responsibility of a parent

otherwise allocated responsibility under a parenting plan to secure the safety and welfare of the

child or of a child’s parent, where it finds that interests of the child would be served by such limit or denial, in light of credible evidence that the parent to be limited has “abused, neglected, or abandoned a child, as defined by state law; has inflicted domestic abuse, or allowed another to inflict domestic abuse.

Ayres and Mitts framework), and that the presumption itself may be ill-conceived for at least a large number of families.¹⁰

This paper proceeds as follows. First, it details the role custody presumptions have played, as conceived to fit a combination of then current mores, a distaste for judicial discretion, and a recognition of the role legal rules play in the bargaining surrounding separation, concluding with the values modern scholars and regimes hold most important in custody statutes. It continues with a discussion of the herding/anti-herding phenomenon described by Ayres and Mitts, followed by its application to the child custody area. An empirical section applies the paradigm to case files from two counties in a single jurisdiction favoring shared custody, Arizona, showing not only how pooling is taking place but possible negative consequences of it. Finally, a conclusion discusses what couples would likely select without herding-type rules, how the pooling custody rules might be seen to create systemic risks, how individual children are negatively affected, and what a better rule might look like. Various alternative reasons for the results are explored, and future studies described.

I. Custody Standards and Judicial Discretion

Academics, especially those writing in family law, present child custody proceedings as exemplars of discretionary decisionmaking.¹¹ Legislatures have long realized that dissolving families that present cases where judges must choose between fit parents need to be individualized,¹² since each family presents its own unique characteristics.¹³ The goal of custody decisions is not to reward parents as much as to serve their children's needs.¹⁴ While children all need food, shelter and clothing, their individual emotional needs, medical

¹⁰ See, e.g., Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U.L. REV. 779 (2006) (arguing that equal custody laws operate as penalty default rules forcing parents to contract around the statutory default).

¹¹ Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONT. PROBS. 226, 250-51 (1975); Robert A. Burt, *Experts, Custody Disputes, & Legal Fantasies*, 14 THE PSYCHIATRIC HOSPITAL 140 (1983); David .L Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 491 (1984); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1165, 1181 (1986); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991). More recently, see Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 156-57 (2014) (summarizing the findings of a conference of family law experts dealing with the discretionary "best interests" standard and noting that trial courts retain a great deal of discretion to determine the actual distribution of parenting time under most statutory frameworks).

¹² See finding 1 from Pruett & DiFonzo, *supra* note 11 ("The most effective decision-making about parenting time after separation is inescapably case-specific"), and finding that "Statutory presumptions prescribing specific allocations of shared parenting time are unsupportable since no prescription will fit all, or even the majority of, families' particular circumstances."

¹³ As Schneider, *supra* note 11, acknowledges, judges act within the constraints of social norms as well as their legal training and the norms that training inculcates (Citing H.A. Finlay, *Judicial Discretion in Family and Other Litigation*, 2 MONASH L. REV. 221, 222 (1976)).

¹⁴ Statutes may state that the best interests of the child are the primary concern. See, e.g., Va. Code 124.2, Tex. Code § 153.002; Wis. Stat. § 20-1242. The ALI Principles, *supra* note 9, make this explicit, as § 2.02(2) (fairness to the parties is secondary). See also Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893-94 (2000).

requirements, and educational needs vary like snowflakes. While parents are the parties in custody proceedings, children are always the intended third party beneficiaries¹⁵ of whatever agreement the parents make or arrangement the court orders. Statutes are therefore typically drawn broadly to include the “best interests of the child” language, most with a list of factors to help guide courts.¹⁶ More recent legislative forays indicate sine-like traverses across the

¹⁵ See, e.g., *Drake v. Drake*, 455 N.Y.S.2d 420 (N.Y. App. Div. 1982) (while child could sue directly for the college tuition or insurance prescribed in the parents’ separation agreement, and was an intended beneficiary of the monthly support payments, only the mother had the ability to enforce the ongoing duty of support). Jill Hasday maintains that this retention of parental rights often conflicts with the children’s interests. Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 849-50 (2004).

¹⁶ Carl Schneider, *supra* note 11, suggests that this slightly cabined form of discretion (using guidelines or factors) seem to acknowledge the possible desirability of cabining discretion but the impossibility of doing so in any very confining way.” See also the Uniform Marriage and Divorce Act (UMDA) §401 (now Model Marriage and Divorce Act); Minn. Stat. §518.17 (2013) provides in part:
Subdivision 1. The best interests of the child. (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:
(1) the wishes of the child's parent or parents as to custody;
(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
(3) the child's primary caretaker;
(4) the intimacy of the relationship between each parent and the child;
(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
(6) the child's adjustment to home, school, and community;
(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
(8) the permanence, as a family unit, of the existing or proposed custodial home;
(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;
(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
(11) the child's cultural background;
(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
(13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.
The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

Similarly, Ariz. Stat. §25-403 sets out a best interests standard as follows:

25-403. Legal decision-making; best interests of child

A. The court shall determine legal decision-making and parenting time, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being, including:

1. The past, present and potential future relationship between the parent and the child.
2. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.

best interests standard, with some presumptions (like the primary caretaker presumption and the ALI replication principle) largely favoring mothers,¹⁷ while shared or equal-parenting presumptions, despite their non-gendered terminology, favor fathers who have played modest caretaking functions while the parents' relationship remained intact.¹⁸

While "best interests of the child" sounds like a neutral model, and has been the ostensible standard since the late 19th century,¹⁹ over time it has taken on different content that has caused preferences to move between mother and father. Originally, since living in an intact marriage was presumed best for children, whoever caused that marriage to break was deemed unfit to care for the child.²⁰ Living with the innocent parent therefore was in the child's best interests. By the early twentieth century, as first Freudian and then attachment theory took center stage in psychiatry and psychology, "best interests" meant living with one's mother for a child of tender years.²¹ Later, as constitutional cases made gendered presumptions suspect, and following publication of the important work of Freud, Goldstein and Solnit, *Beyond the Best Interests of the Child*,²² the standard morphed into living with

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3. The child's adjustment to home, school and community.
 4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.
 5. The mental and physical health of all individuals involved.
 6. Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
 7. Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
 8. Whether there has been domestic violence or child abuse pursuant to section 25-403.03.
 9. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
 10. Whether a parent has complied with chapter 3, article 5 of this title.
 11. Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.

B. In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

¹⁷ See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (rules shouldn't encourage parental possessiveness and self-centeredness); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615 (1992).

¹⁸ Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody*, NELLCO Legal Scholarship Repository, (Columbia University, 2011)(forthcoming 76 LAW & CONT. PROBS. – (2014).

¹⁹ See, e.g., Hasday, *supra* note 15, at 825, 849 (2004); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235 (1985); Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489,497 (1996).

²⁰ Hasday, *supra* note 15, at 849.

²¹ See, e.g., J.B. v. A.B., 242 S.E.2d 248 (W. Va. 1978); Krieger v. Krieger, 81 P.2d 1081, 1083 (Idaho 1938); Kirstakas v. Kirstakas, 286 A.2d 535, 528 (Md. App. 1972); Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. App 1938).

²² (1973). See also Richard Neely, *The Primary Caretaker Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984-85); Kennedy v. Kennedy, 376 N.W.2d 702 (Minn. 1985). The rule was also briefly adopted by statute in Minnesota, and criticized by Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990-1991). The phrase still appears as one of a number of

one's "primary caretaker." Concerned about "the use of custody...being used in an abusive way as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce" and "the urgent need...for a legal structure upon which a divorcing couple may rely in reaching a settlement," Justice Neely's *Garska* opinion proposed that "the best interests of children would be best served by awarding them to the primary caretaker parent, regardless of sex." The so-called primary caretaker rule became the standard for about ten years in West Virginia, for a few years by statute in Minnesota, and as a factor in many more states' current custody framework.²³ Of course, because of prevailing mores, this results in mothers having custody and fathers visitation the vast majority of the time.²⁴

factors in many statutes and in many legal decisions. See, e.g., Minn. Stat. 518.17 (Factor 3); *Gianvito v. Gianvito*, (2009 Pa. Super. 1008)(though not always determinative).

²³ Discussions of the rule appear in Robert Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 11-12 (1985); Crippen, *supra* note 22.

²⁴ See, e.g., Jed H. Abraham, *Why Men Fight for Their Kids: How Bias in the System Puts Dads at a Disadvantage*, 17 FAM. ADVOC. 48 (1994); Steven J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?* 28 FAM. L.Q. 247, 255 (1994).

For a discussion of the problems of presumptions creating entitlements, see ANDREW I. SCHEPARD, CHILDREN, COURTS AND CUSTODY, INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 166 (2004):

Furthermore, presumptions that guide custody decisions in contested cases create legal entitlements that may inadvertently influence the bargaining and trade-offs of divorce settlement negotiations. A presumption of equal physical custody, for example, generally favors men who have not taken care of their children on a day-to-day basis, whereas a presumption favoring primary caretakers and continuity of pre-divorce child care relationships generally favors women. Each can use a custody presumption in his or her favor as a bargaining chip to seek more favorable financial terms in a divorce settlement. Because of the custody presumption, the parent who it favors may receive more economic benefits than he or she would otherwise be entitled to. Custody presumptions can thus create an incentive for parents to confuse their personal economic interests with their children's emotional needs, compounding the difficulties parents already face in focusing on the children's best interests in the turbulence of divorce.

See also Scott & Emery, *supra* note 18 (arguing that the best interest rule has persisted because the groups are in equipoise, and that "best interests" functions poorly not only because of discretion but also because mental health professionals are ill-equipped to deal with competing claims of domestic violence and parental alienation syndrome. For evidence of what judges determined to be unfounded claims of domestic violence, see Douglas W. Allen & Margaret F. Brinig, *Do Joint Parenting Laws Make Any Difference?* 8 J. EMPIRICAL LEGAL STUDS. 304, 321 & Table 6 (2011). See generally Linda C. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Best Interests of Children in the Balance*, 42 FAM. L.Q. 381, 395-96 (2008). One recent study finding no evidence of parental alienation (but some of children deciding themselves for their own reasons not to have contact, is the "Nuffield Report", Jane Fortin, Joan Hunt & Lesley Scanlan, Taking a Longer View of Contact: The Perspectives of Young Adults Who Experienced Parental Separation in Their Youth, Nuffield Foundation, Final Report, November 2012, xviii [hereinafter Nuffield Report], available at <http://www.nuffieldfoundation.org/recollections-contact-issues-young-adults> (last visited April 22, 2013)(398 adults 18-35 interviewed by telephone, with 50 whose parents separated after the law changed in 1989 and who had contact with the non-custodial parent, having face to face in-depth interviews).

The “best interests” rule itself has also morphed into a more solid standard by the addition of various factors defining “best interests.”²⁵ A mild form of a default rule can also be seen in states’ adoption of parenting guidelines.²⁶

A variant of both “primary caretaker” and “joint custody,” the replication rule, was advocated by the American Law Institute in 2000,²⁷ but has only taken statutory root in one state. West Virginia’s experiment with the primary caretaker rule ended when the legislature adopted this replication standard in 2001.²⁸ Part of a much larger framework of placing decisionmaking primarily upon the parents, Section 2.09 provides that in the case where they cannot agree, the judge will award custody to fit divorcing parents “in light of the caretaking functions each parent performed for the child before their separation,” with “the amount of residential time that will allow the child to maintain a meaningful relationship with each parent.” While in some families this would resemble the traditional mother-custody-with-frequent-and-regular-visitation pattern, the ALI standard would also (and increasingly, these days²⁹) allow for frequent, and sometimes equal, contact with both parents, if that is the way

²⁵ Thus even traditional “best interests” statutes list a set of factors that judges may or may not take into consideration. For example, the Model Marriage and Divorce Act, Section 402, defines “best interests” to include “all relevant factors including (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school and community. And (5) The mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect this relationship to the child.” MINN. STAT. ANN. 518.17 includes in addition to these “the child’s primary caretaker,” “the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity,” “the permanence as a family unit, of the existing or proposed custodial home,” “the child’s cultural background,” and “the effect on the child of the actions of an abuser, if related to domestic abuse...that has occurred between the parents.” The statute bears the same exclusion of custodial conduct and requires detailed findings on each of the factors and an explanation of how these led to the court’s conclusion.

²⁶ For Indiana’s, see <http://www.in.gov/judiciary/rules/parenting/>. The Indiana Parenting Guidelines are designed to “represent the minimum recommended time a parent should have to maintain frequent, meaningful, and continuing contact with a child.” Guidelines at 6. By giving a minimum amount, this also places an upper boundary, or maximum amount, of time the other parent can have. This would seem to meet one of Fennell’s “overharvesting” concerns, Lee Anne Fennell, in *Adjusting Alienability*, 122 HARV. L. REV. 1404, 1429-34 (2009), though frequent transfers between parents could also tax the child either because of the amount of time spent in transportation or in the confusion as the child transitions between homes and family systems.

²⁷ ALI PRINCIPLES, supra note 9, at § 2.07 (2000). See also John S. Murray, *Improving Parent and Child Relationships Within the Divorced Family: A Call for Legal Reform*, 19 U. MICH. J.L. REF. 563 (1986)

²⁸ W.VA.CODE ANN. §48-9-206 (MICHIE 2001). The test is sometimes called the “approximation rule.”

²⁹ ELLEN GALINSKY, KERSTIN AUMANN & JAMES T. BOND. GENDER AND GENERATION AT WORK AND AT HOME. NEW YORK, NY: FAMILIES AND WORK INSTITUTE (2009); Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity*, 37 DEMOGRAPHY 401, 411 (2000)(for working two-parent families, fathers do about a third of the child care).

they parented before separation.³⁰ The ALI replication rule also gives no incentive to divorce based on expectation of custody nor bargaining leverage that wasn't there already.³¹

Joint custody was popularized for a fairly brief time in the late 1980s in a few states, notably California³² and Wisconsin,³³ but joint physical custody was opposed by feminists and advocates for victims of domestic violence³⁴ as well as some academics who were concerned about the effect of continued mobility on children, especially infants.³⁵ Since then, another round of joint custody presumption initiatives has been fomented by father's rights groups, who have not been successful in courts on constitutional grounds³⁶ but have gained ground in some state legislatures, notably in Arkansas,³⁷ Arizona,³⁸ Iowa,³⁹ New Mexico⁴⁰ and Wisconsin.⁴¹ For a time in the early 1980s, and increasingly since the turn of the century, joint custody (meaning alternating or shared custody or parenting time) has been

³⁰ A survey of Pima County residents supported equal custody awards in hypothetical situations where pre-separation parenting was equally shared. Of course such a rule would not eliminate either strategic behavior before separation or difficulties in calculating the hours each parent devoted to child care. Sanford Braver et al. *Lay Judgments About Child Custody*, 17 PSYCH. PUB. POL'Y & L. 212 (2011) (jury pool candidates surveyed about what they thought was fair and what they would do given various scenarios; 69% were in favor of equal custody if each parent had done approximately the same amount of child care before separation, but this declined to 21% when the mother had done most of the child care or 27% where father had done most of the child care during the marriage). The answers were similar even where the couple was high conflict.

³¹ For empirical work examining the relationship between expectations of custody and filing for divorce, see Margaret F. Brinig & Douglas W. Allen, "*These Boots Are Made for Walking*": *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000), Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135 (2011).

³² See Catherine R. Albiston & Eleanor E. Maccoby, *Does Joint Legal Custody Matter?*, 2 STANFORD L. & POL'Y REV. 167 (1990)(changing the custody standard did not make an appreciable difference in actual, as opposed to court ordered, custody and visitation patterns.)

³³ See, e.g., Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce, Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279 (1993).

³⁴ See, e.g., Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. OF WOMEN & L. 1 (1995), and sources cited therein.

³⁵ See, e.g., Samatha Tornello et al., *Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children*. 75 J. MARRIAGE & FAM. 871 (2013).

³⁶ See, e.g., Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345 (2005).

³⁷ ARK. CODE § 9-13-101(c)(2).

³⁸ ARIZ. REV. STAT. § 25-403.02.

³⁹ IOWA CODE ANN. § 541.41(1)(a)

⁴⁰ N.M. STAT. § 40-4-91

⁴¹ WIS. STAT. § 767.41

another option.⁴² Because both parents, at least in theory, win,⁴³ and because judges need not make difficult custody binary determinations, joint custody presumptions have been seen as vindicating parental rights, forcing parents to cooperate in the reconstituted family,⁴⁴ and ensuring children the two parent influence so many lack at parental dissolution.⁴⁵ The joint

⁴² How often it is actually used, and remains viable for parents, is another matter. For a chart illustrating the incidence of joint custody internationally, see University of Oxford, Department of Social Policy and Intervention, *Caring For Children After Parental Separation: Would Legislation For Shared Parenting Time Help Children?* (May, 2011). at 4 & Table 1 (3.1% in the U.K. to 28% in Sweden). For some U.S. state experiences, see fn. 53-58, *infra*. There is a presumption since 2006 in Australia that the best interests of the child is to have equal shared parenting responsibility, under the Family Law Act § 61 DA and, that the court must consider whether if reasonably practicable and in the best interests of the child to spend equal time, or failing that, significant and substantial time, with each parent. Family Law Act § 65 DAA (defined as time allowing each parent to be involved in the child's daily routine and significant events. Family Law Act §65 DAA (3).

⁴³ See, e.g., Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L & POL'Y 301, 314 (2001).

⁴⁴ For some generally favorable consideration of the idea in principle, see Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L. J. 393 (1998). More recently, see ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* (2d ed. 2012).

⁴⁵ See, e.g., Pruett & DiFonzio, *supra* note 11, at 159:

Research has led to widespread agreement among professionals that children generally have improved prospects after separation and divorce when they have healthy, loving relationships with two parents before and after separation and divorce. Research has also soundly established that the multiple changes in home, school, neighborhood, and so on that often accompany separation and divorce are difficult for children and that continuity and consistency—especially in quality parenting and parent-child relationships—support child adaptation. In particular, studies have focused on the importance for children of their fathers staying involved after separation, as fathers are more likely than mothers to spend less time with or withdraw from their children after separation.

For a recently adopted favoring both parenting plans and joint custody, see ARIZ. REV. STAT. § 25-403.02 (effective Jan. 1, 2013)(“B. Consistent with the child’s best interests ...the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”) See also FLA. STAT. ANN. § 61.13 (c) (2010) (statute as a whole establishes a presumption of substantial time with each as being in child’s best interests; section (3) establishes factors governing parenting plan); LA. STAT. ANN. § 9:335 (requires court to establish joint custody implementation order except for good cause show; provides that “to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally”); 40-4-9.1 (establishes a presumption that joint custody is in the child’s best interests but then sets forth factors and requires parenting plan; no specific time sharing arrangement required though time with each is to be “significant”).

A recent attempt to enact a very strong presumption of joint custody, S.F. 1218, passed the legislature but was vetoed by Minnesota’s governor. Another has reportedly been introduced in this year’s session, as has a similar proposal in Michigan. H.B. 4120, see <http://achildsright.typepad.com/achildsright/2013/01/mi-2013-2014-equal-parenting-bill-hb-4120.html> and <http://parentalrightsequality.blogspot.com/2013/01/michigan-2013-14-hb-4120-equal.html>. In 2005, an equal time provision was introduced but died in committee in California. AB 1307, Bill Analysis, Assembly Comm. On Judiciary, May 3, 2005, at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1307&sess=0506&house=B&author=dymally. See also W. VA. SB 438 (2009), discussed in Alison Knezevich, *Sweeping Child-Custody Changes Proposed*, 3\16\09, wvgazette.com; N.Y. A03181 (2009) (requiring court to order joint custody unless contrary to child’s interest). While Maine and Iowa, IOWA CODE § 541.41(1)(a) have very strong presumptions, at least Iowa’s Supreme Court has decided that consistent with “best interests,” the legislature could not have enacted a joint physical custody presumption. In *re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007). For discussion, see <http://www.iowafathers.com/>. The politics and public choice considerations for most of this legislation is discussed in Scott & Emery, *supra* note 21.

custody rule—particularly in its strong form, the equal custody rule—has been a particular darling of interest groups concerned about the too real plight of noncustodial parents, especially fathers.⁴⁶ As a “rights-based” approach, it has also gleaned support from some civil libertarians,⁴⁷ and, early on, “sameness” feminists.⁴⁸ On a slightly less exalted plain, because child support guidelines shift once a child spends some amount of time (typically a quarter to a third) with each parent, wealthier noncustodial parents are particularly attracted to equal custody shares.⁴⁹

In Great Britain, an equal custody bill was also defeated. See Tim Shipman, *Fathers Lose Bid for Equal Custody Rights after Review of Family Law*, mailonline, Nov. 2, 2011; see generally Alexander Masardo, *Managing shared residence in Britain and France: Questioning a default primary carer model*, in *SOCIAL POLICY REVIEW* 21 197 (Kirsten Rummery, Ian Greener & Chris Holden, eds. 2009). For research justifying the bill’s defeat, see Nuffield Report, *supra* note 25, at xviii.

In Australia, the measure achieved more success with 2006 legislation including the introduction of a presumption in favor of “equal shared parental responsibility” (Family Law Act §61DA(1)), with a nexus between the application of the presumption and considerations in relation to time arrangements (Family Law Act §65DAA). The presumption may be rebutted by evidence satisfying a court that it would not be in a child’s best interests for both parents to have equal shared parental responsibility (Family Law Act §61DA(4)), and it is not applicable where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence (Family Law Act §61DA(2)). Where orders for shared parental responsibility are made pursuant to Family Law Act §61DA(1), the courts are obliged to consider whether making orders for children to spend equal or substantial and significant time with each parent, would be reasonably practicable and in the child’s best interests (Family Law Act § 65DAA). For a discussion, see Ruth Weston, Lixia Qu, Matthew Gray, John De Maio, Rae Kaspiw, Lawrie Moloney and Kelly Hand, *Shared Care Time: An Increasingly Common Arrangement*, Australian Institute of Family Studies, Family Matters No. 88, 2011, available at <http://www.aifs.gov.au/institute/pubs/fm2011/fm88/fm88f.html>, For a discussion of the need to consult children, see PATRICK PARKINSON AND JUDY CASHMORE, *THE VOICE OF A CHILD IN FAMILY LAW DISPUTES* (2009) (suggesting that there are both pros and cons of involving children directly and that in any event they should not be understood to make the decision).

For a discussion of these and other Western European jurisdictions’ custody rules, see PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD*, 45-56 (2011).

⁴⁶ See, e.g., *Fathers and Dads for Equal Custody Rights*, <http://www.fathersrights.org/>.

One interesting statistic is that shared custody families more often involve boys than girls. Sons are slightly more likely than daughters to be living in a shared parenting family. Heather Juby, Celine Bourdais & Nicole Gratton, *Sharing Roles, Sharing Custody*, 67 *J. MARRIAGE & FAM.*, 157 (2005).; Ed Spruijt & Vincent Duindam, (2010). *Joint Physical Custody In The Netherlands And The Well Being Of Children*. 51 *J. DIV. & REMARRIAGE*, 65, 72 & Table 3 (2010)(19% of the boys and 15% of the girls lived in shared custody HOUSEHOLDS’ 3561 Dutch children surveyed); Dutch children surveyed); Marygold S. Melli & Patricia R. Brown, *Exploring A New Family Form- The Shared Time Family*, 22 *INT’L J. L. POL’Y & 231*, 238 & Table 1 (2008)(of 598 surveyed families, 35.7% of the mother custody families had only girls, compared to 30.9% of the shared placement families).

⁴⁷ See, e.g., Donald C. Hubin, *Parental Rights and Due Process*, 1 *J. L. & FAM. STUD.* 123 (1999). For one such argument, see Edward Kruk, *Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody*, 40 *AM.J. FAMILY THERAPY* 33, (2012) (British Columbian social worker).

⁴⁸ See, e.g., the testimony for the Idaho joint custody bill, 1982 S.B. 1379, introduced by the only female state senator, Edith Miller Klein, with favorable testimony from a women’s rights advocate. Klein successfully sponsored a resolution to eliminate all sex discrimination in Idaho law. <http://www.boiseartsandhistory.org/blog/2012/11/08/mrs-edith-miller-klein-an-idaho-senator/>. She and her husband had no children. Legal Pioneer, *Former State Senator Klein Dies At 83*, Idaho Spokesman-Review Jan. 2, 1999.

⁴⁹ See, e.g., Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 *FAM. L.Q.* 319, 321 (1988); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 *MD. L. REV.* 497, 517 (1988)(“Legislation skewed toward awards of joint custody

While this is an empirical point, and one that might be fruitfully explored, it would be interesting to see whether the attempt by states to segregate the various categories proposed by Mnookin—saying that child support is fixed by guidelines, for example, or that nonpayment of child support has no effect on access to children (and vice-versa), are frustrated by many states’ decision to allow variance from the guidelines once some threshold time with children is achieved. Some states (among them the large states of Florida,⁵⁰ Illinois,⁵¹ Massachusetts,⁵² Pennsylvania,⁵³ Texas⁵⁴ and Washington⁵⁵) do not have an offset

increases the ability of the parent requesting joint custody to engage in this type of extortion. David Chambers has noted that ‘a parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support.’”

⁵⁰ FLA. STAT. § 61-30. The statute provides in (1)(a) that “Notwithstanding the variance limitations of this section, the trier of fact shall order payment of child support which varies from the guideline amount as provided in paragraph (11)(b) whenever any of the children are required by court order or mediation agreement to spend a substantial amount of time with either parent. This requirement applies to any living arrangement, whether temporary or permanent.” The state does have a shared custody presumption. Fla. Stat. § 61.13(2)(c)(2) (2009), but still requires a best interests determination by the court even if there is agreement. *Sparks v. Sparks*, Fla. Dist. Ct. App., No. 1D11-3327, 12/20/11.

⁵¹ 750 ILL. COMP. STAT. 5/505 (provides for specific percentages of supporting party’s net income based on number of children, to be varied only if inappropriate after considering the best interests of the child in light of various relevant factors (not including shared custody). Illinois law contains no statutory presumption of equal parenting time even where the parents are awarded joint legal custody. Ill. Comp. Stat. 750 ILL. COMP. STAT. § 5/602.1(d) (“Nothing within this section shall imply or presume that joint custody shall necessarily mean equal parenting time.”)

⁵² MASS. GEN. LAWS ch. 208, § 28 (allows for rebuttal of presumptive guideline amounts if unjust or inappropriate under the circumstances and written findings of the specific facts of the case justifying departure from the guidelines. Mass. Gen. Laws Ann. ch. 208, § 31 provides that “physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.”

⁵³ 23 PA. CONS. STAT. ANN. § 4322 (“There shall be a rebuttable presumption, in any judicial or expedited process, that the amount of the award which would result from the application of such guideline is the correct amount of support to be awarded. A written finding or specific finding on the record that the application of the guideline would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, if based upon” “the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, with primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties’ assets, as warrant special attention.” Since 2010, Pennsylvania’s custody law provides that “it is public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated.” However, shared parenting is just one of the options listed in 23 Pa. Cons. Stat. 5323.

⁵⁴ TEX. FAM. CODE ANN. § 154.121 (Section 154.123 does allow, in (b), variance based on “(4) the amount of time of possession of and access to a child.”) The state does presume that shared parenting is in the child’s best interests. Tex. Fam. Code Ann. § 153.001 (West), for the “public policy of this state” consists of “assur[ing] that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; [] provid[ing] a safe, stable, and nonviolent environment for the child; and [] encourag[ing] parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.”

⁵⁵ WASH. REV. CODE § 26.19.001 includes in the legislative intent and finding “(3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule.”

The custody statute provides that “The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child’s

developmental level and the family's social and economic circumstances." WASH. REV. CODE § 26.09.187(3)(a), but that "[t]he court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time (joint physical custody) only if the court finds the following:

The parties have agreed to such provisions and the agreement was knowingly and voluntarily entered into; or

The parties have a satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting functions; and the provisions are in the best interests of the child." Rev. Code Wash. § 26.09.187(3)(b)

A 2009 Washington State study found that "46 percent of children of divorce, statewide, are ordered to spend a minimum of 35 percent parenting time with their biological fathers." Bill Harrington, Giving Parents Equal Parenting Time by Law, *Seattle Times*, Feb. 25, 2009, at

http://seattletimes.com/html/opinion/2008786615_opinb26harrington.html.

for shared parenting time. Others, such as Arizona,⁵⁶ California,⁵⁷ Michigan,⁵⁸ Oregon⁵⁹ and Virginia,⁶⁰ do allow for offset. What is the effect on the percentage of custody awarded to or

⁵⁶ ARIZ. REV. STAT. § 25-320. Section (D)(8) provides that “The duration of parenting time and related expenses” shall be one of the criteria. While Schedule A to the child support guidelines subtracts some percentage from the amount otherwise owed for various levels of parenting days (computed in six hour increments) up to 48.6% (for 182 days), Schedule B, in effect when custody is shared equally, subtracts the lower earning parent’s total amount due from the higher, and then divides the difference in two. If \$2000 per month is owed, and only one parent has any earnings at all, this means the parent who would otherwise pay \$2000 only pays \$1000. Thus the biggest disadvantage is to lower earning parents when incomes are the most disparate. Further, while many states multiply the amount owed in order to recognize the duplicate fixed expenses when children are living in two households, see Allen & Brinig, *supra* note 57, Arizona uses the same total child support duty whether all overnights are with one parent or whether 50% of the time is spent in each parent’s household. This means that the baseline amount is lower.

Arizona recently adopted a new parenting time statute. ARIZ. REV. STAT. § 25-403.02 (2013), providing that (B) “Consistent with the child’s best interests ..., the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.” There is no explicit preference for joint custody, though the new statute does provide for maximum time with each parent.

⁵⁷ CAL. FAM. CODE § 4503 provides in (c) “The guideline takes into account each parent’s actual income and level of responsibility for the children.” Section 4055 provides for the guideline, and in (3) provides for a multiplier that is the “approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent.” CAL. FAM. CODE § 3020 (b) provides that “The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. “ Section (a) provides that safety of the child is the court’s primary concern. Section (c) provides “Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court’s order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.”

⁵⁸ 2013 Michigan Child Support Formula Manual. Sec. 3.03 allows for adjustment based on parental time since “Presuming that as parents spend more time with their children they will directly contribute a greater share of the children’s expenses, a base support obligation needs to offset some of the costs and savings associated with time spent with each parents.” The (complicated) formula takes into account the approximate annual number of overnights spent with each parents as well as the two parents’ base support obligation.

Available at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/2013MCSF.pdf>.

The current statute, MICH. COMP. LAWS § 722.23 provides simply for a list of factors. The legislature is currently considering a presumptive joint custody statute.

⁵⁹ ORE. REV. STAT. §§ 137-050-0700 et seq. The amount of time each parent spends with their children is factored into the calculation. A calculator is available following the links at <http://www.oregonchildsupport.gov/calculator/index.shtml>.

While Oregon law is complex and requires parenting plans, joint custody is preferred under 107.101: It is the policy of this state to:(1) Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child;(2) Encourage such parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage;(3) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary;(4) Grant parents and courts the widest discretion in developing a parenting plan; and(5) Consider the best interests of the child and the safety of the parties in developing a parenting plan. More than a third of Oregon divorces in 2002 involved joint custody. Allen & Brinig, *supra* note 25.

⁶⁰ VA. CODE ANN. § 20-108.2 (G)(3)©, provides for different calculations when a party has custody or visitation of a child or children for more than 90 days of the year. Custody shares are determined by dividing the number of days by 365. Shared support need means the presumptive guideline amount of needed support for the shared child(ren) using the schedule for the combined gross income of the parents and the number of

bargained for by each parent? Lee Fennell, writing in the property context,⁶¹ suggests that sometimes bargaining allows inalienability rules to become permeable. Even if they are not, the economically stronger party can exert leverage along other, permissible fronts, in this context child support in excess of the standard guideline amount, or, as Mary Ann Glendon suggests, delay in or cost of, the proceedings.⁶²

As one might predict from Mnookin and Kornhauser's stress on bargaining,⁶³ at the same time as these substantive debates over standards, a growing movement toward alternative dispute resolution in the divorce context has both engaged and alarmed the major players.⁶⁴ While the ALI's "replication" parenting time standard has convinced a limited audience, its reliance on parenting plans has, in some form, surfaced in virtually every U.S. jurisdiction.⁶⁵ Many states mandate mediation in disputed custody cases, and the remainder allow it when the parents wish it or allow judges to refer even recalcitrant parents

shared children, multiplied by 1.4. The mother would then pay the shared support need times the father's custody share plus the health care and child care paid by mother times her income share. The two may be offset by subtracting the smaller from the larger.

Section 20-108.1 provides that the guideline amounts may be rebutted by (2) arrangements regarding custody of the children, including the cost of visitation travel.

Va. Code Ann. § 20-124.2 provides:

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

⁶¹ Fennell, *supra* note 26. See also Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. LAW REV. 1641 (2011) (Threatening, while never intending, an action involving property may cause the other party or parties to act in a way advantaging the strategist).

⁶² Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986), notes that "the greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial...To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue—and a large measure of discretion means exactly that—the economically stronger party gains negotiating leverage from the superior ability to prolong negotiation, to engage in expensive pretrial discovery, and to use preliminary court appearances for harassment.")

⁶³ Robert H., Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) at 971-72.

⁶⁴ See, e.g., Trina R. Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1595-96 (1991); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 119 CLEARINGHOUSE REV. 431, 435 (1985); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. L. REV. 162 (1988); Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 353 (1996); Brinig, *supra* note 34; but see Joan Kelly, *Mediated and Adversarial Divorces: Respondents' Perceptions of Their Processes and Outcomes*, 24 MEDIATION Q. 71, 78 (1989).

⁶⁵ ALI PRINCIPLES, *supra* note 9, at § 2.05 (2002) ("The parenting plan is a core concept of this Chapter,"); MO. ANN. STAT. § 452.375 (subd. 9); MONT. CODE ANN. § 40-4-234(1); TENN. CODE ANN. §§ 336-6-401 et seq.; WASH. REV. CODE ANN. § 26.09, discussed in Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REF. 65 (1990).

to it.⁶⁶ In the late 1980s to the mid-1990s, a feminist-led objection to the informality and face-to-face nature of mediation when there was domestic violence⁶⁷ or significant power disparity crystallized in exceptions to mandatory—or any other form of—mediation.⁶⁸ Still more recently, both judges and other professionals⁶⁹ have noted that any kind of default rule disadvantages the children who need the most help, those with parents in conflicted custody proceedings, particularly those with parents of low- or modest income.⁷⁰

The preceding paragraph mentioned Mnookin and Kornhauser. At roughly the same time as divorces reached 50% of first marriages, two scholars, Robert Mnookin and Lewis Kornhauser, published a path-breaking article in the *Yale Law Journal*.⁷¹ “Bargaining in the Shadow of the Law: The Case of Divorce” immediately became featured reading in dispute resolution, family law, and, to an only slightly lesser extent, law and economics. For purposes of this paper, the important points were, first, that legal rules set an endowment (or starting) point for bargaining at divorce, bargaining that in its essence is between money (property, alimony and child support) and time with children (custody and visitation).⁷² Secondly, the authors maintained that women were disadvantaged by a movement toward gender-neutral “best interests of the child” rules⁷³ because they would trade financial assets

⁶⁶ One early defense of mediation is Andrew Shepard, *Taking Children Seriously, Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985). A collection of the mediation statutes can be seen in Reporter’s Notes to § 2.07, ALI PRINCIPLES, *supra* note 9, at 171-176 (2000), and online updates,

⁶⁷ For one elaborate set of procedures designed to minimize harm in families with violence, see Department of Justice, Canada, Making appropriate parenting arrangements in family violence cases: applying the literature to identify promising practices, available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/2005_3/sum-som.html.

⁶⁸ See sources cited in note 64, *supra*. It also causes exceptions to parenting guidelines. See Indiana Court Rules, Indiana Parenting Time Guidelines, Scope, § 1, at 1-2 (2008)(“However, they are not applicable to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child’s physical health or safety, or significantly impair the child’s emotional development.”).

⁶⁹ In the AFCC “think tank,” the non-judicial group included custody evaluators (neutrals appointed by courts to determine “best interests), lawyers representing victims of domestic violence, especially the indigent, lawyers who handle high profile custody disputes involving wealthy clients, as well as the mental health professionals who testify on behalf of mothers or fathers in custody litigation. Of course all these players, and by definition the judges hearing custody cases, deal with the small percentage who end up in litigation.

⁷⁰ This was one of the themes at the AFCC think tank. See, e.g., Mary Jean Dolan & Daniel J. Hyman, An Empirical Critique of the ALI Approximation Rule for Child Custody Disputes, presented at the 5th Annual Emerging Family Law Scholars and Teachers Conference, Fordham Law School, May 21, 2012; Elrod & Dale, *supra* note 24, at 384 (2008)(“High conflict parents keep their children and themselves in perpetual turmoil, consume an extraordinary amount of court services, and deplete their own personal and financial resources. Secondly, judges find themselves ill prepared to make future predictions about parents and their children.”); Pamela S. Rudolph, Attachment in Child Custody: An Additive Factor, Not a Determinative One, 46 Fam. L.Q. 1 (2012).

⁷¹ Mnookin & Kornhauser, *supra* note 63. The divorce rate peaked in 1980-81.

⁷² Mnookin & Kornhauser, *supra* note 63, at 959-60.

⁷³ *Id.* at 978-79. At the time Mnookin and Kornhauser wrote, many states still had maternal preference rules, especially for children of “tender years.”

to secure what they really valued, time with their children.⁷⁴ Men might take advantage of the rules to behave strategically, threatening to ask for custody when in fact they didn't really want it (or did not want as much time as they'd asked for).⁷⁵

For the past thirty-five years, this bargaining paradigm has dominated the thinking of scholars who have looked systematically at what was happening during the divorce process. It has influenced the procedures favored for custody disputes, particularly because it brought to common understanding the statistic that about 90% were settled before trial,⁷⁶ a percentage that has stood up through many empirical tests.⁷⁷ It was part of the thinking behind separating the custody portion of dissolutions involving children from equitable distribution of property, alimony, and child support. While the timing may just be fortuitous, it is possible that "Bargaining in the Shadow" played a role in regularizing child support guidelines (thus removing child support to some extent from the bargaining table).⁷⁸ The

⁷⁴ I will note that other than the writing of Richard Neely who made claims from his own practice, no study has found pervasive evidence that such trading did or does go on. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981); Neely, *supra* note 22, at 177-78; Elster, *supra* note 2, at 5; Jerry McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 137 (1987); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984), Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 161 HARV. L. REV. 727, 760-61 (1988); Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 470 (1999), all assume trading of custody time for money takes place. Studies finding no evidence of trades include ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD 100-03 (1992) (about 10% of fathers and 7% of mothers asked for more physical custody than they actually wanted, but there was no indication that this was to extract money); Robert Weiss and Robert Willis, *Transfers Among Divorced Couples: Evidence and Interpretation*, 11 J. LAB. ECON. 629 (1993); Brinig & Aleeev, *supra* note 34.

⁷⁵ See Mnookin & Kornhauser, *supra* note 63, at 968-71, 972-73.

⁷⁶ *Id.* at 955 & n.23. For more recent affirmations, see SANFORD BRAVER & MARY O'CONNELL, DIVORCED DADS: SHATTERING THE MYTHS 1998; T.K. Logan et al., *Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records*, 18 J. FAM. VIOLENCE 269 (2003) (Between 78 and 92% settled)

⁷⁷ See, e.g., Braver & O'Connell, *supra* note 76 (2-10% fail to reach settlement); Marygold Melli, Harold Erlanger & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTG. L. REV. 1133, 1142 (1988); Brinig & Alexeev, *supra* note 33. See also Joan Hunt & Caridwen Roberts, *Child Contact with the Non-Resident Parents*, 3 Family Policy Briefing 1, Department of Social Policy and Social Work, University of Oxford, 2004 (10%) available at <http://www.spig.clara.net/reports/hunt.pdf> (last visited May 23, 2013); House of Representatives, Standing Committee on Families and Community Affairs, *Every Picture Tells a Story Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation 7 & Fig. 1.1* (Parliament of Australia, 2003) (6-7% actually produce a court judgment), available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/childcustody/report.htm (last visited May 23, 2013).

⁷⁸ These have been mandated by Congress as part of Title IV of the Social Security Act since the late 1980s. Family Support Act of 1988, P.L. 100-485, 102 Stat. 2343 (codified throughout 42 U.S.C.); see, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 759-60 & Chart 3 (2009). For a discussion on the effect of various types of guidelines on divorce rates, with examples, see Allen & Brinig, *supra* note 31. For a discussion in general of the purposes of child support, see Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41 (1998).

federally mandated and therefore ubiquitous, child support guidelines most often tie support obligations not only to parental income but also to the time spent with the child.⁷⁹

What I'd like to address here is the role played by Mnookin and Kornhauser's central arguments about the law's setting an endowment point, one in which the uncertainty of the gender-neutral "best interests" would disfavor women. To flesh out the logic, we need at least one other step. This point was set not by academics or legislatures, but by the Supreme Court, ruling in a case about voluntary commitment of children for inpatient mental health treatment, a case called *Parham v. J.R.*⁸⁰ The essential part of the Court's reasoning, from this article's perspective, is that "the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment" for making difficult decisions. "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."⁸¹ In other words, parents are necessary and able to voice their children's best interests.

Scott and Emery have looked at what seems to be a stalemate in the legislative action surrounding best interests in terms of gender politics. Another possibility here, which we will consider again in the empirical section of this paper, is to consider the various goals that can be met with each state's interpretation of "best interests." The three most important goals seem to be maintenance of stability and continuity, promotion of strong and meaningful relationships with both parents, and minimizing the child's exposure to violence and conflict.⁸² What is less clear is which goal is most important, whether any of the three trumps the other two, and whether a statutory presumption or something like parenting guidelines would best aid judges in handling contested cases as well as parents bargaining "in the shadow of the law."⁸³

⁷⁹ Parenting time deductions sometimes begin after a certain threshold number of days or overnights is reached. Sometimes, as in Arizona, the deductions begin slowly, with as few as three days spent with the parent with less custodial time, increasing to 50% of the total amount computed in equal time situations. In some states, and Canada, the total amount due is increased by a multiplier (typically 40% is added to the original amount) in shared parenting situations before deductions are made, and in a few, only costs that vary with additional time are counted.

⁸⁰ 442 U.S. 584 (1979). For my own work questioning whether parents are capable of making difficult choices at divorce or when the other parent dies, see Margaret F. Brinig, Troxel and The Limits of Community, 32 RUTG. L.J. 733 (2001).

⁸¹ 442 U.S. at 602. Note that this is in contradiction to the focus in other jurisdictions, begun with the UN Convention on the Rights of the Child Art. 12(2), which specifies that the child's voice must be heard in any judicial and administrative proceeding affecting the child, either directly or through a representative or an appropriate body. For example, in Great Britain, the Children Act of 1987 and the Australian Family Law Reform Act of 1995 both give the child the rights and parents responsibilities. The parental rights perspective is criticized, inter alia, in Linda Henry Elrod, *Epilogue: of Families, Federalism and a Quest for Policy*, 39 FAM. L.Q. 843, 846 (1999); David Meyer, *Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008).

⁸² For an early suggestion that conflict was important to avoid, see Elster, *supra* note 2.

⁸³ Mnookin & Kornhauser, *supra* note 63. See also Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office* 20 L. & Soc. REV. 93, 113 (1986), suggesting that most divorce lawyers try to get their clients to settle the full range of issues in the case rather than contest them.

The best available studies (long term, using large and representative samples, and from around the world), show that children are generally disadvantaged by their parents' divorce.⁸⁴ Over the short term this is particularly acute, and can be seen in adjustment problems, financial difficulties, and distraction on the part of parents. Over the longer term, most children (probably in the 70% range), are quite resilient.⁸⁵ Nonetheless children of divorce tend to delay marriage longer, marry less often, and divorce more frequently than children of intact families.⁸⁶

Similarly, it is quite well demonstrated that some dissolving families experience domestic violence either before parents separate or on a continuing basis.⁸⁷ The proportion is disputed, but seems to be higher among those who never married than among those who do.⁸⁸ When children are exposed to violence (either between their parents or directed at themselves), no one doubts that they are harmed.⁸⁹ Psychologists and sociologists write that

⁸⁴ See, e.g., Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social and Emotional Well-Being of the Next Generation*, in 15 THE FUTURE OF CHILDREN: MARRIAGE AND CHILD WELLBEING 75, 77 (2005)(more behavioral problems, more symptoms of psychological maladjustment, lower academic achievement, more social difficulties, and poorer self-concepts). See also sources cited in P. PARKINSON & J. CASHMORE, *supra* note 45, at 1 & n.4.

⁸⁵ See, E. MAVIS HETHERINGTON, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2003); JUDITH S., WALLERSTEIN ET AL., THE UNEXPECTED LEGACY: THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) and PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997).

⁸⁶ See, e.g., Margaret F. Brinig & Steven L. Nock, *'I Only Want Trust': Norms, Trust and Autonomy*, 32 JOURNAL OF SOCIO-ECONOMICS 471 (2003); Marriage and Divorce in the United States, see generally Casey E. Copen et al., First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth, 49 National Health Statistics Reports, Mar. 22, 2012 (likelihood of divorcing, page 7; marrying page 12 & Table 1; marrying older at 14 & Table 3, all based on presence or absence of both parents in household at age 14).

⁸⁷ See Shannon Catalino, Intimate Partner Violence, 1993-2010, Department of Justice, Bureau of Justice Statistics Fact Sheet (Nov.27, 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv9310.pdf>; (The data were developed from the Bureau of Justice Statistics' (BJS) National Crime Victimization Survey (NCVS), which annually collects information on nonfatal victimizations reported and not reported to the police against persons age 12 or older from a nationally representative sample of U.S. households. The report shows a declining rate from 1994 to 2010, from 9.8 per 1,000 persons age 12 or older to 3.6 per 1000. Females living in households comprised of one female adult with children experienced intimate partner violence at a rate more than 10 times higher than households with married adults with children. Id. at 2 & Table 1.) Linda Girdner, *Custody Mediation in the United States: Empowerment or Social Control?* 3 CAN. J. WOMEN & L. 134, 138 & n.19 (1989)(reporting that a Canadian study shows physical violence given as reason for marital separation by 50-75% of women); DEMIE KURZ, FOR RICHER, FOR POORER: FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE (1995)(about 30%); Allen & Brinig, *supra* note 24, at 313 & Table 1 (2011) (.26 (before 1997) to .21 (1998-2002) of random selection of divorce cases in Oregon involving children alleged domestic violence).

⁸⁸ See, e.g., Amanda Berger et al., Relationship Violence Among Young Adult Couples, Child Trends Research Brief 2012-14 (2101), available at http://www.childtrends.org/Files/Child_Trends-2012_06_01_RB_CoupleViolence.pdf (highest level among cohabiting couples, lowest among married couples, counting any type of violence and surveying both partners, 45% of married couples and 52% of cohabiting couples experienced violence; for those resulting in injury, 8% of married couples and 15% of cohabiting). This seems to be true in Spain and Great Britain as well.

⁸⁹ See, e.g., AMATO & BOOTH, *supra* note 85 (suggesting that children are only better off if their parents had a highly conflictual marriage before divorce, a case that occurs only about 30% of the time); and, more recently, E. MARK CUMMINGS & PATRICK T. DAVIES, MARITAL CONFLICT AND CHILDREN: AN EMOTIONAL SECURITY PERSPECTIVE vii-viii (2010); Rena Repetti, Shelley E. Taylor & Theresa E. Seeman, *Risky families: Family & Social Environments and the Mental and Physical Health of Offspring*, 128 PSYCH. BULL. 330 (2002); ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS 100 (2012) ("Hundreds of studies show that parental conflict is toxic for

families with a high degree of visible conflict are those in which children might even do better if their parents divorce than if the parents stay together.⁹⁰

Along the same lines, some parents (how many is contested) are not fit to be regular caretakers for children, usually because they are involved with substance abuse, abuse of children or mental illness.⁹¹ (Some might be institutionalized in a variety of settings.) However, the vast majority are fit to be custodians.

There is no dispute over the fact that there are tremendous costs involved in litigated custody disputes.⁹² These costs can be seen in court time (and resources),⁹³ the cost of the conflict to the child, the costs to each parent (financially, emotionally and socially),⁹⁴ and the costs of their continuing to have to deal with each other in non-positive ways, especially in cases involving domestic violence.⁹⁵ As we have seen, there are also costs of uncertainty in deciding what's best for children.

children in divorce"); E. Mark Cummings, Christine Merrilees & Melissa Ward George, *Fathers, Marriages, And Families: Revisiting And Updating The Framework For Fathering In Family Context*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 154 (5th ed., Michael E. Lamb, ed. 2010). See also Nuffield Report, *supra* note 27, at xii, xiii (ongoing conflict leads to poor relationships with parents in adulthood, as does absence of non-residential parent's emotional investment in the child's life).

⁹⁰ For some examples, See Paul Amato & Alan Booth, *A Prospective Study of Parental Divorce and Parent-Child Relationships*, 58 J. MARR & FAM. 356 (1996); Susan Jekielek, *Parental Conflict, Marital Disruption and Children's Emotional Well-Being*, 76 SOCIAL FORCES 905 (1998); Donna Morrison & Mary Jo Coiro, *Parental Conflict and Marital Disruption: Do Children Benefit When High-Conflict Marriages are Dissolved*, 61 J. MARRIAGE & FAMILY 626 (1999); Alan Booth & Paul Amato, *Parental Pre-Divorce Relations and Offspring Post-Divorce Well-Being*, 62 J. MARRIAGE & FAMILY 197, 210 (2001).

⁹¹ One study indicates that this number is between 8 and 15% than JANET JOHNSTON, VIVIENNE ROSEBY, KATHRYN KUEHNLE, IN *THE NAME OF THE CHILD: UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* (2009). See Linda Neilson, *Shared residential custody: Review of the Research*, AM. J. FAM. L. 4 (January, 2013).

⁹² "Tragically, a small, but significant, number of parents engage in a type of guerilla warfare, litigating repeatedly, clogging courts and harming their children." Elrod & Dale, *supra* note 24, at 388 (Citing MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* (1999)). The article concludes that "if it does not reduce conflict, it will not be in the best interests of children." *Id.* at 418.; E. MACCOBY & R. MNOOKIN, *supra* note 74, at 100, 159 (1992); Constance Ahrons, *The Good Divorce* 56 (1994); JANET R. JOHNSTON & VIVIENNE ROSEBY, IN *THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN* 4 (1977).

⁹³ See, e.g., Kyle Pruett & Marsha Kline Pruett, Eds., *CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA: CHILD CUSTODY* (1998). Experts will most clearly be needed when there is strategic behavior. There have been critics of their over-use in the past, that they have just increased the costs and given judges an excuse to do whatever they'd like anyway, that they can offer little because so much is contested or the research weak, and so forth.

⁹⁴ Many of these costs are enumerated in Mnookin & Kornhauser, *supra* note 63.

⁹⁵ See, e.g., Merle H. Weimer, *Domestic Violence and Custody: Importing The American Law Institute's Principles of the Law of Family Dissolution Into Oregon Law*, 35 WILLIAMETTE L. REV. 643, 645 (1998)(noting the attention paid to domestic violence in what was then a draft). More recently, see, e.g., Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 398 (1999); Jennifer L. Hardesty and Lawrence H. Ganong, *How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands*, 23 J. SOC. & PERSONAL RELATIONSHIPS 543 (2006). http://www.childtrends.org/Files/Child_Trends-2012_06_01_RB_CoupleViolence.pdf

Further, and not surprisingly, parents are enormously invested in their children. It may be slightly less obvious that loss of custody involves real harm (not just pretended or imagined harm) to them.⁹⁶ As two-parent families with loving parents are best for children (biological or adoptive), continuing relationships with two nurturing parents (biological or adoptive) who no longer live together is typically the second-best solution.⁹⁷

At this juncture in time, professionals contest more than just percentages of time that should be allocated to each parent. Some claim that “relationship” equals “parenting time”⁹⁸ and, “nurturing” necessarily involves overnight stays. Some claim that the confusion caused by moving between two households outweighs the benefit, at least for some.⁹⁹ There is debate about whether the “continuing relationship with two nurturing parents” trumps or is trumped by the child’s need for continuity and stability.¹⁰⁰ Experts do not agree whether exceptions to alternating custody need to be made when it’s impracticable (say, for a nursing

⁹⁶ Brinig & Nock, *supra* note 86 (noncustodial fathers, holding constant all available other factors, have a real and significant increase in depressive symptoms following a custody order giving it to the mother).

⁹⁷ See, e.g., “This paper starts from the viewpoint that evidence fully supports the benefit to children of having a meaningful relationship with both parents after separation.” University of Oxford, Department of Social Policy and Intervention, *Caring for children after parental separation: would legislation for shared parenting time help children?* (May, 2011). See also Nuffield Report, *supra* note 24, at xii.

⁹⁸ See, e.g., William B. Fabricius, Karina R. Sokol, Priscila Diaz & Sanford L. Braver, *Parenting Time, Parent Conflict, Parent-Child Relationships, and Children’s Physical Health*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 188, 193-94 (K. Juehne & L. Drozl, eds. 2012) (claiming that time is a necessary agreement for cultivating meaningful relationships); contra Paul R. Amato & Joan G. Gilbreth, *Non-Resident Fathers And Children’s Wellbeing: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999), who review 63 studies on parent-child contact and children’s well-being finding that the quality of contact is more important than the frequency of contact. Good outcomes for children were more likely when non-resident fathers had positive relationships with their children and had an ‘active parenting’ approach, including both warmth and setting boundaries. See also Brinig, *supra* note 36 (finding that overnights not statistically related to wellbeing, but “closeness” to non-custodial father was); Nuffield Report, *supra* note 24, at xii-xiii (overnights not strongly associated with positive experiences of closeness); those with more frequent contact had very close pre-separation relationships, but overnights not a significant factor). No blueprint works for all or even a majority of cases, *id.* at xiii-xiv.

⁹⁹ See, e.g., Juliana M. Sobowlewski & Paul R. Amato, *Parents’ Discord and Divorce, Parent-Child Relationships and Subjective Well-Being in Early Adulthood: Is Feeling Close to Two Parents Always Better than Feeling Close to One?*, 85 SOCIAL FORCES 1105, 1118 (2007).

¹⁰⁰ See, e.g., Pruett and DiFonzio, *supra* note 11, at 158 (1). One common place for this debate to play out is in “move away” cases. In the move-away context, see the rule enunciated in a California case: “Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, “the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining” that custody arrangement. (Burgess, *supra*, 13 Cal. 4th 25, at 32–33, 51 Cal.Rptr.2d 444, 913 P.2d 473.) In re Marriage of Brown & Yana, 37 Cal. 4th 947, 956, 127 P.3d 28, 32 (2006) notes that parental happiness is a lesser concern than either of the other two.

or infant child,¹⁰¹ or a child with disabilities, or when a parent is in the armed forces, or lives too far away, or both parents are poor).¹⁰²

Examining the various perspectives of the concerned individuals and society in turn, we come first to the child, who is the center of dispute between (we will assume) fit and loving parents. The child will be advantaged by the complementarity of the two parents involved,¹⁰³ as well as by the continuity and stability of whatever arrangement is reached. Some research from Australia shows advantage from the child's being considered—being heard—even though other considerations make up the final decision.¹⁰⁴

The fit parents primarily (assuming *Parham* is correct) seek to maximize the benefits and long-term happiness of the child. They may also seek some sort of just compensation for their past sacrifices or recognition for the roles they have played, in sociological terms, as father or mother. They may very much value the societal trust given to their parenting, particularly at a time when their trust in their own spouse or partner is at low ebb.¹⁰⁵ To a lesser extent, they may consider the feelings of the other parent, either in terms of revenge or possibly beneficence. Note again that they are unable to use damages (property compensation) to offset losses of parenting, either because they are constrained by statutes, have little property, or because compensation is incommensurate with the losses and gains involved.

¹⁰¹ For arguments that shared parenting of infants involving overnight stays is not appropriate, see Jennifer McIntosh, Bruce Smyth, Margaret Kelaher & Yvonne Wells, Post separation parenting arrangements: outcomes for infants and children. Sydney, Australia: Australian Government. 2010, available at http://www.familytransitions.com.au/Family_Transitions/Family_Transitions_files/Post%20Separation%20parenting%20arrangements%20and%20developmental%20outcomes%20for%20children%20%26%20infants%202010.pdf; R. EMERY, *supra* note 90, at 118-19 (2010); Tornello et al., *supra* note 38 For a balanced discussion of both attachment and balanced parenting perspectives, See Marsha Kline Pruett, Jennifer E. McIntosh and Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration*, 52 FAM. CT. REV. 240, 242-47 (2014).

¹⁰² For a judicial perspective, see Gerald R. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 212-13 (1998):

Further, joint custody is a more expensive proposition than sole custody. Joint custodians are each required to maintain suitable housing for children, with extra clothing and toys. It has been estimated that these expenditures constitute from one-fourth to one-third of the total child-related expenditures. Initially, there is the question of whether the costs associated with joint custody make such arrangements feasible for low-income families. One study noted that joint custody is not spreading very quickly to lower socio-economic populations. Reviewing the literature, one is left with the feeling that joint custody is an upper-middle class phenomenon.

Such considerations are relevant to young adults whose parents separated. Nuffield Report, *supra* note 27, at xviii.

¹⁰³ See, e.g., Ira Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1117 (1994). This is not the same as the contention made by some in the same-sex marriage movement debate that men and women are complementary in marriage. See, e.g., Ryan T. Anderson, *Marriage: What it Is, Why it Matters, and the Consequences of Redefining It*, Heritage Foundation, available at <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it>.

¹⁰⁴ McIntosh et al., *supra* note 101.

¹⁰⁵ Brinig and Nock, *supra* note 85.

Society's interests at separation are to discover and further the "best interests" of the particular child while minimizing strategic behavior by parents, as well as the various kinds of costs noted already. Of course there are difference between looking case-by-case ("ex post"), when we are more interested in the first societal interest of individualized child welfare and long term ("ex ante"), when we are more interested in the set of costs. This long-term role is the typical role for policy makers and academics and may be one reason they have focused on the bargaining, rather than the litigating, share of disputes.

In sum, at the present time, courts, legislatures, family lawyers, therapists, and interest groups are all focused on changing or maintaining the standards used to determine how to devise the best rules for children whose parents no longer live together.¹⁰⁶ The pressure of the arguments has increased to the point where in January of 2013 the Association of Family and Conciliation Courts called a meeting (complete with a facilitator to handle disputes) to see whether any rapprochement between the various players (including some from Canada and Australia) could be made using the available scientific evidence.¹⁰⁷ Although the raw divorce rate in the United States has continued to fall since its peak in 1981, so that it is just about what it was in 1970,¹⁰⁸ family dissolution disputes involving children continue to increase. That is so because the unwed birth rate has risen dramatically since 1960, so that in 2010 it was about 41%,¹⁰⁹ and unmarried couples, who do not of course divorce, are not as stable as their married counterparts.¹¹⁰

Presumptions in some ways seem the ideal way of moving from the over-flexible best interests standard to a situation facilitating bargaining without straitjacketing courts. Presumptions would seem to maximize the possibility that all the goals of the custody proceeding can be met. However, custody presumptions, like absolute rules, require that most separating families be fundamentally alike, since, like rules, they act to "pool" parenting situations. To the contrary, families with children differ along many important dimensions

¹⁰⁶ There is virtual consensus, both among academics and legislatures, that joint decision-making (or "joint legal custody") tends to produce preferable results for fit parents in most situations. All U.S. statutes now allow it, and many have strong presumptions that it is appropriate. For a chart listing these, Elrod & Spector, *supra* note 78, at 758 & Chart 2 (2009). This piece, however, considers shared parenting time, or joint physical custody. The facilitator was Bernard Mayer of Notre Dame's KROC Institute for International Peace Studies.

¹⁰⁷ Association of Family and Conciliation Courts, Shared Parenting Think Tank, Closing the Gap: Research, Practice, Policy and Shared Parenting, Chicago, IL, Jan. 24-26, 2013. A final report was published in the April, 2014 issue of Family Court Review, as Pruett & DiFonzo, *supra* note 11, and the special issue also includes various subgroup reports.

¹⁰⁸ See, e.g., Dana Rotz, Why Have Divorce Rates Fallen? The Role of Women's Age at Marriage, 2012 (under review); Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSP. 27 (2007).

¹⁰⁹ National Vital Statistics Report 61(1) (Aug. 12,,2012), Births: Final Data for 2010, Table C, available at http://www.cdc.gov/nchs/data/nvsr61/nvsr61_01.pdf (40.8%)

¹¹⁰ M.D. Bramlett & W.D. Mosher, Cohabitation, Marriage, Divorce and Remarriage in the United States. National Center for Health Statistics, Vital Health. Stat. 23(33)(2002), available from http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf. (The probability of a cohabiting relationship lasting even five years is 51%, compared to 80% for marriage.)

even when parents are “fit,” meaning that their abilities to parent will not typically be questioned or interfered with by the state outside the custody context.¹¹¹

Presumptions in child custody are naturally disfavored by three groups—the judges who lose their discretion and seemingly a part of their “raison d’être” (though deciding contested custody cases is difficult and uncomfortable), the helping professionals who otherwise would assist in making determinations based on “best interests,” and whatever group is disfavored by the particular way the presumption is set.

Custody rules, including the ones examined here, are generally enacted with a great deal of advocacy but without a great deal of empirical research behind them, and are rarely tested carefully to see whether justice to the individual affected children is being served. This paper presents an initial foray into such a test, looking at the effect of a strong child shared custody presumption on the behavior of parents and judges during and within five years of the original custody proceeding. There are limitations to this empirical approach: most of the case files do not provide close glimpses into what the parents were thinking at any given point in time, what arrangements judges would have ordered absent the presumption, or what professionals such as custody evaluators would have done differently. While my observations in each case begin with the initial filing in 2008 and end with the last filing in early 2014 (or before), they are not longitudinal in the sense that I can show causation. To obtain that sort of predictive ability, at minimum one would need to have a change in the law and cases from before and after the law took effect. It would also be helpful to have a “control” state with generally similar legal rules and social norms but where no such change in the law took place. Nonetheless, the ability to look at two counties (Maricopa and Pima) in the same state (Arizona) provides the opportunity to examine differences in implementation. Finally, other unusual aspects of Arizona’s laws, those dealing with domestic violence and the reduction of child support with equally shared parenting time, probably impact the results, creating further pooling.

Even recognizing these limitations, the picture is a mixed one: some couples do fine with shared custody, and are able to adjust over time without result to acrimonious processes. Their children are presumably better for the frequent and meaningful contact with both the parents.¹¹² The successes must be weighed against another group of cases where, at best, shared parenting seems to take place at the price of considerable parental conflict and continued litigation.¹¹³ The emerging factual pattern seems to fit within Ayres and Mitts’ prescription for a separating equilibrium, while the presumption, bolstered by strong community support (in Pima County, at any rate)¹¹⁴ for shared parenting, pushes for a

¹¹¹ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

¹¹² Accord, see Pruett & DiFonzo, *supra* note 4, at 154 (3) (2014) (Social science supports shared parenting when both parents agree to it).

¹¹³ Some of the costs of litigation are explored in Mnookin & Kornhauser, *supra* note 63, at 971-72.

¹¹⁴ Braver et al., *supra* note 30 (jury pool candidates surveyed about what they thought was fair and what they would do given various scenarios; 69% were in favor of equal custody if each parent had done approximately the same amount of child care before separation, but this declined to 21% when the mother

pooling equilibrium highlighted by equally shared custody. Particularly troublesome (and unstable) are cases involving indications of domestic violence and/or substance abuse as well as those from the lower half of family incomes and the increasing number of unmarried couples affected by custody and child support orders. The sum of these findings suggests that the way shared parenting has been implemented by presumption in Arizona has led to many mistakes. To the extent that that value of meaningful contact with both parents is important, it is not being shared by lower income parents, parents who never married, or those of Hispanic origin. Further, because shared or equal parenting is being forced on some families despite domestic violence and on couples who are deeply conflicted to the point they cannot co-parent effectively, some children are being exposed to exactly the permanent sort of harm psychologists feel is most likely to harm them.

Why pooling is likely to fail: Parents are not alike

Parents are not alike, despite Leo Tolstoy's claim that all happy families may be.¹¹⁵ They differ in easily observable and measurable ways as well as more subtle, psychological ones. The very differences between parents in intact families may aid children,¹¹⁶ though these same differences may make growing up more challenging for children whose parents no longer live together.¹¹⁷

The academic literature has discussed some of these differences, and how they may make the typical "one size fits all," or in Ayres/Mitts terminology, "pooling" approach of legal regulation difficult at best, counterproductive at worst.¹¹⁸ The data obtained from Arizona court records allows us to trace the influence of some, but not all, of these differences.

One set of objections to pooling stems from cultural differences. In work using the National Longitudinal Survey of Adolescent Health, Brinig and Nock noted racial differences in the impact of legal status (their parents' marriage or formal adoption) on various groups of children. The bottom line was that for some children in the United States, marriage (rather than staying together) affects wellbeing in numerous ways. For others, if their parents live together it does not seem to matter whether they are married or not.¹¹⁹ Similarly, for most children, living in a birth or adoptive family is far preferable to living in an informal family with kin. For African-American children, living with kin is virtually indistinguishable from

had done most of the child care or 27% where father had done most of the child care during the marriage). The answers were similar even where the couple was high conflict.

¹¹⁵ LEO TOLSTOY, ANNA KARENINA 1 (1878) ("All happy families are alike; each unhappy family is unhappy in its own way.")

¹¹⁶ Lupu, *supra* note 103.

¹¹⁷ ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (New York: Crown Pubs. 2005)

¹¹⁸ See, e.g., Bartlett, *supra* note 74, at 468 (1999)(one-size-fits-all produces lousy results for some individual children).

¹¹⁹ *The One-Size Fits All Family*, 49 SANTA CLARA L. REV. 1371 (2009)

adoption or living with biological parents.¹²⁰ (For all children, living with foster parents is the least preferable situation,¹²¹ though whether it is the foster families or the events leading to placement that is problematic is not revealed by the data.)

Using the National Longitudinal Survey of Youth (1979), Brinig documented differences in responses to varying parenting styles following the patterns of Baumrind¹²² and Maccoby and Martin,¹²³ finding, consistent with other literature¹²⁴ that African-American children responded more favorably to authoritarian parenting than did majority children, who had better results with either authoritative or permissive parenting styles. In Israel, Dwairy and Dor¹²⁵ have noted that different immigrant groups to Israel seem to do better under different parenting styles, while Mayselless and coauthors¹²⁶ have found best adaptation to the Israeli military following authoritative parenting. All these studies can be taken to caution lawmakers from assuming that policies directed at families will always have the same results, even when implemented in good faith. While we cannot directly measure parenting style given our data here, we can detect any differences Hispanic culture makes, because a number of the separating parents in the Arizona sample are self-or other identified as Hispanic.¹²⁷

Other observable characteristics that might make differences include income, whether the parents had ever married, whether either parent displayed signs of alcohol or drug abuse or mental illness, whether the relationship was characterized by domestic violence, and whether the child was an infant at the time of separation. Indications that courts were dealing with the less favorable of these types of families might indicate that absent agreement, a court should not award equal or even substantially shared parenting.¹²⁸ A number of prior studies,

¹²⁰ Margaret F. Brinig and Steven L. Nock, How Much Does Legal Status Matter? Adoption by Kin Caregivers, 36 Fam. L.Q. 449, 463 (2002).

¹²¹ Id. at 462-63.

¹²² Diana Baumrind, The Influence of Parenting Style on Adolescent Competence and Substance Use, 11 J. Adolescence 56 (1991)

¹²³ Eleanor Maccoby & Martin, Sociology in the Context of the Family: Parent-Child Interaction, In P.H. Mussen (Series Ed.) & E.M. Hetherington (Vol. Ed.), Handbook of Child Psychology (vol. 4): Socialization, Personality, and Social Development 1 (1983).

¹²⁴ Beau Abar, Keith L. Carter & Adam Winsler, The Effects of Maternal Parenting Style and Religious Commitment on Self-Regulation and Achievement and Risk Behavior Among African-American Parochial College Students, 32 J Adolescence 759 (2009)

¹²⁵ Marwen Dwairy & Asnat Dor, Parenting and Psychological Adjustment of Adolescent Immigrants in Israel, 23 J. Fam. Psych. 416 (2009).

¹²⁶ Ofra Mayselless, Miri Scharf, & Michel Sholt, (2003). *From Authoritative Parenting Practices to an Authoritarian Context: Exploring the Person-Environment Fit*, 13 JOURNAL OF RESEARCH ON ADOLESCENCE, 427-456 (2003).

¹²⁷ In some cases, one or the other of the parents still had homes in Mexico, was currently living there, or had married there. In others, the divorce records had forms answered in Spanish, or featured hearings requiring an interpreter. In some of those with protective orders or bench warrants, the assailant or victim was identified as Hispanic in police reports. Finally, in some we followed Census methods, using the probabilities from the list of most common Hispanic surnames weighted by the Hispanic percentage population in the census tract.

¹²⁸ See, e.g., Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 188, 191 (2014).

most notably the recent one done by Melli and coauthor in Wisconsin,¹²⁹ indicate that equal or substantially shared parenting is most common in wealthy couples.¹³⁰ On the contrary, many jurisdictions disallow substantial custody to be awarded the perpetrator of domestic violence,¹³¹ while most place substantial restrictions or supervision requirements on parents who abuse substances or whose mental illness may endanger themselves or the child.¹³² Even many advocates of shared parenting in general hesitate to endorse it when children are infants.¹³³

Other possible differences that can be measured in the Arizona data include the way the parenting plan was reached, whether by default, consent, or after contested court hearing.¹³⁴ Most of the early studies of joint custody success involve parents who opted into shared parenting either before separation or fairly early in the divorce process.¹³⁵ One might expect these couples to be more successful as co-parents than those parents who each initially favored sole custody awards to themselves or who are otherwise unable to settle the incidents of divorce.¹³⁶ Most of the statutes listing factors for when joint physical custody is appropriate mention distance.¹³⁷ While children may be able to flourish moving between two households in the same neighborhood and school district, keeping their friends and

¹²⁹ Melli & Brown, *supra* note 45; Judi Bartfeld, Shared Placement: An Overview of Prevalence, Trends, Economic Implications, and Impacts on Child Well-Being, University of Wisconsin Institute on Poverty, 2011. See also Suzanne Reynolds, Ralph Peoples & Catherine Harris, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629 (2007).

¹³⁰ There is also evidence that parents with substantial higher education may favor equal or joint parenting, though this characteristic is highly correlated with income.

¹³¹ See, e.g., ARK. CODE § 9-13-101©(2); Idaho Code § 320717B(5); Minn. Stat. § 518.17 subd. 2.

¹³² See, e.g., WIS. STAT 767.41 (5)(am) (14); ALI PRINCIPLES, *supra* note 9, § 2.13.

¹³³ See Pruett & DiFonzio, *supra* note 11, at 162:

Embedded within the shared parenting research is a hotbed of controversy on the question of overnights for fathers with very young children who do not primarily reside with them. As indicated, early paternal involvement serves as a protective factor for later father–child relationships. Yet the primacy of attachment research paradigms for mapping the pathway to healthy development has led to dyadic considerations of security and stability that have, until very recently, excluded the father or other caregiver. The emphasis on assisting parents through a conflict-laden transition, while their children’s brains and minds are developing rapidly and in need of consistent nurturance and support in order to develop physiological and biological regulation and trust in the world around them, can pit the uncoupling family’s dynamics in direct opposition to the child’s capacities and needs.

See also Marsha Kline Pruett, Jennifer E. McIntosh & Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration*, 52 FAM. CT. REV. 240 (2014) (suggesting that for young children the decision needs to be individualized); Indiana Parenting Time Guidelines, *supra* note 69; also Tornello et al., *supra* note 35 Some of the debate among researchers seems to emanate from differences in their belief in attachment theory.

¹³⁴ A final variation, inconsistently titled by the two observed courts, is that the arrangement was negotiated by attorneys and confirmed in the final court hearing.

¹³⁵ An exception is Robert E. Emery, Sheila G. Matthews and Katherine M. Kitzman, *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning One Year After Settlement*, 62 J. CONSULT. & CLINICAL PSYCH. 124 (1994).

¹³⁶ See also Pruett & DiFonzo, *supra* note 11, at 154.

¹³⁷ For some examples, see WASH. REV. CODE § 26.09187(3)(b); ALA. CODE § 30-3-152(a)(5)(geographic proximity of parents to each other as this relates to the practical considerations of joint physical custody); N.MEX. STAT. § 40-4-91B(7)(“geographic distance between the parties’ residences”); WIS. STAT. § 767.41(4)(a)(2).

classrooms constant, equal parenting becomes increasingly difficult as parents are located at greater distances. Frequent contact with both parents, one of the goals of many of the statutes,¹³⁸ is impossible once travel takes more than a couple of hours.

II. Herding and Separating Models in the Context of Child Custody.

This article began with the observation that law professor Ian Ayres and attorney Joshua Mitts write that traditional regulatory schemes, imposing across-the-board mandates to regulate externalities, move behavior from many simply mimicking others to a new, mandated pool. They argue that this can be less useful for society than a system where regulation induces separating behaviors, since pooling suppresses the production of information and may exacerbate systemic risk. The information-production function suppressed by pooling can otherwise steer both private and public actors toward better evidence-based outcomes.¹³⁹

The Arizona law in place at the beginning of my study was typical of the rules in many states “friendly” to joint parenting, allowing mimicking rather than more strongly channeling shared parenting.¹⁴⁰ The state moved in 2010¹⁴¹ and again in 2012¹⁴² progressively toward mandating equal parenting for all separating couples.¹⁴³ Arizona as a whole even in 2007 had

¹³⁸ See, e.g., TEX. CODE ANN §153.0001(a)(1)(“frequent and continuing”); VA. CODE § 20-124.2(B)(“frequent and continuing”), Wis. Stat. §767.41 (regularly occurring and meaningful periods of physical placement to provide predictability and stability”)

¹³⁹ Ayres and Mitts, *supra* note 1, at 3.

¹⁴⁰ ARIZ. REV. STAT. § 25–403.01. Sole and joint custody

A. In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another. The court in determining custody shall not prefer a parent as custodian because of that parent's sex.

B. The court may issue an order for joint custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests. In determining whether joint custody is in the child's best interests, the court shall consider the factors prescribed in section 25–403, subsection A and all of the following:

1. The agreement or lack of an agreement by the parents regarding joint custody.
2. Whether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child.
3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody.
4. Whether the joint custody arrangement is logistically possible.

C. The court may issue an order for joint custody of a child if both parents agree and submit a written parenting plan and the court finds such an order is in the best interests of the child. The court may order joint legal custody without ordering joint physical custody.

Child Custody, 2005 Ariz. Legis. Serv. Ch. 45 (S.B. 1045) (West).

¹⁴¹ Laws 2010, Ch. 186, § 2.

¹⁴² Laws 2012, Ch. 309, § 8, eff. Jan. 1, 2013

¹⁴³ ARIZ. REV. STAT. § 25-403.02 now includes in part:

B. Consistent with the child's best interests in § 25-403 and §§ 25-403.03, 25-403.04 and 25-403.05, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time. The court shall not prefer a parent's proposed plan because of the parent's or child's gender.

more equal parenting than most other jurisdictions,¹⁴⁴ and Maricopa County, the most populous in the state, led the way and drives the state-level results.¹⁴⁵ In other words, by imitating others, the majority of couples not having trial-determined custody outcomes, chose some degree of joint parenting, and the most frequently occurring single outcome, other than no overnights at all, was equal or nearly equal parenting.¹⁴⁶ The figure also shows peaks or concentrations at various other points, though these may be due to incentives driven by the shared custody deductions of the child support system.

¹⁴⁴ SEE PATRICK PARKINSON, *THE PAYOFFS AND PITFALLS OF LAWS THAT ENCOURAGE SHARED PARENTING: LESSONS FROM THE AUSTRALIAN EXPERIENCE*, 13 (2014). North Carolina in 2006 had 15.3% of cases with at least 123 days of parenting time (33%), Reynolds et al., *supra* note 127, at 1667 (2006-07); Oregon, in 2002, had 32% of joint custody according to MARGARET F. BRINIG, *LAW, FAMILY AND COMMUNITY: SUPPORTING THE COVENANT* 89 & Fig. 2.1 (2010); Wisconsin had 43.8% with at least 30% parenting time in 2007, according to Bartfeld, *supra* note 129 (2011); Washington in 2007 had 16% equal and another 18% over 35% according to Thomas George, *Residential Time Summary Reports Filed in Washington July 2007-March 2008*, Olympia: Washington State Center for Court Research, available at www.courts.wa.gov/wscv/docs/ResidentialTimeSummaryReport.pdf; Arizona in 2007 had 15% equal custody, and another 19% with at least 116 days, according to Venohr & Kaunelis, *Arizona Child Support Guideline Review: Analysis of Case File Data*. Denver: Center for Policy Research, available at www.azcourts.gov/Portals/74/CSGRC/repository/2009-CaseFileRev.pdf.

¹⁴⁵ Because Maricopa's population is so much larger than any other county in the state, its custody numbers drive the state averages. Pima's (and presumably other counties') are skewed to the left, the lower amounts. Pima's totals were slightly different (added up to only 91%) because of a large number of cases in which no parenting time reduction was ordered. These do not show up on the figure (which begins at 4-20 days).

¹⁴⁶ The various spikes in the figure correspond, by definition, to frequently occurring parenting patterns. While the 182 day pattern is obvious (though it may be through alternating weeks or seasons, or 2-2-5-5 day patterns), the spike around 60 days accounts for traditional custody arrangements (every other weekend (52 days) plus one week during the summer (4.75 additional days)). The 104 day pattern is for one parent to have the children during the school week with the other living with them on weekends (or, in long distance situations, one having most of summer vacation plus the longer breaks during the school year).

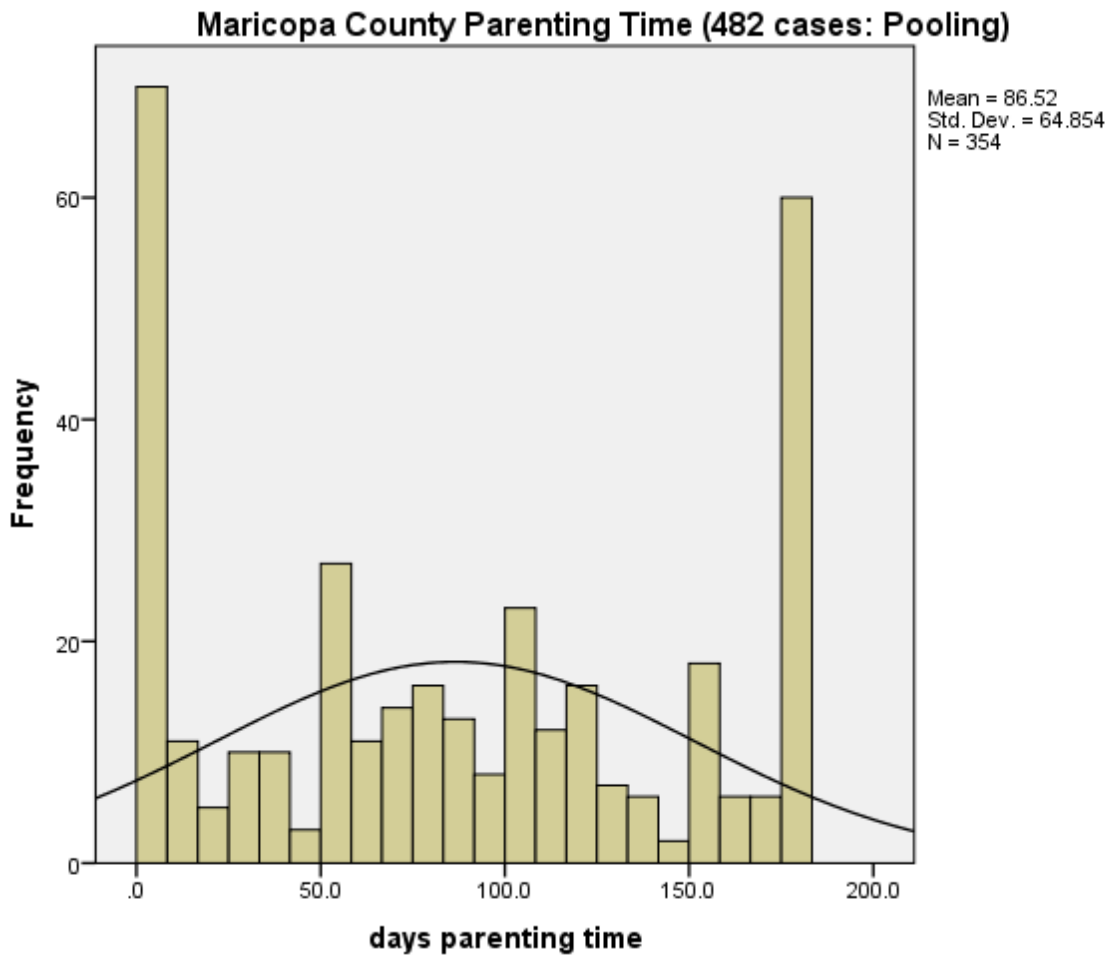
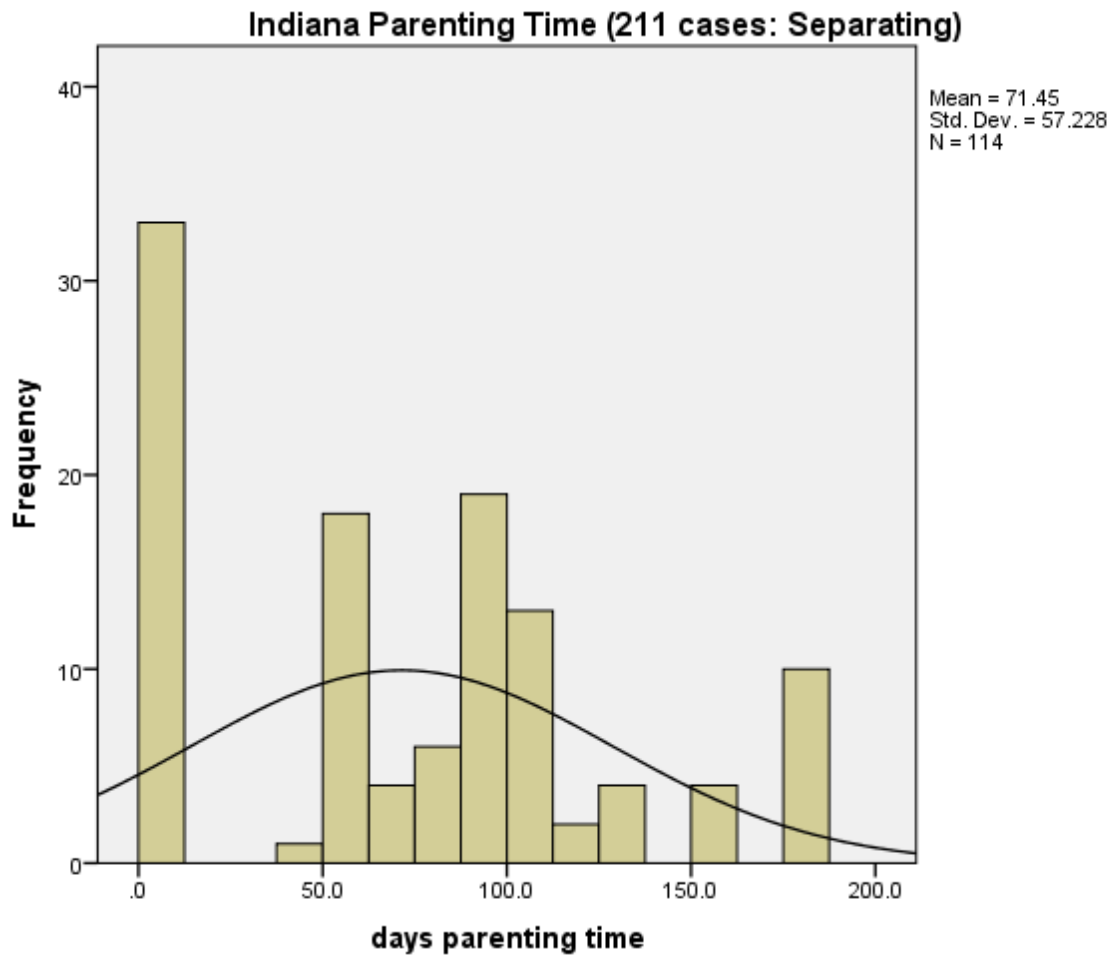


Figure 2

What would couples do without the strong herding rules? The most recent national study was done in 1989-90, with less than 20 states participating, and gives us means rather than a more detailed look. A look at the 211 cases I've coded so far in Indiana gives a more balanced picture than that found in Arizona, one typical of a separating equilibrium in Ayres and Mitts' formulation:



Sometimes, as Ayres and Mitts point out, moving from mandatory (such as the rule all mothers got custody under a tender years presumption) to a default (joint parenting) will induce more separation, that is, a smoother distribution across all the points. The authors' illustration is that with home schooling as an exception from compulsory public or private education, there will be more experimentation.¹⁴⁷ Ayres and Mitts suggest that such defaults may induce separation, as opposed to pooling, when there is no regulatory transparency. This would be true in the custody situation only if all decisions were kept confidential. Clearly each judge knows his or her past decisions (and almost certainly is attempting to apply the law in a consistent way).¹⁴⁸ But every attorney also knows what has happened with clients,

¹⁴⁷ Private schooling was constitutionally permitted as an option in *Pierce v. Society of Sisters*. Homeschooling became increasingly popular following *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (allowing Amish parents to be exempt from compulsory education through age 16 in order to pursue the home-based vocational education commensurate with their religious tradition).

¹⁴⁸ This prior tendency/self-knowledge would be evidenced in written opinions, but these are highly unlikely in family law matters precisely because of the discretion accorded to trial court judges. The class of cases in which the judge's tendency to "clump" might occur is those decided by the court, in Maricopa known as DDI, or decree of dissolution after trial. The judges, of course, might be influenced by many things, including, according to a recent study (that only observed the tendency in women's rights cases) whether they have daughters. Glynn, Adam, and Maya Sen. 2014. Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues? *American Journal of Political Science*. Copy at <http://j.mp/NzXAEG>.

and attorney CLE courses and other meetings facilitate the spread of general custody patterns as well as what worked in a particular kind of case.¹⁴⁹ The talk spread in divorced and single parents' support groups or just among casual friends also may induce people to follow trends like shared parenting.¹⁵⁰ In such cases, where others' practices are known, Ayres and Mitts show how Bayesian decision-making will induce pooling, as actors "find it individually more rational to mimic the tried-and-seemingly-true behavior of others rather than to take the road less traveled."¹⁵¹

Ayres and Mitts write at greatest length¹⁵² about the tendency of pooling regulations to increase the chance of systemic risk.¹⁵³ There is no exact analog in the custody world, where *individual* failures are the legal concern.¹⁵⁴ However, to the extent that racial and cultural groups, or lower income families, are disadvantaged by particular parenting arrangements, the exacerbation of income inequalities would present a major problem, one that might, a generation down the line, create systemic failure.¹⁵⁵ This type of systemic risk is what some of the results in Arizona seem to portend.¹⁵⁶ There is also the possibility,

¹⁴⁹ This herding effect would be most pronounced in those cases decided by consent, termed by Maricopa Consent Decrees of Dissolution. In Mnookin & Kornhauser, *supra* note 12, terminology, these would be bargains reached "in the shadow of the law." In an online survey taken in May, 2014, of members of the family law section of the state bar in Maricopa, with 57 responses, the changes made to the law in 2013 would primarily affect judges' decisions, not what they advised their clients, and then only make a difference to fathers seeking equal custody. More than half (52.6%) answered that the change made no or minimal change in the way their clients would reach parenting time decisions. The same survey revealed that two-thirds (66.7%) felt that the new law would make at least a moderate difference to judges deciding contested custody cases. The number of fathers who would likely be successful in obtaining equal parenting time (81.7%) following the law was much greater than prior to the law (47.3%). Survey responses available on request to author.

¹⁵⁰ For one thoughtful discussion of social norms, see Richard C. McAdams, *Focal Point Theory of Expressive Law*, 79 VA. L. REV. 339 (2000). For the original paper coining the term "norm entrepreneurs," see Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). Arguably the divorced fathers groups have played major roles in moving norms toward joint parenting.

¹⁵¹ Ayres & Mitts, *supra* note 1, at 4.

¹⁵² See also Ian Ayres & Joshua Mitts, *Three Proposals for Regulating the Distribution of Home Equity*, 31 YALE J. ON REG. — (2014).

¹⁵³ See Ayres & Mitts, *supra* note 1, & Figure 2 on page 6. Note the similarity with the bunching in Arizona at parenting times of 39-57 days (.05% subtraction from child support according to Appendix A, 88-115 days (16.1% subtraction from child support); and 173-82 days (48.6% subtraction, or 50% under Schedule B).

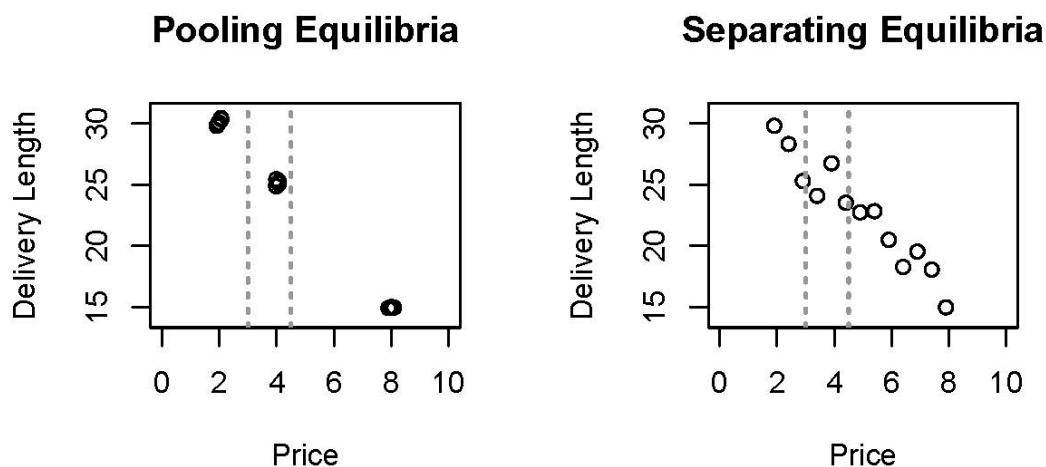
¹⁵⁴ There has been much concern about a particular kind of systemic risk, that dealing with interracial placement of children, which might adversely affect the racial minority groups themselves. For a consideration of this risk, see Margaret F. Brinig, *Book Review, The Child's Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARVARD LAW REVIEW 2129 (2004).

¹⁵⁵ For a discussion of this problem in the context of marriage, see JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS* (Oxford University Press, forthcoming 2014).

¹⁵⁶ Depending upon the success of shared parenting, there may be a risk from its under-use by less advantaged or cultural minority families. That is, if children of separating parents do much better when their parents share parenting, whole groups of children are at risk. On the other hand, if income inequality between parents presents special problems for equal-parenting separated couples because of faulty assumptions behind the child support guidelines, there could be another unhappy systemic effect that would only be worth the cost if the benefits of coparenting outweighed the documented risks of growing up (at least partially) in poverty. As far as I know, no research has been done on growing up in two households, one of which is far poorer than the other. This result was certainly not the goal of the child support guidelines, and in some

discussed elsewhere¹⁵⁷ and therefore left to the side here, that the shared custody presumption is initially a bad choice of where to set the default.

Figure 2: The Effect of Potential Shocks on Pooling v. Separating Equilibria



Ayres and Mitts say that pooling may result if “the cost of altering the default is sufficiently high.”¹⁵⁸ In the Arizona custody context, this may well be the case with the latest version of the custody statute, which requires the judge to order a parenting plan that maximizes the parenting time for both parents. In order to deviate from the statute, the judge would presumably have to list specific reasons under the other sections (such as substance abuse) that such an order is not appropriate.¹⁵⁹ While Arizona law restricts joint legal decision-making (joint legal custody) in cases of domestic violence, a finding that domestic violence occurred does not necessarily affect the decision that the parties should share parenting time, and a decision affecting parenting time would require a (high cost, in terms of court time, legal fees, missed work and emotional energy)¹⁶⁰ additional hearing and a finding that substantial parenting time would endanger the *child*.¹⁶¹ For their discussions of why variety might be preferable, Ayres and Mitts repeat the familiar modern portfolio theory, which presupposes that distribution across different investments reduces the chance of correlation

jurisdictions (Canada, for example), is expressly what is being avoided by very generous awards to the lower income parent. See Allen & Brinig, *supra* note 31, at 146-47(2011).

¹⁵⁷ Brinig, *Penalty Defaults*, *supra* note 10.

¹⁵⁸ Ayres and Mitts, *supra* note 1, at 8 & fn. 14.

¹⁵⁹ ARIZ. REV. STAT. § 25-403(B) provides:

B. In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

¹⁶⁰ See Mnookin & Kornhauser, *supra* note 63 at 971-72.

¹⁶¹ ARIZ. REV. STAT. § 25-403.01 provides:

D. A parent who is not granted sole or joint legal decision-making is entitled to reasonable parenting time to ensure that the minor child has substantial, frequent, meaningful and continuing contact with the parent unless the court finds, after a hearing, that parenting time would endanger the child's physical, mental, moral or emotional health.

among them and thus of failure given market loss.¹⁶² However Ayres and Mitts extend the theory in successive sections to biodiversity and ecosystem stability,¹⁶³ genetic variation and population survival,¹⁶⁴ and even types of political regimes (democratic and dictatorial types were both needed to repel Hitler's Nazi invasion).¹⁶⁵ In modern pluralistic families, a variety of parenting arrangements accommodate parents who live and work in a variety of settings.¹⁶⁶

Much of the rest of Ayres and Mitts' paper is devoted to consideration of the benefits of separating equilibria for generating information and for experimentation, and this application of their theory seems to apply most closely to shared custody presumptions. They maintain that "diversity permits learning of better outcomes in alternative states of the world."¹⁶⁷ One of the historic problems with sweeping legal rules in the family area is that their effects often are not measured,¹⁶⁸ or are not measured in scientifically valid ways before they are copied.¹⁶⁹ In particular, in many of the papers supporting joint parenting, families opted into the arrangement, or the groups studied were very small or in particular geographic areas. Much less research supports the success of laws defaulting to substantial or equal co-

¹⁶² Ayres & Mitts, *supra* note 1, at 11.

¹⁶³ *Id.* at 11-13.

¹⁶⁴ *Id.* at 13-15 (where variation in the variation, or kurtosis, is essential to systemic stability given unexpected shocks to the system).

¹⁶⁵ *Id.* at 25-16.

¹⁶⁶ Thus Maria Cancian et al., *Who Gets Custody. Now? Dramatic Changes in Children's Living Arrangements After Divorce*, DEMOGRAPHY (forthcoming 2014) note that shared parenting is much more likely to be chosen (by parties or judges) in Wisconsin counties other than the most urban, Milwaukee, which also boasts the greatest minority populations.

¹⁶⁷ Ayres & Mitts, *supra* note 1, at 16.

¹⁶⁸ As Pruett & DiFonzo, *supra* note 11, at 161:

For example, areas of research with strong supporting bodies elucidate both the harm to children due to continued exposure to parental conflict, and the important protective factor of positive quality parenting by both parents. In contrast, under what conditions and how best parents in moderate conflict can continue to share decision making and parenting time exemplifies an area about which we do not have a sufficient body of knowledge to recommend policy. Similar concerns underlie the question of when having children alternate between two homes on a regular basis becomes more anxiety producing than beneficial.

¹⁶⁹ The classic example here is the famous study on mandatory arrest following a police call for domestic violence. When the Minneapolis findings (carefully made through randomized trials) suggesting that mandatory arrest would reduce recidivism by aggressors were replicated in other cities, a number showed precisely the opposite result. Nonetheless, mandatory arrest remains the solution of choice. See Lawrence Sherman et al., *Crime, Punishment and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992); and Lawrence W. Sherman et al., *The Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIM. 137 (1992).

The recent legislative success of proponents of more equal co-parenting may be thought of as just such a "informational cascade," Ayres and Mitts, *supra* note 1; Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 993 (1992); and Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity Fads, and Informational Cascades*, 12 J. ECON. PERSPECTIVES 151 (1998). The informational cascade has been enhanced of late by blogs, websites and the intense lobbying efforts of men's groups. Such groups will eventually propagate ideas about the availability of equal parenting through the separating parenting world as well. In Arizona, the custody law reforms of 2012 were preceded by an intensive media campaign.

parenting among divorcing families¹⁷⁰ (let alone families who never married and may never have lived together).¹⁷¹ Research has shown that re-partnering (through a second marriage or otherwise) does affect child wellbeing. Again, there is no systematic look on how well re-partnering works, from the child's perspective, in cases of shared parenting.¹⁷² Most separating couples will in fact re-partner, though the new union is less likely to be remarriage for minorities.¹⁷³

Following Ayres and Mitts' explanation, once some number of parents have voiced favorable opinions of joint parenting, others, in the face of uncertainty about it or even prior mild opposition, will opt in,¹⁷⁴ causing a series of pooling equilibria. These, in turn, prevent discovery not only of which terms (here, parenting arrangements) are more effective on average, but also "whether some are more effective under different conditions such as locations and even time," precisely the problem with default custody rules.¹⁷⁵ The authors suggest menu approaches, which may induce separating equilibria whenever the cost of individualized negotiations for an alternative set of terms exceeds the cost of contracting under the menu.¹⁷⁶ After a discussion of applications to the recent financial crisis, the authors conclude with "The Parable of the Bridges,"¹⁷⁷ explaining how in 1850, the Angers Bridge collapsed when a battalion of French soldiers marched across it, spontaneously falling into step with the bridge's vibrations, inadvertently amplifying them. This, too, is a kind of pooling that may amplify systemic risk, and a laissez-faire approach will not always work, according to Ayres and Mitts, who suggest mandating or actively encouraging non-

¹⁷⁰ See, e.g., Pruett & DiFonzo, *supra* note 11, at 162: ("As a result, participants at the think tank cautioned that the nuances apparent in the current literature on parenting time call for parental agreement or individualized judicial assessments rather than decisions premised on legal presumptions . . .")

¹⁷¹ See, e.g., Pruett & DiFonzo, *supra* note 11, at 168:

It is inappropriate to have a presumption that covers all situations when not enough is known to verify that the presumption will benefit almost all children and families. Presumptions appear in the law as a blunt instrument, yet we know very little empirically about how a presumption would apply to same-sex couples, nonbiological parents, never-married partners who had no significant partnership before having a child together, and so on.

¹⁷² Ayres & Mitts, *supra* note 1, suggest explicit randomized testing of law and regulation. *Id.* at 17, suggesting that "separating equilibria complement randomization: the latter facilitates causal inference while the former expands society's knowledge regarding the covariance of potential outcomes with varying type of contractual equilibria." *Id.* at 24. While divorcing parents in Arizona are not presented with menus, the forms many use (available from an institution known as The Divorce Store) for divorce custody and support do present a menu look, asking clients: do you want sole custody (with or without supervision?) or joint custody (with or without a primary custodian), and, for parenting plans, what do you want to do during the school year? The summer? For extended holidays? For non-weekend holidays?

¹⁷³ Bramlett & Mosher, *supra* note 110. Pruett and DiFonzo express some concern about shared parenting with this group. Pruett & DiFonzo, *supra* note 11, at 166.

¹⁷⁴ Ayres & Mitts, *supra* note 1, at 18.

¹⁷⁵ Ayres & Mills *supra* note 1, at 20.

¹⁷⁶ Ayres & Mitts, *supra* note 1, at 24. They use haggling over new car prices as an example of a task that might be more happily accomplished through a limited menu of prices and financing terms. A menu approach to be used by mediators is suggested in R. Emery, *supra* note 44, at 186, based upon the age of the child and the amount of conflict in the parents' relationship.

¹⁷⁷ Ayres & Mitts, *supra* note 1, at 40.

uniformity.¹⁷⁸ Legislation that encourages the formulation of individualized parenting plans without a single default custody pattern like Arizona's equal parenting default would maximize non-uniformity, better serving both individual children and a future society in which more and more separating couples will be unmarried.¹⁷⁹

III. An Empirical Test of Pooling Models: Randomized Cases from Maricopa

When I set about looking for particular jurisdictions in which to study the effect of preferences for shared parenting and child support laws, I had several criteria: first, a "modern" statute, that is, one that talked in terms not of custody and visitation but in terms of parenting time. Second and relatedly, I wanted a state that for some time had parenting guidelines propounded by the judiciary to give additional guidance to judges making parenting time decisions. Third, I preferred to analyze states that had comparable child support guidelines, especially in the way they treated substantially shared parenting. Fourth, given the first criteria, I looked for states with substantial experience with shared parenting: that is, states likely to be above average in shared parenting awards. And last, I needed states that would allow me remote access to electronic records. This required that the counties involved at least keep electronic records of not only judicial activity (or minute entries), but also scanned documents such as pleadings, reports of various kinds, motions, and decisions and orders of judges, mediators, and so forth. The two states I ultimately chose were Arizona and Indiana. At the time of this writing, I am still accessing and coding the Indiana files, but have received and closely studied records from the two most populous counties in Arizona, Maricopa (which includes Phoenix)¹⁸⁰ and Pima (which includes Tucson),¹⁸¹ which together include 81.6% of the state's residents.¹⁸²

The Court Administrator in Maricopa County sent me the complete list of intake files from eight weeks in January-February, April and September of 2008. These identified not only file names and the type of action involved, but also the names of parties, their addresses (where available), their counsel (or whether, as most couples were, they were self-representing, or "pro per" as it is called there), and very often their dates of birth. From these I randomly selected files representing specific types of actions,¹⁸³ with the following results:

¹⁷⁸ Ayres & Mitts, *supra* note 1, at 41.

¹⁷⁹ This brings us back to the summary of the Think Tank meeting on shared parenting compiled by Pruett and DiFonzo, *supra* note 11, who wrote (1) The most effective decision-making about parenting time is inescapably case-specific, and (2) statutory presumptions prescribing specific allocations of shared parenting time are unsupportable because no prescription will fit all, or even the majority of families' particular circumstances. *Id.* at 153-54.

¹⁸⁰ The 2013 population estimate according to the Census Department is 4009412.

¹⁸¹ The 2013 population estimate is 996554.

¹⁸² The 2013 population estimate is 6,626,624

¹⁸³ Please note that while I selected files randomly, I did not attempt to match the actual proportion of files in the sample. Thus while my contrasts within and between groups does not present statistical issues, I am sure that it is not representative of all the cases involving children decided in Maricopa, for instance. The sample underrepresented the population of divorces with children among this group (62.6% compared with 73% in the intake weeks represented), slightly underrepresented the unmarried custody cases (7.37%

	Frequency	Percent	Valid Percent	Cumulative Percent
601 Dissolution with Children	363	58.5	58.5	58.5
602 Dissolution without Children	51	8.2	8.2	66.8
621 Legal Separation	7	1.1	1.1	67.9
624 Custody	43	6.9	6.9	74.8
625 Protective Order	1	.2	.2	75.0
628 Support	155	25.0	25.0	100.0
Total	620	100.0	100.0	

Many of the legal separations eventually were changed by one of the spouses to a final dissolution. The one protective order case was not analyzed further, though there were protective orders that were part of each of the other types of cases.¹⁸⁴

There are two kinds of court data involved in the study. The first is publicly available online,¹⁸⁵ and is simply a listing of transactions with the clerk's office dealing with the file. The most important for analysis purposes is a second grouping within the publically available file, a listing of the (minute) time scheduled with the decision maker.

The second kind of data was obtained after receiving institutional review board approval and with assurances that individual records would be kept confidential. It was the actual documents, such as pleadings and other motions, letters, reports, orders, and so forth, involved with each file selected above. These documents contain a host of information. Some are routine or appear in every case involving children. Such documents include affidavits of service of process, orders to complete parenting time education classes (and certifications when they were attended), motions and orders dealing with continuances of

compared to 9.7% in the intake weeks represented) and substantially overrepresented the establishment of support group (27.7% compared to 17% in the weeks intake represented).

¹⁸⁴ Some of these cases were dismissed at various points, and for various reasons. A number (17) couples reconciled and voluntarily dismissed the actions. A perhaps overlapping group of 28 had their cases dismissed by the court for failure to prosecute them. A third group of 16 involved absent parents or children and therefore a lack of jurisdiction to decide custody and/or support issues.

¹⁸⁵ Maricopa's are found at <http://www.superiorcourt.maricopa.gov/docket/FamilyCourtCases/>. Pima's are found at http://www.agave.cosc.pima.gov/home.asp?Include=pages/record_search.htm.

various trial dates. Some were quite routine but did not appear in every case, including motions and orders for return of evidence, cash receipts, calculations of arrearages by the department of economic security (since the final numbers would be found elsewhere), and orders of publication when respondents could not be located. The information I coded came from complaints and answers (or motions and responses), reports by child coordinators or of drug testing, completed parental worksheets for child support, parenting plans (joint or sole), and final dissolution orders (or orders dealing with motions or protective orders). The complaint typically included names and birth dates of parents and children, if any, the date of marriage (if the parties were married), addresses, occupations of the parents, what property was owned by the couple and how the petitioner wanted it split, what parenting time was asked for, and whether spousal support or child support was sought. It also indicated which party was bringing the action (father or (at least nominally, in the case of Title IVD support) mother) and whether or not there had been or currently was domestic violence. The answer corroborated or sometimes corrected the details found in the complaint, asking for the same or different things. The child support worksheets at the time of the dissolution or other order identified which parent was the primary custodial parent, what each parent's monthly income was, whether or not either was responsible for additional or court ordered support for another child, whether the child was over 12 or had extraordinary expenses, who was ordered to pay child support, what the parenting time of the payor parent was (calculated by totaling the number of days or partial days), and whether the amount was adjusted because it exceeded the amount needed for self-support (in 2008, \$775 monthly). Some cases involved temporary motions for support, requests for custody evaluations or mediation, discovery motions (which I usually ignored unless the total number of these was very large), actions involving protective orders and, if requested, the results of protective order hearings, and motions post dissolution (or order) to increase or decrease child support or parenting time or to enforce either. The motions were accompanied by supporting reasons, which were frequently referred to by the court in resolving them. The divorce decrees or parenting orders incorporated any agreements of the parties, which sometimes were attached and sometimes separately filed. These usually included parenting plans and sometimes included property settlement agreements. The stand-alone support orders included reasons for deviating from the amounts calculated on the worksheet (the state child support guideline amounts) and sometimes employer information (which was also sometimes included in a separate document). All of these alleged or found facts were carefully coded. [A sample worksheet, with identifiers removed, from July of 2008 is appended.]

The child support guidelines explicitly defined and still define¹⁸⁶ how to count days or partial days for parenting time.¹⁸⁷ Once the total is determined, a table in the guidelines¹⁸⁸ reveals what percentage of the obligation should be reduced to obtain preliminary child support owed. For example, the traditional, or “basic,” parenting plan would be for the child to spend every other weekend plus one evening during the week plus split holidays plus two weeks in the summer with the non-primary parent. While many parents use a calculator (obtainable as a free download) for this, the plan would include 52 (for the weekends) + 3 (12 X .25, for one mid-week evening a week) + 5 (for holidays) + 12 days (for summer, two weeks less the weekend already counted) = 72 days, or a 10.5% reduction in the support that would otherwise have been awarded. A separate table known as Appendix B equates the total support obligation borne (or imputed) to each parent when parenting time is equal.¹⁸⁹

Even a preliminary examination of these 2008 and later court documents reveals at least two worlds, which in Figure 1 reveals as the two pools around 0 and 182 days.¹⁹⁰ The first is a world involving divorcing, relatively wealthy parents. For these wealthier once-married parents, 27 percent indicate that they have equal custody, and the average parenting time adjustment¹⁹¹ exceeds 122 days a year, or 33% of the total time.¹⁹² The norm for these parents is clearly to share custody,¹⁹³ and in those equaling or exceeding the median income of mothers (\$2300 a month),¹⁹⁴ substantial parenting time is quite routine. The marriages

¹⁸⁶ Arizona Child Support Guidelines, Adopted by the Arizona Supreme Court, as Amended By Executive Order 2011-46, effective June 1, 2011, drs10h.pdf, at 11.

¹⁸⁷ Arizona Child Support Guidelines, Adopted by the Arizona Supreme Court, effective January 1, 2006, 2005CSG.pdf [2005 Guidelines] at page 10:

A. Each block of time begins and ends when the noncustodial parent receives or returns the child from the custodial parent or from a third party with whom the custodial parent left the child. Third party includes, for example, a school or childcare provider.

B. Count one day of parenting time for each 24 hours within any block of time.

C. To the extent there is a period of less than 24 hours remaining in the block of time, after all 24-hour days are counted or for any block of time which is in total less than 24 hours in duration:

1. A period of 12 hours or more counts as one day.

2. A period of 6 to 11 hours counts as a half-day.

3. A period of 3 to 5 hours counts as a quarter-day.

5. Periods of less than 3 hours may count as a quarter-day if, during those hours, the noncustodial parent pays for routine expenses of the child, such as meals.

¹⁸⁸ Id. at 11.

¹⁸⁹ 2005 Arizona Guidelines, Appendix A. The simplest way of thinking about this is to subtract the smaller amount due from each parent from the larger one and divide by 2.

¹⁹⁰ The same startling results are obtained if mother’s income is divided by quintiles: lowest 98.63 days; fourth 100.855 days; 3rd 107.068 days; 2nd 121.143 days and highest 124.049 days.

¹⁹¹ More than 94% of the child support worksheets indicated such an adjustment.

¹⁹² In other states favoring shared parenting, anything over 25% would count as substantial sharing. See, e.g., Minn. Rev. Stat. 518.175 (j) (“In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child.”)

¹⁹³ Joint legal custody, or shared decision-making, was part of the plan for 73% of the couples.

¹⁹⁴ There were several reasons to consider the income of mothers rather than fathers. First, in cases with very low maternal income and high paternal income, it would be unusual not to have a primary caretaker. Second, I knew that maternal, but not paternal, income was related to custody time. Third, using the total child support amount would be misleading because there were frequently deductions for other children supported by mothers and/or fathers. The gross income figures eliminated this concern.

usually dissolve by consent decree, so that 50.6% had agreed-upon orders that both dissolved the marriage and set custody.¹⁹⁵ They did not often have post-decree court modifications—56.4% had one or no appearances.¹⁹⁶

For less wealthy, married Maricopa parents (those with less than the median mother's income), only 9.4% featured equal custody, and the average amount of parenting time enjoyed by the parent without primary custody is just over 97 days, or 26% of the time (with a reduction in child support of 26.1%).¹⁹⁷ The pattern of divorce was different as well, reversing the practice of the wealthier parents. The predominating dissolution (42.8%) was by default.¹⁹⁸

The difference becomes yet starker for unmarried parents. Again, there are two groups. One involves actions to establish support, which are usually (though not always) initiated by the state to collect arrearages or reimbursement for public assistance. In these cases, the median (and mode, or most frequently recurring amount) mother's income was \$1196 per month, not coincidentally that attributable to minimum wage (the figure utilized to calculate TANF, or public assistance). Only 3, or 2% of these couples, indicated equal parenting. Further, only 34% of these couples indicated any parenting time adjustment to child support at all,¹⁹⁹ and the average amount for this third was 77 days only, or slightly more than 20% of the time (justifying a reduction of 10.5% in child support).

The other unmarried group involved actions for custody, parenting time and support. Fathers most often brought these suits, and many had established paternity through the hospital's paternity program and had been listed on the child's birth certificate. While they

¹⁹⁵ 28.8% had default dissolutions, and 13.5% had a decree of dissolution following a trial. Another way of discriminating in the data is by looking at Hispanic surnames. The classic article suggesting that this is the appropriate way to identify Hispanic or Latino families (used by the Census Bureau, is David L. Word et al., "Demographic Aspects of Surnames from Census 2000," (2008). Available at <http://www.census.gov/genealogy/www/surnames.pdf>.) In the wealthier, married group 25.2% of the couples had at least one with a common Hispanic surname (that is, with over 70% likelihood that the person using it would self-identify as Hispanic according to the 2000 census). For the less wealthy, married couples it was 36.7%, nearly the same as for the custody group (37.2%), but still lower than the support group, where 49.7% had at least one common Hispanic surname. See Marc N. Elliott et al., *Using Indirect Estimates Based on Name and Census Tract to Improve the Efficiency of Sampling Matched Ethnic Couples from Marriage License Data*, 77 *Pub. Opinion Q.* 375 (2013). Ethnicity is important because it is possible that with this population social norms might run toward mother-caretaking, and also because information about the real possibility of judges' ordering equal or substantially shared custody may not be effectively communicated to the Hispanic parents. Hispanic parents may be less likely to elect shared parenting. See Christine Linnquist, Nord & Nicholas Zill, *Non-Custodial Parents' Participation in their Children's Lives: Evidence from the Survey of Income and Program Participation*, vol. 1, at 12 (1996), available at fatherhood.hhs.gov/SIPP/NonCusp1.htm.

¹⁹⁶ The corresponding number for the lower income married couples was 58.9%, though the single most litigious, with 25 court entries following dissolution, was in this group.

¹⁹⁷ Joint legal custody was part of the order or plan in 57.8% of these couples.

¹⁹⁸ Default dissolutions occur when the other party is served but does not contest, or is reached only by publication. In default dissolutions, the petitioner is granted whatever was established in the complaint (or has been agreed to previously by the other). Consent dissolutions constituted only 26.7%, and dissolutions by decree again were 15%.

¹⁹⁹ They therefore make up a large number of the "0" pool in Figure 1.

were not wealthy—the mother’s median income was \$1500 a month—more than 71% of the parents had an adjustment for parenting time on the worksheets, and parenting time averaged 101 days (both figures higher than those for than the lower income, married parents). These are, by definition, involved or at least motivated fathers, and at least some indicated relationships of longstanding, one even of twelve years. While they were not divorcing, so were not filing the associated forms, they were active following initial custody decrees, with more than half having two or more court appearances and one “outlier” boasting, if that is the right word, 33 appearances. As Pruett and DiFonzo summarize the literature, they express concern about applying studies of formerly married parents to this group, who may be quite different.²⁰⁰

One other set of immediate observations involves the role of lawyers. More than three quarters (76.5%) of the petitioners completing divorces were not legally represented.²⁰¹ For the respondents, 96.1% were pro per, as this is called in Arizona. A valid question asked by lay people is whether attorneys are “worth it.” While they are likely to have more appearances pre-decree (averaging about two appearances in court as opposed to less than one), the average number of reappearances at or post the decree is not significantly different (3.39 for represented petitioners compared to 3.10 for the pro se).²⁰² This is not surprising, since the mean gross incomes for the represented groups are about \$500 dollars higher for mothers and more than \$2300 higher for fathers, so that more than custody is typically at stake (\$6053.27 total gross income per month for the represented compared to \$3700.49 for the pro se). Another indication that the cases might be more complicated is that the represented group is more likely to have significant property other than homes or pensions (usually stock or additional homes), with only about 12% of the pro se parties having other significant assets compared to 26.9% of the parties represented by attorneys. In the support establishment cases, while the state represented the custodial parent (always the mother unless a collateral relative had custody), it was extremely uncommon to have the father represented. Likewise for the custody cases, few had representation.²⁰³

We return now to the values argued for various child custody (or parenting time) regimes.²⁰⁴ How well does a state with a large amount of shared and even a significant amount of equal custody, or a pooling regime, promote continuity and stability, maximize

²⁰⁰ Pruett & DiFonzo, *supra* note 11, at 155-56, 162, 166.

²⁰¹ I do not think that this result will be duplicated in Indiana. For example, in the Lake County (suburban Chicago) cases I’ve coded, 77/219 plaintiffs, or 35.5%, had attorneys, as well as 25.6% of the defendants.

²⁰² Typically in the pro se actions the post-decree petitions were to reduce child support (21% of the self-represented cases), while in the petitioner represented cases, they were equally likely (15.2%) to be to reduce child support or increase parenting time. Increasing parenting time, because of the adjustments to child support, would also have the effect of reducing the support. The threshold for granting a change to ordered child support is a deviation of 15% or more in the amount calculated on the worksheet. In the cases where only a reduction was sought, it was typically because the obligor’s income had decreased (and/or the obligor was unemployed).

²⁰³ 8/43 were represented.

²⁰⁴ These are discussed *supra* at 17-19.

time with both parents, and minimize conflict and violence? Are these values systematically satisfied differently for different groups?

continuity and stability. Two methods of measuring continuity and stability seem possible from this data. The first is the most obvious, appears in other literature,²⁰⁵ and would look at how stable custody awards remain over time. In particular, one might compare the number of motions to change parenting time (or change the parenting plan completely, say, from a sole custody plan to a joint one or from one primary residence to the other) based upon the original order (comparing primary maternal or paternal custody to equally shared custody). One might even make the comparison depend upon the number of days of parenting time. Tendencies to change custody might also depend upon income, representation (or not), age or gender of the child, and whether substance abuse or mental illness was involved with the case.²⁰⁶ I did not find differences along this measure in the Arizona cases attributable to pooling toward equal custody.

The more difficult question considers whether the original order itself was consistent with the parenting done before separation.²⁰⁷ The files do not contain any direct and consistent measure of parental practices before separation. One possible indication would be that one of the spouses was staying at home to do child care. Divorcing parents do list their occupations in their complaints and responses, and some did put down “child care” or “stay at home parent” or “none” (as opposed to “unemployed”). However, the fact that one parent isn’t working while the other does isn’t always indicative of the childcare arrangement.²⁰⁸ Further, the complaints do not always contain this occupation information (and never do for support cases, at least for the non-paying parent). A more reliable indication may be gross wage differences between the parents, since marriages are typically assortative (so that the spouse will have comparable education and other human capital)²⁰⁹, while staying out of the labor force to care for dependents or working part time has a permanent negative effect on income.²¹⁰

²⁰⁵ Maccoby & Mnookin, *supra* note 74, Melli and Brown, *supra* note 46, Reynolds et al., *supra* note 129 all refer to “maternal custody drift”.

²⁰⁶ Post-decree discovery or incidence of child abuse by a parent or partner might also result in parenting time modifications, but there were a very small number of these cases.

²⁰⁷ This is, of course, the default of the ALI Principles, *supra* note 9, § 2.07 for parents who cannot agree on a parenting plan. The intuition is that absent the preferred agreed-upon plan, the second best solution is to approximate whatever the parents were doing before.

²⁰⁸ In fact, some older literature indicates that unemployed Hispanic fathers, in particular, are less likely to do child care or housework for psychological/cultural reasons; that to assume women’s work would threaten masculine identity.

²⁰⁹ GARY S. BECKER, A TREATISE ON THE FAMILY (2d ed., 1991). Recently, see *Elizabeth McClintock, Beauty and Status: The Illusion of Exchange in Partner Selection*, 79 AM. SOC. REV. – (2014).

²¹⁰ See, e.g., Joni Hersch, *Opting Out Among Women with Elite Education*, Vanderbilt University Law School Law and Economics Working Paper 13-05 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221482; Heather Boushay, *Opting Out: The Effect of Children on Women’s Employment in the United States*, 14 FEMINIST ECON. 1 (2008).

However well having a stay-at-home spouse may work for married couples or for long term cohabitants (those who file custody actions),²¹¹ it is unlikely to describe many unmarried couples, both of whom may be unemployed or employed at minimum wage regardless of child care obligations. One would assume that for the low earning couples, a move toward equal custody of a young child would present a great and perhaps threatening break in continuity. (On the other hand, if a third party, such as an aunt or grandmother, is providing the child care while the parents work there may be little or at least a smaller dampening effect on wages.) The strongest case for a lack of continuity may be for couples who did not live together after the birth of the child, who has been living with one parent only from birth.

Once the initial order has been made and some time has passed, a new continuity arises (or the original one, whatever the parents were doing prior to separation continues, is strengthened). The child or children becomes used to the new pattern of spending time with the parents, as well as accustomed to the neighborhood (or neighborhoods), school, after school friends, and so forth. Some parents want to relocate to some distance away, claiming employment opportunities for themselves or a new spouse, the need to be closer to families of origin, and so forth. These cases are frequently litigated, especially if the parents have been sharing parenting time (and have joint legal custody). A primary parent may well claim that necessary relocation permits the primary relationship to remain stable and continuous. The parent who would be left behind claims (even if there can be no claim based on equal custody or parenting time), that the neighborhood and friends and school will all be lost. One famous case also pointed out that relocation would threaten the fragile relationship between father and child.²¹² If the noncustodial parent has been faithfully spending the ordered time, courts may be reluctant to permit the move.²¹³ As with several features of equally shared custody, geographic restrictions may be particularly hard on the less wealthy participants in the labor force, who usually move to take advantage of employment. The impact will be most keenly felt by immigrants, particularly seasonal employees or those without documents. No empirical evidence can be shown from the Arizona cases that directly show discontinuity, though there were few cases where relocation became an issue.

The second major value going into Arizona's best interest of the child consideration is to maximize time with both parents. This was clearly a function of statutory revisions in 2010 and 2013, but shared custody seems to have been a feature of Arizona custody even by 2008.²¹⁴

²¹¹ Some of the custody (624) complaints stated that fathers had done the primary caretaking while the couple lived together, in one case, for twelve years. Some of these couples had informal equal parenting plans that were only now being threatened.

²¹² *Marriage of Lamusga*, 88 P.3d 81 (Cal. 2006).

²¹³ See, e.g., *H.A. v. A.A.*, No. 03A01-1308-DR-354 (Feb. 5, 2014 Ind. Ct. App.) (mother's wish to move to Hawaii with new husband, though in good faith, was not in best interests of child).

²¹⁴ The median amount of parenting time enjoyed by the divorcing parent with the smaller share is 99 days in Pima County and 106 days in Maricopa. The fact that the mean is so much higher in Maricopa (111 days) is driven by the large number of equal custody cases in that jurisdiction. (It is also 99 days in Pima County, for the equal custody cases are balanced by a number of cases in which one parent did not receive any time at all for various reasons).

Generally, it may be worth discussing whether such a value should be imposed when not constitutionally required (as in *Loving v. Virginia*²¹⁵ or *Brown v. Board of Education*²¹⁶), where groups were grouped based upon race. Maximizing time with both separating parents equally does not seem to present courts with a similar constitutional question, and the child’s interests may outweigh the parents’. In Iowa, where the legislature (over the objection of the judiciary and family law Bar), enacted presumptive shared parenting time, the Supreme Court in *Hansen v. Hansen* (2007)²¹⁷ declared that the child’s best interests still must be considered in every case, so that basing a decision on a single factor only is not appropriate.

Shared parenting time has been felt to be appropriate for children in many states for some thirty years so long as it is requested by both fit parents.²¹⁸ One critique of mediation brought by feminists was that mediators were punishing parents who did not conform to their preferred method (shared parenting) by awarding, or threatening to award, primary custody to the other parent.²¹⁹ With the 2008 sample, we can examine how frequently shared parenting would have been selected anyway by considering whether it is more or less frequent when mediation is used to settle the case.²²⁰ Another possibility is to see whether the frequency

²¹⁵ 388 U.S. 1 (1967).

²¹⁶ 347 U.S. 483 (1954).

²¹⁷ 733 N.W.2d 683 (Iowa 2007).

²¹⁸ See, for example, 19A ME. CODE §1653(2); TEX. CIV. CODE § 153.001; FLA. STAT. ANN. § 61.13 (c) (2010). Some statutes explicitly require that it be logistically possible given the parents’ incomes, ability to cooperate, and locations.

²¹⁹ Grillo, supra note 62.

²²⁰ Compared to an overall median of 109 days for the spouse who was not the primary custodial parent, the mediated cases had a median of 143 days, which is a statistically significant difference. The means were also statistically significantly different at $p < .01$ (107 versus 130 days). If the mediated result turns out to work less well than the non-mediated, there may be a problem with the automatic referrals whenever parties do not agree. And it does. The 62 mediated divorce cases were significantly (at $p < .001$) more likely to have more post-decree appearances (2.4 for non-mediated compared to 5.84 mediated), post-decree motions for more (.09/.306) or less (.063/.226) custody, decreases (.157/.323) or increases (.067/.242) in child support, and enforcement of child support (.11/.258) or visitation (.033/.097) than the 300 not referred to mediation. These rather large differences of at least 200% suggest as well that the temporary gains for the court system may be offset by the later problems in the contested custody cases that are automatically referred. Of course they are not causative—mediation does not necessarily create the problems (though the larger number of days of parenting time may). While the number of days of parenting time increased with mediation, the tendency for equal custody did not (Pearson’s $R = .311$; Spearman correlation = .475). In contrast, the contested divorces (DDIs) for Maricopa did not have many significant consequences in post-decree litigation. While the number of appearances was higher (.20 compared to .121 for default or consent decrees), this was apparently only due to the slightly higher incidences of motions to reduce (.292 compared to .169 and enforce (.229 compared to .12) child support, not custody or visitation changes.

Days of parenting time with or without mediator involvement: Maricopa completed divorces with children

Mediator involved	Mean	N	Std. Deviation
.0	106.653	229	55.4786

is affected when either parent brought up domestic violence (at least alleging that it had occurred during the marriage) either as part of the original pleading or at any rate before divorce. Surprisingly, the mean number of parenting days was almost exactly the same.²²¹ Finally, there were some cases where both spouses asked for sole custody in their original complaint and answer.²²²

Relatedly, there is the important goal of minimizing the child’s exposure to conflict.²²³ From the Maricopa court files dataset we cannot directly measure the impact of conflict upon children any more than we can look at the positive effects of shared parenting.²²⁴ Nor can we directly measure conflict’s impact on the parents.²²⁵ There are some indirect measures of conflict. One is a consideration of post-decree domestic violence petitions. These are less likely to be strategic since domestic violence statutorily militates against shared parenting only at the time of the original order, and will not by itself justify a change in the parenting time schedule (though there may be a change to a neutral or supervised place for the exchange)²²⁶. In a simple binomial regression, (meaning that the dependent variable, whether there was one or more post-decree petitions for protective orders, can be answered yes or no) predicting .06 of the variance, shows that the more equal the parenting time (by the number of days of adjustment in child support), the more likely

1.0	129.830	53	48.6786
Total	111.009	282	54.9375

²²¹ This either suggests that parties are not filing for protective orders strategically or that courts are for the most part ignoring allegation of domestic violence. The mean number of parenting days in completed divorces involving protective orders or allegations of violence in complaint or answer was 110 days. For those without, the mean number was 111.18. Domestic violence be discussed further under the heading of minimization of conflict.

²²² There were not many of these (9). In one, the court awarded split custody. In another, the father was eventually going to be completely disabled by his Lou Gehrig’s disease. In a third, the court awarded equal joint custody and the parties divorced by consent decree (prepared by father). No child support was ordered because of the equal custody. The mother ended up with the marital home, paying \$45K to father to equalize. The parties were so low income that any award of child support would have exceeded their ability to pay; both had been living in the marital home and neither wanted to move.

²²³ See, e.g., Pruett & DiFonzo, *supra* note 11, at 164:

The think tank experts agreed that, when either or both parents have been violent through physical, verbal, or psychological abuse of the other parent, a comprehensive assessment is necessary before a shared parenting plan is considered. A substantive body of research makes clear how destructive such violence can be to parents’ ability to raise their children with the requisite sensitivity and structure that promotes victim and child safety and well-being. In addition to diminishing parenting capacity, family violence negatively affects children’s well-being directly. When children are directly involved in the conflict or are the subjects of it, the probabilities for their healthy development are far worse.

²²⁴ As previously mentioned, conflict and especially children’s exposure to it is agreed by academics to have negative consequences for children. See, e.g., Elrod & Dale, *supra* note 24; Elster, *supra* note 2, and sources cited in notes 87 and 90, *supra*. There were occasions where judges or child welfare professionals wrote that the child was having problems largely because of the parents’ continued litigation or bitterness, but nothing systematic.

²²⁵ There was anecdotal information in the files about parents’ cashing out retirement funds to meet legal obligations or seeking professional help to deal with the continued stress of the divorce.

²²⁶ This is an unusual feature of Arizona law.

there was to be a protective order request, holding constant median household income in the census tract²²⁷ and whether or not the parties were represented. The exponents signify that each additional day of parenting time beyond 109 (the mean) was associated with an additional 1% likelihood of a post-decree protective order. This is a troubling finding.²²⁸ Note that it is the unrepresented (pro per) couples who are considerably likely to file for these orders, perhaps because they cannot afford representation in seeking a modification of parenting time.²²⁹

Variable	B	S.E.	Sig.	Exp(B)
Days of parenting to time	.011	.005	.016	1.011
Median household income	.000	.000	.022	1.000
Pro per (no attorney)	.802	.474	.090	2.229
Constant	-5.566	.970	.000	.004

Another indirect way of detecting conflicted couples is to see whether motions for temporary custody or changes in custody and/or child support were contested. This can be done by noting the number of court documents entitled RES (for response) and seeing if the number of parenting time days is different for the two groups (or vice-versa). While the difference here is not statistically significant,²³⁰ motion-contested cases before the decree are associated with more orders (of almost all types) after the decree.²³¹ While contesting various actions²³² does not mean that the parties are physically violent, it does show a

²²⁷ Neither the gross income of the mother nor the father was statistically significant.

²²⁸ It might indicate that the screens for violence at initial hearings were not accurate and/or that additional opportunities given by the frequent exchanges of the child created more opportunities for conflict. In one case in which the former apparently occurred, the trial court awarded equal custody because the father in question hadn't abused the parties' child, but only the mother's older child.

²²⁹ Most jurisdictions have consciously made filing for protective orders relatively simple and low cost.

²³⁰ Fewer days were awarded in the conflicted cases (111 to 104, but this isn't statistically significant). Only 5/44 contested cases (11.4%) had equal custody at the time of decree, compared to 56/295 (19%) of the less contested. This is actually an encouraging sign that the courts aren't awarding equal custody often in the cases where it is least likely to be successful.

²³¹ There were statistically significantly more post decree motions (.132 of the cases compared to .136 of them), motions for decreases (.157 to .386) and increases (.075 to .250) in child support, motions to reduce parenting time (.072 to .227) to enforce child support (.110 to .318) or visitation (.035 to .114), and post-decree protective orders (.069 to .205).

²³² I do not include an answer to the original divorce decree. Some of these corrected things like children's birthdays or the dates of the marriage, asked for a reversion to a pre-marriage surname, or specified particular assets that had been left out of the complaint. An answer also makes a default decree possible if the parties have worked out a parenting plan and property settlement, as many couples had, or dissolution by consent if that was sought. It also gives jurisdiction for support and custody actions when one spouse was out of state.

willingness to spend money and time, including the court's, in an attempt to thwart what the other is doing or seeking. While motions for reductions in parenting time were significantly correlated with the number of days ordered, the significance disappears once the mother's gross income is included.²³³

A rather obvious check is on the number of court actions post decree. This is not significantly correlated with parenting time,²³⁴ nor is the assignment of a parenting coordinator, which happens in the most contested cases.²³⁵ The cases in which one parent at least allegedly had drug, alcohol or mental illness problems were some of the most litigated in the sample. One reason for this is that in the substance abuse cases, frequent negative drug testing (TASC, using hair) was often a requirement to avoid or be freed from supervised visitation.²³⁶ Another is that drug violations are typically criminal, and all serious deficiencies on the part of the parent may be enough not only to reduce or suspend custody but also to involve the child protective system.²³⁷ Finally, in the substance abuse cases anyway, not being entirely truthful is part of the symptomatology.²³⁸

Contested Custody Cases

The small proportion of divorcing couples who end up in court could be quarreling about many things. While custody may be a factor, so may be ownership of a house or business or pension plan (or even, in some cases, the family dogs). However, of the 49 Maricopa cases where the divorce was granted after a hearing, 47 involved custody issues that could not be resolved by the parents even at the 11th hour.²³⁹ In 33 of these cases, the

²³³ Cox & Snell R2= .041. Court actions post/decre

	B	S.E.	Sig.	Exp(B)
daysparentingtime	.005	.004	.155	1.005
PWCgrossincomemother	.000	.000	.018	1.000
Constant	-3.320	.550	.000	.036

²³⁴ It is, however, correlated significantly with higher total amounts of support ordered.

²³⁵ There is no statistical correlation between having equal custody and the assignment of a coordinator, either. What is correlated significantly are the traditional "fault" grounds for divorce: adultery, substance abuse, and pre-decree protective order claims of domestic violence.

²³⁶ In Maricopa, 18 cases required TASC testing. In Pima County, only 5 cases required TASC testing.

²³⁷ Twelve of the Maricopa County cases involved CPS investigations; of these a third involved drug or alcohol abuse.

²³⁸ Dorothy Roberts, in *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001) has made the point that the child welfare system tends to be more involved with families of color than otherwise, and that the presence of social workers in the community itself may exacerbate social problems. See also Dorothy H. Roberts, *Child Welfare's Paradox*, 49 WILLIAM & MARY L. REV. 881-901 (2007).

²³⁹ More than a quarter (26.9%, or 94 of 404) of the Pima County divorce cases were contested, and nearly half of these (43) involved competing claims for custody from the start. Contested actions were statistically significantly likely to be referred to a mediator (.380, $p < .001$) and were even more closely associated with requiring a child custody evaluator or an interview with the child (.402, $p < .001$). After

responding parent had filed an answer (spending \$269 to do so). And in 32 of those 33, the responding parent asked for a different custody arrangement than had the parent who filed for dissolution. At the extreme, each parent asked for sole custody in him- or herself, with no visitation (or restricted visitation) to be granted to the other parent. Sometimes one wanted sole custody while the other sought joint legal custody and reasonable visitation. Sometimes they disagreed from the start of the divorce action²⁴⁰ over which of them should be the primary custodian. In most cases, court procedures or the judge personally forced the parents into mediation or conciliation to try to get them to settle the custody action. They also attended mandatory parenting classes and sometimes classes for high conflict couples. But they could not agree to work as a team even though they had been told that conflict was hard on their children. Because they staked out their positions early, it does not seem that the process or their attorneys encouraged their views (and most parents, in fact, were not represented).

Eventually, one or the other parent usually won, meaning that what they'd asked for in the complaint was granted by the trial court. Sometimes the decision-making court needed the help of custody evaluators, who might even interview the child to ascertain the child's feelings. Frequently the court took the custody decision "under advisement," meaning that the parents did not know the outcome until sometime (hours or days) later. In the vast majority of cases, after fighting these fierce battles, the parents were supposed to get over their hostility and co-parent.²⁴¹ In many they would need to exchange the children frequently (sometimes at the police station). In four, the court granted them equal custody even though neither had asked for it. In several cases, the children ended up being abused by a parent during custodial time or by his or her partner. In more than a few, domestic violence continued after the divorce.

While some of these cases disappeared from the legal landscape after the terms were declared, many continued to litigate, some until April of 2014. They continued conflict over child support, enforcement of the parenting schedules (including tardiness or refusal to open the door), and a number had post-decree domestic violence incidents. Sometimes the litigation involved payment for counseling of the children. In one case the court moaned that the children would do better in school if they weren't subjected to the continual stress of

dissolution, they continued to display conflict, with significantly more motions to increase custody (.258, $p < .001$) or decrease it (.292, $p < .001$) or child support (.169, $p < .001$), or, notably, post-decree complaints of domestic violence (.323, $p < .001$). There was no significant correlation with the incomes of either mother or father, nor with the number of parenting time days (96.6 days for contested cases, 100 for uncontested), and only slightly with either parent's being represented (-.105, $p < .10$). About 20% of the contesting parents had equal custody in the dissolution decrees compared to 24% of the less contentious cases. These were more likely to have had court ordered equal custody (.294 did, compared to .139 in the remainder of the cases, $p < .10$), and far more likely to have motions for less custody on the other parent's part (.353 compared to .087, $p < .001$).

²⁴⁰ On occasion, the parties were still living together at the time of filing.

²⁴¹ Of the 39 contested custody Pima cases, only 25% had less than 60 days of parenting time, and 50% had more than 180 days.

parental bickering. A child coordinator wrote in one report that the “parties are observed in communication dynamic of distrust, hostility and accusation.”

One of the assumptions of those arguing for shared parenting is that the cases involving domestic violence can be screened out early in the process. In Arizona, while the judges were successful in doing this a number of times, in some they were not. More than half the contested cases (25/47) involved at least alleged domestic violence (and some had two or more protective orders upheld after hearings). In one, where a mother gave up her claim for sole parenting on the day of trial, the judge asked the father to leave the courtroom, went through the questions again, and decreed that she had voluntarily decided to share custody. Substantial domestic violence operates as a factor in Arizona only against shared decision making (legal custody), not shared parenting time.²⁴²

Clearly, public policy in Arizona and many other states disfavors false accusations of domestic violence or abuse.²⁴³ It is important, therefore, not to give incentives to claim abuse in order to get custody (or property or revenge). But indications of drug or alcohol abuse or mental illness and particularly pre-decree domestic violence together predict many of the cases of post-decree domestic violence.²⁴⁴ These cases seem to call for early intervention, better screening, and some solution other than substantially equal parenting. Pooling toward equal custody poses problems for these parents and especially for their children.

IV. Some Early Conclusions

Contrary to some of the academic literature, the Maricopa cases reveal little evidence of either complaints of domestic violence in order to escape shared parenting or of allegations that a primary custodial parent was alienating the child.²⁴⁵ But the incidence of domestic

²⁴² If the parent who committed an act of domestic violence is seeking parenting time, that parent has to prove to the judge that parenting time will not endanger the child or significantly harm the child's emotional development. The judge may place conditions on parenting time that best protects the child and the other parent from further harm. Ariz. Rev. Stat. § 25-403.03(F). In the cases I examined, children were sometimes exchanged at police stations, for example.

²⁴³ See, e.g., ARIZ. STAT. § 25-403 (11) (making false reporting a factor against the award of legal decision-making or parenting time); and Ariz. Stat. § 13-2907.02 (making false reporting of child abuse a misdemeanor). Other states have similar rules. See, e.g., in New York, *Karen PP v. Clyde QQ*, 197 A.D.2d 753 (3rd Dept. 1993) (award of custody to the parent falsely accused); N.Y. PENAL LAW § 240.50(4); Cal. Fam. Code § 3022.5 (a motion for reconsideration of existing child custody order will be granted if based on the fact that the other parent was convicted of falsely accusing the moving parent of child abuse); 325 ILL. CONS. STAT. § 5/4 (knowingly filing a false report is a misdemeanor).

²⁴⁴ In simple correlations, domestic violence and resolution by a court rather than default or consent is significant at $p < .01$ (coefficient is .351) and substance abuse or mental illness significant at $p < .01$ (coefficient is .227). A logistic regression with just these two predictors produces a Cox and Snell R^2 of .102, with each significant at $p < .05$, domestic violence at $p < .001$. A case is more than six times more likely (exponent is 6.61) to end up with a DDI decree if domestic violence is alleged early on and more than twice as likely (exponent is 2.32) if there's substance abuse or mental illness. In Pima, the logistic regression predicted .066, while pre-decree domestic violence made it 7.455 times more likely that post-decree violence would be an issue (while substance/abuse/mental illness was not statistically significant).

²⁴⁵ The Maricopa cases contained four cases in which the noncustodial parent claimed some form of alienation: three of these claims were made by fathers. Pima had only one. In each county, there were a few POP orders that were not substantiated after hearings (with complaints made equally often by both men and

violence correlating with increased parenting time certainly warrants further examination, and gives one pause. It would be far less concerning if we could identify these troubling cases in advance, but courts are not apparently consistently doing so.²⁴⁶ In states with statutes promoting separating equilibria, perhaps by making findings of domestic violence indications against shared parenting, these mistakes of pooling would be avoided.

The fact that shared parenting has become the norm neither for most of the separated unmarried parents (at least not from the legal records left behind) nor for the less wealthy parents in our sample is also troubling. If shared parenting truly benefits children, that benefit should not be reserved for the wealthy, made difficult for the middle class (either logistically or because of the decreased child support owed), and certainly should not be impossible for the poor. Nor should a differential impact upon Hispanics in the sample be ignored.²⁴⁷ This difference (in parenting days) persists even when income is included in simple regression analysis, and is nearly as strong as the income effect.²⁴⁸

I began this inquiry wondering whether it was true that fathers asked for more custody than they actually wanted in order to reduce or eliminate child support payments. I did not find evidence of systematic opportunism (as I might have if there had been many motions to change custody back to a primary system after a lapse of time), but there were a handful of

women), and some cases in which the court found that domestic violence had occurred, but that it was not serious, or, in one case, was only directed to the other parent and not the child, or in another, was only directed against the father's stepdaughter. The horrors foretold by both political sides do not seem to have materialized. There was precisely one case involving enforcement of a parenting time decree in Maricopa, and 11 in Pima.

²⁴⁶ Margaret F. Brinig, Leslie Drozl & Loretta Frederick, *Perspectives on Joint Custody Parenting as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 272 (2014).

²⁴⁷ In the Maricopa divorce sample, 14% had equal custody compared to nearly 20% for the non-Hispanic sample. Even for the non-equal parenting plans, the Hispanic numbers were far (and statistically significantly) lower: 95.53 days compared to 115.28 for non-Hispanics.

²⁴⁸ The R² predicts .044 of the variance.

Coefficients^a

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	106.492	5.168		20.606	.000
	Either has Hispanic surname	-18.509	6.955	-.155	-2.661	.008
	Mother's gross income	.003	.001	.158	2.714	.007

a. Dependent Variable: days of parenting time

cases of this. I would like to track what particular judges are doing in the two counties to see if, despite the statute, there is variability in the tendency to award shared parenting. I also plan to use the current sample to question whether parents who will not pay child support when able can be identified in advance. I am also beginning to look at cases from Indiana, which had a different scheme for reducing child support based on parenting time. In Indiana there might be still less evidence of “trading” going on than the small amount found in Maricopa²⁴⁹ or potentially less of a disparity among wealthier and poorer parents. Obviously it would be good to have either interviews with children or run a series of psycho-social tests on them, both to find out if they do truly benefit from additional days of parenting time. While a successful legislative attempt to create still more shared parenting has been made by legislators in Arizona, it would be interesting to see whether a strong shared parenting presumption had more or less traction in a state without a track record of shared parenting.²⁵⁰

The law in place at the time of my study was typical of many states “friendly” to joint parenting.²⁵¹ The state moved in 2010²⁵² and again in 2012²⁵³ progressively toward equal parenting for all separating couples.²⁵⁴ The child support rules, again typical ones,

²⁴⁹ I found 10 cases in which it may have occurred in Maricopa (numbers 72, 93, 143, 161, 188, 327, 360, 480, 484 and 595).

²⁵⁰ ARK. CODE § 9-13-101, enacted in 2013, has very strong language mandating maximizing the time spent with each parent if requested by either or ordered by the judge. However, Arkansas is a state that until recently had a presumption against shared parenting, and it is unclear whether the statute will have much, if any, effect. Attorneys (19) answering a survey there were all aware of the new law, but nearly 60% thought that it would make a very small or small effect in practice, and all but one thought that there was less than a 40% chance that a father would be awarded equal custody before passage of the new law when the mother asked for sole custody. Afterwards, 8 thought there would be at least a 50% chance.

²⁵¹ ARIZ. REV. STAT. § 25-403.01. Sole and joint custody

A. In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another. The court in determining custody shall not prefer a parent as custodian because of that parent's sex.

B. The court may issue an order for joint custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests. In determining whether joint custody is in the child's best interests, the court shall consider the factors prescribed in section 25-403, subsection A and all of the following:

1. The agreement or lack of an agreement by the parents regarding joint custody.
2. Whether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child.
3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody.
4. Whether the joint custody arrangement is logistically possible.

C. The court may issue an order for joint custody of a child if both parents agree and submit a written parenting plan and the court finds such an order is in the best interests of the child. The court may order joint legal custody without ordering joint physical custody.

CHILD CUSTODY, 2005 Ariz. Legis. Serv. Ch. 45 (S.B. 1045) (WEST).

²⁵² Laws 2010, Ch. 186, § 2.

²⁵³ Laws 2012, Ch. 309, § 8, eff. Jan. 1, 2013

²⁵⁴ ARIZ. REV. STAT. § 25-403.02 now includes in part:

B. Consistent with the child's best interests in § 25-403 and §§ 25-403.03, 25-403.04 and 25-403.05, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding

automatically deduct from the amount a parent must otherwise pay for a scheduled parenting time adjustment.²⁵⁵ If the parents are equal custodians, the total amounts attributable to shared expenses at their joint income levels is equalized between the two households.²⁵⁶ This means that for a high earning father and lower earning mother, the amount paid will be only a fraction of what he would ordinarily pay, and when the incomes are roughly equal, the ordered payment will often be zero. The difference is not made up by alimony (spousal support), which is typically less in amount than the difference in child support, and which usually ends after two or three years.²⁵⁷ In some cases, the mothers sharing parenting time ended up on public assistance though the fathers were living quite comfortably.²⁵⁸

To answer the questions posed at the beginning of the paper, and by its title, I do find that the pooling encouraged by the Arizona statute contains many risks. I first summarize the systemic risk that pooling may encourage. By this, I do not mean that the divorce regime itself will collapse under the weight of cases (though the fact that the litigation exceeds national averages does not bode well for the increased settlement most presumptions encourage). Those more systemic risks the data support include a tolerance for inter-partner violence, a possible exacerbation of wealth/income gaps (to the extent that children of wealthy married parents benefit from increased contact with both parents while children of poor unmarried parents do not) and a devaluation of pluralism (to the extent that non-Hispanic parents but not Hispanic parents take advantage of shared parenting).

Second, the decisions for individual families would seem to be better without herding behavior in particular kinds of cases, those in which parents are heavily conflicted (that is, where they do not agree on shared custody from early in the process or where domestic violence is a factor). We do not yet have good evidence on benefits (or detriments) to children from court-mandated shared parenting, nor of how well it functions for very small

their child and that maximizes their respective parenting time. The court shall not prefer a parent's proposed plan because of the parent's or child's gender.

²⁵⁵ The current Guidelines, adopted by the Arizona Supreme Court and effective Jan. 1, 2011, are available at <https://www.azcourts.gov/Portals/31/GuideSched10072011.pdf>. The appropriate tables remain at Appendices A and B.

²⁵⁶ The example provided in the Guidelines, supra note 223, at 13-14 is
EXAMPLE: After making all applicable adjustments under Sections 9 and 13, the remaining child support obligation is \$1500. The parents' proportionate shares of the obligation are \$1000 and \$500. To equalize the child support available in both households, deduct the lower amount from the higher amount (\$1000 - \$500 = \$500), then divide the balance in half ($\$500 \div 2 = \250). The resulting amount, \$250, is paid to the parent with the lower obligation.

²⁵⁷ While this may have been a national trend for some years, New Jersey seems to be moving in the direction of eliminating permanent alimony. The bill passed July 26, 2014, and has been sent to the governor for his signature. See <http://www.njlawjournal.com/id=1202661000396/NJ-Assembly-Committee-Approves-Major-Overhaul-of-Alimony-System#ixzz35mnhrura>. The Bill numbers are A845, A971 and A1649, as amended.

²⁵⁸ Some examples are Pima 25, 277, 319 and 350, and Maricopa 210, in all of which more than 30% was deducted from the amount fathers were otherwise to pay, and the mothers went on public assistance. The fathers' incomes varied from \$2340 a month to \$3797, and they paid from a low of \$146.39 to a high of \$382 in child support.

children or infants. This is work that needs to be done before “maximization of time with both parents” becomes a norm for court-ordered custody.

What is the ideal presumption? For about fifteen years I have admired what the ALI has done in favoring parental choices of parenting plans and in replicating pre-separation agreements where they cannot agree. No presumption is perfect, and I realize that a group of cases will remain in which courts must make serious efforts to protect children (and sometimes their parents) at risk. I also realize that while this paper is a start, Arizona is not a perfect state to consider because of the idiosyncrasies of its treatment of domestic violence (which, to repeat, only affects legal decision-making in the state instead of parenting time) and its child support guidelines (which first equate the amount spent in two households where children are residing to one, and then reduces the amount by fixed amounts unrelated to the difference between fixed and variable costs incurred by the parents).

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Marriage for Immigration in the Republic of Korea

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I. Introduction

In Korea the incidence of cross-border marriages has been sharply increasing for the last 15 years. Until the early 1990s the percentage of cross-border marriages remained relatively stable at about 1.2%. Then around 1995, this number started to increase rapidly. It peaked at 13% in 2005 and was still at 8.6% in 2012.¹ This upswing has absolutely been driven by the increase in the number of marriages between Korean males and foreign females—especially from the PRC and Vietnam. While only 13.2% of Korea's cross-border marriages were between Korean males and foreign females in 1991, this percentage increased to 77.8% in 2008 and remained relatively steady in 2012 at 72.9%. Most foreign-born spouses were Vietnamese, Chinese, or ethnic Korean-Chinese, the ratios of which in 2012, for example, were 26.5%, 23.7%, and 18.8%, respectively.²

This increase is said to have started in the early 1990s when the Korean and PRC governments cooperated to promote cross-border marriages between Korean men in rural areas and ethnic Korean-Chinese women in the Yanbian Korean Autonomous Prefecture,³ marking the establishment of diplomatic relations between the two governments. In addition, in 1999 the Korean government lifted regulations on the marriage brokerage industry,⁴ which is believed to have significantly contributed to the increase. In addition to those external factors, there are internal factors that influenced the increase in cross-border marriages. First, it became more difficult for Korean men in rural areas to find Korean women willing to marry them, which was a negative by-product of the rapid, unbalanced growth of this country. These men had little choice but to set their sights on foreign women. As a result of the growth of the marriage brokerage industry, some Korean men were paid a considerable money to marry foreign women—about 5 million KRW. The foreign spouses often paid significant fees—between 8 and 12 million KRW—to these marriage brokers because they wanted to live in Korea, to have occupations in Korea, and to support their family in their homelands. This was a very burdensome amount considering the economic condition of their homelands. They would generally decide to marry after meeting their prospective spouse only for a couple of days. In short, the motives of foreign spouses to marry Korean men has been economic, to get permission to live in or immigrate to Korea, and to get employed to earn money.⁵

This kind of marriage, which serves as a tool for immigration (*marriage for immigration*), has been observed in many countries throughout the 20th century, and Korea is not an

¹ MINISTRY OF HEALTH AND WELFARE, *Statistical Yearbook 2013* (Seoul: 2013), 27.

² MINISTRY OF HEALTH AND WELFARE (Fn 1), 27-28.

³ Most are descendants of Koreans who had been deported by the Japanese or had exited Korea during the Period of Japanese Occupation from 1910 to 1945. They use Korean language as well as or more than Mandarin Chinese.

⁴ The Korean Family Rite Act, article 5 of which prohibited the unregistered marriage brokerage business, was abolished in 1999.

⁵ HYUN, "The Theory and the Practice of International Marriage," 35 *Journal of Private Case Law Studies* 1175, 1179-1187 (2013) (in Korean). It is not different in other countries. See, LYNSKEY, "Immigration Marriage Fraud Amendment of 1986: Till Congress Do Part Us," 41 *University of Miami Law Review* 1088 (1987) (for the U.S.); EUROPEAN COMMISSION, *Misuse of the Right to Family Reunification. Marriage for Convenience and False Declaration of Parenthood* (Luxemburg: 2012), 24 ff. (for E.U. member states)

exception. Nonetheless, the legal ramifications of marriage for immigration had not been much discussed in Korea until recently. This is because most immigrants were not foreigners who wanted to enter Korea but Korean women who wanted to leave Korea, an area that Korean law and legal practice had little to do with. The scene, however, has changed. Along with the economic growth of Korea and the globalization of both Korea and emigrating countries, more and more foreigners are attempting to immigrate to Korea. At the same time, the topic of marriage for immigration is becoming increasingly prominent in legal practice as well as in legal theory.

Korean regulations on marriage for immigration mainly leave the process in the hands of public prosecutors. In such cases, the legal issue is not whether the foreign spouse should be permitted to immigrate to Korea but whether she honestly intended to engage in a marital relationship at the time of the marriage. This paper argues that the current approach is strange and needs to be changed. Before describing the problems associated with this present system, however, we provide an overview of it as well as an analysis of how it came to be.

II. Marriage for Immigration in the Context of Immigration Law, Family Law, and Criminal Law in Korea

1. Independent Developments of Related Doctrines in Immigration Law, Family Law, and Criminal Law

(1) Privilege or Benefit granted to Foreign-Born Spouses in Korean Immigration Law

Similar to the immigration laws in many other countries, Korean immigration law grants certain privileges or benefits to a spouse of a Korean. Though these privileges have been granted since the passage of the Korean Nationality Act of 1948, the first act of its kind in Korea, the nature of the privileges have changed over time.

Under the Korean Nationality Act of 1948, as soon as the marriage was granted, the foreign wife of a Korean husband obtained Korean nationality *ipso iure* (i.e., without any application for naturalization or naturalization process [category 1 of article 3 of the Korean Nationality Act of 1948]). It is worth noting that the opposite case is not regulated in the same way: if a Korean woman marries a foreign husband and in so doing acquires nationality in his native country, she loses her Korean nationality (category 1 of article 12 of the Korean Nationality Act of 1948). Thus, it was not required that a foreigner lose her nationality in her native country in order to acquire Korean nationality; however, if foreign nationality was acquired, Korean nationality was likewise revoked. This asymmetry triggered debate at the scheduled session of the Legislation and Judiciary Committee of the Korean National Assembly. Baek, the head of the committee, made the following remarks regarding those two provisions at the session: “The East Asian tradition has seen the family as the most important, whose master or head is the husband; so, wife has a good reason to acquire the nationality of her husband when she is a foreigner; even though the foreign wife comes to have dual nationality as a result, it ought to be tolerated.”⁶ These comments show that the asymmetric regulation was

⁶ MYOUNG, LEE, and KIM, *Nationality and Law: The Origin and the Future* (Seoul: 2009), 59-60 (in Korean).

an inevitable compromise of the *principle of identical nationality of married couple*, which had not been expressively addressed, possibly because it had been taken for granted, along with two other principles of Korean nationality law—the *principles of avoiding dual nationality* as well as the *principle of avoiding statelessness*.⁷ These provisions included a sort of a legislative ordering of these principles: when all three requirements could not be met simultaneously, the most important was to prevent statelessness. Although guaranty of identical nationality was second to this goal, it, however, still had priority over the prevention of dual nationality. Because the Korean Nationality Act of 1948 had already guaranteed Korean nationality for the foreign wife of a Korean husband, the Korean Immigration Control Law, which was enacted first in 1963 and has been one of two constituents of Korean immigration law, indicated that no further privilege or benefit was granted to a foreigner married to a Korean.

The Korean Nationality Act was significantly revised in 1997, and the updated version came into effect in 1998. As soon as the Seoul High Court made a request for a constitutional review of the principle of *paternal-side-limited ius sanguinis principle* on August 20, 1997, the Ministry of Justice of Korea hurried to finish drafting an amendment of the Korean Nationality Act and submitted it to the Korean National Assembly. The Korean National Assembly discussed and passed the bill, with only slight modification, in just a couple of months.⁸ This revision was mainly intended to substitute paternal-side-limited *ius sanguinis* with *unlimited ius sanguinis*, whereby either parent—the father or mother—could pass nationality to their child. As a result, a new mechanism was implemented that made it possible to retain nationality in a certain country and not in others to avoid dual nationality.⁹

To promote gender equality, the revised Korean Nationality Act of 1998 abolished the *ipso iure* acquisition of Korean nationality by foreign wives. Granting Korean nationality to both the foreign wife of a Korean man and the foreign husband of a Korean woman seems not to have been regarded as a realistic alternative by Korean legislators; the alternative was to grant a foreign spouse of a Korean the option to obtain nationality in Korea or retain nationality in their native country. If he or she chose not to obtain Korean nationality, the nationality of one spouse would differ from that of the other. To this extent, the principle of

⁷ The Minister of Justice Lee summarized three principles of the draft of the Korean Nationality Law of 1948 as follows: (1) the principle of *paternal side limited ius sanguinis* to preserve the ethnic homogeneity of Korean, (2) the principle of *avoiding dual nationality*, and (3) the principle of complementary *ius soli* to avoid statelessness. MYOUNG, LEE, and KIM (Fn 6), 55-56.

⁸ As a result, the revised Korean Nationality Act came into effect before the Constitutional Court of Korea decided on the constitutionality of the Korean Nationality Act prior to the revision. Nonetheless, the Constitutional Court of Korea declared that some provisions of the Korean Nationality Act prior to the 1998 revision were unconstitutional because they were opposed to the principle of equality of man and woman before law promulgated in article 3 of the Constitution of the Republic of Korea, and the principle of equal treatment of man and woman in family life promulgated in article 36 of the Constitution of the Republic of Korea. See Korean Constitutional Court's decision rendered on August 31, 2000 (97Hunga12). The UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 provided another driving force. The Korean National Assembly ratified the convention with reservation of article 9 thereof, because this provision contradicted the Korean Nationality Act directly. MYOUNG, LEE, and KIM (Fn 6), 67-69. For more detailed information of this revision, see also SUK, *Law of Nationality* (Seoul: 2011), 65-70 (in Korean).

⁹ See category 1 of article 2 and articles 12, 13 of the Korean Nationality Act.

identical nationality of married couples was loosened. Nonetheless, this principle still influenced the new legislation in two ways: first, the revised Korean Nationality Act of 1998 made the naturalization process for a foreign spouse of a Korean much easier (*simple naturalization*, subparagraph 2 of article 6 of the Korean Nationality Act of 1998). He or she could obtain permission for naturalization through being married to the Korean spouse and having domicile in Korea for only two and a half years, or by being married to the Korean spouse for three years and having domicile in Korea for one year. He or she is not required to sustain his or her domicile in Korea for five years, which is a requirement for general naturalization under article 5 of the Korean Nationality Act of 1998. These requirements have changed several times since 1998. The domicile-sustaining period for the first alternative has been reduced to two years. In addition, a provision was added to protect the nationalities of those who are unable to continue the marriage due to the death or disappearance of their Korean spouse or other causes out of their control; nonetheless, the basic framework remains unchanged. All other requirements for general naturalization need to be met, and the Minister of Justice maintains a discretionary power to reject permission for simple naturalization even if all aforementioned requirements are met.¹⁰ In practice, however, these requirements seem to matter rarely.¹¹

Secondly, in order to compensate for the tightening of requirements to acquire Korean nationality, a privileged or beneficial status of sojourn for the foreign spouse of a Korean who had not yet acquired Korean nationality but had domicile in Korea was introduced. Category 16 of article 9 of the Executive Decree of the Korean Immigration Control Law, revised in 1984, enacted a new form of visa for the spouse of a resident in Korea, the current equivalents of which are article 10 of the Korean Immigration Control Law and article 12 combined with schedule 1 of the Executive Decree thereof. Under these provisions, the foreign spouse of one who has a visa for permanent residency (F-5) in Korea is granted an F-4 visa, and the foreign spouse of one who has Korean nationality is granted an F-6 visa, both of which last for three years and can be renewed. In addition, one who is approved by the Minister of Justice to have been unable to continue marriage due to the death or disappearance of his or her Korean spouse or other causes out of his or her control¹² also can obtain and retain an F-6 visa. This benefit can be explained by the *principle (or right) of family unification*,¹³ the higher rank principle that justifies the principle of identical nationality of married couples in nationality law.

The principles or interests considered seem to be the same: prevention of dual nationality as well as statelessness and promotion of family unification (sometimes by guaranteeing

¹⁰ See the Korean Supreme Court's decision rendered on July 15, 2010 (2009Du19069). Also see the Korean Supreme Court's decisions rendered on May 12, 2010 (2010Du8348) and October 28, 2010 (2010Du1675).

¹¹ SUK (Fn 8), 125-126, 145, 151 (in Korean).

¹² Note the parallel between subparagraph 2 of article 6 of the Korean Nationality Act and schedule 1 of the Executive Decree of the Korean Immigration Control Law.

¹³ PARK and LEE, *The Study for Reforming the Immigration Control Act and the Nationality Act: focusing on foreign laborers, immigrant women and children* (Seoul, 2012), 81-83 (in Korean); KIM, "A Few Issues of Human Rights on the Deportation of Illegal stay alien workers," 17(3) *Chosun law journal* 23, 27 ff. (2010) (in Korean).

identical nationality of the married couple and sometimes by granting status of sojourn). The way to negotiate between these sometimes conflicting interests, however, has changed. Although the foreign spouse of a Korean still receives benefits, the benefits are not as extensive as previously offered. He or she has to wait for years and to meet further requirements.¹⁴ The ordering is not simple anymore; it relies on more complex criteria and, sometimes, the evaluation of specific factors relevant to the case. So what was the impetus of this change? The answer to that question lies in how one defines and regulates marriage, which is a matter directly related to family law.

(2) Understanding of Marriage According to Family Law

The Korean Civil Code was enacted in 1958 and effectuated in 1960. At that time, many provisions on marriage and family in the Korean Civil Code revealed its patriarchal character. For example, subparagraph 2 of article 826 of the Korean Civil Code prescribed that a wife should live with her husband in his residence, and subparagraph 1 of article 909 declared that only a father had parental authority. It also presupposed a stereotypical gender role in families: according to article 833 and subparagraph 2 of article 830, the husband should bear all living costs unless he made other arrangement with his wife, and all objects for which ownership was not clear presumably belonged to the husband.¹⁵ These provisions show a specific understanding of marriage: the husband goes out to work and earn money, and the wife takes care of the household, gives birth to babies, and raises them; the husband is the head of the family, and so he has the power to determine the residence of his family and other important matters including the way to raise their child; the wife should respect her husband's decision. In this system, the wife can find herself in serious social and economic trouble if she becomes divorced. A process for division of marital property did not exist in the Korean Civil Code of 1960 because the property of the wife was strictly separated from that of the husband (*separate property system*); this was of minor importance to wife because she had little chance to accumulate her own property. Thus, divorce was not easy. And actually it was not easily allowed. Article 840 of the Korean Civil Code prescribes that either the husband or wife can file for a divorce when the other party has committed an act of infidelity, deserted him or her maliciously, maltreated him or her severely, or there exists any other serious issue making it difficult to continue the marriage (*judicial divorce*).¹⁶ Unlike other causes of divorce, the last one, an issue that makes it difficult to continue the marriage, could have been classified as a *no-fault divorce cause*. No evidence exists to indicate that the

¹⁴ Another change in the way those conflicting interests were balanced relates to the principle of avoiding dual nationality. The revised Korean Nationality Act of 1998 accepts more exceptions to this principle.

¹⁵ LEE, "The Understanding of Marriage, the Personal Obligations therefrom, and the Sanctions against breach of those obligations," 53(3) *Seoul Law Journal* 483, 503-504 (2012) (in Korean).

¹⁶ The Korean Civil Code has two modes of divorce: *divorce by agreement* (article 834 thereof and following articles) and *judicial divorce*. Most divorced couple have a divorce by agreement. This is logical, as divorce by agreement is easier and cheaper than judicial divorce. The negotiation for divorce by agreement itself, however, usually reflects the legal regime for judicial divorce. See MNOOKIN and KORNHAUSER, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950 (1979).

Korean Civil Code adopted a *fault-based divorce system*.¹⁷ The Supreme Court of Korea, however, had interpreted the divorce law of the Korean Civil Code as a kind of fault-based divorce law in two ways: first, it established a rule that a divorce decree would not be granted to the party who was responsible for the breakup of the marriage;¹⁸ second, the notion of a serious issue making it difficult to continue the marriage was interpreted narrowly.

Those abovementioned provisions have been amended step-by-step. Under subparagraph 2 of article 830 of the Korean Civil Code revised in 1977, co-ownership of property is presumed when it is uncertain whom they belong to (the ratio of stakes is 50% to 50%).¹⁹ In addition, under article 833 of the Korean Civil Code revised in 1990, living costs should be shared by husband and wife (the ratio is determined on a case-by-case basis considering all the relevant factors). Under the same amendment, the residence is to be determined by agreement between the husband and wife or, if they cannot arrive at an agreement, by the decision of the Family Court (subparagraph 2 of article 826 of the revised Korean Civil Code of 1990). Furthermore, parental authority is to be exercised jointly by both parents, and, when they do not arrive at an understanding, one of them can call upon the Family Court to decide how to exercise parental authority (subparagraph 2 of article 909 of the revised Korean Civil Code of 1990).

All of these revisions can be seen as the result of a step-by-step evolution toward gender equality.²⁰ Subparagraph 1 of article 36 of the Constitution of the Republic of Korea of 1948 had already declared that marriage and family life ought to be based on the dignity of every individual and the equality of both genders. Nonetheless, the Korean Civil Code of 1960 did not respect this constitutional requirement.²¹ Along with the advancement of women's social, economic, and political status, however, all of these provisions appeared more and more

¹⁷ It is exactly the contrary. Article 840 of the Korean Civil Code modelled for the revised Japanese Civil Code of 1946, and the legislators of the Japanese Civil Code of 1946 actually intended a no-fault divorce system. ABE, in SIMAZU and ABE (ed.), *Revised Japanese Civil Law Annotated*, Vol. 22 (Tokyo: 2008), 348-351 (in Japanese).

¹⁸ See the Korean Supreme Court's decisions rendered on September 21, 1965 (65Mu37), on March 23, 1971 (70Mu41), and on March 22, 1983 (82Mu57). The Supreme Court of Korea did not address the legal basis of this rule. Many academicians suggested the legal basis of this rule be estoppel or a duty of good faith promulgated in article 2 of the Korean Civil Code.

¹⁹ This revision is of very little meaning in practice because there are rarely cases when it is uncertain to whom a property belongs (real estates and stocks, the most important properties, use a registration system, and the titleholder of receivables are found by the interpretation of the contract, which is regarded as a matter of legal argumentation rather than that of factual proof). In cases where this law is applicable, the properties in question usually have relatively low values (think of tangibles). The theoretical and ideological significance of this revision, however, cannot be exaggerated.

²⁰ YANG, "The Transformation of Family Relationship and Family Law," 18 *Journal of Private Case Law Studies* 481, 490 ff., 502 ff. (1996) (in Korean); YUNE, "Law and Economics of Marriage and Divorce," 9(1) *Korean Journal of Law and Economics* 35, 37-38 (2012) (in Korean); LEE (Fn 15), 510-511.

²¹ This fact was thoroughly recognized by the legislators of the Korean Civil Code of 1960. The deliberation process of the draft of the Korean Civil Code is filled with debates on this point. Some argued that constitutionally mandated gender equality of constitution was not in harmony with Korean tradition or it was too early to fully realize gender equality in 1960, and, in the end, they won. YUNE, "Tradition and the Constitution in the Context of the Korean Family Law," 5(1) *Journal of Korean Law* 194, 197-199 (2005). See also, YANG (Fn 20), 487-490.

outdated, unfair, and, ultimately, unconstitutional.²² Divorce law also changed. The 1990 revision granted both parties in a divorce a claim to divide of *de facto* marital property (i.e., all the property accumulated during the marriage irrespective of its titleholder [article 839-2 of the Korean Civil Code of 1990]). Simultaneously, courts started to loosen the requirements for judicial divorce: first, exceptions to the rule prohibiting a divorce decree for the one deemed at fault in the divorce have been developed,²³ and even where no exception is found, the rule is not applied as strictly as it was before;²⁴ second, they interpreted the paramount cause of divorce—the serious issue making it difficult to continue the marriage—more generously.²⁵

For now, it is important to note what promoting gender equality in family law resulted in. As is revealed in the revised articles of 826, 833, 909 of the Korean Civil Code of 1990, the gap created by abolishing the husband's authority and responsibility was filled with the couple's agreement. It is noteworthy that the concept of marriage in family law has been formalized. The law simply defers the formation and transformation of a certain family unit and spousal relationship to the relevant parties and does address how the couple should negotiate such an agreement. In this way, marriage is shifting from a public institution common to all members of a society to a private arrangement between the parties of that specific marriage.²⁶

Therefore, it is clear why the ranking of the aforementioned principles was changed in the revised Korean Nationality Act. So long as women stayed in the house as housewives and a stereotypical notion of marriage was preserved, conferring nationality or sojourn status upon a foreign wife simply because she married a Korean did not risk very much. The more the legal understanding of marriage becomes formalized, the coverage of marriage extended, and the actual lifestyle of married couples diversified, the more likely it is for cross-border marriage laws to be abused. For this reason, further criteria were needed to determine whether a particular marriage deserves to be privileged by immigration law.

(3) Simulated Marriage in Family Law and Criminal Law

²² The Constitutional Court of Korea declared certain family law provisions, including those not addressed in this paper, unconstitutional. On the Constitutional Court's role in the course of development of Korean family law, see generally YUNE (Fn 21).

²³ See the Korean Supreme Court's decisions rendered on April 14, 1987 (86Mu28), on April 25, 1988 (87Mu9), and on June 27, 1989 (88Mu740). Exceptions approved in the abovementioned cases can be summarized as follows: (1) when it is obvious that the defendant also wants to get divorced (but does not agree to do so only to torture the spouse who wants divorce), (2) when the claimant's fault is not graver than the defendant's, or (3) when the fault the claimant made has no causal relationship with the breakup. See KIM and KIM, *Law of Family and Succession*, 11th ed. (Seoul: 2013), 193-196 (in Korean).

²⁴ See the Korean Supreme Court's decision rendered on December 24, 2009 (2009Mu2130), and also KIM and KIM (Fn 23), 192-193.

²⁵ Compare the Korean Supreme Court's decisions rendered on February 7, 1967 (66Mu34), on February 13, 1979 (78Mu34), and on April 26, 1966 (66Mu4) with those decisions rendered on March 25, 1986 (85Mu85), on January 11, 1991 (90Mu552), and on December 22, 1987 (86Mu90). It is no wonder because this cause of divorce, as a general provision, can and should reflect the changing values of a society. On the function of a general clause, see LEE, "A Bequest for a Concubine against Public Policy and Boni mores," 16(4) *Journal of Comparative Private Law* 1, 3-7 (2006) (in Korean).

²⁶ LEE (Fn 15), 511-512.

Similar to family laws in many other jurisdictions, the Korean Civil Code also utilizes a civil marriage system. Couples who want to make a *de iure* marital relationship have to make an agreement regarding their marriage and report it to the official governing the registration of family relationships (article 812 of the Korean Civil Code). However, the characteristic of Korean Civil Code does not require the couple to make (or represent) their marital agreement or perform marital ceremony in front of the official. Instead, it only requires a report and registration of the marriage; this system is modelled after the Japanese Civil Code (*report system*).

Likewise, category 1 of article 815 of the Korean Civil Code declares that a marriage the parties did not agree to is void.²⁷ Concerning this provision, two issues need clarification: first, what the marriage agreement means, and second, what the consequences are of a void marriage.

Regarding the definition of the marriage agreement, there are generally two different positions: one argues that the marital intent, as a condition of valid marriage, is to form a functioning marriage (i.e., a both spiritual and corporal community life, which typically includes living in the same residence, sharing earnings and living costs, having sexual intercourses, maintaining relationships with each other's relatives, etc.) (*substantial marital intent*),²⁸ while the other argues that a shared agreement to register as a married couple is enough to establish a valid marriage, and the intent to make a functioning marriage should be neither required nor examined (*formal marital intent*).²⁹

The Supreme Court of Korea follows the former view. Accordingly, a marriage registration between parents made only to legitimize their son based on fears that his illegitimacy could break a proposed match for him³⁰ or a marriage undertaken only to prevent one party from being fired from a job as a teacher at an elementary school³¹ would be considered void. As a simulated marriage, they would be deemed to lack substantial marital intent. This is understandable in two respects: first, when this case law was formed, there existed a specific and substantial model of marriage based on a stereotypical traditional family; most couples lived in the same residence, had sexual intercourses,³² and, as a result, children; the husband went to work to earn money, and the wife cared for the household and the children. Thus, it

²⁷ This provision also modelled after the Japanese Civil Code.

²⁸ KIM and KIM (Fn 23), 83-85; LEE, "Will and Registration in the Juridical Act in Family Law," 36 *The Korean Journal of Civil Law* 613, 627 ff. (2006) (in Korean).

²⁹ JUNG, *Studies on Korean Family Law* (Seoul: 1967), 753 (in Korean).

³⁰ See the Korean Supreme Court's decision rendered on May 27, 1975 (74Mu23). This case seems to be the first case where the Supreme Court of Korea dealt with the simulated marriage issue. Though the Korean Supreme Court's decision rendered on November 25, 1975 (75Mu26) ruled that a marriage in which both parties agreed to get divorced as soon as their sons were reported and registered as their legitimate children should not be void, this decision remained an exception. This decision will be revisited below.

³¹ See the Korean Supreme Court's decision rendered on January 29, 1980 (79Mu62, 63).

³² The fact marital rape did not constitute a (rape) crime though was not expressly prescribed in the Korean Criminal Code could be added. See the Korean Supreme Court's decision rendered on March 10, 1970 (70Do29). This case law has been overruled by the Korean Supreme Court's en banc decision rendered on May 16, 2013 (2012Do14788).

was easy to define what marriage was, and there was very little need to acknowledge other forms of relationship as marriage.

Second, case law on so-called *de facto marriage* might have influenced on the interpretation of marital intent as a condition of a valid *de iure* marriage. *De facto* marriage means a form of cohabitation, and this does not meet the report and registration requirement of *de iure marriage*. Korean courts tried to protect members of such marriages by *quasi-marriage theory*, which argued that parties involved in *de facto* marriages should be provided with some of the legal protections originally designed for parties involved in *de iure* marriages. In order to justify this interpretation or analogy, this theory required that all of the other (or at least most) requirements of *de iure* marriage—except report and registration—including the marital intents of both parties,³³ should be met. Marital intent, in this sense, was inevitably substantive, as there was no report and registration in *de facto* marriage—otherwise, it would not discern the protected *de facto* marriage from other unprotected relationship. This substantive understanding of marital intent aimed at protecting *de facto* marriage, in turn, could have influenced the understanding of marital intent as a condition of *de iure* marriage.

It is also important to consider what void marriage means. Again, two different positions are presented. The majority view found in civil procedure literature argues that void marriage is not void *ab initio* and *per se*, but rather is retrospectively³⁴ voidable by the procedure of declaration of nullity of marriage (article 2 of the Korean Family Litigation Act). For, this case is classified as a family case and so is subject to the Family Court's jurisdiction, and the decree to declare nullity of marriage has *erga omnes* effect (articles 21 and 22 of the Korean Family Litigation Act).³⁵ The majority view found in family law literature is different. It argues that void marriage is null and void *ab initio* and *per se* irrespective whether the decree to declare the nullity of marriage has been granted.³⁶ The Supreme Court of Korea follows the latter.³⁷

As a result, it is possible to punish simulated marriage as a crime under the Korean Criminal Code. According to articles 228 and 229 of the Korean Criminal Code, any person who makes a false report to an official and has that official register the false fact in the authentic deed or equivalent or any person who utters the falsely registered deed shall be punished by imprisonment for up to three years or by a fine up to 7 million KRW. The very essence of this crime is a sort of false preparation of official document which is governed by article 227 of the Korean Criminal Code. Untrue entry in an officially authenticated original deed is a type of false alteration of the officially authenticated original deed, an official document,

³³ See the Korean Supreme Court's decision rendered on May 8, 1979 (79Mu3). This decision required marital intent on the part of each party as a subjective condition of the protected *de facto* marriage and substantive marital life as an objective condition thereof, which could be recognized as a spousal community life from the viewpoints of social perception as well as familial order.

³⁴ Korean family law acknowledges voidable marriage in addition to void marriage. Voidable marriage can be nullified by the procedure to rescind marriage but has no retrospective effect. See articles 816 and 824 of the Korean Civil Code.

³⁵ SONG and PARK, *The Law of Civil Procedure in Korea*, 7th ed. (Seoul: 2014), 196-197 (in Korean).

³⁶ KIM and KIM (Fn 23), 113-114.

³⁷ See the Korean Supreme Court's decision rendered on December 22, 1956 (55Da399).

committed by the person who submitted false record in order to exploit the innocent official. It actually limits the scope of criminal punishment, as it criminalizes preparation not of all the official document but of part of it.³⁸ Because all of the other requirements are met, it is only left to determine whether reporting and registering a simulated marriage as a marriage is untrue (i.e., false). Unlike in the similar situation in contract law—reporting and registering simulated transfer of immovable³⁹—the Supreme Court of Korea ruled that it is false so that it constitutes a violation of that provision. Moreover, the registration itself is regarded as an utterance as noted in article 229—and therefore also a violation of it.⁴⁰ Thus, parties of simulated marriage shall be punished by imprisonment for up to four-and-a-half years or by a fine up to 10.5 million KRW.

2. Regulation on Marriage for Immigration in Korea as a Unintended Mixture of Independently Developed Doctrines in Immigration Law, Family Law, and Criminal Law

(1) Dynamics of Immigration Law, Family Law, and Criminal Law in Regulating Marriage for Immigration

The regulatory regime regarding marriage for immigration in Korea can be seen as a mixture of all the independent regulations imposed by immigration law, family law, and criminal law.

As explained earlier, Korean immigration law grants legal privileges to a foreigner who marries a Korean or a resident of Korea. These privileges can be considered one of the legal consequences of marriage. As can be expected, however, the Supreme Court of Korea, which interprets the intent to marry as a condition of valid marriage substantively, sees marriage only for immigration as a sort of simulated marriage and thus declares this type of marriage null and void *ab initio*.⁴¹ In actuality, marriage for immigration seems to be the only category of simulated marriage of practical importance today; marriage for legitimation or retention of occupation are no longer relevant concerns.

Moreover, the Supreme Court of Korea regards a marriage where one party had mental reservations about engaging in the marital relationship and the other party did not as lacking marital intent as a simulated marriage,⁴² though such a marriage is also voidable for fraud,⁴³ and judicial divorce for malicious desertion or another serious cause is possible.

This approach in family law, in turn, seems to influence regulations regarding immigration law. As explained earlier, Korean immigration law, especially the Korean Nationality Act of

³⁸ If it were not for these provisions, preparation of all the official document exploiting the innocent official would have been punished as an *indirect principal* of a crime of violation against article 227 of the Korean Criminal Code. See LEE, *Criminal Law. Individual Crimes*, 5th ed. (Seoul: 2007), 590 (in Korean).

³⁹ See the Korean Supreme Court's en banc decision rendered on March 28, 1972 (71Do2417) and decision rendered on September 24, 1991 (91Do1164).

⁴⁰ See the Korean Supreme Court decisions rendered on September 10, 1985 (85Do1481) and on November 22, 1996 (95Do2049). These decisions will be revisited below.

⁴¹ See those decisions referred in Fn 39.

⁴² See the Korean Supreme Court's decision rendered on June 10, 2010 (2010Mu574).

⁴³ See category 3 of article 816 of the Korean Civil Code, under which fraud and duress in the course of representing marital intent is a cause to make that marriage voidable.

1998, is not satisfied with ascertaining the existence of cross-border marriage between a Korean and a foreigner. It requires the relevant parties to meet further requirements. Generally speaking, however, the only issue raised in cases regarding the permission for or rejection of naturalization seems to be whether both parties have continued a “normal” marriage for the required period,⁴⁴ which is similar to the criteria used to judge whether a marriage is simulated.⁴⁵ When a marriage is void ab initio and per se, it never satisfies the requirement to obtain naturalization or issuance of visa, as the marriage as a condition of simple marriage or F-4 visa ought to be the valid one. When the requirement of marital intent is interpreted strictly, other requirements might well play little role in excluding improper application for immigration. Conversely, once this practice has been consolidated, it could be difficult to lessen the criteria of marital intent, as it is a concept relevant not only to family law but also to immigration law through controlling permission for naturalization or issuance of visas.

More importantly, the regulation on marriage for immigration is in the hands of the public prosecutor under this regime. As has been explained, reporting and registering a simulated marriage is a crime—a violation of articles 228 and 229 of the Korean Criminal Code. Prior to the revision of the Korean Nationality Act in 1998, this was the only way the government interfered with marriage for immigration. After the 1998 revision, where *ipso iure* acquisition of Korean nationality has been substituted with the application and permission for naturalization, officials of the Korea Immigration Service, a part of the Ministry of Justice, were granted authority of inspection (article 20 of the Korean Nationality Act) to decide whether the Minister of Justice should permit naturalization or, if already permitted, revoke the permission (articles 6 and 21 of the Korean Nationality Act). So, he or she can (1) request another relevant governmental agency to investigate the applicant’s personal background, criminal history, and current situation during his or her stay, or seek an opinion on other necessary matters, (2) request the applicant to submit evidential documents, and, more importantly, (3) make a field inspection of the residence (article 4 of the Executive Decree of the Korean Nationality Act).⁴⁶ Because officials who find simulated marriage in the course of inspection are required to report it to a criminal investigative agency such as the police or public prosecutor, those found to have registered a simulated marriage could ultimately be criminally charged. The fact that most cases concerning marriage for immigration were not civil or family cases but criminal or administrative cases⁴⁷ indicates that the initiative of

⁴⁴ See the Seoul Administrative Court’s decisions rendered on November 20, 2009 (2009Guhap23372), on December 3, 2009 (2009Guhap29097), on December 4, 2009 (2009Guhap22331), on December 31, 2009 (2009Guhap24085), on January 15, 2010 (2009Guhap32000), on February 17, 2010 (2009Guhap30950), on April 2, 2010 (2009Guhap37746), on July 23, 2010 (2009Guhap50442), on September 2, 2010 (2010Guhap17618), on September 9, 2010 (2010Guhap7994).

⁴⁵ See, for example, the Seoul Administrative Court’ decision rendered on May 13, 2010 (2010Guhap42052).

⁴⁶ Similarly, the head of the Korean diplomatic mission abroad has authority to examine the course of communication and the marital intent, Korean language ability of the sponsored applicant for visa, preparation of the residence in Korea, and the like in order to judge whether marriage is really intended and “normal” marital life is possible. See article 9-5 of the Administrative Order of the Korean Immigration Control Law.

⁴⁷ See those decisions referred in Fn 39 and Fn 44.

regulating this type of marriage is in the hands of public agencies, especially public prosecutors.

It is not the end of the story. In principle either party of a simulated marriage should be granted a decree to declare nullity of the marriage if he or she wants to correct the record in the registration of family relationships (article 101 of the Korean Act of the Registration, Etc. of Family Relationship). According to the Supreme Court of Korea, however, when the criminal conviction is upheld, the registration can be corrected merely through permission of the Family Court rather than a decree to declare nullity of that marriage.⁴⁸

(2) Legal Criteria and Factual Evidences Used in Judging Marriage for Immigration

As explained earlier, in Korea a marriage undertaken solely to obtain nationality is considered a simulated marriage, which is null and void according to family law, constitutes a crime according to criminal law, and provides no basis for the immigration benefit according to immigration law. Nonetheless, this does not necessarily mean that regulations regarding marriage for immigration are strict in Korea. That depends highly on the perspective of the government official, public prosecutor, or judge dealing with the evidence and facts related to the case. Let me explain further.

Whether the parties involved in a marriage truly intended to form a marital bond is a problem of fact finding. The fact that matters here, however, rest squarely in the minds of the parties in question. Strictly speaking, their intent is unobservable and unverifiable. Moreover, the intent to marry is usually oriented to the marital relationship as a social reality—not to the legal effect of *de iure* marriage. Couples rarely recognize the legal meaning of marriage. They often have little interest in it, and might not even consider that they are entering a legal relationship by getting married. Or worse yet, their intent might be amorphous or unclear. As marriage represents a comprehensive, long-standing relationship, it is difficult for most couples to create a detailed agreement regarding the condition of their marriage. As a result, determining the marital intent is very difficult. Except for rare situation where the parties expressly agreed their marriage to be a simulation without any legal effect, it is a problem of construction of parties' intention rather than interpretation of it. Governmental officials, public prosecutors, and judges have no choice but to collect clues in attempt to construct the intention of the marrying parties. Like other constructions, this one is inevitably influenced by the attitude of the constructor.

This begs the question, what attitude or approach those constructors in Korea, especially judges, have. Of course, their attitude cannot be simply generalized. In fact, it might be impossible to predict, as this kind of judgment is highly influenced by the context of the relevant case. However, based on decisions that address this issue in some detail, it is clear that judges can and sometimes do interfere with a marriage for immigration strongly when they believe doing so is justifiable.

⁴⁸ See the Korean Supreme Court's decision rendered on October 8, 2009 (2009Su64).

The most important case in this regard is the Korean Supreme Court's decision rendered on June 10, 2010 (2010Mu574). In that case, the plaintiff, a Korean national man, was married to the defendant, a Philippine national woman. They had a wedding ceremony in the Philippines and entered Korea together. The defendant, however, disappeared, leaving a note written that said she married to support her family and needed to go make money—only after one month from entering Korea. The plaintiff filed a lawsuit to request that the marriage be declared void. The claim was dismissed on the following grounds: the defendant had run a “normal” spousal life with the plaintiff for one month after entering Korea; she had a trip with the plaintiff to Jeju Island shortly before leaving the home; according to the aforementioned note, she left the home with hesitation regarding whether she should continue the marriage or go to work to support her family. The Supreme Court of Korea, however, reversed this judgment. The following factors were given as the grounds for reversal: the plaintiff carefully helped the defendant to adapt to a life in Korea; the defendant left her new home after only one month; the defendant wrote that she felt that she should work to support her family, that was why she married to him, and that she really appreciated him making it possible for her to work in Korea legally; she became able to work in Korea shortly before she left the home; her cousin who lived in Korea and corresponded with her believed she entered Korea in order to support her family in the Philippines; and they never had sexual intercourse during the period she stayed in the home because she refused to have such a relationship with him. The factors the Supreme Court of Korea listed, except for the lack of sexual intercourse, were not seemingly persuasive enough to judge whether the relevant marriage was a simulation. They proved that the defendant had an economic motive when marrying the plaintiff, but did not refute the possibility that the defendant intended to make a true marriage. Thus, this decision suggests that either the evidentiary requirement for simulation in case of marriage for immigration is especially low or that consummation of the marriage is a decisive factor to determine whether it is a simulation.

There are other cases that support this presumption. A decision recently rendered by the Seoul Administrative Court⁴⁹ rejected a request for permission of naturalization on the following grounds: the plaintiff entered Korea in 1999 and stayed for years despite expiration of her visa before she married a Korean man; she reentered Korea as a wife of a Korean national (F-2 visa) only six months after she married and left Korea; the facts indicate that she registered the marriage in order to avoid expiration of her visa; she revealed that her sister as well as her husband's brother and mother were unaware of their marriage; they had no wedding ceremony; she had no relationship with her husband's friends; and her husband stayed in Seoul for only two or three days per week and spent most of his time in other areas where he went to work. These facts indicate that they had no spiritual and corporal community life.

Here is another decision⁵⁰ made on very similar ground: again, the plaintiff stayed in Korea despite expiration of her visa; each spouse provided a different explanations regarding how they came to meet each other; the plaintiff did not know about her husband's brothers and

⁴⁹ See the Seoul Administrative Court's decision rendered on September 9, 2010 (2010Guhap7994).

⁵⁰ See the Seoul Administrative Court's decision rendered on August 27, 2010 (2009Guhap57252).

sisters; in the course of field inspection, the plaintiff, asking her husband to cooperate with her, told him that she had to return to her Chinese ex-husband unless she acquired Korean nationality, indicating she had continued a de facto marriage relationship with her ex-husband; she did not tell her daughter who lived in Korea, about her marriage, and the Korean husband was unaware that she had a daughter. Furthermore, this decision pointed out that she requested a mediation for divorce three months before the second anniversary, which could be used to infer that they had not had a “normal” marital relationship for two years.

Yet another decision⁵¹ rejected the request for naturalization on the following grounds: most of the plaintiff’s stay in Korea was made possible by a G-1 visa; the plaintiff and her Korean husband registered their marriage only five months before the expiration of the plaintiff’s visa, and it was unclear how they came to meet; the plaintiff requested issuance of an F-2 visa instead of a G-1 visa but revoked this request, saying that her husband left the home; the plaintiff filed for a divorce without trying to search for her husband as soon as he left the home; though the plaintiff wrote in the complaint for divorce that she intended to have a genuine marriage, and not a marriage for money or immigration, she requested permission of naturalization. These facts indicate that she married in order to avoid expiration of her visa and to acquire Korean nationality and she filed for a divorce when her husband did not cooperate with her.

It is suggested that a foreigner who married a Korean and wants to live in Korea should live with the Korean spouse and avoid being parted temporarily for as long as possible—at least for two years. They should not file for divorce during that period. They should let their parents, brothers, and sisters know about their marriage. They should keep acquaintances and maintain communication with each one’s family, and they should have sexual intercourse. Couples may have to provide evidences to prove these facts, and, more importantly, the governmental official, public prosecutor, or judge will likely inspect the couple and their home in order to collect evidences regarding those facts.

III. Discussion

1. Substantial Aspects

(1) Difficulty in Harmonization of Conflicting Interests in Marriage for Immigration

Decades ago, marriage for immigration was not a serious issue. There were very few marriage for immigration, and few difficult questions regarding how to handle it. Let me explain this point in some detail before discussing the current situation.

First, the state has the authority to determine proper and improper immigration requests (*state interest to control immigration*).⁵² As is evident through the study of history, nationality (and also citizenship), a person’s attribution to a certain county, provides a criteria according to which the country imposes duties (to obey) as well as grants rights and powers as a national

⁵¹ See the Seoul Administrative Court’s decision rendered on May 26, 2010 (2010Guhap498).

⁵² Ping v. U.S., 130 U.S. 581, 609 (1889); Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 340 (1909); ABRAMS, “Immigration Law and the Regulation of Marriage”, 91 *Minnesota Law Review* 1625, 1638 ff. (2000)

(or, traditionally, subject).⁵³ Considering the increase in state function today, to whom a country imposes duties as well as grants rights and powers as a national has become an increasingly politically and economically sensitive issue.⁵⁴ In addition, having the rights and powers of a national in a modern democratic country includes the right to participate in political process either as a voter or as a representative. Thus, status as a national can influence the identity of a political community. And the issue of national security cannot be overlooked. Every country has the right to reject a foreigner's immigration application, and it has the responsibility to accept its own national and power of diplomatic protection for him or her.⁵⁵ Most countries in the world follow a selective immigration policy and prefer prospective immigrants who have professional competences or are going to invest a considerable amount of money in the country—in short, those who would contribute to the country. Korea is not an exception thereof. Even when they permit immigration and naturalization more generously, they still require prospective immigrants to integrate and engage fully through learning the language and understanding the culture.

National's *right to family unification*, however, also deserves respect. Although there is no provision in Korean law and no decision of the Constitutional Court of Korea that addresses the right to family unification,⁵⁶ subparagraph 1 of article 36 of the Constitution of the Republic of Korea imposes on the state a duty to protect marriage and family life. Some adjudications rendered by the National Human Rights Commission of Korea, most of which are cases related to the regulation of marriage for immigration, also dealt with this issue as a violation of subparagraph 1 of article 36 of the Constitution.⁵⁷ The reason why the issue has not been raised lies in the fact that freedom of movement is well protected at the domestic level. Regarding cross-border marriage, however, it is required that foreigners who make family with nationals be permitted immigration to ensure that national can live with their family.

Freedom of equal and autonomous family life and the *right to privacy* also deserves respect. The former is protected by the same article of the Constitution of the Republic of Korea (subparagraph 1 of article 36), and the latter, by article 17 thereof, which concerns the privacy of the spousal relationship.⁵⁸ When marriage and family is used as a substantial criteria to investigate immigration requests, it could infringe upon freedom of equal and autonomous family life and the right to privacy, as inspection to internal spousal life would be required.

⁵³ MYOUNG, LEE, and KIM (Fn 6), 7-35; SUK (Fn 8), 15-16, 28.

⁵⁴ This consideration explains the reason why most countries require a prospective national to be competent enough to support his or her own lifestyle as a condition of immigration and why they regulate foreigner's economic activities including employment.

⁵⁵ SUK (Fn 8), 26-28.

⁵⁶ SUNG, *Constitutional Law*, 13th ed. (Seoul: 2013), 801-804 (in Korea).

⁵⁷ See the decisions rendered by the National Human Rights Commission of Korea on January 13, 2003 (02Jinin1428), on September 8, 2003 (03Jinin931), and August 16, 2004 (04Jinin1581). See also, RAE, "Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts The Marriage Fraud Act", 15 *Pepperdine Law Review* 181 (1988).

⁵⁸ SUNG (Fn 56), 635.

When marriage has a definite form in law as well as in society, the potential conflict between the state's interest in controlling immigration and the individual's interest in family unification can be successfully avoided. As marriage had a definite form and could be rarely abused for other purposes, it could at least guarantee the foreign spouse's integration and engagement in Korean society as well as her loyalty to Korea. Because marriage itself guaranteed a certain situation to support permission for immigration or naturalization, further inspection of the spousal relationship of the relevant family was not needed as much. In this way, infringement on the freedom of family life and the right to privacy could be avoided also.⁵⁹

As the understanding of marriage in family law has been formalized and the modality of marriage in society has become increasingly diversified, however, the potential conflict has been realized. Now marriage no longer guarantees the adequacy of immigration permission for those who marry Koreans. If a formalized concept of marriage is accepted in family law as well as in immigration law, the advancement of equality and autonomy in marriage would be preserved, infringement on privacy of spousal relationship could be avoided, and family unification would not be endangered. In this case, however, the state's interest of immigration control would be entirely surrendered. This could encourage prospective immigrants to abuse cross-border marriage as an instrument to easily obtain nationality, which, in turn, would contribute to the social devaluation of marriage in general. The question of whether to abandon to control immigration is highly political and should be decided through the political process by the appropriate representatives.

On the contrary, when marriage mainly or solely for immigration is excluded from the jurisdiction of family law as well as from that of immigration law, the achievement of equal and autonomous marriage could be at least partly neutralized, a traditional understanding of marriage could become popular again, and the privacy of spousal relationship could be endangered—instead of protecting the state's interest in immigration control. This backward step in family law and infringement of privacy can be observed in Korea. As explained earlier, a cross-border couple has an incentive to pretend that they have a stereo-typical marriage in order to avoid suspicion from governmental officials and public prosecutors, and their internal spousal life, including their relationship with each other's relatives and friends and their sexual life, is subject to investigation. For example, the question of whether a couple has had a sexual intercourse cannot play a decisive role in judging whether a marriage between two Koreans is a simulation; doing so would constitute privacy infringement. Nonetheless, this criterion is used to judge whether cross-border marriage is a simulation.

(2) Decoupling Family Law and Immigration Law and a More Formalized Approach

⁵⁹ Immigration laws in many jurisdictions also used to grant foreign wives of their nationals their nationality merely on the basis of the marriage [U.S. Code Title 8 - Aliens and Nationality §1152 (1982); article 12 of the French Civil Code (Code civil) of 1804; article 6 of the German Nationality Act (Reichs- und Staatsangehörigkeitsgesetz) of 1913; article 9 of the Austrian Nationality Act (Staatsbürgerschaftsgesetz) of 1965; article 3 of the Swiss Citizenship Act (Bürgerschaftsrecht) of 1952].

A complete solution to this dilemma might not be possible. Implementing more fine-tuned policy alternatives is possible, however.

First, it is recommended to decouple family law and immigration law, or validity of marriage and permission for immigration.⁶⁰ Unless the criteria used to determine immigration permission are separated from those used to determine validity of marriage, it is hard to avoid the need for judges to negate marriages that appear suspicious in terms of immigration law.

Traditionally, the concept of void and voidable marriage complemented strict divorce law. Though divorce was not allowed in principle, some couples were allowed to leave behind their unhappy marriage via the construction of void or voidable marriage. Along with the divorce law reform in 1960-1980, however, the practical importance of these concepts decreased. Now, wide acceptance of simulated marriage has made it difficult to differentiate between the two situations—no marriage and broken marriage. Herein lies the reason why case law sees that the agreement of parties of a marriage to exclude some effects of marriage does not always negate the marriage itself but only the agreement to exclude some effects of marriage,⁶¹ and also the reason why the case law developed a *doctrine of retrospective explicit or implicit rectification of void marriage*⁶² in violation of article 139 of the Korean Civil Code, which includes only prospective rectification of a void juridical act. In this regard, it is recommended to be prudent when deciding whether a marriage is a simulation. Unless obvious evidence that refutes any other interpretation is presented, courts should avoid deciding that a marriage is simulated and should defer the disposition of it to divorce.⁶³

⁶⁰ Many courts in the U.S. follow this approach. Even a marriage solely for immigration, which cannot be benefited in immigration law, is still valid in family law (common law). Compare *in re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W.2d. 461 (1976); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F.Supp. 865 (S.D. Tex. 1970), and U.S. Code Title 8 §1151 (1986); ABRAMS (Fn. 52), pp. 1668 ff.; LYNKEY (Fn. 5), pp. 1094 ff. In Swiss number 4 of article 120 of the Civil Code, which negated a simulated marriage for immigration, was abridged along with the tightening of the condition of immigration permission for foreign spouse of Swiss national in immigration law. See GEISER and LÜCHINGER, zu Art. 105 N. 15-16 in *Balser Kommentar zum Zivilgesetzbuch I* (2. Aufl., Basel: 2002, in German). There are voices to maintain to decouple family law issue from immigration law issue also in Germany and France. See EISFELD, *Die Scheinehe in Deutschland im 19. und 20. Jahrhundert* (Tübingen: 2005), 219 ff. (for German law, in German); MURAT, "La lute contre les mariages de complaisance se poursuit", *J.C.P.* 1993, I, 3639 n° 4 (for French law, in French).

⁶¹ See the Korean Supreme Court's decision rendered on November 25, 1975 (Fn 30). According to majority opinion in German legal literature, an agreement to exclude some of the effects of marriage does not negate the marriage itself but only negate that agreement, because if the provisions for the effect of marriage be converted to the conditions for a valid marriage, they would be devaluated. Generally, EISFELD (Fn. 60), 190 f.

⁶² See the Korean Supreme Court's decisions rendered on December 28, 1965 (65Mu61) and on December 27, 1991 (91Mu30). See also the Korean Supreme Court's decision rendered on December 26, 1990 (90Mu293), according to which the intention or agreement not to live together and just to communicate does not negate the substantive marital intent.

⁶³ See KIM, "A Study on the Meaning of 'Agreement on Marriage'," 36(4) HUFFS law review 346, 351-355 (2012) (*More Prudent Examination of Substantive Marital Intent*). HEPTING ("Eheschließungsrecht nach Reform", *FamRZ* 1998, 713, 730, in German) maintains the evidential requirement in the annulment proceeding of marriage for immigration should be as high as in ordinary criminal proceedings. Swiss Federal Court also denied to nullify a marriage in a case very similar to that of 2010Mu574. See BGE 98 II 1. For various factual and evidential factors considered in deciding marriage for immigration, see EUROPEAN COMMISSION (Fn. 5), 31 ff.

Deciding the legal status of a marriage should be based not on what the couple intended before but what they are doing now.⁶⁴ Nonetheless, this is not the case, as the conditions of permission for immigration depends on the validity of the marriage and there are no other devices to control immigration permission. Furthermore, there are many consequences and benefits associated with marriage, and not all of them are subject to scrutinization for immigration control. It would be better to acknowledge a marriage and grant them all the effects and benefits of marriage other than the effect or benefit in immigration law.⁶⁵

Moreover, this approach could pose more serious danger. Judges might be conscious that the real issue at hand was immigration control. This would not, however, be addressed in the judgment, as the only legal issue would be the marital intent. And because whether a couple had an intention to make a marriage before they registered their marriage is unobservable and unverifiable; judges would infer the intention from the observed and proved clues before and after concluding marriage. It is very difficult to discern if an individual intended to make a real marriage but changed his or her mind after the marriage was registered or if there was never any intention to make a real marriage at all.⁶⁶ In short, as judges would suffer lack of factual or evidential grounds to decide whether the marriage is a simulation. Thus, they tend to, and actually have no choice but to, supplement this lack with a presumption for one party

⁶⁴ In this regard, the case where one party intended to form a marital relationship and the other had no intention to do so (mental reservation) should be discerned from the case of simulation. If this marriage is void per se and ab initio irrespective of awareness and willing of the one who had marital intent, the innocent also would lose all the benefit and protection granted by the marriage. It is difficult to say that the protection of the innocent who believed to be married is less important than the rejection of recognition of that marriage based on vague criteria. The most important reason why marital intent is required as a condition of valid marriage is to prevent coerced marriage. This function is, however, fulfilled by marriageable age (over 18 years. article 807 of the Korean Civil Code), fraud, and duress (category 3 of article 816 of the Korean Civil Code; Korean case law interprets the concept of fraud and duress flexibly enough to substitute the concept of lack of marital intent). In addition, it should be considered the marital intent of each spouse as a condition of valid marriage in a cross-border marriage is governed by the law of the native county of each party {article 36 of the Korean Act of Private international Law, and SUK, *Private International Law Annotated* (Seoul: 2013), 445-447; SUK, "Several Chinese Law Issues raised before Korean Courts: with Emphases on Laws on Contract, Tort, Marriage and Recognition and Enforcement of Foreign Judgment," 51(3) *Seoul Law Journal* 181, 209-213 (2010)} and that there are many jurisdictions which adopt formal marital intent view as a condition of valid marriage. For example, the U.S. (Fn. 60), Germany, Austria, and Switzerland adopt the formal intent approach. Although both Austrian and Swiss law had provisions to negate a marriage solely for immigration [article 23 of the Austrian Marriage Act (Ehegesetz); number 4 of article 120 of the Swiss Civil Code (Zivilgesetzbuch) prior to revision of 2000, and German law has provisions to prohibit simulated marriage in general (number 2 of subparagraph 2 of article 1314 of the German Civil Code (Bürgerliches Gesetzbuch)], the formers do not deal with this issue as a simulated marriage, and the latter is applied only to marriage for immigration cases. See DIEKMANN, *Familienrechtliche Probleme sogenannter Scheinehen im deutschen Recht unter des österreichischen und schweizerischen Zivilrechts* (Frankfurt a.M.: 1991, in German). On the contrary, French law follows the substantial intent view. According to Cass. civ. 1er 20. novembre 1963, D. 1963, S. 465 (Appietto), a marriage which excludes some of the effects given by marriage law is void when it pursues mainly the advantages given by laws other than marriage law, so that a marriage for immigration is void. FULCHIRON, "Acquisition de la nationalité française à raison du mariage", *J.Cl.-droit international privé française*, Fasc. 502-60 (1995, in French).

⁶⁵ See the Seoul District Court's decision rendered on July 12, 1996 (96No3403). Though this decision adopted a formal marital intent view, the argument holds true even when we adopt a more prudent examination of the substantive marital intent view.

⁶⁶ DIEKMANN (Fn. 64), 173.

or another or with their own conjectures. As explained in the previous chapter, Korean courts seem to follow the latter approach. It might channel the traditional image or concept of family and, sometimes, an unexamined and unjustified bias toward foreigners, especially from the countries less developed than Korea to this judgment. Making matters worse, some judges think that they decide only whether the marriage is a simulation. In such cases, which are highly likely, judges' attitudes toward diverse forms of marriage or foreign immigrants are examined neither by themselves nor by others. Open and transparent control is always better than hidden, or, sometimes, unconscious control. Decoupling the family law issue (simulation) from the immigration law issue (eligibility to immigrate) and directly examining whether an immigration request might well be accepted according to immigration law will enable this open and transparent control.

Decoupling family law and immigration law has another advantage. When the power of immigration decision making rests solely with judges, it can be difficult for them to perform successfully all their roles of prohibiting improper attempt to immigrate to Korea and to strictly check the legality of their decision and possible biases; these two roles have opposite directions. If we separate the former role from the latter, and confer the former, which is highly political, to governmental officials (the Korean Immigration Service), judges can concentrate on the latter role to check the legality of adjudication made by a governmental official, which would allow them to be more objective and unbiased.

However, this is not enough. Even if family law and immigration law are decoupled, the problem of infringement of privacy remains unsolved. We cannot grant privileges or benefits, such as issuance of a visa or permission for naturalization, to a foreigner whenever or just because he or she is married to a Korean—though we should take that fact into consideration. A couple's right to family unification depends on the definite form of the marriage. For example, when couple agrees to marry but live separately,⁶⁷ family unification would not matter so much. Because there is always a possibility that the couple did not honestly report what their marriage would be, there remains always a necessity to decide whether the relevant marriage really needs some benefit in terms of issuance of visa or permission of naturalization to promote family unification. This might need an investigation of the internal spousal relationship.

If the condition of immigration is more formalized, however, the extent of the privacy infringement can be lessened. Instead of requiring "normal" marriage, it is recommended to lengthen the period needed to acquire permanent residence and nationality, and introduce more thorough procedures to examine the purpose of cross-border marriage before issuing visas. The fewer benefits that are granted to foreign spouses of a national, and the more cost or burden that is associated with acquiring nationality, the less cross-border marriage would be abused only to enable an immigration and the less need there would be for a thorough inspection that might constitute severe infringement of privacy.⁶⁸ In addition, an inspection

⁶⁷ Think of the marriage between a Chinese actress TANG Wei and a Korean movie director KIM Taeyong. According to their announcement, TANG will not live in Korea despite their marriage.

⁶⁸ This is the reason why the benefit granted to foreign spouse of national in terms of immigration permission has been decreased or totally abolished in most jurisdictions. See article 9 and abolishment of article 6 of the

that seriously endangers the privacy and personal lives of a couple should be prevented expressly and more strictly. For example, a question about sexual life of a couple should be prohibited on principle.⁶⁹

2. Procedural Aspects

(1) Distorted Communication

Another problem in the current regulatory regime on marriage for immigration in Korea lies in the fact that public prosecutors have procedural initiative. As explained earlier, marriage for immigration is void *per se* and *ab initio* as a simulation, meaning that it constitutes a crime of *untrue entry in officially authenticated original deed*. Therefore, public prosecutors can and do investigate and charge foreigners when are suspected of being a party in a simulated marriage. Governmental officials also have the authority to make a field investigation.

Some consequences of this approach are well demonstrated by a Seoul Northern District Court's decision rendered on February 19, 2009 (2008No1702).⁷⁰ Korean marriage broker A offered Korean man B 3,000,000 KRW to enter into a simulated marriage. Refusing the offer, B told A that he was very lonely and wanted to get married and live with his wife; 3,000,000 KRW was not a lot of money for him, and so B said he was not willing to marry for money. A told B, however, that he could not broker the marriage unless B was paid and so B had better accept the money and spend it on the prospective wife. When B agreed and was paid 3,000,000 KRW, the broker A introduced a Chinese woman C who lived in China to B. B got married to C, and brought her to Korea. They lived together in Korea and had sexual intercourse. Of course, as soon as C entered Korea, she got employed. She seemed to contribute to support their household with the money she earned. B did not, however, let his relatives know about his marriage. After a year or so, they broke up. A, B, and C were charged as *aiders* (article 31 of the Korean Criminal Code) and *co-principals* (article 30 of the Korean Criminal Code) of untrue entry in officially authenticated original deed. The Seoul Northern District Court, as an appellate court, quashed the conviction of the first instance to A and C (B did not appeal) and declared them not guilty.

Judging by all the factors presented, the judgment of the appellate court could be supported even by the criteria adopted by the Supreme Court of Korea and other lower courts in Korea. They had sexual intercourses and lived together in the same residence for more than one year. C even contributed to support their household with her earnings. Despite that one of her

German Nationality Act (Staatsangehörigkeitsgesetz) of 1969; articles 37 and 37-1 of the French Code of Nationality (Code de la nationalité française) of 1973; article 11a of the revised Austrian Nationality Act of 1983; the U.S. Immigration Marriage Fraud Amendment of 1986 (U.S. Code Title 8) §1186a; and article 15 and abolishment of article 3 of the revised Swiss Citizenship Act of 1990 (also with the amended Federal Constitution of 1982).

⁶⁹ DE ARMAS, "For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases within the Scope of the Constitution", 15 *Journal of Gender, Social Policy & the Law* 743, 758 ff. (2007); DIEKMANN (Fn. 64), 17. And see article 15c of the Swiss Citizenship Act.

⁷⁰ I participated in the procedure as one of three judges constituting the appellate court panel and drafted the judgment myself. Some of underlying facts is by my memory. On details of this case, see KIM (Fn 60), 353-354.

motives to get married to B was to make money and she had paid the broker's fee, these factors were insufficient to rebut the claim that they had substantial marital intent. The question here is not whether the judgment of the appellate court is justified; it is why the public prosecutor charged them and the first judge convicted them.

This question cannot be answered definitely of course. The interesting point is, however, that B, the Korean husband, testified that their marriage was a simulation⁷¹ in the courtroom even though he had told A that he would not enter into a simulated marriage. The main reasons he presented were that he had been paid 3,000,000 KRW for the marriage and C had paid a considerable amount of money to enter Korea where other people said the marriage was typically a simulation to be criminally charged. As a whole, B did not seem to understand the legal meaning of simulated marriage and did not seem to discern a simulated marriage from a marriage validly made but shortly thereafter broken up. Other people's (inaccurate) advice must have contributed to this misunderstanding. On the contrary, C made a statement that she had been divorced in China for years, had been lonely and so also had wanted a real marriage and real companionship, had tried to continue the marriage but could not do so because of language and cultural differences as well as B's economic incompetency. C, however, suffered lack of language skills to explain the subtle difference between simulated marriage and valid.

This is not unique. In general, a Korean spouse involved in a cross-border marriage tends to be undereducated and poor, and a foreign spouse tends to lack language skills. As explained earlier, the criteria that Korean courts use to judge whether a marriage is a simulation are subtle and nuanced. The authoritative structure of criminal proceedings can distort communication in the courtroom because one of the parties, the defendant, is also subject to the judgment. And there exists no criminal proceeding generous to foreigners especially who cannot speak the language used in the courtroom. In this situation, lack of education, low economic status, lack of language skills could be factors causing the procedure to be handled improperly, amplifying the disadvantages associated with this regulatory regime.

(2) Decriminalization of Simulated Marriage

This danger can be avoided by decriminalizing simulated marriage.⁷² This is possible simply by overruling some case laws.

There is no compelling ground on which to view the reporting and registering of a void marriage as a crime of untrue entry in officially authenticated original deed. It depends on how the term "false" is defined as a condition of this crime. It is totally consistent that the

⁷¹ As B did not appeal, B was not a defendant any longer in the appellate proceeding so that he could testify as a witness.

⁷² Participating or conspiring to engage in marriage fraud (for immigration) is under criminal punishment in many jurisdictions. See, RAE (Fn. 57), 193 ff. (U.S. Code Title 8 – Alien and Nationality §1325) (for the U.S.) and EUROPEAN COMMISSION (Fn. 5), 39 ff. (for EU member states). It is, however, not strongly enforced in many countries, and even criticized in some. See Swiss Obergericht Zürich SJZ 1982, 129; LÜDERITZ, "Mißbräuchliche Personenstandsänderung oder spouse leasing in Germany", in *Festschrift für Oehler zum 70. Geburtstag* (Köln: 1985), 498 (in German).

report of a simulated marriage, which is void from a family law perspective, is not false because untrue entry in an officially authenticated original deed only considers factual aspects, e.g., whether the applicant(s) actually made an application; whether the application form reflects details such as name, birth date, address, nationality honestly; whether they wanted to report and register a marriage. It does not matter whether the application is valid from a private law perspective.⁷³ Actually, the Supreme Court of Korea followed this view in a case where both parties simulated a contract to convey a real property from one to the other (which is void per se and ab initio as a simulated juridical act; see article 108 of the Korean Civil Code) and registered this conveyance. The Supreme Court of Korea declared that it did not constitute a crime of untrue entry in an officially authenticated original deed because both applicants⁷⁴ made an application to register their conveyance⁷⁵ and did not care that the contract and the registration were also void.⁷⁶ So, overruling the case law related to the meaning of “false” in simulated marriage would not contradict any other case law related to a crime of untrue entry in an officially authenticated original deed. On the contrary, there exists a contradiction regarding the ways the existing case law interprets this provision in two situations.⁷⁷

Moreover, the proposition that reporting and registering a simulated marriage constitutes a violation of articles 228 and 229 of the Korean Criminal Code presupposes that a simulated marriage is void per se and ab initio. However, it would be impossible to say that the registration was “false at the time of reporting and registering a simulated marriage” if it were not void per se and ab initio, but only retrospectively voidable. Of course, the Supreme Court of Korea and the majority view in family law literature in Korea see a void marriage as void per se and ab initio. The objective or function of this regime is, however, to enable collateral attack. Though the standing to bring a suit requesting that a marriage be declared void is confined to the parties of the marriage, their guardian, or certain range of relatives (article 23 of the Korean Family Litigation Act), those who could not or did not bring that suit can maintain in other suits that the marriage was void.⁷⁸ For example, coheirs of a deceased person can fight the alleged heirship of others, arguing that their heirship is based on a void marriage.⁷⁹ This consequence of void marriage, however, does not support the criminalization of simulated marriage for several reasons:

First, this construction, which enables collateral attack, is only to benefit others’ private interests and not for state or public interest. That is the reason why public prosecutors do not

⁷³ See the Seoul District Court’s decision rendered on July 12, 1996 (96No3403).

⁷⁴ An application to register conveyance of a real property should be made jointly by the seller-owner and the buyer. See article 28 of the Korean Registration of Real Estate Act.

⁷⁵ See decisions cited in Fn 39.

⁷⁶ If a contract is void per se and ab initio, the conveyance made to perform the contract is also void per se and ab initio under the Korean Civil Code (*Principle of Consensual Transfer*). See the Korean Supreme Court’s decisions rendered on May 24, 1977 (75Da1394) and on July 27, 1982 (80Da2968).

⁷⁷ SUK, “Does Registering a Simulated Marriage Constitute a Crime of Untrue Entry in Officially Authenticated Original Deed?” 6 *Journal of Criminal Case Studies* 330, 339-341 (1998).

⁷⁸ See the Korean Supreme Court’s decision rendered on September 13, 2013 (2013Du9564).

⁷⁹ See decision referred in Fn 37.

have standing to bring a suit requesting that a marriage be declared void.⁸⁰ The current case law bypasses this limit by criminalizing reporting and registering of simulated marriage and allowing correction of registration of family relationship based on the conviction. It deviates from the original function or intent of the void per se and ab initio construction. More importantly, it contradicts the doctrine of retrospective explicit or implicit rectification of void marriage. As explained before, a marriage void for simulation could be retrospectively rectified. Considering the purpose or function of this doctrine, those couples who retrospectively rectified their marriage should not be subject to criminal punishment. The problem is that there is no construction to justify this result. If a change of circumstance that occurred after committing a crime should influence the possibility to punish the crime, the circumstance should be an *objective condition of punishment*. There is no provision to prescribe that the voidness of marriage and lack of rectification is an objective condition of punishment of article 228 of the Korean Criminal Code—without which it cannot be construed by judges.

Second, the propriety of this construction itself is dubious. Let me revisit the example above. The reason why the deceased did not bring a suit to request declaration of voidness of his or her marriage might lie in the fact that he or she did not want to deprive his or her (simulated) spouse of the privileges or benefits of the (simulated) marriage. This construction fails to account for this possibility on the part of those who have the standing to bring the suit according to article 23 of the Korean Family Litigation Act. The most absurd result of this construction is that a child of the simulated couple is deemed to be an illegitimate child. Because of these defects, this construction has been repeatedly criticized in family law literature.⁸¹

⁸⁰ In Germany, Switzerland, Austria, and France, public prosecutors or immigration agency have standing to bring a suit to nullify simulated marriage (article 1316 of the German Civil Code; article 106 of the Swiss Civil Code; article 28 of the Austrian Marriage Act and article 172 of the French Civil Code. According to article 28 of the Austrian Marriage Act the only one who can bring a suit to nullify a marriage solely for immigration is the public prosecutor). However, there are few suits brought by public prosecutors in these countries. Swiss Federal Court overruled its case law to actually deny the power of immigration agency to bring this suit. BGE 77 II 193. See DIEKMANN (Fn. 64), 138 f., 160 f.

⁸¹ See KIM and KIM (Fn 23), 116. In many jurisdictions, a void marriage is not void until the court declares it void. See articles 201 and 202 of the French Civil Code; article 1310 and the following articles of the revised German Civil Code of 1998; article 27 and the following articles of the Austrian Marriage Act; article 109 of the Swiss Civil Code; RAYMOND, “Mariage—Demandes en nullité—Mariage putative”, Art.201 à 202 Fasc.120, J.Cl.—civil art. 201 à 202 Fasc.120 (Paris: 2004, in French); WELLENHOFER, zu §1313 BGB Rn. 1 in *Münchener Kommentar zum BGB* (6. Aufl., 2013: München in German); STABENTHEINER, zu §§29~31 EheG Rz. 6 ff. in Rummel (hrsg.) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* 2. Band/4. Teil: EheG, KSchG (3. Aufl., Wien: 2002, in German); GEISER and LÜCHINGER, zu Art. 109 N. 2 ff. in *Balser Kommentar zum Zivilgesetzbuch I* (Fn. 60) (in German). The U.S. Courts have declared marriage solely for immigration be “void” in several cases. U.S. v. Rubenstein, 151 F.2d 915 (2d cir., 1945); Lutwak v. U.S., 344 U.S. 604 (1953); Faustin v. Lewis, 85 N.J. 507, 427 A.2d 1105 (1981). Most of them are, however, the cases for annulment of the marriage and not collateral attack (compare the cases cited in Fn. 60, all of which are collateral attack cases) and so they can be reinterpreted to mean “voidable.”

IV. Conclusion

The incidence of cross-border marriage has been significantly increasing for the last 20 years in Korea. A considerable part of this trend is composed of marriages for immigration (i.e., marriages which aimed at getting privileges or benefits such as visa issuance or naturalization permission). Korean law previously granted a foreign spouse, especially a foreign wife who married a Korean, significant benefits under immigration law. Because the way marriage is understood socially as well as legally has changed, however, marriage is often abused as a vehicle to enter and work in Korea. As the definition of marriage is widened and largely formalized, the marriage contract can no longer be relied on to guarantee the appropriateness of the spouse's immigration. Korean law has coped with this problem by combining several doctrines independently developed in family law and criminal law. Marriage for immigration is sometimes void *per se* and *ab initio* in family law, and as a result reporting and registering one, a condition of marriage in Korean law, constitutes a crime. Because the privileges attached to marriage in immigration law presuppose voidness of the marriage, a foreign spouse in a simulated marriage cannot be granted the privileges. As it is a crime, the procedure that deals with this issue is a criminal one and the initiation of this procedure is in the hands of a public prosecutor. This approach, however, poses the danger of negating the achievements of modern family law (i.e., the autonomy and equality of marriage liberated from a stereo-typical marriage model based on patriarchy and preexisting gender roles). More importantly, it might encourage an unchecked and even unconscious bias toward foreign women from less developed countries. In the least, it necessarily infringes on the couple's privacy regarding their internal spousal relationship. These dangers are amplified by the criminalization of an immigration attempt via marriage. Defendants of a criminal charge are easily deprived of the opportunity to clarify the truth and to correct possible bias; not to mention, many foreign women do not speak Korean very well.

Though it seems impossible to fully harmonize all of the conflicting interests, there exists an approach better than the current one. Substantially, it is recommended to decouple family law and immigration law regarding this issue (i.e., the decision related to voidness for simulation and the decision related to propriety of immigration) and to further formalize the conditions for immigration. In this way, immigration control can be performed more openly and transparently by the administrative agency, whereas the management of the legality of immigration control can be handled independently by judge, which would contribute to the exclusion of possible bias, and the likelihood of privacy infringement can be decreased. Procedurally, decriminalization of immigration attempts via marriage seems to be the best solution. Some of these recommendations can be realized only by new enactment or amendment of statutes, while others can be realized merely by overruling preexisting case laws.

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Children's voices: Centre-stage or side-lined in out-of-court dispute resolution in England
and Wales?
Jan Ewing

1

Introduction

Listening to the voice of the child within family dispute resolution processes has become a 'clarion call' in recent decades.² Increasingly, the welfare paradigm in family law in England and Wales, which viewed children as vulnerable dependents, has been challenged by a new paradigm emphasising children's rights and viewing children as competent social actors who have a right to be consulted following the breakdown of their parents' relationship.³

When parents separate, children overwhelmingly report that they want information, both general and specific, and that they wish to be consulted on the arrangements to be made for them.⁴ They wish to have a 'voice', not necessarily a 'choice' in the arrangements made (save for children in abusive or violent families who want both a voice and a choice).⁵ Uncertainty coupled with fear of decisions being made without their involvement causes distress for children.⁶ Conversely, children who report that they were consulted over or influenced the making of contact and residence arrangements report higher degrees of satisfaction with the

¹ The author is a Research Associate at the University of Kent on the ERSC funded 'Mapping Paths to Family Justice' project. The project is led by Anne Barlow at the University of Exeter. The CIs are Anne Barlow, Rosemary Hunter (University of Kent) and Janet Smithson (University of Exeter).

² James, A.L. and James, A. (1999) 'Pump Up the Volume: Listening to Children in Separation and Divorce' *Childhood* 6 (2): 189-206 at p.189

³ Hunter, R. (2007) 'Close Encounters of a Judicial Kind: "Hearing" Children's "Voices" in Family Law Proceedings', *Child and Family Law Quarterly*, 19: 283-303; James and James (1999), *ibid*; Parkinson, P. and Cashmore, J. (2009) *The voice of a child in family law disputes*, Oxford Scholarship online; Smart, C. and Neale, B. (2000) "'It's my life too"—Children's perspectives on post-divorce parenting'. *Family Law*, 30 (3): 163-169

⁴ Smart and Neale (2000), *ibid*; Walker, J. and Lake-Carroll, A. (2014) 'Hearing the Voices of Children and Young People in Dispute Resolution Processes', *Report of the Family Mediation Task Force, Appendix D*. Ministry of Justice; Walker, J., McCarthy, P., Coombes, M., Richards, M. and Bridge, C. (2007) *The Family Advice and Information Service: A changing role for family lawyers in England and Wales* (Legal Services Commission); Walker, J., McCarthy, P., Stark, C. and Laing, K. (2004) *Picking up the Pieces: Marriage and divorce two years after information provision* (Lord Chancellor's Department).

⁵ Parkinson, P. and Cashmore, J., (2007) 'Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce' *Family Court Review*, Vol. 46 (1) 91-104; Parkinson and Cashmore (2009), *op. cit.* 3; Smart and Neale (2000), *op. cit.* 3.

⁶ Douglas, G., Murch, M., Scanlan, L. and Perry, A. (2000) 'Safeguarding Children's Welfare in Non-Contentious Divorce: Towards a New Conception of the Legal Process', *Modern Law Review*, 63: 177-196; Lansdown, G. (2011) *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12*. (Save the Children UK on behalf of Save the Children and UNICEF)

arrangements.⁷ Giving children a voice can lead to more durable agreements; improved parental alliances; better father–child relationships and more cooperative co-parenting.⁸

The right of the child capable of forming his or her own views to express those views freely in all matters affecting them, and for the views of the child to be given due weight in accordance with the child's age and maturity, is enshrined in the United Nations Convention on the Rights of the Child 1989, Article 12 (Article 12). Article 12.2 provides that the right of the child capable of expressing his or her view to do so extends to both “judicial and administrative proceedings affecting the child”. According to the Committee on the Rights of the Child, this encompasses alternative dispute resolution mechanisms such as mediation.⁹

In spite of the compelling evidence that children wish to be heard following parental separation, the evidence to date, in much of Europe as well as the UK,¹⁰ is that the emphasis on hearing the voice of the child on family breakdown is more rhetorical than real.¹¹ As Ferguson convincingly argues,¹² it does children a dis-service to give them the 'right' to be heard in theory unless in practice that right is exercisable, and leads to better outcomes as assessed by the child.

Drawing on data from a three-year ESRC-funded project, ‘Mapping Paths to Family Justice’ (the project), this paper documents the ways in which children's voices continue to be marginalised in three out-of-court family dispute resolution (FDR) processes in England and Wales; solicitor negotiations, mediation and collaborative law. This marginalisation may occur through:

- (a) Lack of direct consultation with children in the process
- (b) Loss of focus on the child in the FDR process
- (c) Parties’ use of the rhetoric of child welfare to promote their own positions, resulting in children being exposed to prolonged and deepening conflict between their parents and possibly court proceedings.

Each of these causes of marginalisation and silencing - or at least diminishment - of the voice of the child in FDR processes will be discussed. The paper will conclude by considering the

⁷ Butler, I., Scanlon, L., Robinson, M., Douglas, G. and Murch, M. (2002) ‘Children's involvement in their parents' divorce: Implications for practice.’ *Children and Society*, 16(2): 89-102.

⁸ Walker and Lake-Carroll (2014), op. cit. 4

⁹ Committee on the Rights of the Child (2009) General Comment No. 12 *The right of the child to be heard*, CRC/C/GC/12, United Nations Convention on the Rights of the Child, para. 32; Lansdown (2011) op. cit. 6

¹⁰ Rešetar, B. and Emery, R. (2008) ‘Children's Rights in European Legal Proceedings: Why are Family Practices so Different from Legal Theories?’ *Family Court Review*, 46 (1): 65–77

¹¹ James and James (1999), op. cit. 2.

¹² Ferguson, L. (2013) ‘Not merely rights for children but children’s rights: The theory gap and the assumption of the importance of children’s rights’, *International Journal of Children’s Rights*, 21: 177–208.

need for some qualification of the principle of party autonomy in out-of-court dispute resolution processes to ensure that children's voices are heard.

Background and aims

There are three main types of FDR practised in post-separation parenting disputes in the UK. These are: solicitor negotiation (in which solicitors engage in a process of correspondence and discussion to broker a solution on behalf of their clients without going to court); mediation (in which both parties attempt to resolve issues relating to their separation with the assistance of a professional family mediator) and collaborative law (in which each party is represented by their own lawyer and negotiations are conducted face to face in four-way meetings between the parties and their lawyers, with all parties agreeing not to go to court). Against the backdrop of changes in the landscape of family law outlined below, the project's central aim was to provide evidence about the awareness, usage, experience and outcomes of these three FDR processes. The project also sought to:

- produce a 'map' of family dispute resolution pathways and consider which pathways are most appropriate for which cases and parties;
- consider which (if any) norms are embedded in these different processes and
- provide research evidence to inform policy and consider best practice.

There have been seismic shifts in the landscape of family dispute resolution in the UK in recent decades. Traditionally, people's first port of call when faced with problems concerning family breakdown was to see a solicitor.¹³ However, since the 1990s, successive UK governments have promoted mediation as the preferred means of resolving family disputes. People applying for legal aid for family disputes were first required to receive information and be assessed for suitability for mediation. Subsequently, unless falling within a narrow band of exemptions (chiefly relating to domestic violence issues), any party wishing to make a court application following family breakdown is required to first attend a Mediation Information and Assessment Meeting (MIAM).¹⁴ A MIAM is a short meeting that provides information about mediation as a way of resolving disputes.¹⁵ Legal aid is now effectively available only for mediation, not for court proceedings.¹⁶ Collaborative Law, was introduced to England and Wales in 2003, in response to the dissatisfaction of a number of family lawyers with traditional adversarial processes. Since it has never been supported by public funding, however, it tends to be used mainly by relatively well-off parties, primarily to resolve financial arrangements, although the interests of children are an essential consideration in that process.

¹³ Genn, H (1999) *Paths to Justice: What People Do and Think about Going to Law?* (Oxford: Hart Publishing).

¹⁴ Children and Families Act 2014, s. 10 (1)

¹⁵ Practice Direction 3A – Family Mediation Information and Assessment Meetings (MIAMs); and now Children and Families Act 2014.

¹⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

In 2013 the Family Justice Review, led by Sir David Norgrove, made a raft of recommendations to overhaul the family justice system in England and Wales indicating that, “these recommendations aim to ensure that children’s interests are truly central to the operation of the family justice system.”¹⁷ The UK government accepted the review's recommendations stating that one of the “key principles” guiding reform of the family justice system should be that “children must be given an opportunity to have their voices heard in the decisions that affect them.”¹⁸ In light of this commitment, this paper examines the extent to which children's voices are “heard” in FDR processes in England and Wales.

Methods

The study had three phases. First, we undertook a national survey of awareness and experiences of the three FDR processes under review using a structured questionnaire administered as part of two larger surveys: the TNS-BMRB nationally representative Omnibus survey, and the Civil and Social Justice Panel Survey. Results of the survey phase are reported elsewhere.¹⁹

In phase two we undertook in-depth qualitative interviews with 96 parties (45 men and 51 women) who had undergone one or more of the dispute resolution processes in the past 15 years. Several parties had experienced more than one process; 56 had experienced Mediation, 44 Solicitor Negotiation and 8 Collaborative Law. There was a mixture of legally aided and non-legally aided parties. Some parties were recruited via follow-up contacts from the surveys, but most were recruited via law firms and mediation organisations. Consequently, the majority of parties interviewed had experienced family dispute resolution relatively recently (with the earliest mediation experiences dating from 2002). There was also a range of successful and unsuccessful attempts at FDR.

We also undertook in-depth qualitative interviews with 40 solicitors and mediators. The majority of the solicitors interviewed were trained and practised in all three FDR processes. Just over half of those practising solely as mediators had come from a legal background with just under half from a non-legal (therapeutic/social work) background.

Phase three entailed recording sessions from each FDR process and analysing the transcripts to understand the dynamics of the process and the interactions between the parties and practitioners, and to triangulate the interview data. We recorded five mediation processes (4

¹⁷ Family Justice Review, Final Report (November 2011), Department for Education and Ministry of Justice, p.26.

¹⁸ Ministry of Justice and Department for Education (2012) *The Government Response to the Family Justice Review: A system with children and families at its heart*, Cm 8273, at p. 8.

¹⁹ For a summary of the Phase 1 findings see Barlow et al. (2013) 'Mapping Paths to Family Justice - a National Picture of Findings on Out of Court Family Dispute Resolution' *Family Law* 43 (3): pp 306-10.

children's matters and one financial; 4 sole and one co-mediation; involving a total of 9 separate sessions) and three collaborative law processes (all concerning divorce and financial matters; involving a total of 11 separate sessions – with one case running to 7 sessions). In the two collaborative cases where the parties had minor children, the parties had agreed post-separation arrangements for the children prior to commencing the collaborative process. In relation to solicitor negotiations, we took the pragmatic decision to record the first solicitor-client interview since this is when the client would be explaining the disputed issues, the solicitor would be giving advice and explaining FDR options, and (ideally) together they would be agreeing a course of action. Additionally, most of the subsequent progress of a negotiated case is conducted by telephone or written correspondence rather than face-to-face meetings. We recorded 5 lawyer-client first interviews: 2 concerning children's matters, 2 divorce and finances and one focused primarily on divorce; 4 privately funded and one legally aided.

The voice of the child in contested proceedings

When a court is determining any question with respect to a child's upbringing, the welfare of the child is the 'paramount consideration'.²⁰ In order to determine how best to promote the child's welfare, the court must, amongst a number of other factors, consider 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).'²¹ At the first court appointment the judge must consider 'the way to involve the child'²² and 'how are the wishes and feelings of the child to be ascertained (if at all)?'²³ Traditionally the child's views in contested proceedings are sought by appointing a Family Court Adviser²⁴ to report to the court on the child's wishes and feelings, or, in more serious and intractable cases, by making the child a party to proceedings and appointing a Guardian to represent the child's interests to the court.²⁵ Some courts have adopted the practice of requiring all children over the age of 8 to attend court for the first appointment, when they will be interviewed by a Family Court Adviser and their views fed back to the judge and the parties, however this practice is not widespread.

More typically, two factors interact to limit the degree of consultation with children. First due to financial constraints, courts are encouraged to minimise the ordering of reports and appointment of Guardians to cases only where they are absolutely necessary. Secondly, courts strongly encourage parents to agree arrangements between themselves rather than proceeding to adjudication, which again may obviate any need to ascertain the child's views.

²⁰ The Children Act 1989, s1(1)

²¹ The Children Act 1989, s1(3)

²² Practice Direction 12b – The Revised Private Law Programme, para 2.2 (f)

²³ *Ibid*, para 5.5 (a)

²⁴ Children Act 1989, s. 7

²⁵ *Ibid*, s.9.2

In reality, then, children are consulted in only a minority of cases that go to court.²⁶ Indeed, this fact was highlighted by one of the parties we interviewed, Henry,²⁷ a father with residence of two children aged 13 and nine. He explained that within contested residence proceedings the children wrote a letter to their mother:

“saying that they were concerned they didn’t feel they were being listened to and that nobody from this Cafcass place²⁸ had actually asked them what they wanted yet and they were concerned that it was all rushing forward and nobody would give them the information so they couldn't express proper opinions and so on.”

Following accusations from the mother's solicitors that Henry had coerced the children to write the letter the Family Court Adviser appointed a mediator qualified to undertake direct consultation to speak to the children which the children, Henry reported, found helpful. However, following a change of personnel at Cafcass, the new Family Court Adviser took the decision that further sessions between the children and the mediator were not appropriate.

The voice of the child in out-of-court FDR processes

The codes and protocols governing family law solicitors, mediators and collaborative lawyers in England and Wales require practitioners to promote the child's welfare as the paramount consideration in family law disputes. The codes/protocols also encourage the separation of children's and adults' needs with parents encouraged to focus on the children's needs.²⁹

Traditionally solicitors have been viewed as adversarial and mediation (and collaborative law) as more conciliatory. However recent research into solicitors' practice shows that most family lawyers are committed to a non-adversarial approach which considers the long term interests of the family, particularly children, not just the client's interests.³⁰ Webley asserts that within the context of FDR, both the Law Society (which regulates family lawyers) and the College of Mediators, “appear to be converging on a feminised conception of professional, which shuns latent adversarialism and prizes co-operation and settlement for the good of children and long term parenting arrangements.”³¹

²⁶ There have also been criticism of how children’s wishes and feelings are obtained and responded to in court proceedings, but that is beyond the scope of this paper. See, e.g. Sawyer, C. (2000) 'An Inside Story- Ascertaining the Child's Wishes and Feelings', *Family Law*, 30 (3): 170; May, V. and Smart, C. (2004) 'Silence in court? – hearing children in residence and contact disputes' *Child and Family Law Quarterly*, 16(3): 305-315; Smart, C. and Neale, B. (1999) *Family Fragments?* Cambridge: Polity; Smart and Neale (2000), op. cit. 3.

²⁷ All names used in this paper, for both parties and practitioners, are pseudonyms.

²⁸ Cafcass – the Children and Family Court Advisory and Support Service – is the organisation responsible for the provision of court welfare services, including Family Court Advisers and Children’s Guardians.

²⁹ Family Law Protocol, Third Edition (2010) para. 1.5; Mediation Council's Code of Practice 5.7.1

³⁰ See Eekelaar, J., Maclean, M. and Beinart, S. (2000) *Family Lawyers: The Divorce Work of Solicitors*, Hart Publishing; Ingleby, R (1992) *Solicitors and Divorce*, Oxford: Oxford University Press; Sarat, A. and Felstiner, W. (1995) *Divorce Lawyers and their Clients: Power and Meaning in Legal Process*, Oxford: Oxford University Press.

³¹ Webley, L., (2010) *Adversarialism and Consensus? The Professions’ Construction of Solicitor and Family Mediator Identity and Role*, Quid Pro: New Orleans at p. 198.

Nevertheless, within all FDR processes, parents remain the “principal conduit” for conveying the wishes and feelings of the children to lawyers and mediators.³² The remainder of this paper considers the evidence from the ‘Mapping Paths to Family Justice’ project concerning the extent to which children’s voices are heard in mediation, collaborative law and solicitor negotiations.

Direct consultation with children in mediation

The Code of Practice for mediators requires mediators to encourage participants to consider the children’s wishes and feelings. If appropriate, mediators may discuss with participants whether and to what extent it is proper to consult the children directly in order to ascertain their wishes and feelings.³³

Although the UK’s Family Mediation Council (FMC) has 396 mediators on its register trained to provide direct consultation with children, very few children and young people participate directly in the mediation process, with some mediators involving children maybe once or twice a year at most.³⁴ Mediation is child-focused but rarely child-inclusive and where children are included this is usually to assist parents’ decision-making in difficult cases or where parents are stuck. The decision to include children is taken by the adults rather than viewed as the right of the child.³⁵

The lack of consensus amongst practitioner interviewees in the present study over whether child-inclusive mediation is in the best interests of children reflects similar disagreements in the research.³⁶ Emery suggests that children (save for teenagers where appropriate) should generally not be included in mediation as he feels that in giving children the ‘right’ to be heard in mediation, too many children end up with the ‘responsibility’ of making custody decisions. He argues that parents know what is best for their children and parents should take responsibility for decision-making over children on family breakdown.³⁷ Walker argues persuasively, however, that children can distinguish between participation and decision-making and that consulting children directly should never be about the latter.³⁸

In child-focused mediation the mediator encourages the parties to keep the children at the forefront of the decision-making but children are not directly consulted. In child-inclusive mediation the views of the child are sought directly, by the child speaking to the mediator or

³² O’Quigley, A. (2000) *Listening to children’s views. The findings and recommendations of recent research.* Joseph Rowntree Foundation.

³³ Mediation Council’s Code of Practice 5.7.2

³⁴ Walker and Lake-Carroll (2014), op. cit. 4

³⁵ Ibid.

³⁶ Dennison, G. (2010) ‘Is mediation compatible with children’s rights?’ *Journal of Social Welfare and Family Law*, 32(2):169-182

³⁷ Emery, R. (2012) *Re-negotiating Family Relationships: Divorce, Child Custody and Mediation*, 2nd Edition, The Guilford Press.

³⁸ Walker, J. (2013) ‘How can we ensure that children’s voices are heard in mediation?’ *Family Law*, 43(2): 191-195

to an independent child consultant. McIntosh et al. found that parents and children reported enduring reductions in levels of conflict and improved management of disputes following child-focused and child-inclusive mediation. However, child-inclusive mediation was also associated with a significant level of parental relationship repair and improved emotional availability of parents to children. Agreements reached were developmentally sensitive with parents and children more content with arrangements over a one-year period post-mediation.³⁹ Agreements reached in child-inclusive mediation were more enduring than agreements made in child-focused mediation at a four-year follow-up.⁴⁰

Direct consultation with children: Evidence from the practitioner sample

Of the 31 mediators in our practitioner sample, 20 were qualified to provide direct consultation with children. But only a couple of mediators practised direct consultation relatively frequently. One of these estimated that she had an average of three cases a year. Consistent with Walker and Lake-Carroll's findings,⁴¹ most practised direct consultation rarely. Many had had only one or two cases ever. Some were qualified but never practised, either because of lack of opportunity, personal misgivings or because they belonged to mediation organisations opposed in principle to direct consultation with children. One mediator had no experience of direct consultation despite having been qualified for ten years. It was perhaps therefore unsurprising that there were very few examples of child-inclusive mediation in our party sample. Where direct consultation does take place this is almost always carried out by a different mediator or child consultant to ensure that the children have an independent voice.

Some practitioners who had undertaken the direct consultation training expressed misgivings over the quality of the training offered. The additional cost of child-inclusive mediation was also a barrier. Consent from both parents for the mediator to consult the child was not always forthcoming. Several mediators were cautious about direct consultation because of the risk that, consciously or unconsciously, parents might seek to influence the child, adding pressure on the child, particularly where the parents held polarised positions. There were concerns that it can be difficult for the mediator to assess accurately whether the child had been 'primed' by a parent. Other mediators expressed reticence because of difficulties around how information from the children would be fed back to the parents, with concerns that the process could be damaging for the child if not handled well. These concerns echo the anxieties over direct consultation expressed by mediators in much of the available research.⁴²

³⁹ McIntosh, J., Wells, Y., Smith, B. and Long, C. (2008) 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustments', *Family Court Review*, 46(1): 105–124

⁴⁰ McIntosh, J., Smyth, B., Kelaher, M., Wells, Y. and Long, C. (2010). 'Post-separation parenting arrangements: Patterns of developmental outcomes: Studies of Two Risk Groups', *Family Matters* (86): 40–48

⁴¹ Walker, and Lake-Carroll(2014), op. cit. 4

⁴² Walker (2013) op. cit. 38

In the present study, the reservations of practitioners reluctant to engage children directly in the mediation process centred on the belief that the parents ought to be able to adequately represent the child's voice. The view of the majority of those who had reservations about child-inclusive mediation was summarised by Peter Young, a mediator and former solicitor:

“To be honest I have never found the need to bring children into mediation because my practice seems to work quite well on the basis that the children’s voice is heard but it’s the parents that will bring that voice.”

By contrast, some mediators were positive about the potential for direct consultation to assist older children who might be struggling to tell their parents what they really feel, and some thought that direct consultation enabled the mediator to understand more fully the dynamic of the whole family:

[Direct consultation with children] “really gives you a much better sense of the whole family; the whole dynamic.” (Laura Gurney)

Others viewed direct consultation as the right of the child:

I am “very pro direct consultation... I am very much about involving the voice of the child, you know. All the research that I have read in the last 10 years tells me the same common factor; children don't feel heard, they feel lied to and they feel betrayed by the parents because they haven’t been told the truth about things, there is no honesty in the process for them, and that the decision making quite often ignores the children’s wishes.” (Molly Turner)

One mediator said that very often the parents give diametrically opposed versions of what the children say they want so direct consultation gives the children an opportunity to say how they actually feel and is “really, really useful in terms of getting parents to see it from the child’s perspective.” (Hannah Phillips)

Walker concludes that the patchy exercise of direct consultation of children in mediation in the UK “appears to have been based less on the rights and needs of children and more on ...factors to do with the personal position of each mediator on the matter.”⁴³ The evidence from the present study bears out this observation. There was also some limited evidence that those most comfortable with the concept of direct consultation often had previous professional experience of working with children. This suggests that mediators may require additional initial training and continued professional development to enable them to undertake or refer to direct consultation where appropriate.

Direct consultation with children: Evidence from the party sample

The party interviewees were generally reluctant to engage in child-inclusive mediation. Ryan, whose eldest two children were aged 16 and 17, indicated that direct consultation was not

⁴³ Walker (2013) *ibid.*

considered but he would not have supported it as he felt that mediation would have been “awkward” if the children were involved and he did not think that it would be good for them.

Lynn's mediator did raise the possibility of the parties' eight-year-old daughter attending mediation. The parties were unable to agree the practicalities of who would take the child to and from mediation. The daughter considered attending but in the event did not wish to take up the mediator's offer.

Most parents wanted to minimise the impact of the separation on the children and believed that this could be achieved best by shielding the children from involvement in the chosen FDR process. Claire, a mother of two young children, typified this view:

“We didn't tell them until we had already got this agreement sorted and I had found somewhere [to live]. So they were told probably 2 weeks before I moved out that it was all happening. So at the time of the mediation they didn't know anything about it, but of course we wanted to protect the children from all that as much as possible...”

Some parties actively chose mediation because they thought that would avoid the children facing the “trauma” of being interviewed by court officers:

“I just wanted a resolution. I didn't want... because my concern was when I looked about going to court was that the children, because of their age, would be interviewed by court officers and I didn't want to put them through that, and so I just wanted a resolution... where the children... I knew they had to be involved at some stage but I wanted a resolution where it was less traumatic for the children.” (Malcolm)

McIntosh et al.'s study highlighted the ability of direct consultation to assist parents “to see it from the child's perspective”. One of the fathers who had used child-inclusive mediation to resolve his family dispute in McIntosh's sample, for example, observed:

“I heard their opinions, which were an eye opener. It gave insight into what they were going through. I do stuff differently now. Getting past the hurt and seeing them more clearly is what happened.”⁴⁴

However, this was not a view expressed within our party sample. The parties whose children were consulted were generally not particularly positive about the experience for the children. Gerald was unhappy that his children were interviewed together when he had wanted the mediator to see them separately. The parties failed to reach agreement in mediation but subsequently settled following intervention from Gerald's ex-wife's new partner.

Ernest said that he “felt uncomfortable” about the mediator's suggestion of speaking directly to his 11-year-old daughter because he felt that his ex-wife was putting the children “in a position where they would have to make a choice”. He agreed that the mediator could speak to the child about a specific issue (choice of school) but felt that the mediator went beyond

⁴⁴ McIntosh et al. (2008) op. cit. 39 at p. 117.

“the original remit” by discussing contact arrangements with the child as well. Ernest had told his daughter that he would support her choice of school “110%” and, after the child clearly articulated her choice in direct consultation, the parties agreed matters without recourse to the court. However, Ernest thought that consulting his daughter direct had “put her in a difficult position”. His view was:

“I think mediation has to be child-focused... rather than child-inclusive. I think there are better ways of bringing the child... I think the jargon now is 'into the room'. I think there's better ways of focusing on the child than actually bringing them to mediation. I think it puts them in a very difficult position... I am not saying it's not appropriate in all cases, but I think it has to be managed so very carefully.”

Although the research yielded insufficient data on parties' experiences of child inclusive mediation to be able to make an assessment of its value, parties did report in some cases how, after prolonged dispute, consulting the children outside the dispute resolution process had helped to resolve the issue. For example Sheila's ex-husband proposed in collaborative sessions an arrangement whereby the children would spend more time with him, which Sheila resisted because she did not think it would be in the children's best interests at that particular time. This was one of the reasons the collaborative process broke down, after which:

“I actually spoke to the kids... and I said, ‘Look, part of the reason things were difficult was because we were about to make these new arrangements. What do you think?’ And they said, ‘Fine, we'll try it’.”

It would appear that consulting children may be an effective mechanism for dealing with some difficult cases, particularly where parties have fixed and incompatible conceptions of child welfare.

Direct consultation with children: The recorded sessions

None of our recorded mediation sessions included direct consultation with children, although the children involved were mostly too young for this to be a realistic option. Neither was there any evidence from the party interviews or recorded sessions of children being given the opportunity to speak to a child consultant in collaborative law, and none of the collaborative practitioners suggested hearing the voice of the child in this way. Moreover, the fact that child inclusive mediation appears to be a relatively ad-hoc and sparsely used practice makes it difficult to test concerns or to draw conclusions about its efficacy.

Focus on the child in the FDR process

All three processes officially espouse a focus on the children's needs and well-being, both in children's cases and in financial cases where there are dependent children. The increasing number of ‘hybrid’ practitioners, qualified in more than one process, has arguably helped to ensure that child focus has become part of lawyer-led processes. Richard Benson, a practitioner qualified in the three processes, indicated that a child-focused approach is “fundamental” to all family dispute resolution processes, a view echoed unanimously in the

practitioner interviews. He demonstrated this approach in a recorded session subsequent to his practitioner interview:

“The reality is as you have said, you have got kids and they are at the heart of the solution.”(Solicitor-Client Interview 203)

Many parties said that the mediator or solicitor did focus on the child’s welfare and put that at the centre of negotiations:

“[The mediator was] very clear with me that it was about the children and not about either of us, really. It was all about them.” (Tilda, settled child arrangements in mediation)

“My lawyer yeah, she 100% she agreed with me that the kids should come first.” (Jason, solicitor negotiations followed by children proceedings that settled prior to final hearing)

Good practitioners in all FDR processes provided information to parties on the courts’ focus on children’s welfare, and also on social science evidence about child development. In the absence of direct consultation, several parties reported that by providing helpful, age appropriate literature on separation for the children to read, their mediators had “empowered” the children.

In the recorded sessions, we saw considerable emphasis on “bringing the children into the room” by discussing the children's personalities at the beginning of the first session.⁴⁵ Often this appears to be a 'good ice-breaker' and is used by practitioners as a reminder that the process is 'child-focused'. The following exchange in collaborative case 214 typifies this approach:

§1. Wife's collaborative lawyer:

“We have got the [children] on the agenda, not because we think there was anything major to think about from what I gather, as everything seems to be going reasonably well there, but just as a kind of reminder that, you know, they are three very important people who aren’t sitting in this room.”

§2. Husband's collaborative lawyer:

“I would like to hear what they are like. Would you mind describing them...? Because all I know is sort of how old they are and what they are doing [educationally]... but I don't really know much about them...”

⁴⁵ Cf Trinder, L., Jenks, C.J. and Firth A. (2010) ‘Talking Children into Being in Absentia? Children as a Strategic and Contingent Resource in Family Court Dispute Resolution’ *Child and Family Law Quarterly* 22(2): 234-257, who found that this did not occur in the in-court conciliation sessions they observed.

A discussion of the child's personality was also used to good effect at the outset of mediation 209, a highly conflictual contact dispute, as a means of getting the parents to focus on what they did agree on, namely that they were the proud parents of a “clever... switched on... bubbly” toddler.

In the recorded mediation sessions, mediators often used 'reframing' techniques when parties were becoming positional to try to break an impasse and to try to refocus the discussion on the children's needs. For example:

Wife:

“My priority is for [husband] to realise that having the children half the time is not in their best interest.”

Mediator:

“So can I rephrase that, if I may, – and I do this all the time – arrangements for the children?” (Mediation 207)

There was also evidence of effective use of reframing to move negotiations forward in a child-centred way in the party interviews:

“One of my husband’s objectives was to spend as much time with the children as possible and so the mediator said, ‘Well, why don’t we phrase it as to be able to build meaningful relationships with the children?’” (Tracy, Mediation)

In the recorded sessions we observed mediators in particular using a focus on the child’s welfare as a tool to bring the parties together and encourage them to put their adult dispute aside in order to co-operate as parents and to reach agreement.⁴⁶ Mediators often made several appeals during the sessions to try to keep the discussion child-focused and to diffuse tensions if conflict escalated:

“[L]et’s explore the options in terms of reintroducing contact, bearing in mind that what we are looking for here is a solution that has [child]’s best interests at heart rather than a solution that is specifically geared to either one of you, because that’s the most important isn’t it?” (Co-mediator, 209)

(and later):

“Let’s just return [mother], let’s just return to the central issue here which is the welfare of [child].” (Co-mediator, 209)

Despite this evidence of good practice, where parties were entrenched in their adult dispute, practitioners' efforts to get the parties to focus on the children were often in vain resulting in children’s interests receding into the background.

⁴⁶ Trinder et al. (2010) *ibid* report similar findings.

In addition to loss of child-focus in some instances, there were also a number of parties who said that they thought the process was not child focused, for example:

“And how far did you think that the mediator was focusing on the needs of your daughter?”

I don't think he was at all. No, not at all. I don't think my daughter was mentioned in any way of him explaining to us that we are parents to a child, that wasn't the process. All he kept making it about was me and [ex-partner] ... instead of the child being the important part of all this.” (Karl)

“I expected us to be talking about what was best for my son but it turned out to be, in my opinion, what was best for his mum.” (Leo, Mediation)

Some parties felt that that there was incongruence between mediation theory and practice. Sonia, for example, indicated that in the MIAM the mediator had emphasised the need to focus on the children but, in Sonia's opinion, had failed to put this into practice in the mediation session:

“[The mediator] decided that we had a choice between discussing our finances or discussing about the child, and we discussed finances. And she made that decision, therefore, that that was the most important thing... It's like [the mediator] knows what to say. It's not like she's not aware of it; she just didn't do it. So there's no point in saying it.”

Some parties felt that the focus was on agreement rather than the best interests of the children:

“Do you feel the children were at the centre of the process? Were they trying to make you do what was right for them, is that how it was explained, or was it more adult focused would you say?”

I can't say that it was to me very completely child focused... [Mediation] wasn't directed. It was more 'this is what [ex-partner] wants to do, this is what Rebecca wants to do, can you come to an arrangement of what you want?' rather than 'this is what is best for the children'.” (Rebecca, mediation)

An important caveat is that the perceived lack of child-focus outlined above largely reflects the interviewed party's perception, but this may also be a symptom of the problem. In a number of the party interviews the party appeared to conflate the child's interests and their own interests, or at least to have difficulty separating the children's needs from their own, casting doubt on practitioners' views reported earlier that parents are the best representatives of children's voices.

Parties' use of the rhetoric of child welfare to promote their own positions

Vaughan notes the tendency for spouses/partners to uncouple “*asymmetrically*”; that is to be at different stages of the grieving process over the breakdown of the relationship.⁴⁷ There was evidence of this asymmetry in all three processes. Best practice in such circumstances was for the practitioner to halt the proceedings until both parties were emotionally ready to cooperate and cope with negotiations with the ex-partner. Emery suggests that when parties at different stages in the grieving process try to negotiate, this asymmetry can lead to “his” and “her” versions of the divorce as well as “his” and “her” versions of how the children are coping with the divorce.⁴⁸ The parents then become polarised in their positions, each strategically invoking the rhetoric of children's rights to advance and legitimise their own immutable positions. Similarly, Sawyer suggests that the culture of non-adversarialism in family disputes has achieved:

“... a remarkable feat of language whereby a certain structure of parental rights is renamed ‘children's rights’ so as to make it impossible to question, and dissent becomes untenable and even pathological.”⁴⁹

In the party interviews, we found one party accusing the other of using child welfare rhetoric to legitimise their position:

“[My ex-husband] kept banging on about [child welfare]. You see, this is his big thing that, you know, he wanted what’s best for the children and I didn’t. I was just a selfish mad woman, you know. So in fact, he kept banging on about it. He knew the correct buzzwords. He knew what sort of things to hang his argument on, so he kept banging on about it. [The mediator] didn’t really need to.” (Monica)

This phenomenon was also strikingly evident in our recorded sessions. Three of the four mediations involving children disputes were unresolved because of fundamental clashes between the parents over their views on children's best interests. Appeals by the mediators to approach the negotiations as “Team Parents” (206) or “Project Children” (207) are fruitless when parents are so polarised, and exhortations to focus on the child's needs rather than their own are equally fruitless when both parents insist that they ARE focusing on the child's needs:

⁴⁷ Vaughan, D. (1990) *Uncoupling, Turning Points in Intimate Relationships*. New York: Vintage Books.

⁴⁸ Emery, R.E., (2012) *Re-negotiating Family Relationships: Divorce, Child Custody and Mediation*, 2nd Edition, The Guilford Press.

⁴⁹ Sawyer, C. (2000) op. cit. 26 at p. 173. See also James, A. L. (2008), 'Children, the UNCRC, and Family Law in England and Wales'. *Family Court Review*, 46 (1): 53–64; Ryrstedt, E. (2012) 'Mediation regarding children - is the result always in the best interests of the child? A view from Sweden' *Int. J.L.P.F.* 2012, 26(2), 220-241; Trinder et al. (2010) op. cit. 45; Walker (2013) op. cit. 38.

Mother:

“...when the children fall over, when they cry, when they wake up in the night, it is me that they ask for. And children need to be with their mum the majority of the time. There’s no doubt about that, [husband], they need to be with their mum.”

Father:

“... in the same way that [wife] is being emphatic about ‘I believe that that would be best for the children,’ then that’s my position too... If it was significantly less than equal time with each of us, then they won’t have the relationship with me that they deserve, and need.”(Mediation 207)

Like the fathers in Smart and Neale's study, the fathers in the mediated cases with parents expressing polarised views invoked a ‘rights’ discourse, casting themselves in the role of a victim forced to enforce their legitimate rights.⁵⁰ But their perceived rights to spend equal time with their children tended to be cast in terms of their children’s ‘rights’ to have their father equally involved in their upbringing. The mothers in these cases, by contrast, invoked a discourse of care, asserting children’s need for stability and routine with themselves as primary carer. Inevitably, children’s own wishes, and how they might feel about the conflict between their parents, become sidelined in such disputes.

Conclusions

The fundamental shift away from court towards out-of-court settlement of family disputes in recent decades may be seen to have resulted in a loss of opportunities for children’s voices to be heard in decision-making about post-separation parenting arrangements. The evidence from the present study, confirming earlier research in England & Wales, is that children are rarely consulted in out-of-court dispute resolution processes. And in the absence of direct consultation with children, while dispute resolution practitioners endeavour to be child-focused, there is an inevitable tendency for all processes to become dominated by adult agendas and for children’s voices to be marginalised.

Our findings suggest that, in order to place children more at the centre of the decision-making process,⁵¹ there is a need for a more systematic – and nuanced – approach to the inclusion of the voice of the child in all out-of-court dispute resolution processes. Since divorce and separation is a process not a discrete event⁵² involvement of the child must also be viewed as a process and must be tailored to the needs of the individual child.⁵³

⁵⁰ Smart and Neale (1999) op. cit. 26

⁵¹ Barton, C. and Pugsley, J. (2014) 'The Voice Of The Child: Are Mediators Listening?' *Family Law* (3): 357-358

⁵² Mansfield, P. (2000) 'From Divorce Prevention to Marriage Support. In The Rt. Hon. Lord Justice Thorpe, and E. Clarke (Eds.), *No Fault or Flaw The Future of the Family Law Act 1996, (Papers given to the President’s Third Inter-Disciplinary Conference on Family Law)* Bristol: Jordans Publishing Ltd, 29-33

⁵³ Smart and Neale (1999) op. cit. 26; Walker (2013) op. cit. 38; Committee on the Rights of the Child (2009) op. cit. 9 at para. 133.

Ensuring that children's voices are heard would require some qualification of the principle of party autonomy, which is taken to be a fundamental tenet of FDR, but which recognises only the two adult parties to a family dispute as the key players in its resolution. The most obvious way to achieve such a change would be by means of amendment to the codes and protocols for solicitors, mediators and collaborative lawyers to reflect the expectation that (a) children should be informed of their rights to express their views in decisions concerning them following parental separation,⁵⁴ and (b) children should be afforded the opportunity to make their views known. How children's views would be sought in practice would need careful consideration. Children's right to express a view must include a right not to express a view should they so choose. Nevertheless, such amendments would have the effect of shifting the issue of hearing children's voices in out-of-court FDR processes from the margins to centre-stage, and of reframing the issue from being a matter of children's welfare to one of children's rights.

⁵⁴Committee on the Rights of the Child (2009) op. cit. 9 at para. 41; Lansdown op. cit. 6

The structural integrity of marriages following major breaches of trust in the first four years.

Jan Ewing, University of Cambridge

Introduction

Whilst the pressures on modern marriages are widely documented in both academic and popular literature, optimism for the future of one's own marriage, at least at the outset, remains high (Whitehead and Popenoe, 2001). Despite such optimism, approximately 42% of UK couples marrying at the start of the twenty first century will divorce (ONS, 2013). In 2010, 8.1% of marriages in England and Wales had ended by the fifth anniversary. The probability of divorcing by the next anniversary rises rapidly in the first few years of marriage to a peak of 3.25% by the 6th anniversary before falling with each year of marriage thereafter (ONS, 2013).

Declines in marital happiness are steepest in the early years (VanLangingham, et al., 2001). It is likely that for some divorcing in later years the 'uncoupling' process began in the early years with patterns of communication and conflict resolution adopted soon after marriage affecting the marriage's trajectory, culminating in its ultimate demise. A reversal of the trend towards marital breakdown in the early years requires a better understanding of how and why some marriages become more or less fulfilling in the critical first few years.

Background and aims

By collecting predominantly qualitative data from 52 couples interviewed separately but consecutively 3 times over the first four years of their marriage I hoped to provide valuable insights into how these marriages developed over the first few years and to elucidate how and why the marriages become more or less satisfying over that period. By gathering detailed data from open-ended questions in semi-structured interviews I aimed to capture, in their own words, the interviewees' thoughts, feelings and judgements of their marriage as it developed over the first four years more systematically than forced choice ratings from self-administered questionnaires could allow.

I was particularly interested in the structural integrity of the marriages under scrutiny. In engineering, structural integrity refers to a structure's uncompromised ability to resist the required loads safely. The components of a bridge, for example, must be strong enough to endure the repeated strain of loads crossing the bridge. A fracture in one component could have catastrophic results. In car design, the structure must be able to absorb the impact of a crash whilst retaining the vehicle's integrity to minimise the risk of injury to the occupants. For marriages to remain viable and fulfilling, they need to withstand the iterative, potentially

erosive, effect of daily stresses and irritations. They must also successfully navigate key transitions (such as the transition to parenthood) and withstand the major impact of serious external pressures (bereavement, unemployment etc.) or major internally-caused challenges such as infidelity.

Methods

Fifty three couples agreed to take part in the study: 44 recruited via a Registry office¹ (8.7% response rate); 7 via “Snowballing” (referrals by friends and acquaintances) and 2 in response to church mailings (following approaches to 95 local churches and all other faith-based or secular establishments registered to hold civil marriages on their premises according to the County Council’s website).

Couples were recruited before or within the first 6 months of their marriage. Volunteers agreed to be interviewed on three occasions over the first 4 years of their marriage; at 3-6 months, 18-24 months and 3-4 years. They were also required to complete a short written questionnaire following each interview which rated the marriage on a seven point scale (from 0; extremely unhappy to 6; perfect). Parties were interviewed separately but consecutively. Only those marrying for the first time were recruited to ensure that the findings were not contaminated by previous experiences the partners may have had in former marriages.

Fifty-three interviewee couples completed the first interview. Fifty couples completed the second interview (2 couples had separated between time 1 and time 2. Another couple were not contactable and were thus excluded from the sample). Forty-nine couples completed the third interview (the missing couple appeared to be intact but the parties were unwilling to be interviewed). Both the separated couples agreed to be interviewed (separately) post separation using an altered interview guide, although one wife later withdrew her consent. Analysis was based on data from the 52 couples who completed at least 2 interviews. This paper however is limited predominantly to analysis of data from 7 couples: 5 couples who had experienced major internally-caused challenges and 2 couples for whom the behaviour of one of the spouses had the potential to have a major detrimental effect on the marriages. Since the reaction of the ‘wronged spouse’ is likely to determine trajectories, I mainly quote from that spouse below.

Since the study's aim was to examine the mechanisms whereby marriages become more or less satisfactory in the early years, a case study approach seemed most appropriate. Case studies are useful for answering “how” or “why” questions (Yin, 2014). They may also illuminate the nuances and complexities of intimate relationships (Day Sclater, 1999).

¹ In the UK, parties register their intention to marry at a local Registry Office

What drives thriving marriages?

Gottman et al. (2002) hypothesised that three aspects are required to build the “Sound Marital House.” The first, a strong marital friendship, is foundational and affects the overall level of positivity in the marriage. This basis of friendship promotes the creation of positive sentiment override. Positive sentiment override occurs when one partner views the negative act of the other as out of character and due to circumstances beyond the other’s control whilst a positive act is attributed to stable and internal characteristics of the other partner. The third component is the effective regulation of conflict. Positive sentiment override works to blunt conflict’s impact, reducing the likelihood that spouses respond to negativity with negativity and diminishing the severity and destructiveness of any conflict.

The three components of the “Sound Marital House” work together to help create “shared symbolic meaning”, a successful meshing of spouses’ life dreams, goals and narratives. This creates a sense of “we-ness”; a sense of being a team, a united partnership.

Taking the analogy of the “Sound Marital House” as the touchstone against which to measure the marriages under scrutiny, I expected to find, and indeed did find, that the marriages that remained the happiest over the first four years (“consistently extra-happy” marriages):

1. Were based fundamentally on strong foundations of friendship;
2. Tended to view their spouses’ actions in a favourable light (positive sentiment override);
3. Repaired quickly and effectively;
4. Displayed shared symbolic meaning (“couple focus”).

Twenty marriages were categorised as consistently extra-happy.

The spouses in consistently extra-happy marriages were “*in it for everything*” (Duncan Henderson, time 1). Consistent with Reibstein’s (2006) findings, pulling together during difficult periods had strengthened their relationships. These couples were, like the intact, thriving couples in Walker et al.’s (2010) study, “rooted in a common purpose”. They approached issues as a team. They had long-term orientation, seeking the good of the relationships above personal gain (Stanley, Rhoades and Whitton, 2010).

When coupled with strong commitment to their own marriages (“private commitment”) but not necessarily strong commitment to the institution of marriage (“institutional commitment”) marriages built on the “Sound Marital House” model avoided the iterative, erosive effect of minor day-to-day issues such as disputes over housework or childcare (which I termed minor internally-caused challenges).

Marital trajectories and major internally-caused challenges

Potentially far more corrosive than minor internally-caused challenges are major challenges resulting from the actions of a spouse, such as infidelity. Three types of trajectory emerged

for couples who faced such challenges. Having the components of the “Sound Marital House” in place at the outset of the marriages enabled some spouses to reframe potentially marriage-threatening behaviours, blunting their capacity to erode marital happiness. These couples were highly satisfied with their marriages throughout the first four years.

For others, where the breaches of trust went to the heart of the marriage and involved infidelity, a profusion of positive sentiment override and a strong basis of friendship to fall back on in the immediate aftermath of the breach of trust enabled ‘wronged’ spouses to recover and to regain high levels of happiness.

A third group did not display the components of the “Sound Marital House” at the outset. Since the structural integrity of these marriages was already compromised prior to the major challenge, the couples were ill-equipped to withstand a major incursion into their marriages. The viability of these marriages long-term was uncertain.

This paper will examine the marital trajectories of couples who faced major internally-caused challenges and conclude by considering the implications of the findings on policies aimed at supporting marriages in the critical early years.

Potential major internal challenges and consistently extra-happy marriages

Two consistently extra-happy couples faced potentially marriage-threatening issues. Major internal challenges were identified subjectively when one or both spouses viewed the behaviour in question as marriage-threatening. Since the test is subjective, I coded neither marriage discussed here positively for major internal challenges. Nevertheless, their responses to these issues are instructive. Both marriages had the components of the “Sound Marital House” coupled with strong private commitment in place at the outset. Because their marriages were otherwise deeply fulfilling, the potentially marriage-threatening issue did not blunt the spouses' fulfilment with the marriages.

Alistair and Emily Vickers²

Alistair had a habit of visiting adult content internet sites that pre-dated the relationship. He had been honest and open with Emily about this issue prior to marriage. He was addressing the issue in counselling indicating, at time 1:

“I’m trying to change the behaviour habits in me that don’t build our relationship; get rid of them.”

Both spouses strongly displayed the components of the “Sound Marital House” at each time point as well as displaying strong private commitment and institutional commitment. Emily’s assertion at time 2 that “we are in this for the long haul” echoes similar sentiments expressed by both spouses throughout the process. The couple’s ‘long haul’ mentality meant that what could have been marriage threatening became something that needed to be addressed

² All names used in this paper are pseudonyms

(which Alistair was doing) but that did not threaten the marriage's stability. Emily was one of a small minority whose commitment could be categorised as 'moral commitment' (staying because one ought to stay; see Johnson et al. 1999). This orientated her to work hard to ensure that the marriage remained deeply fulfilling.

Alistair's internet habit pre-dated the relationship, which may have made it less threatening to Emily than issues faced by some of the other couples discussed below. Nevertheless, as the marriage was otherwise deeply fulfilling, Emily was able to reframe her husband's behaviour as a "very tiny issue."

Peter and Selina Monroe

Peter Monroe brought into the marriage debts of around £20,000 resulting from the breakdown of a former relationship. He had not disclosed the debts until after the parties had married. Selina strongly displayed all the components of the "Sound Marital House" throughout the study. Despite the non-disclosure, Selina said, at time 1, "Honest communication is one of our strengths."

Selina displayed strong positive sentiment override. Since her global marital assessment was positive she reframed her husband's actions as an understandable response to difficult circumstances rather than a deliberate intention to deceive:

"I think he was hiding it from himself...he'd had the debt ever since the woman left with his child. It was such a shock at the time that he's related the debt to that shock and psychologically he cut himself off from it... He was afraid of looking at it so he was not just hiding it from me, he was hiding it from himself as well and so it was pretty much a shock to him as much as it was to me." (Time 1)

Selina indicated at time 3 that she supported Peter by working as a team to pay off the debt and not becoming resentful about it. Her strong couple focus and team mentality expressed at time 1 helped her view this issue as something to overcome together. Selina viewed the debt as "the first big test" of the marriage. She expressed confidence that their team approach to reducing the debt would strengthen the relationship. She drew positives from the situation believing that Peter opening up to her about the debts had helped them both to open up to each other in other areas thereby enhancing their closeness and intimacy.

In the two scenarios above, the wives' "emotional bank accounts" (Gottman et al., 2002) were in credit. They had the components of the "Sound Marital House" in place. Neither couple disclosed any minor internally-caused challenges at any point. Since the wives were otherwise extremely happy in their marriages they were able to reframe their husbands' behaviour. Accordingly, the issues did not threaten the structural integrity of these marriages. The issues pre-dated the relationships and were therefore less of a personal indictment than had the breaches occurred during the marriages or as a response to dissatisfaction with the

relationships. In the following two marriages such mitigating factors did not exist and the behaviour had the potential to be far more destructive.

Major internal challenges and ‘U-shaped’ marital trajectories

Two couples had a ‘U-shaped’ trajectory; that is, at least one spouse’s self-rating score fell by 2 or more between the first two interviews to 2 (a little unhappy) or less but increased by 2 or more between the second and third interviews with both spouses rating the marriage 4 (very happy) or above by the final interview. In both cases, the cause of the dramatic fall in self-rated scores was a major internal challenge involving sexual infidelity of one form or another.³ Given the similarities between their stories and their means of recovery I analyse the two marriages together, considering the impact of the components of the “Sound Marital House” on the marriages’ trajectories. Because only two couples fell into this category, the findings may not be generalisable but these couples nevertheless offered intriguing insights into why some couples are able to recover from major, internally induced setbacks, whilst others are not.

At times 1 and 3 Amanda Gordon scored strongly on several components of the “Sound Marital House”; shared symbolic meaning (couple focus), friendship, repair and sentiment override. At time 2, in the immediate aftermath of the breach of trust, her scores for couple focus and repair fell to inadequate, friendship fell to adequate and sentiment override remained positive.

Save for scoring adequate couple focus at time 2 (following disclosure of his wife's infidelity), Alex Rogers scored strongly for the “Sound Marital House” components and private commitment at each time point. For both these individuals, positive sentiment override and strong friendship appeared to be most instrumental in regaining high levels of happiness in their marriages at time 3.

‘U-shaped’ marital trajectories and sentiment override

Positive sentiment override was a given in the present study in all but the unhappiest interviewees by time 3. The evidence on the pivotal role of sentiment override in facilitating recovery from major internal challenges however was compelling. The ‘wronged’ spouses in both marriages that recovered from major breaches of trust displayed the strongest positive sentiment override in the sample. By completely divorcing her husband’s act of betrayal from the person he essentially was, Amanda Gordon was able to forgive Ray and move on:

“The person that lived here between [dates] last year was not Ray. It wasn’t the Ray that I knew that had done this...You can put it down to a one off period of time where he wasn’t himself cos he’d got so disheartened and he lost all his confidence because

³ The wife was the ‘wronged’ spouse in the Gordon couple and the husband was the ‘wronged’ spouse in the Rogers couple.

of [lists extenuating circumstances]...I would put it down to some sort of psychotic episode...the bit that I've forgiven is the bit that wasn't Ray." (Time 2)

By time 3, the couple were 'very happy' in the marriage. Amanda was able to say "Ray is just the Ray that I knew at the beginning now."

Alex Rogers, whilst perhaps less fervent, nevertheless categorised his wife's actions as entirely out of character:

"I'm still surprised it happened... even though it's happened; I still think it's very unlike her... It's almost like it wasn't her... I was convinced that it would never happen because I knew Davina...She was so honest, she is so honest with me in all other ways there was no secret; there was never any suspicion of mine." (Time 2)

"I think despite what happened with Davina she is committed, essentially a committed and faithful person as am I and...she has got strong principles as have I." (Time 3)

When severely tested the 'wronged spouse' in these marriages disassociated their spouses' behaviour from their intrinsic natures. This was key to their recoveries. Save for Amanda who, in the aftermath of the major breach of trust, aired some discontent over sharing housework, neither couple revealed any minor internally-caused challenges throughout the interview process. They dealt quickly and effectively with any issues. The absence of minor concerns and irritations is likely to have assisted the 'wronged spouses' to reframe their spouses' breaches of trust as aberrations due to circumstances.

'U-shaped' marital trajectories and friendship

Prior to transitioning into a romantic relationship the Gordons knew each other for 19 months and the Rogers knew each other for 17 months (compared to a mean of 9.89 months across the sample). Friendship was the basis of their relationships from the outset. Slowly cementing friendships before commencing romantic relationships ensured that this foundational component of the "Sound Marital House" (Gottman et al., 2002) was in place. Stanley, Rhoades and Whitton (2010) suggested that sliding through transitions provides less support for sustained commitment than intentionally deciding to become committed as part of the transition process. Because speed of relationship development increases the likelihood of entering risky pathways (Stanley and Rhoades, 2009) then transitioning slowly from friendships into romantic relationships should minimise the risks of marrying someone who is not "a good fit." This may account for better outcomes for those who took time to form romantic relationships.

In the aftermath of the disclosure of Davina's affair Alex indicated, several times, that having been friends for a long time before they were romantically involved he, "fell back on...[their] solid friendship" to get him through this dark period. Friendship is foundational to the "Sound Marital House" and was foundational to these two marriages. Particularly for Alex Rogers, it was critical to their recoveries following the major internal challenges.

The testing of their relationships had made Alex Rogers and Amanda Gordon realise the strength of their commitment to their respective marriages. Alex indicated that had he been asked hypothetically at time 1 how he would respond if Davina had an affair he would, without question, have answered that he would leave her. However when it happened he realised that what he had with Davina was “worth working for” (time 2). Similarly for Amanda, severe testing of her commitment made her appreciate that her personal breaking point would be “something quite extreme.”

Both ‘wronged spouses’ had had Christian upbringings. Whilst now non-practising, Amanda Gordon reflected at time 2 that “some of that [her Christian upbringing] got me through it.” Alex Rogers indicated at time 3 that the “Christian values” from his upbringing had given him strong “family values and morals” which ensured that he had not “undertake[n] marriage lightly.” Both these individuals were prepared to work hard to restore their marriages. Amanda Gordon reflected that she would probably have left her husband following the breach of trust had they not been married. Nevertheless, her internal moral code rather than a commitment to the institution guided her decision to stay. Similarly, Alex Rogers indicated that personal happiness, rather than a commitment to the institution of marriage was vital.

The couples for whom potentially marriage threatening behaviour did not become a major issue and the couples who recovered following a major breach of trust had one important characteristic in common. Save for Amanda Gordon at time 2, none disclosed minor internally-caused challenges. They repaired promptly and effectively so their ‘marital houses’ were structurally sound when trauma struck. This is in stark contrast to the three marriages considered in the final section of this chapter. When the components of the “Sound Marital House” were not in place at the outset, the consequences for marriages faced with major internally-caused challenges were devastating.

Structurally unsound marriages and major internally-caused challenges

Three ‘structurally unsound’ marriages suffered major internally-caused challenges. The marriages were intact, but fragile, at time 3. For one marriage, the major challenge had occurred between times 1 and 2 and the reverberations were still causing difficulties by time 3. In the other two marriages the major challenges had occurred between times 2 and 3. The timing meant that I did not have the benefit of a follow-up interview as I had had for the couples with a ‘U-shaped’ trajectory. Any conclusions are therefore necessarily more speculative than those drawn above. However, two of the three interviewees who displayed negative sentiment override at time 3 were the wives struggling to recover from major internal challenges. Negative sentiment override occurs when negative acts are attributed to stable and internal characteristics of the other partner whilst positive acts are seen as fleeting and situationally determined. The presence of negative sentiment override coupled with the evidence of weaknesses in the structural integrity of these marriages before the major challenges gave cause for concern for the long-term viability of these unions.

In the marriages jeopardised most following major internally-caused challenges, couple focus for one or both spouses was adequate at best at time 1. Whilst strong friendship at time 1 was almost universal, half of the spouses in these fragile marriages began the process with adequate friendship scores. In the interview preceding the major internally-caused challenges, repair for one or both spouses was at best adequate. The structural integrity of these marriages had already been compromised prior to the major challenge. The couples were therefore ill-equipped to withstand a major incursion into their marriages.

Sam and Claire Doyle

Sam and Claire Doyle were colleagues for 3 months prior to commencing a relationship. They slid quickly into cohabiting:

“We went out for a date...and then she came back and... she just never left really... she never left. She’s still upstairs!” (Sam Doyle; time 1)

Throughout the process both praised the other's supportiveness and complemented the others' personality. Unfortunately, despite displaying positive sentiment override, the Doyles failed to score well on the other components of the “Sound Marital House.” They were one of two couples to score no higher than adequate for friendship consistently. (The only other couple who both scored adequately for friendship at time 1 had separated by time 2). Three couples repaired inadequately at time 1; the Doyles and the two couples who separated. Whilst communication is not a separate component of the “Sound Marital House” there are overlaps with repair. Not surprisingly, those interviewees who communicated poorly tended to repair poorly. The Doyles were the only couple who communicated unconstructively at time 1. This persisted throughout the study and by time 3 Sam felt that this was “just almost the norm now.” Sam described the constant arguing as “draining for both of us.”

At time 2 both spouses' self-rated scores for happiness with the marriage had dropped precipitously. Sam had made some unilateral decisions concerning the couples' finances with dire consequences when the credit crunch hit. These decisions would potentially affect most marriages negatively but the Doyles' marriage was already structurally compromised since the components of the “Sound Marital House” were not in place at the outset. They were struggling to hold their relationship together at times 2 and 3.

Sam's actions had adversely affected their physical relationship, causing the couple to pull in opposite directions and leaving Claire feeling defeated:

“I've said to him that I can't give him what he needs [physically] because he doesn't give me what I need psychologically and emotionally... by him [not] acknowledging me, giving me that small bit of respect... it affects how I feel about him and in the relationship and... because I don't get that... it just affects how I feel. It's stuff that he doesn't understand is important but I can't tell him anymore.” (Claire Doyle; time 2)

A number of external, family related stresses, major and minor, unfortunately compound the Doyles' situation.

“Basically there’s loads of stuff that goes on in mine and Sam’s life that isn’t about our relationship but... just has a huge effect on our relationship and we don’t get to concentrate on the marriage... there’s always some big, massive other dilemma or tragedy about something else... Everything else just gets in the way.” (Claire Doyle; time 2)

Both spouses acknowledged that they would probably have separated if they were not married. Both displayed strong private and institutional commitment at time 1, which dropped to adequate at time 2 after the major internal challenge. Claire’s adequate commitment to the institution at time 2 had strengthened by time 3, perhaps because she had had to plumb the depths of her commitment to the institution when her dissatisfaction failed to abate:

“You shouldn’t divorce, I don’t think you should divorce...I think if I wasn’t married to Sam that we wouldn’t still be together but the fact that we’re married has made it seem more [of a] commitment.”

There was however some cause for optimism. Whereas James Isaac below spoke in terms of a “switch” having been “switched” in a negative direction, for Claire Doyle a conversation with a friend had “flicked the switch” in a positive direction. Whilst the marriage was still rocky, Claire had a renewed determination to try to make it work:

“I got to the point where I was like 'I am ready to go' and Sam was saying...he wants to try blah, blah, blah and... I was sitting there with one of my friends one night and she just said 'You either have to go or you actually have to let him try; he is telling you he wants to try so you have to actually really let him try' and... so that’s what flicked the switch if you see what I mean. So it’s like, ok try; so that’s really what happened.” (Claire Doyle; time 3)

Sam and Claire indicated at time 3 that the severity of their arguments had diminished. They wanted the marriage to succeed and had sought counselling when the situation had become intolerable before so would hopefully do so again if matters worsened. Without successfully addressing their communication and repair issues, however, it is difficult to see how the marriage would recover from another major impact. The recursive, erosive effect of inadequate repair if unattended to might in time lead the marriage to lose its structural integrity and dissolve.

James and Catherine Isaac

James and Catherine Isaac began a relationship after 9 months (around average for the sample). They began cohabiting 3 years later. Both rated their marriage either 5 (extremely happy) or 4 (very happy) at times 1 and 2 but this dropped to 2 (a little unhappy) for James and 1 (fairly unhappy) for Catherine at time 3. The steep decline in happiness at time 3

followed a series of major disagreements, many centred on differing approaches to parenting their toddler that brought key differences in their personality into relief. As with the Doyles, however, the steep decline was perhaps predictable as the components of the “Sound Marital House” were not in place for them both at the outset. James scored strongly for couple focus, friendship, and sentiment override at times 1 and 2. His repair score was strong at time 1 and adequate at time 2, however. Catherine scored adequate for friendship; adequate then strong for couple focus and adequate then inadequate for repair at the first two interviews. Her sentiment override was negative at time 2. Both acknowledged that they had very different personalities, which had led to issues from the outset. The following comment from James at time 1 echoes a similar comment from Catherine at time 1:

“She and I are so completely different in terms of character and style and approach and everything, so it was quite a rocky initial twelve months...just working out how we both would be in a relationship together and all that kind of thing, it was quite interesting. So yeah, not your typical blossoming romance, early days type stuff.”

When still very happy in the marriage James relished these differences and viewed them as a strength. Their different approaches to money for example at time 1 was, he said, “incredibly good” since Catherine was “somebody to make up my whole”. Different conflict approaches gave “passion and dynamism” to their relationship and he concluded: “I’d hate it if we just had the same approach to everything. Probably find it pretty dull.” James confidently predicted at time 1: “The great thing between us is we kind of do make one whole person, and so theoretically there shouldn’t be an awful lot we can’t face.” Whilst acknowledging their differences at time 2 James said, “the reason we get on so well I think is we’ve found that balance where we’re both pretty happy I think.”

Catherine perhaps had greater insight at time 1, into the potential for conflict in their different approaches:

“So in terms of solving differences, I don’t think we’ve really had that many in terms of challenges cos it’s very early days yet and I don’t think we ever really do [solve them]. Which I think probably for me is quite stressful cos I like to tie things up and move on and... [James is] quite comfortable... to have things hanging... I think that’s probably where stress might come up if that continues; for me anyway.”

Pre-parenthood, Catherine had found the personality differences between her and James “refreshing” but on transitioning to parenthood this had become more problematic. Catherine spoke of how their different parenting styles caused her to become upset and James to become defensive. By time 3, she reflected that whilst James was loving and genuine she had always had concerns around how much she could be herself around him but had hoped that these “would just go away over time.”

At time 1, the fact that they, as James put it, “look[ed] at the world through two completely different lenses” had been stimulating for both spouses. By time 3, when both were deeply

unhappy, it felt as if “somebody has switched the switch” and the things that had once attracted, now repelled:

“[The issues] have probably been bubbling along for quite some time, probably even before we got married if I’m honest but they were never sufficiently bad and the arguments were never sufficiently frequent enough to make you feel like there was a major problem... it kind of feels like somebody has switched the switch a little bit whereby the opposites and the differences that first attracted us to each other are now the things that are driving each other up the wall... we absolutely loved each other, still do but I think it’s those differences now that are starting to create more conflict than we ever credited for.” (James Isaac; time 3)

James’ private and institutional commitment was consistently strong. Catherine’s private commitment was consistently adequate and her commitment to the institution was neutral at the outset falling to weak at time 2. At time 2, prior to the significant drop in his self-rating marital happiness score, James’s view of commitment fell squarely within Johnson et al.’s (1999) concept of “moral commitment”; staying because one ought to stay:

“What would make me stay? I think what would make me stay is a sense of... duty’s probably the wrong word but a sense of commitment...I’m not going to let it fail... my happiness is very important but it’s probably not the only factor anymore, there’s a lot more factors in the equation.”

James was not as explicit in the third interview regarding why he continued to stay despite his unhappiness (he says that his wife will only stay if the relationship returns to perfect whereas that decision is a “grey area” for him). It is plausible, however, that the ‘moral commitment’ he expressed in happier times, in part explains why he continues to stay despite being very unhappy at interview 3.

Both spouses were committed to making the marriage work. They had recently commenced counselling at time 3 and were hopeful that the issues were just, as Catherine put it “a blip.” Without the benefit of a follow-up interview, it is difficult to know whether this was “a blip.” The parties, particularly James, appear to have been ‘side-swiped’ by the incompatibilities that had emerged by time 3. Whilst the Isaacs’ story is different to the Doyles’, the structural integrity of both marriages was compromised prior to the major challenges faced making it difficult to withstand the trauma of the challenges that subsequently assailed them.

Jack and Donna Xia

Jack and Donna Xia knew each other as casual acquaintances before commencing a relationship. Donna indicated that she “knew instantly [they]’d be together.” They were living together and engaged within three and a half months but did not marry for a further three years.

Donna had had a difficult background and at time 1 and 2 idolised Jack whom she described as having “freed” her. She rated the marriage as 6, ‘perfect’ at times 1 and 2 but 0, ‘extremely unhappy’ at time 3. Her scores for the components of the “Sound Marital House”; friendship, sentiment override, repair and couple focus (as well as private and institutional commitment) were strong/positive at times 1 and 2 and weak/inadequate at time 3. Jack’s scores were more moderate. His sentiment override was positive throughout but, save for strong friendship and effective repair at time 1, his scores for the same constructs were adequate or inadequate throughout. The couple had faced a number of major externally-caused challenges by time 3 (bereavements, a miscarriage, redundancy) as well as major internally-caused challenges (that I shall not elaborate on for confidentiality reasons).

At time 1 Donna had said that there was, “nothing lacking anywhere in the relationship” and was adamant that “I couldn’t care less whether I was living in a cardboard box; as long as I’ve got Jack I wouldn’t have a care in the world.” She presented an idealist vision of the marriage at time 1 confidently predicting:

“I’m living a fairy-tale. You read it in school and you’re little Cinderella, Snow White but to be honest I’m living that fairy-tale. I had the fairy-tale Prince Charming, I had the fairy-tale wedding so I suppose it’s what they say, they lived happily ever after...It’s like somebody waved a magic wand and we’ve got the perfect marriage.”

This view is in sharp relief to what Ramm et al. (2010) termed a ‘developmentalist’ attitude displayed by a consistently extra-happy wife, Lucy Young: “I didn’t go into it thinking it was going to be Cinderella and all happiness.”

In engineering terms an underlying weakness in a component part can cause it to fracture suddenly. Here the marriage that Donna described at times 1 and 2 was poles apart from the marriage outlined at time 3. As she poignantly put it:

“At first I was lying to my mates to my best mate yeah everything’s happy, everything’s fine, putting on my fake face and then all of a sudden bang. I can’t keep it up.”

It may be that Jack had changed towards Donna or that the magnitude of the issues that assailed them had taken their toll on the previously ‘perfect’ marriage. More plausibly, Donna’s fairy-tale marriage was just that; a romanticised illusion and that once the dream of the fairy-tale was shattered it became a nightmare for Donna. For example, at time 2 she said that Jack would put his arms around her and wipe away her tears when she cried but at time 3 she disclosed:

“He doesn’t support me. If I am crying he never puts an arm around me...he’s cold...he’s emotionless... He is] the husband from hell... I’m invisible to him.”

Similarly, whilst her husband’s unresponsiveness reduced her to “tears of laughter” at time 1, by time 3 the same issue caused her to conclude that it was “like being married to a freezer.” At time 2 Donna indicated that they dealt with issues as they came up and rarely

argued but by time 3 she said that issues did not get resolved because Jack avoided discussing their problems.

At times 1 Jack described the marriage in far more prosaic terms than his wife:

“I’ve met the right one and I thought why not, give it a go! It can either work or it can’t. I might as well get married and that’s it done... All a marriage is is just a bit of paper.”

In sharp contrast to the interviewees who remained consistently extra-happily married, at time 2 Jack saw little point in 'fighting for your marriage':

“If we hit [difficulties] big time I’d go but I’d take my [child] with me. If we hit [difficulties] big style there won’t be anything worth fighting for. I’d just take my [child] and I’d go.”

Ironically, whilst at time 3 he acknowledged that the marriage had been “up and down” he appeared oblivious to the extent of his wife’s unhappiness and felt that they had supported each other through a difficult period and couldn't think of anything he would want to change about the marriage.

Neff and Karney (2005) and (2008) suggest the need to love compassionately; that is to ground adoration in an accurate perception of a spouse's strengths and weaknesses. Donna’s failure to assess her husband’s strengths and weaknesses accurately compounded the problems rendering her fairy-tale marriage a nightmare.

Major internally-caused challenges have the capacity to tear marriages apart. As outlined above, having all the components of the “Sound Marital House” firmly in place at the outset of the marriages enabled some spouses to reframe marriage threatening behaviours so that marital happiness is not eroded. For others, where the breaches of trust involved infidelity, an abundance of positive sentiment override and a strong basis of friendship enabled ‘wronged spouses’ to move on from the breach. These marriages had sufficient integrity to withstand the trauma. The structural integrity of the marriages jeopardised most following major internally-caused challenges had already been compromised prior to the major challenge. These marriages did not display the components of the “Sound Marital House” at the outset. Some interviewees from these marriages had scant insight into the weaknesses in their relationships. Two of the three couples with marriages in peril following major internally-caused challenges had transitioned quickly into romantic relationships and slid quickly thereafter into cohabitation and/or engagement. They had not taken the time to establish firm foundations of friendship before transitioning into romantic relationships as most of the consistently extra-happy interviewees or the interviewees who recovered from major breaches of trust had done. Consequently, they did not have this basis of friendship to fall back on when confronted with major internally-caused challenges.

Policy implications

The study highlights the need to choose a life-partner wisely and to build healthy relationships on the “Sound Marital House” model from the outset. The findings support the call for a focus on primary rather than tertiary intervention in policies aimed at supporting marriages (Mansfield, 2000). The findings also support the need for “developmentalist” attitudes - viewing potential problems as normative - (Ramm et al. 2010) in successfully navigating marriage threatening issues.

Most relationship support is aimed at existing, committed relationships. Intervening earlier in relationship development, before individuals are committed or perhaps even before they are in relationships, could potentially have a greater impact on improving relationship quality (Markman and Rhoades, 2012; Markman et al., 2013; Rhoades and Stanley, 2009). Educating and equipping young people to make good, safe relationship choices and to build relationships on the “Sound Marital House” (perhaps more aptly the “Sound Relationship House” model) could hugely reduce the human and financial cost of marriage and relationship breakdown. This should be the long-term focus of those tasked with supporting relationships.

References

- Gottman, J. M., Murray, J. D., Swanson, C. C., Tyson, R., & Swanson, K. R. (2002). *The Mathematics of Marriage: Dynamic Nonlinear Models*. Cambridge, Mass.: MIT Press.
- Johnson, M.P., Caughlin, J.P., & Huston, T.L. (1999). The Tripartite Nature of Marital Commitment: Personal, Moral and Structural Reasons to Stay Married, *Journal of Marriage and Family*, 61, 160-177.
- Mansfield, P. (2000). From Divorce Prevention to Marriage Support. In The Rt. Hon. Lord Justice Thorpe, & E. Clarke (Eds.), *No Fault or Flaw The Future of the Family Law Act 1996, (Papers given to the President's Third Inter-Disciplinary Conference on Family Law)* (pp.29-33). Bristol: Jordans Publishing Ltd.
- Markman, H. J., & Rhoades, G. K. (2012). Relationship Education Research: Current Status and Future Directions. *Journal of Marital and Family Therapy*, 38, 169–200.
- Markman, H. J., Rhoades, G. K., Stanley, S. M., & Peterson, K. M. (2013). A randomized clinical trial of the effectiveness of premarital intervention: Moderators of divorce outcomes. *Journal of Family Psychology*, 27, 165-172.
- Neff, L. A., & Karney, B. R. (2005). To Know You Is to Love You: The Implications of Global Adoration and Specific Accuracy for Marital Relationships. *Journal of Personality and Social Psychology*, 88, 480-497.
- Neff, L. A., & Karney, B. R. (2008). Compassionate love in early marriage. In B. Fehr, S. Sprecher, L. G. Underwood, (Eds.), *The science of compassionate love: Theory, research, and applications* (pp. 201-221). Malden, MA: Wiley-Blackwell.
- Office of National Statistics. (2013). What percentage of marriages end in divorce? *Part of Divorce in England and Wales 2011 Release*:
<http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html>
- Ramm, J., Coleman, L., Glenn, F., & Mansfield, P. (2010). *Relationship difficulties and help-seeking behaviour – Secondary analysis of an existing data-set. Report submitted to the Department for Education*. London: One Plus One.
- Reibstein, J. (2006). *The Best Kept Secret, Men and Women's Stories of Lasting Love*. London: Bloomsbury Publishing Plc.

- Stanley, S.M., & Rhoades, G.K. (2009). Marriages at risk: Relationship formation and opportunities for relationship education. In H. Benson, & S. Callan (Eds.), *What works in relationship education: Lessons from academics and service deliverers in the United States and Europe* (21-44). Doha, Qatar: Doha International Institute for Family Studies and Development.
- Stanley, S.M., Rhoades, G.K., & Whitton, S., (2010). Commitment: Functions, Formation, and the Securing of Romantic Attachment. *Journal of Family Theory and Review*, 2, 243–257.
- VanLangingham, J., Johnson, D.R., & Amato, P.R. (2001). Marital Happiness, Marital Duration and the U-Shaped Curve: Evidence from a Five-Wave Panel Survey. *Social Forces*, 78, 1313-1341.
- Walker, J., Barrett, H., Wilson, G., & Chang, Y-S. (2010). *Relationships matter: understanding the needs of adults (particularly parents) regarding relationship support*. London: DCSF.
- Whitehead, B. D., & Popenoe, D. (2001). Who wants to marry a soul mate? In D. Popenoe, & B. D. Whitehead, *The State of Our Unions: The Social Health of Marriage in America* (pp. 6– 16). Piscataway, NJ: National Marriage Project.

Delegalizing Family Law

By Marsha Garrison*

Change in prevailing family norms may produce change in some – or all – dimensions of family law. Such a shift may alter the frequency and locus of rules as compared to discretionary standards. It might create new preferences and mechanisms for dispute resolution. It might change the type of fact-finding in which adjudicative fora engage and even the need for formal fact-finding.

In this chapter, I describe and analyze recent shifts in family law propelled by recent shifts in family formation and family life. The new family produced by these shifts is, virtually everywhere, fragile; partner and parent-child separation have become mainstream and unremarkable.¹ The new family is also, increasingly, nonmarital; in many nations today, close to, or even more than, half of births take place outside of marriage.² Finally, the new family is complex. Today's families are populated with stepparents, stepchildren, half-siblings, short-term cohabitants, and their children, often in rapid succession.³

In this chapter, I argue that these shifts in family norms have produced, in several prominent areas of family law, a move toward what I call delegalization, *i.e.*, away from traditional, fact-based adjudication. Delegalization is evident in the proliferation of alternatives to courtroom adjudication such as mediation, family group conferencing, and diversion programs. It is also evident in areas of family law where bureaucratic procedures -- forms, guidelines, or worksheets handled by clerks -- have replaced fact-intensive, perhaps discretionary, decision making by judges and other fact finders.

Here, I focus on delegalization in its bureaucratic guise. I briefly describe several delegalization experiments representative of the bureaucratic trend. I critique these experiments, and I conclude that bureaucratic delegalization can provide clear benefits over traditional fact finding, but only in contexts where factual assessment is genuinely superfluous and the new, nonadjudicative norms that replace traditional fact finding are both evidence-based and consistent with public values. Some recent delegalization experiments meet these requirements, I find, while others do not.

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¹ See Eurostat, Marriage and Divorce Statistics, 2012. Retrieved from http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Marriage_and_divorce_statistics; D.B. Elliott et al, Historical Marriage Trends from 1890-2010: A Focus on Race Differences, Population Association of America, SEHSD Working Paper Number 2012-12, 2012. Retrieved from <http://www.census.gov/hhes/socdemo/marriage/data/acs/ElliottetalPAA2012paper.pdf>; Japanese Marriage Trends in 2002: Later Unions and More Divorce Families, Social Trends: Series No. 9. Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016635.pdf>

² See S.J. Ventura, Changing Patterns of Nonmarital Childbearing, 2009, fig. 6. Retrieved from <http://www.cdc.gov/nchs/data/databriefs/db18.htm#findings>

³ See S.S. McLanahan & I. Garfinkel, Fragile Families: Debates, Facts, and Solutions, in M. Garrison & E.S. Scott (eds.) *Marriage at the Crossroads: The Brave New World of Twenty-First Century Families* 142, 151-53 (Cambridge Univ. Press 2012).

Delegalization: Why and Where

An important introductory question is why increased family fragility and complexity have produced a delegalization trend. One factor is simply case volume. If families dissolve frequently, the number of dissolution cases that traditional adjudicative fora must deal with goes up. High case volume naturally produces a quest for efficiency. It also subtly encourages the development of mechanisms aimed at producing decision-making uniformity; highly individualized decision making can come to seem superfluous, even undesirable, as well as impractical.

A second factor is the relative incapacity of traditional adjudication to affect future behavior. Adjudication looks backward; its aim is to uncover what happened in the past. But the central problem confronted by fragile, separating families is their ongoing responsibility for children's care long after separation; the problem these families face – and which it is in the public interest for them to solve – is fulfilling their responsibilities equitably and in a manner that promotes children's welfare. This type of future-directed problem solving lies outside the competence of traditional, adjudicative case processing, but it is a central focus of collaborative dispute-resolution methods like mediation.

The quest for efficiency and the incapacities of the adjudicative model play into the goals and decisions of individuals as well as policy makers. When family dissolution is routine, family members will want legal mechanisms to achieve dissolution that are fast and cheap; bureaucratic case processing almost invariably meets these efficiency goals better than traditional adjudication. When they are confronted with the task of building future harmony, they will not be naturally led to forms of dispute resolution that emphasize the past.

Despite its lure, delegalization is not a universal trend. Indeed, there are some types of family disputes where family law has moved in the opposite direction. The most obvious example is family violence. Well into the twentieth century, the “language of privacy and love” was used to justify formal and informal noninterventionist policies toward family violence.⁴ These policies were evident both within tort and criminal law; they produced intrafamilial tort immunities and policies under which law enforcement agencies typically treated all but the most serious incidents of family violence as private matters for which arrest and prosecution were inappropriate. During the 1960s and 70s, this noninterventionist model gave way to one emphasizing legal remedies. Tort immunities have largely disappeared; the criminal law has moved from a hands-off approach to one favoring mandatory arrest and prosecution.⁵ Similarly, the “discovery” of child abuse during the 1960s produced a wave of mandatory reporting laws, a strong emphasis on criminal prosecution and, in some countries, the criminalization of all corporal punishment.⁶

⁴ R.B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2118-19 (1996).

⁵ See U.N. Dept. of Social & Economic Affairs, Division of Women, Handbook for Legislation on Violence Against Women 37 (2010) (urging proarrest and prosecution policies as necessary features of domestic violence legislation). Retrieved from <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

⁶ See generally The Protection Project & Int'l Centre for Missing and Exploited Children, Child Protection Model Law Best Practices: Protection of Children from Neglect, Abuse, Maltreatment, and Exploitation (2013).

This legalization of family violence is, in fact, altogether consistent with the delegalization of status determination and dissolution. Routine family dissolution undercuts the claim that families achieve harmony best when left alone. Routine family dissolution also tends to refocus public attention on the individuals of which a family is comprised instead of the family as a unit. The family as a special and private space in which the needs and interests of individuals are subservient to the interests of the whole thus tends to dissolve, with the result that family members gain the rights a stranger would have against other family members.

So, delegalization as a trend is prominent in areas of family law related to status and the determination of post-separation rights. It is less evident in areas of family law where status and/or obligation are not at issue.⁷ It is not evident at all in the developing law governing family violence and intrafamilial torts.

Examples of Delegalization

In this section, I describe two different types of bureaucratic delegalization, status alteration through forms and decision-making algorithms. I also offer two examples of each delegalization model.

1. Status Alteration Through Forms

a. Summary Marriage Dissolution

The first example of forms as a means of status alteration is summary marriage dissolution. Summary marriage dissolution differs from traditional divorce in that it changes the divorce process from a judicial proceeding into one that is essentially administrative. Perhaps the best example of this new approach comes from California where, for a number of years, some couples have been permitted to end their marriages through a process so “quick [and] easy” that “[y]ou will not have to talk to a judge and you may not need to hire a lawyer.”⁸ Not all of California’s divorce population qualifies for summary dissolution. The couple must:

- Have been married for less than 5 years;
- Have no children together born or adopted before or during the marriage;
- Not own real estate or rent real estate except for a personal residence;
- Not owe more than \$6,000 in post-marital debt (excepting car loans);
- Have marital assets worth less than \$40,000 (excepting cars);
- Not have separate property worth more than \$40,000.⁹

The couple that meets all of these requirements may obtain a divorce based on filing a joint petition, an income and expense declaration, three worksheets showing their assets (marital and separate) as well as the division of those assets, and a “judgment of dissolution”

Retrieved from

http://www.icmec.org/en_X1/icmec_publications/Annotated_CP_Model_Law_Jan_2013_Final_w_cover.pdf;
M. Cutland, Child Abuse and Its Legislation: The Global Picture, 97 Archives Dis. Child 679-84 (2012).

⁷ I should also note that there is one type of dissolution in which the picture is quite mixed, the case of cohabitants. The dramatically increased frequency of cohabitation and childbearing within such relationships has produced a range of responses that are difficult to categorize. This issue is beyond the scope of the current paper.

⁸ California Courts, Self-Help, Divorce: Summary Dissolution, <http://www.courts.ca.gov/1241.htm>

⁹ Id.

form. The forms are all available online or at the relevant courthouse. They are simple and easy to fill out. No professional guidance is needed. A divorce is automatically entered six months after the paperwork is filed.¹⁰

Of course, traditional divorce actions were and are typically settled out of court; so are lawsuits of every variety. But traditional divorce is nonetheless adjudicative; a complaint is filed, followed by an answer, etc. By contrast, summary marriage dissolution involves less paper than the typical real estate closing. Like the real estate closing, it represents a change of legal status based on the parties' agreement and the filing of forms. Indeed, summary marriage dissolution is almost as simple as getting a marriage license.

California has not collected or published divorce statistics since 1990 so it is impossible to discern what proportion of the California divorce pool uses the summary-dissolution process, but it is likely substantial. While the median marital duration at divorce in the United States has recently increased, half of all divorces take place within twelve years after marriage¹¹; all empirical research has shown that the typical divorcing couple has a very modest asset pool.¹²

b. In-Hospital Paternity Establishment

The vast increase in nonmarital birth rates has enhanced the desirability of cheaper and faster methods of determining parentage. In the United States, the result is an informal method of assigning fatherhood, generally described as in-hospital paternity establishment (IHPE).

Prior to the introduction of IHPE, paternity establishment required the unmarried mother or a public-assistance agency, acting on her behalf, to bring an action against an alleged father. Rules of evidence were developed specifically for courts engaged in this task.¹³ Although the introduction of blood-typing in the 1970s tended to streamline paternity proceedings, an adjudicated determination that a particular man was the child's biological parent was still required. A putative father could consent to a paternity finding, of course, just as divorce defendant could consent to the entry of a divorce judgment, but the law was designed for fact-based litigation.

By contrast, IHPE permits a child's mother and the alleged biological father to establish legal paternity simply by signing a Declaration of Paternity. No court proceeding, or even a court petition, is necessary. The form is brief; one witness and acknowledgement before a notary suffice. Because the forms are available at hospitals, it is not even necessary to visit a government office.

¹⁰ *Id.*

¹¹ See A. Spangler & K.K. Payne, *Marital Duration at Divorce, 2012 (FP-14-11)*, Nat. Ctr. for Marriage & Family Research. Retrieved from <http://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-14-11-marital-duration-2012.pdf>

¹² See sources cited in notes 37-39, *infra*.

¹³ See generally H.D. Krause, *Illegitimacy: Law and Social Policy* (Bobbs-Merrill 1971).

IHPE was developed in the late 1980s in a handful of U.S. jurisdictions. It has since been mandated by federal law,¹⁴ and it has revolutionized U.S. paternity case processing and results. Today, researchers have estimated that as IHPE is responsible for as many as 84% of all paternities established.¹⁵

2. *Decision Making Algorithms*

Decision-making algorithms also rely on forms. But their aim is to curb discretion and produce consistency in decision making. They have gained prominence within family law in two highly diverse contexts.

a. Child Protection

Algorithms have entered child-protection decision making for the simple reason that decisions regarding case opening, service provision, child removal, and reunification have long been criticized as inappropriate, inconsistent, or both. Research has demonstrated that unstructured decisions regarding the safety of children vary significantly from worker to worker, even among those considered to be child-welfare experts.¹⁶ Indeed, researchers have found that the unstructured decisions of child protection workers are not only inconsistent, but reflective of a range of cognitive biases, including overconfidence, skepticism about new information that conflicts with an initial impression, and overconfidence in information that supports an initial impression.¹⁷

In developing decision-making algorithms to assist workers overcome these cognitive biases and achieve higher-quality, more consistent decisions, child-protection agencies have relied primarily on algorithms derived from empirical research about the characteristics of families referred to child-protection services.¹⁸ The best known is the Structured Decision Making (SDM) tools developed by the Children's Research Center. Figure 1 shows such an SDM worksheet:

¹⁴ See Child Support Enforcement Amendments of 1984, P.L. 98-378, 87 Stat. 1205 (1984); Family Support Act of 1988, P.L. 100-485m, 102 Stat. 234 (1988); Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 311; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, 110 Stat. 1205 (1996).

¹⁵ See R. Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 *J. Marriage & Family* 611-626 (2005); Nat'l Child Support Enforcement Association, *Quick Facts: Paternity Establishment* (2011). Retrieved from <http://www.ncsea.org/wp-content/uploads/2011/12/Paternity-Establishment-Quick-Facts.pdf>;

¹⁶ Children's Research Center, *The Improvement of Child Protective Services with Structured Decision Making: The CRC Model 1* (Nat. Council on Crime and Delinquency, 1999) [hereinafter CRC], citing P.J. Rossi et al., *Understanding Child Maltreatment Decisions and Those Who Make Them* (Chapin Hall Center for Children, 1996).

¹⁷ See *Risk and Safety Assessment in Child Welfare: Instrument Comparisons* (University of California at Berkeley School of Social Work, 2005). Retrieved from http://cssr.berkeley.edu/bassc/public/risk_summ.pdf (summarizing literature). See also A. White & P. Walsh, *Risk Assessment in Child Welfare: An Issues Paper 4-5* (Center for Parenting and Research, 2006) (summarizing literature relevant to child welfare decision making).

¹⁸ See *id.* See also A. Shlonsky & D. Wagner, *The Next Step: Integrating Actuarial Risk Assessment and Clinical Judgment into an Evidence-Based Practice Framework in CPS Case Management*, 27 *Child & Youth Services Rev.* 409, 410 (2005).

Figure 1

Michigan Assessment for Substantiated Cases

MICHIGAN ASSESSMENT FOR SUBSTANTIATED CASES
FAMILY RISK ASSESSMENT OF ABUSE/NEGLECT

3/1/95

PS Case Name _____ PS Case # _____
Load # _____ Date _____

Neglect		Score	Abuse		Score
N1.	Current Complaint is for Neglect		A1.	Current Complaint is for Abuse	
	a. No	0		a. No	0
	b. Yes	1		b. Yes	1
N2.	Number of Prior Assigned Complaints		A2.	Prior Assigned Abuse Complaints	
	a. None	0		a. None	0
	b. One	1		b. Abuse complaint(s)	1
	c. Two or more	2		c. Sexual abuse complaint(s)	2
				d. Both b and c	3
N3.	Number of Children in the Home		A3.	Prior CPS Service History	
	a. Two or fewer	0		a. No	0
	b. Three or more	1		b. Yes	1
N4.	Number of Adults in Home at Time of Complaint		A4.	Number of Children in the Home	
	a. Two or more	0		a. One	0
	b. One/none	1		b. Two or more	1
N5.	Age of Primary Caretaker		A5.	Caretaker(s) Abused as Child(ren)	
	a. 30 or older	0		a. No	0
	b. 29 or younger	1		b. Yes	1
N6.	Characteristics of Primary Caretaker (check & add for score)		A6.	Secondary Caretaker has a Current Substance Abuse Problem	
	a. Not applicable	0		a. No, or no secondary caretaker	0
	b. ___ Lacks parenting skills	1		b. Yes (check all that apply)	
	c. ___ Lacks self-esteem	1		___ Alcohol abuse problem	
	d. ___ Apathetic or hopeless	1		___ Drug abuse problem	1
N7.	Primary Caretaker Involved in Harmful Relationships		A7.	Primary or Secondary Caretaker Employs Excessive and/or Inappropriate Discipline	
	a. No	0		a. No	0
	b. Yes, but not a victim of domestic violence	1		b. Yes	2
	c. Yes, as a victim of domestic violence	2			
N8.	Primary Caretaker Has a Current Substance Abuse Problem		A8.	Caretaker(s) has a History of Domestic Violence	
	a. No	0		a. No	0
	b. Alcohol only	1		b. Yes	1
	c. Other drug(s) (with or without alcohol)	3			
N9.	Household is Experiencing Severe Financial Difficulty		A9.	Caretaker(s) is a Dominating Parent	
	a. No	0		a. No	0
	b. Yes	1		b. Yes	1
N10.	Primary Caretaker's Motivation to Improve Parenting Skills		A10.	Child in the Home has a Developmental Disability or History of Delinquency	
	a. Motivated and realistic	0		a. No	0
	b. Unmotivated	1		b. Yes (check all that apply)	
	c. Motivated but unrealistic	2		___ Developmental disability including emotionally impaired	
				___ History of delinquency	1
N11.	Caretaker(s) Response to Investigation		A11.	Secondary Caretaker Motivated to Improve Parenting Skills	
	a. Viewed situation as seriously as investigator and cooperated satisfactorily	0		a. Yes, or no secondary caretaker in home	0
	b. Viewed situation less seriously than investigator	1		b. No	2
	c. Failed to cooperate satisfactorily	2			
	d. Both b and c	3	A12.	Primary Caretaker Views Incident Less Seriously than Agency	
				a. No	0
				b. Yes	1

TOTAL NEGLECT RISK SCORE _____

TOTAL ABUSE RISK SCORE _____

RISK LEVEL

Assign the family's risk level based on the highest score on either scale, using the following chart:

Neglect Score	Abuse Score	Risk Level
0 - 4	0 - 2	Low
5 - 7	3 - 5	Moderate
8 - 12	6 - 9	High
13 - 20	10 - 16	Intensive

OVERRIDES

Policy: Override to Intensive. Check appropriate reason.

- ___ 1. Sexual Abuse cases where the perpetrator is likely to have access to the child victim.
- ___ 2. Cases with non-accidental physical injury to an infant.
- ___ 3. Serious non-accidental physical injury requiring hospital or medical treatment.
- ___ 4. Death (previous or current) of a sibling as a result of abuse or neglect.
- ___ 5. Reason _____

Discretionary: _____

OVERRIDE RISK LEVEL _____ Low _____ Moderate _____ High _____ Intensive

Supervisor's Review/Approval of Discretionary Override _____

Date _____

The aim of SDM and like algorithms is “to classify families into risk groups that have high, medium, or low probabilities of continuing to abuse or neglect their children.”¹⁹ Classification is based on scoring the various items included in the tool; the total determines the family’s risk classification. The family’s resulting risk classification is used to determine “whether to close a report or open a case for CPS In-Home or Out-of-Home Services”²⁰ and to calculate the frequency of a worker’s contact with a family.²¹ The SDM model is the most popular algorithm now in use; today, SDM decision-making tools are in use in eight states and at least one foreign jurisdiction.²²

b. Child Support

A second decision-making-algorithm example comes from child support where, in many jurisdictions, numerical worksheets or formula have largely or fully supplanted traditional discretionary decision making. All U.S. jurisdictions use numerical algorithms to establish presumptive support values; an OECD survey found that, of 31 surveyed nations, eight employed algorithms based on clear rules or rigid formulae, eleven used guidelines, and 12 continued to rely on adjudicative discretion or used a mixed approach.²³ Figure 2 shows one, relatively simple example of a support formula²⁴:

Figure 2

Example of an Income Shares Guidelines Calculation Using 2003 Median Earnings and the Oregon Income Shares Schedule

	Mother	Father		Combined
1. Gross Monthly Income	\$1,762	\$2,631	=	\$4,393
2. Each Parent's Share	40%	+	60%	= 100%
3. Expenditures on Children in Intact Family (One child amount from schedule in Table 1)				\$717
4. Each Parent's Share of Obligation (Each parent's Line 2 x Line 3 Combined)	\$287	+	\$430	= \$717

¹⁹ CRC, supra note 16, at 11.

²⁰ North Carolina Dep’t of Social Service, SDM® Family Risk Assessment of Abuse/Neglect Policy and Procedures. Retrieved from <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-05/man/DSS-5230%20NEW.pdf>.

²¹ See K. Johnson & A. Bogie, Risk Assessment Validation: A Prospective Study 13-14, tbl. 5 (Children’s Research Center 2009). Retrieved from http://www.nccdglobal.org/sites/default/files/publication_pdf/nc_risk_asst_validation_final2009_2.pdf.

²² See CRC, supra note 16, at 2.

²³ See OECD Social Policy Division, Directorate of Employment, Labour & Social Affairs, OECD Family Database: Child Support, tbl. PF1.5.A (2010). Retrieved from www.oecd.org/els/social/family/database.

²⁴ Reprinted from J.C. Venohr & T.E. Griffith, Child Support Guidelines: Issues and Reviews, 43 Fam. Ct. Rev. 415 (2005).

As with child-protection algorithms, support guidelines were introduced to improve both the quality and consistency of decision making. In the United States, numerical guidelines were mandated by the federal government after a dramatic rise in public assistance rolls and research showing that “[t]he average value of child support paid was less than half of what economists estimate as typical child-rearing costs and only 12% of average male earnings for that year. Research at the state level also documented considerable variation in award values, even among families of similar size and socioeconomic characteristics.”²⁵

The guidelines that have been developed rely on varying policy goals and calculation methodologies. Some models aim at poverty prevention; some aim at continuity of child-related expenditure; some have more complex goals.²⁶ And even guidelines animated by the same policy values may employ different calculation strategies. Some use gross income, for example, and others net. They may define income in varying ways. They may or may not take account of obligations to new families, vary award amounts based on the payee parent’s income and/or the amount of residential care a payor parent enjoys, or apply only up to a legislatively prescribed income level.²⁷

But while the content of support guidelines vary substantially, they invariably replace discretionary decision making with a numerical calculation that applies equally to all similarly situated parents.

Evaluating Delegalization: What Works, What Doesn’t

Do these various examples of delegalization represent positive or negative reforms? In my view, the picture is mixed. In some instances, delegalization works: it avoids expensive and time-consuming litigation; it achieves outcomes equal to or better than those that litigation could have achieved. In other instances, delegalization may avoid time-consuming and expensive litigation, but it is associated with harms equal to or greater than those the efficiency and/or consistency gains that it has produced. In a third category of cases, delegalization is not associated with harm, but it has not achieved its full promise.

So, what works and what doesn’t?

1. Success Stories

Both examples of bureaucratic delegalization through forms represent successes, in my view: Each reduces the costs and stresses associated with a litigated proceeding in a context where traditional fact finding is genuinely unnecessary.

With respect to divorce, the advent of unilateral no-fault divorce grounds has shifted the locus of divorce adjudication away from status determination and toward post-divorce parenting arrangements (custody, visitation) and financial entitlements (property division, spousal and child support). But the population served by the California summary dissolution

²⁵ M. Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 Cal. L. Rev. 31 (1998).

²⁶ *Id.*

²⁷ See T. Brito, *Child Support Guidelines and Complicated Families: An Analysis of Cross-State Variation in Legal Treatment of Multiple-Partner Fertility* (Institute for Research on Poverty University of Wisconsin–Madison, 2005). Retrieved from http://irp.wisc.edu/research/childsup/csde/publications/brito_05.pdf

procedure have no children and possess assets so limited that adjudication would never make financial sense.

Adjudication for these couples makes no sense for several reasons. First, California mandates equal division of community assets.²⁸ A court may take misappropriation into account²⁹; there may be a question as to whether an asset is community or separate property. But these issues are not typical and, given that the population for whom summary dissolution is available has relatively few assets to begin with, in most cases a “mistake” in asset characterization or division would only rarely be worth the cost of litigation. Spousal support determination remains highly discretionary in California, but it is rare in marriages of short duration. In sum, the divorcing couples who are eligible for summary dissolution almost never have a legal issue worth litigating. There is no public policy goal served by requiring them to undertake a lengthier, and more costly, process in order to obtain a divorce.

All the evidence suggests that law makers everywhere should adopt the summary dissolution model for childless marriages of short duration. Substantial numbers of divorces occur before the couple has children or major assets. In the United States, the median duration of marriage at divorce is twelve years and, in the United Kingdom, ten.³⁰ Many divorcing couples are also childless; for example, in 2010, only 48% of U.K. divorcing couples had children under 16 at home.³¹

Substantial numbers of divorcing couples also have very few assets. When I studied divorce in three New York counties two decades ago,³² the median net value of marital assets subject to division was only \$18,266,³³ or \$41,619 in 2015 dollars.³⁴ And this was a sample in which contested cases – the wealthiest segment of the total divorce pool³⁵ – were substantially over-represented. Despite this overrepresentation of the wealthy, 18% of the total sample had negative net worth – their debts exceeded their assets.³⁶ And 59% of overall marital property value for even the contested case sample was represented by home equity, household goods, and a car.³⁷ There is nothing unusual about my mid-80s divorce sample. The scarcity of marital property was first reported in 1956 in a pioneering study of divorce in Detroit, Michigan; forty percent of the divorcing couples surveyed in this study had no property beyond

²⁸ CAL. FAM. CODE § 2550.

²⁹ See C.S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 34 *Hastings L.J.* 769 (1982).

³⁰ OECD Social Policy Division, Directorate of Employment, Labour & Social Affairs, *OECD Family Database* (2010). Retrieved from <http://www.oecd.org/els/social/family/database> (reporting that, in OECD countries, average marital duration at divorce ranged from 10 to 17 years).

³¹ See *Divorce Rates Data*, *Guardian*, January 28, 2010.

³² See M. Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 *Brooklyn L. Rev.* 621 (1991) [hereinafter *Good Intentions*]; M. Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 *N.C. L. Rev.* 401 (1996) [hereinafter *Discretionary Decision Making*].

³³ See *Good Intentions*, supra note 32, at 662 tbl. 12.

³⁴ U.S. Inflation Calculator. Retrieved from <http://www.usinflationcalculator.com/>.

³⁵ See *Good Intentions*, supra note 32, at 659.

³⁶ See *id.* at 659 tbl. 8.

³⁷ See *id.* at 665-66 tbl. 15, fig. 1. Asset values could not be determined for couples in the default and consent groups because these couples were not required to file net worth statements. See *id.*

household possessions, and only 18% had property worth \$4000 or more.³⁸ The same phenomenon was “rediscovered” by several other researchers looking at divorce outcomes in other states during the same time period when I was looking at divorce in New York.³⁹

Even in jurisdictions where the rules governing property distribution are far more discretionary than they are in California, for the childless divorcing couple married for only a few years and possessing minimal assets, there is little to fight over. Indeed, the price of legal representation may well exceed any loss in post-divorce entitlements that lawyer representation could avert.⁴⁰ In the early 1990s, curious about just what legal representation would cost a “typical” couple – let us call them Mr. and Mrs. Smith – who needed a simple, uncontested divorce, I had a student call ten different law firms listing divorce as a specialty in the Brooklyn, Manhattan, and Queens yellow pages. The student asked each firm’s representative the “likely cost” of representing the Smiths in an uncontested divorce and told the firm’s representative that the Smiths had been married for five years, were childless, and owned no property except a joint bank account, a car, furniture, and a jointly owned condominium apartment which would be sold, with an equal division of the proceeds. Estimates to handle the Smiths’ divorce ranged from \$459 to \$1770; the mean was \$931 (\$1618 in 2015 dollars).⁴¹

For couples like the Smiths, legal representation comes down to a \$1000-plus paper-preparation fee. And couples like the Smiths are extremely numerous. Researchers have found that the majority of divorcing couples resolve the terms of their divorce themselves with little conflict.⁴² These couples consult a lawyer because they, like “most pro se [divorce] litigants[, have] . . . problems with forms or procedures, many of which are not resolved by the available written instructions.”⁴³ But that lawyer’s fee will significantly reduce the value of their meager assets available for division, without any obvious equity or efficiency gain.

Indeed, there is every reason to expand the pool of divorcing couples eligible for summary dissolution beyond the group which is currently eligible in California. Why should possessing a bit of home equity disqualify a couple? Is there any reason why a couple married for six years, or seven or eight should not be equally eligible? Today, both public policy and public

³⁸ See William J. Goode, *After Divorce* 217 (1956).

³⁹ See B. Baker, *Family Equity at Issue: A Study of the Economic Consequences of Divorce on Women and Children* (1987); L.J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985); J.B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 *Fam. L.Q.* 351 (1987).

⁴⁰ See, e.g., L. Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *Duke L.J.* 612, 671 (1992) (“Individuals acting in their self-interest will acquire such [legal] advice only if its perceived value exceeds its perceived cost.”). Researchers thus report that self-representation at divorce is significantly correlated with income, age, whether the marriage produced children, property-ownership, and marital duration. See B.D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 *St. Louis L.J.* 553, 561-66 (1993); R.C. Cavanagh & D.L. Rhode, *Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *Yale L.J.* 104, 162 (1976) (divorce litigants without children and with short marriages were more likely to self-represent).

⁴¹ See *Discretionary Decision Making*, supra note 32, at 516 n. 387.

⁴² See E.E. Maccoby & R.H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 159 (1992) (reporting that three-quarters of divorcing couples studied “experienced little if any conflict over the terms of the divorce decree”); Cavanagh & Rhode, supra note 41, at 138 (reporting that more than 60% of divorcing couples studied had resolved all property, support, custody, and visitation issues themselves).

⁴³ Am. Bar Association, *Responding to the Needs of the Self-Represented Divorce Litigant* 3 (1994).

sentiment support divorce essentially on demand. There is no public good to be served by requiring couples with nothing to fight over to go through the hoops of a divorce complaint.

In Hospital Paternity Establishment (IHPE) is also an unqualified success story, and for similar reasons. The adjudicative paternity-establishment model assumes that putative fathers will resist a paternity finding. But today, when nonmarital birth is mainstream – indeed, normative in some population groups – new parents are often eager to establish legal ties to their nonmarital child. Many of these parents are cohabiting; even those who live apart are typically planning a future together at the time of their child’s birth.⁴⁴ For parents like these, an adjudicative model is not only unnecessary and inefficient, but its conflict-based adjudicative model may even impede paternity establishment.

Certainly, the evidence suggests that IHPE has increased paternity establishment rates. Indeed, some research shows that IHPE is responsible for an increase in paternity establishment of nearly 40 percent.⁴⁵ Researchers have also found that willingness to establish paternity tends to decrease over time; in one study, over half of fathers who voluntarily established paternity did so within the first month of the child’s birth.⁴⁶ The hospital where the child is born is thus the ideal place to establish paternity; an adjudicative procedure cannot possibly replicate the timeliness of IHPE.

IHPE is also associated with other, more subtle benefits. For example, there is evidence that fathers who acknowledge paternity in the hospital are twice as likely to pay child support as fathers who acknowledge paternity elsewhere,⁴⁷ and are more likely than fathers with no paternity establishment or paternity establishment outside the hospital to be involved in their child’s life (e.g., contact with child within the last 30 days, overnight visits).⁴⁸ Their children are less likely to live in poverty, and spend more time with their fathers.⁴⁹

In sum, there is reason for policy makers everywhere to adopt IHPE. There is no public policy goal served by relying exclusively on an adjudicative model for paternity establishment, and there is every reason to encourage consensual and cooperative planning by unmarried parents.

⁴⁴ See McLanahan & Garfinkel, *supra* note 3, at 145-46.

⁴⁵ See M. Rossin-Slater, *Engaging Absent Fathers: Lessons from Paternity Establishment Programs* (2011). Retrieved

from http://www.columbia.edu/~mr2856/research/ROSSIN_PATERNITY_PAPER_Fall2011_tosubmit.pdf.

⁴⁶ See P.R. Brown et al., *Voluntary Paternity Acknowledgement* (Report of the Wisconsin Department of Workforce Development, 2004). Retrieved from <http://www.ssc.wisc.edu/irpweb/research/childsup/cspolicy/pdfs/volpat.pdf>; E. Wattenberg et al., *A Study of Paternity Decisions of Young, Unmarried Parents* (Ford Foundation, 1991).

⁴⁷ See Mincy et al., *supra* note 15; P.R. Brown et al., *A Decade of Voluntary Paternity Acknowledgment in Wisconsin: 1997–2007* (University of Wisconsin Institute for Research on Poverty, 2008) (less likely to have child support order, but more likely to pay it); J. Pearson & N. Thoennes, *Acknowledging paternity in hospital settings* 54 *Public Welfare* 44 (1996).

⁴⁸ See Mincy et al., *supra* note 15; Brown et al., *supra* note 47.

⁴⁹ See C. DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the U.S.: 2004* (U.S. Census Bureau, Current Population Report P60-229, 2005); K. Guzzo, *Paternity Establishment for Men's Nonmarital Births*, 28 *Population Research & Policy Review* 853-872 (2009); Mincy et al., *supra* note 15.

2. *Unsuccessful and Less Successful Initiatives*

While the move away from traditional adjudication has been an unqualified success in both the cases of in-hospital paternity establishment and summary dissolution for couples without real divorce disputes, the use of algorithms in child-protection and child-support decision making demonstrates that delegalization is not invariably useful. Indeed, in the case of child protection, it is possible that the introduction of algorithms has actually worsened case-processing norms. In the case of child support, the picture is mixed.

In each instance, problems emerge from the fact that the algorithms policymakers have adopted are poorly grounded both in public values and empirical evidence on the relevant decision-making variables.

Let us first consider the algorithms used in child-protection decision making, where the problems are worst. Recall that these instruments are based on unsubstantiated maltreatment allegations and caseworker determinations that maltreatment has occurred (substantiation). Substantiation does follow some kind of investigation, of course, but the determinations on which instruments like the SDM form shown in Figure 1 were based rested on intuitive caseworker judgments. Unsurprisingly, researchers have found that caseworkers do not agree on what constitutes good parenting, and statutory definitions of maltreatment are typically too vague to ensure consistency.⁵⁰ Cultural variation in child supervision and discipline complicate these already large problems.⁵¹ So does the fact that neglect – the largest category of maltreatment – may apply both to situations in which a child has been harmed and those in which harm is only risked; thus, in a U.S. survey of maltreatment cases, only about 20% of children who had been classified as maltreated were injured enough to require medical or psychological treatment.⁵² Nor is either harm or risk a matter of binary, yes/no selection; each is measured incrementally, but without any obvious, empirically-based scale (let alone a cut-off point) for determining how much harm or risk is too much.⁵³

Decision-making tools reliant on intuitive maltreatment determinations can be analogized to instruments designed to measure lung cancer risk without a standard description of lung cancer. Reliance on instruments so derived may do nothing more than reinforce existing decision-making patterns, flaws and biases intact. Reconsider the risk assessment tool shown in Figure 1, originally developed in Michigan using Michigan cases. North Carolina adopted this algorithm in 2001.⁵⁴ But after a North Carolina case survey⁵⁴ revealed that the Michigan assessment tool's "moderate" and "high" risk categories did not meaningfully distinguish

⁵⁰ See P. Welbourne, *Culture, Children's Rights and Child Protection*, 11 *Child Abuse Rev.* 345 (2002) (describing variation in workers' perceptions of good parenting). See also S.J. Rose & W. Meezan, *Variations in Perceptions of Child Neglect*, 75 *Child Welfare* 139-60 (1996).

⁵¹ See M.A. Straus & G.K. Kantor, *Definition and Measurement of Neglectful Behavior: Some Principles and Guidelines*, 29 *Child Abuse & Neglect* 19, 21 (2005) (summarizing literature on cultural variation in concepts of neglect).

⁵² See A.J. Sedlak & D.D. Broadhurst, *Third National Incidence Study of Child Abuse and Neglect (NIS-3)* (U.S. Dept. of Health & Human Services, 1996).

⁵³ See National Research Council, *Understanding Child Abuse and Neglect* 5 (1993). See also Straus & Kantor, *supra* note 52.

⁵⁴ See Johnson & Bogie, *supra* note at i.

propensity toward a new maltreatment report or case opening in North Carolina,⁵⁵ CRC researchers revised the tool by identifying, from data collected in North Carolina, “[r]isk factors that demonstrated a significant statistical association with subsequent CPS involvement” and thereafter using regression analyses to identify the combination of risk factors that were the best North Carolina predictors.⁵⁶ As a result of this process, prior case involvement was recoded (reflecting North Carolina’s adoption of a case-entry model that diverts some cases from a traditional investigative track), three items (caregiver history of childhood maltreatment, housing needs, and caregiver mental health) were added to the neglect index, several items were removed (N6(c)(d) [whether the primary caretaker lacks self-esteem or is apathetic], N10 [caregiver’s motivation to improve parenting skills], and N11 [caregiver response to assessment]), and one (N x [substance abuse]) was rescored: under the Michigan algorithm, alcohol abuse merits one point while abuse of other drugs merits three; under the new North Carolina model, both drug and alcohol abuse merit one point.⁵⁷

So, could caregiver mental health really be relevant to maltreatment risk in North Carolina but not in Michigan? Could parental motivation really be relevant to maltreatment risk in Michigan but not in North Carolina? Is it possible that drug abuse is three times more powerful a predictor of maltreatment in Michigan than in North Carolina? There is no obvious reason for such divergent patterns if maltreatment is defined and measured the same way in both jurisdictions. Were researchers to find that smoking is predictive of lung cancer (or three times more predictive) in one state but not the other, a search for the environmental variable that ameliorates the impact of smoking in the low- or no-association state would almost certainly be undertaken; in the absence of such a variable, scientific experts would likely conclude that something was wrong with the study. In the case of the Michigan vs. North Carolina risk-assessment algorithms, there is no obvious environmental variable capable of explaining variation. It seems likely that researchers are capturing local child-protection culture instead of genuinely different risk climates.

A second problem with actuarial assessment tools is their frequent reliance on subjective judgments. Consider again the Michigan assessment tool. Under this instrument, a parent is a “moderate risk” simply because the scoring caseworker feels that she “viewed the situation less seriously than the investigator,” “failed to cooperate satisfactorily,” and shows lack of motivation to improve parenting skills. Such subjective criteria reintroduce all the problems with intuitive judgments that decision making algorithms were designed to avoid.

Although highly objective algorithms like the revised North Carolina model avoid the problems of subjective judgment, they, too, pose serious problems. First, the typical instrument’s exclusive focus on negative risk factors will invariably result in identical scores for families that in fact present wildly different risks. For example, under the revised North Carolina model, any single mother with three children who is a victim of domestic violence and experiencing serious financial difficulty scores seven points, the highest “moderate” risk

⁵⁵ See *id.* at 20-21, tbls. 8, 9, figs. 1, 2.

⁵⁶ *Id.* at 28.

⁵⁷ See *id.* at 15-16, 31-32.

score. Parent A, the college-educated mother of three high-achieving teenagers whose large family stands ready to help her gets exactly the same score as Parent B, a high-school dropout whose three toddlers are the product of a series of abusive relationships and who lacks any family or social support.

There is also real risk that parents will be classified as abusive or neglectful simply because they are confronting multiple risks; risk assessment is now, in many agencies, part of the process by which caseworkers decide whether a maltreatment complaint should be closed or an active case opened.⁵⁸ But being the subject of a substantiated maltreatment report is stigmatizing and akin to a quasi-criminal conviction: many forms of employment are not open to individuals who have a child-maltreatment history; such a finding also subjects a parent to continuing state surveillance and to the potential loss of his or her child. Criminal conviction based on risk assessment is not permitted. It should also be disallowed in a child-protection proceeding.

In sum, risk assessment as it is currently practiced presents invite workers to inappropriately substitute risk profiling for fact finding, with potentially large and harmful consequences to parents and their children. Fact finding is important in child protection work; forms and worksheets should not replace factual investigation.

Decision making algorithms used in child support determination present a much more mixed picture. First, because parental incomes and expenses are straightforward numerical values, not based on value judgments or vague definitions, they are much more amenable to worksheets and forms. The frequency of child support determination and the fact that it is invariably grounded in income also suggests that there is large potential for consistency and efficiency gains from a formula. And, given the low level of awards documented under discretionary standards, guidelines have the potential to markedly improve children's economic circumstances. This is important because children in single-mother households are disproportionately low-income. In the U.S., children in single-mother households are almost five times as likely to live in poverty compared to children in two-parent, married households.⁵⁹ Although children's poverty rates are lower in Sweden and Denmark, where public support is far more extensive, the poverty rate gap between children in single-mother and two-parent households is still about 400%.⁶⁰ Moreover, even a presumptive guideline should facilitate bargaining by revealing, with clarity, legislative determinations as to a standard child-support award under circumstances similar to those of the couple at hand.

⁵⁸ Thus, the North Carolina Policy Manual states that the risk assessment should be used in determining "whether to close a report or open a case for CPS In-Home or Out-of-Home Services." North Carolina Dep't of Social Service, *supra*.

⁵⁹ See T. Gabe, *Poverty in the United States 6-7* (Congressional Research Service 7-5700, 2015). Retrieved from <https://www.fas.org/sgp/crs/misc/RL33069.pdf>.

⁶⁰ See Inequality Watch, *Poverty in Europe: The Current Situation (2010)* (showing that Danish and Swedish children in single-mother households are approximately four times more likely to live in poverty relative to the child in a two-parent household. Retrieved from <http://www.inequalitywatch.eu/spip.php?article99>. See also http://www.unicef-irc.org/publications/pdf/rc10_eng.pdf.

All of these factors suggest that child-support guidelines are a valuable project, well worth pursuing. But as presently constituted, child support guidelines have not achieved their full potential.

The first, and probably the largest, problem is simply lack of consensus on what represents a “fair” child support award. In the early days of the guideline movement, three very different approaches to support determination garnered attention. One was typically described as “continuity of expenditure.” This approach seeks to ensure that the child receives the same proportion of total parental income that he or she would have received if the parents lived together. It relies on estimates of typical child-related outlay in intact families to derive a support percentage (calculated either on the basis of gross or net income), which is then prorated between the parents. Both the “percentage-of-obligor-income” and “income-shares” support models are based on a continuity-of-expenditure goal, but because these models incorporate different assumptions about child-related expense, they typically produce different awards. A second approach was generally described as “equal outcomes.” This approach seeks to ensure that each household in the separated family has the same living standard. It relies on a “household equivalence scale” to calculate the percentage of total family income needed by each family; the value of child support is the noncustodial parent’s “excess” income. Finally, the “poverty-prevention” approach focuses on ensuring that the child’s basic needs, calculated from a minimal-needs assessment such as a poverty threshold, are met. A needs standard, that does not vary by parental income level, is established and child support calculated on that basis. After the support need is established, it is prorated on the basis of parental income.

The range of support policy options was thus extensive, but policy debate was nonetheless muted and rarely focused either on the underlying choice between individualist and sharing norms within the family or the ordering of community and familial obligation. Instead, government officials tended to commission economic studies and number crunching. Hard choices about public values were typically avoided.⁶¹

But reliance on number crunching has meant that, even in jurisdictions employing a similar support model, award values are often markedly different. For example, because of variation in the definition of income, the percentages used to calculate support, and “add-ons” to the basic support value, income-shares guidelines produce wildly different results. Thus, a review of 1997 U.S. guidelines reports, for a sample middle-income case, that the highest presumptive award (\$1,054) was in Nebraska, an income-shares state, and that the second-lowest (\$604) was in Kentucky, another income-shares state.⁶² OECD data suggest similar inconsistencies across European jurisdictions.⁶³

⁶¹ See Garrison, *supra* note 25.

⁶² See L.W. Morgan & M.C. Lino, *A Comparison of Child Support Awards Calculated Under States Child Support Guidelines with Expenditures on Children Calculated by the U.S. Department of Agriculture*, 33 *Fam. L.Q.* 191, 209 *tbl. 4* (1999).

⁶³ See OECD Social Policy Division, *supra* note 15, at *tbl. PF 1.5.C.* (showing average per child 2004 support payment ranging from \$128 in Sweden to \$657 in Switzerland).

Case surveys also suggests that deviation from the guideline values occurs frequently. In one U.S. survey, for example, deviation occurred in anywhere from 10% to more than 60% of cases.⁶⁴ Most deviation is downward.⁶⁵

We have no reason to think support guidelines produce results worse than the discretionary regime that preceded them; decisions were also highly inconsistent during that period. But the level of variation across and within jurisdictions with support guidelines demonstrates that much more research – on the economic realities of raising children in separated families, on public perceptions of fairness in relation to those realities – and far more public debate are necessary if support guidelines are to produce results that are optimally consistent and fair.

Conclusion

Delegalization can be a valuable tool in improving both the efficiency and effectiveness of family law proceedings. By offering simple, timely, and consensual processes, delegalization can also minimize stress and enhance the likelihood of cooperative decision making. By routinizing case processing, delegalization also has the capacity to improve the consistency and even the quality of decision making. But delegalization is inappropriate in contexts, like child protection, where individualized fact finding remains essential. And to achieve its promise of improved decision making, the norms that delegalization utilizes must be consistent with the relevant empirical evidence and public values.

⁶⁴ See D. Arnaudo, Deviation from State Child Support Guidelines, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 85, 88–94 (M.C. Haynes ed. 1994) (describing and summarizing research).

⁶⁵ *Id.*

ADOPTION AND INTERNATIONAL ADOPTION: THE CZECH REPUBLIC EXPERIENCE

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Abstract

Adoption is one of the traditional institutions of the Czech family law. However, as in most legal systems of the former Soviet Bloc, since 1949 the Act on Family Law has regulated *only adoption of minor children*. For political reasons, adoption of adults was abandoned as a “*bourgeois anachronism*.” Since 1963, the Act on the Family has regulated *only full adoption of minor children*. [How is this different from the 1949 Act?] Adoption has been created as a status change, as an imitation of biological family ties (*adoption natura imitatur*).

Mainly due to the Czech Republic’s accession to a number of international human rights conventions after 1989, the Czech legal order has broadened *protection of the child’s natural family, of the minor parents of the child, of his or her putative parents [should this be parent?] or parents without full legal capacity*.

According to the New Civil Code, effective since 1st January 2014, adoption should be used only when the minor child cannot live with his or her parents or in his or her original family. The new legislation emphasizes *the obligation of the state to take care of the child’s natural family*: the parents must be provided with a comprehensive assistance and must be warned of the consequences of their non-interest in the child. However, if the court decides on adoption in accordance with the law, the status of the child should not be changed any more as a principle. [Do you mean once the adoption has gone through, the status will not be changed again? Does adoption sever the original status of natural parent-child?]

Regarding inter-country adoption, the law regulates a complicated formal procedure aiming to ensure *the best interests of the child*. The international conventions establish fundamental principles underlying the procedure.

I. INTRODUCTION

As in many other post-communist countries, radical changes to Czech family law were not expected to take place without a re-codification of the Civil Code. In the past years there were a number of attempts to create a new Civil Code involving a lot of new ideas and authors. Nevertheless, a common feature of all the Drafts was that family law, since 1949 being a separate legal regulation, was to be integrated into the new Civil Code. As late as 2012, *after a long transitory period*, a new Civil Code was adopted as the Act No. 89/2012 Coll. (further mainly NCC). It came into effect on the 1st January 2014. The new Civil Code may be said to be *a reasonable compromise* taking into account traditions and new phenomena, models and tendencies. The new Czech family law may then be characterized with the word *continuity* with the previous legal regulation because many changes of law or its application occurred shortly after 1989¹ as a consequence of amendments and the case law of the Constitutional Court and the European Court of Human Rights, among others.

II. SOME WORDS ABOUT LEGAL DEVELOPMENT

Since 1949, adoption of minors has been understood in relation to the concept mentioned above in the abstract as a benefit for both real and social orphans, unwanted or abandoned minor children. On the part of the adoptive parents, adoption is viewed as acceptance of a stranger's minor child as their own. Since 1963, the law regulated *only full adoption of minor children*. Besides, adoption of minors has been created *as a status change*, as an imitation of biological family ties. Mainly due to the Czech Republic's accession to a number of international human rights conventions after 1989, the Czech legal order has broadened protection of the child's natural family, of the minor parents of the child, of the putative parents or parents without full legal capacity.² When speaking about the other international conventions important for Czech family law, which the Czech Republic has acceded after 1989, we have to name especially *Convention for the Protection of Human Rights*

¹ See J. F. Haderka 'The Czech Republic – New Problems and Old Worries' in A Bainham (ed) *International Survey of Family Law 1996* (The Hague – Boston – London: Martinus Nijhoff Publ., 1996) pp. 181-197; J. F. Haderka 'A Half-Hearted Family Law Reform of 1998' in A Bainham (ed) *International Survey of Family Law 2000 Edition* (Bristol: Jordan Publishing, 2000) pp. 119-130; Z. Králíčková 'Czech Family Law: The Right Time for Re-Codification' in B Atkin (ed) *International Survey of Family Law 2009 Edition* (Bristol: Jordan Publishing, 2009) pp. 157-173.

² For details, see Z. Králíčková 'Adoption in the Czech Republic: Reform in the Light of the Child Welfare Laws' in A Bainham (ed) *International Survey of Family Law 2003 Edition* (Bristol: Jordan Publishing, 2003) pp. 125–142.

*and Fundamental Freedoms,*³ *Convention on the Rights of the Child,*⁴ *European Convention on the Exercise of Children's Rights,*⁵ *European Convention on the Legal Status of Children Born out of Wedlock,*⁶ *European Convention on Adoption of Children,*⁷ *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption,*⁸ *Convention on the Civil Aspects of International Child Abduction,*⁹ *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children,*¹⁰ and *Convention on Contact Concerning Children*¹¹ etc.

In connection with this, it is therefore also necessary to draw attention to *the Article 10 of the Constitution of the Czech Republic*, which, thanks to the amendment from 2001 (effective in 2002), states that *the announced international conventions, to whose ratification the Parliament had consented and by which the Czech Republic is bound, form a part of the legal order; if the international convention states something different from the law, the international convention is to be used.*

Let us add, that the main creators of the new Civil Code intended to adapt [or adopt?] the new regulation of adoption of minors in the *European Convention on the Adoption of Children (Revised)*.¹²

³ The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Roma 4. 11. 1950. Czechoslovakia did not accede to it until the fall of the Communist regime, see statement No. 209/1992 Coll.

⁴ The United Nations Convention on the Rights of the Child, New York 20. 11. 1989, statement No. 104/1991 Coll.

⁵ European Convention on the Exercise of Children's Rights, CETS No.: 160, Strasburg 25. 1. 1996, statement No. 54/2001 Coll. Int. tr.

⁶ European Convention on the Legal Status of Children Born out of Wedlock, CETS No.: 085, Strasburg 15. 10. 1975, statement No. 47/2011 Coll. Int. tr.

⁷ European Convention on Adoption of Children, CETS No.: 058, Strasburg 24. 4. 1967, statement No. 132/2000 Coll. Int. tr.

⁸ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, statement No. 47/2001 Coll. Int. tr.

⁹ *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, statement No. 34/1998 Coll.

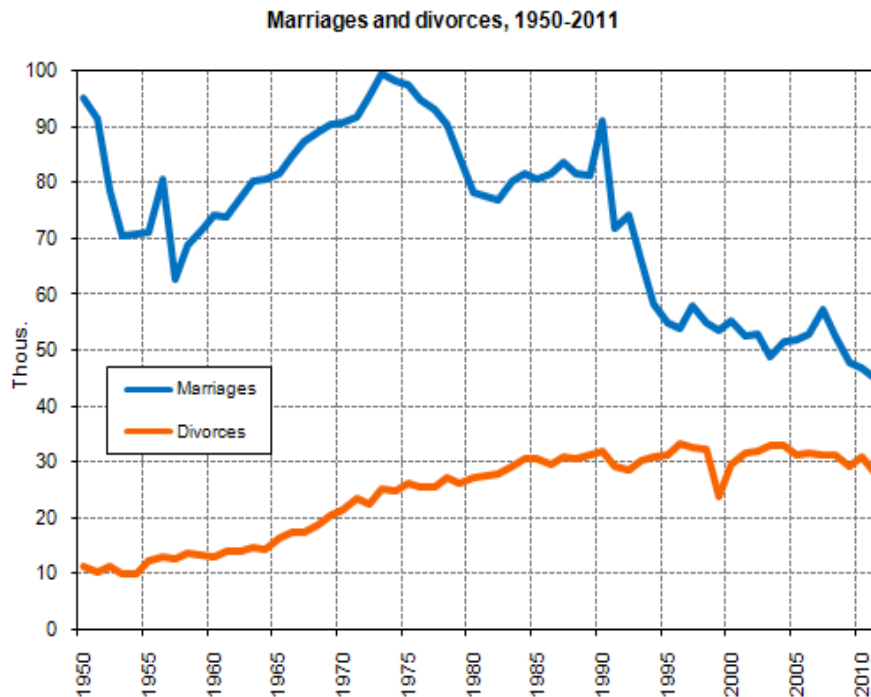
¹⁰ Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, statement No. 141/2001 Coll. Int. tr.

¹¹ European Convention on Contact Concerning Children, CETS No.: 192, Strasburg 15. 5. 2003, statement No. 91/2005 Coll. Int. tr.

¹² European Convention on Adoption of Children (Revised), CETS No.: 202, Strasburg 27. 11. 2008. However, the Czech Republic has not signed the revised version of European Convention on Adoption of Children yet (1. 9. 2014).

III. ABOUT CZECH FAMILY: RELEVANT CURRENT STATISTICAL DATA

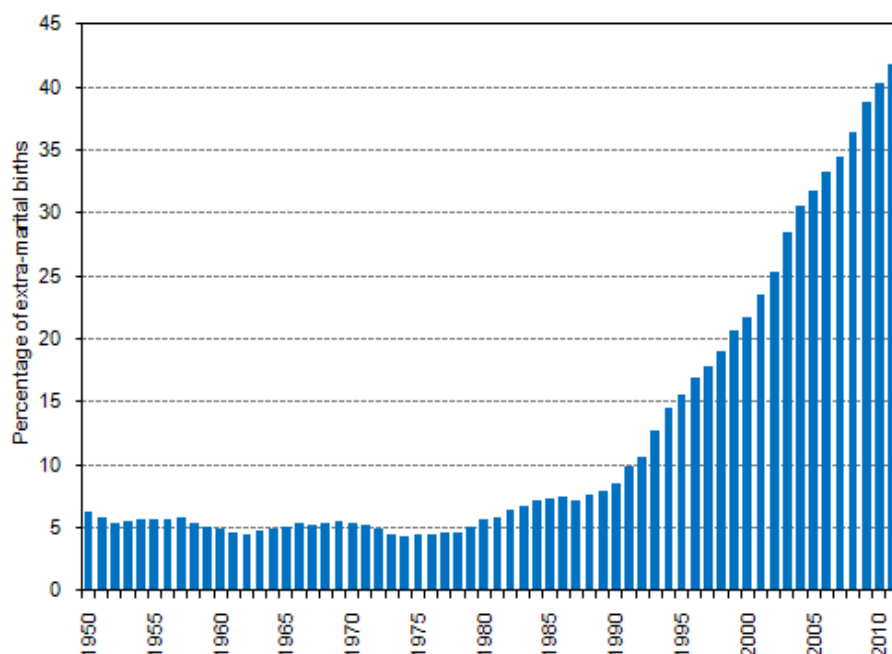
What is typical for Czech family? An idea of the Czech society may be given by the two following charts¹³ and their interpretation below.



The chart *Marriages and divorces* shows the continuous decrease of the number of marriages, especially after the year 1990 (the blue colour line) and quite a high divorce rate (the red colour line). Family is no longer based so much on marriage. Many couples live together quite a long time before marriage or instead of marriage, especially young people with small children. Such couples are not very stable, a situation that creates a lot of problems for children. There are a lot of non-complete families, one-parent families, sometimes intentionally so.

¹³ © Czech Statistical Office, <http://www.czso.cz/>, available in English, too.

Percentage of extra-marital births, 1950-2011



The chart *Percentage of extra marital births* shows an enormous increase in the number of children born out of wedlock, a phenomenon also connected [beside the high divorce rate with minors [minor children?]] with a lot of problems, too. It is generally known that a lot of children born out of wedlock are *legally fatherless*, which puts them at the risk of poverty, etc.

I should mention *another problem* connected with the fact of quite a high number of children born out of wedlock. It is *mothers abandoning newborn children and placing them voluntarily into so called baby-boxes, institutions, or giving them for adoption*.

Since 2005, there has been an increase in the number of *private so-called baby-boxes*, i.e., the places for leaving unwanted children at the premises of maternity hospitals financed by *the Statim foundation*. The statistics say that there have already been 50 of these, and they have “saved” about 100 children since 2005.¹⁴ [I don’t understand these numbers. Where did the other 50 kids come from?] In few cases mothers changed their minds about abandoning their child and sought to have the child in their care and to be registered in the book of births. However, in majority of cases the police have to search for the child’s parents, as the child has the right – at least theoretically – to know his or her origin. If the investigation is inconclusive, the child has the status of *waif* and the state has an obligation to *provide substitute family care to the child*. It is a question whether the so-called baby-boxes give the abandon children more chances for adoption. The children from the so-called baby-boxes are *without past*. They have neither mother, nor father. As for adoption, we may say that the child from the so-called baby-box is *legally free* and therefore “*ideal*” for adoption. However, his or her adoption is often *only a theoretical possibility*. [Why?]

¹⁴ For more statistics see www.statim.cz.

Similarly, the state has to initiate the process of searching for a new family for the child if his or her *mother has demanded her identity to be kept secret* (cf. old Act No. 422/2004 Coll. and new Act No. 372/2011 Coll., on Health Services, and Act No. 373/2011 Coll., on Specific Health Services). In such a case, the child has a mother but her name is concealed to the child and it is necessary to start proceedings on adoptability of a child because of non-interest.

Above mentioned abandoning new born children is *a subject to criticism* by the general public and by professionals in the Czech republic, for instance by *the Ombudsman, Justices of Supreme court or Constitutional court* etc. This bad [why? You haven't said] practice and non-family behaviour [do you mean that it doesn't rely in the family of the birth parents?] has been criticised by *the European Court of Human Rights and by the United Nations Committee on the Rights of the Child* as well.¹⁵

IV. CONDITIONS OF ADOPTION OF MINORS

1. Non Existing or Non Functioning Natural Family

The Czech law makers intended to adapt the new regulation of adoption of minors to the European Convention on Adoption of children (revised) mentioned above. The natural right of the child expressed in a number of national and international documents includes especially the right to grow up in his or her own family. However, if the parents cannot (for objective or subjective reasons), or are unable or unwilling to provide comprehensive care to the child, *the state must intervene taking adequate and appropriate measures corresponding to the degree of disruption of the child's natural family*. Removing the child from the family of origin and placing him or her in an alternate environment must be considered an *extreme and alternative solution of the natural family crisis*.¹⁶ That is why some *new general principles of substitute family care* were introduced *expressis verbis* into the legal order, for instance:

- a. the child belongs to its family of origin;
- b. substitute care is subsidiary to the care in the family of child's origin;
- c. when the state intervention is necessary, the state body should use mild remedies and if they are not sufficient, then radical remedies are acceptable;
- d. removing a child from the family of origin is the last remedy;
- e. regarding substitute care, the child should be placed near to the family of origin to enable personal contact with the parents, siblings etc.;
- f. close relatives are not excluded from the substitute care: for instance child's grandparents are allowed to become foster parents.

As a standard of social work and child protection, I would like to stress the provision of new Civil Code, that states expressly that:

¹⁵ See Committee on the Rights of the Child Reviews Report of the Czech Republic from 31st May 2011 available on <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11098&LangID=E>.

¹⁶ Towards that see Z. Králíčková *Lidskoprávní dimenze českého rodinného práva* (Human Rights Dimension of Czech Family Law) (Brno: Masaryk University, 2009).

- a. insufficient housing and property conditions cannot be considered as a threat to or a serious disruption of the upbringing of a child;
- b. institutional care may be ordered for up to 3 years;
- c. each six months it is necessary to examine the reasons for institutional care
 - by a report from the child protection state body (social worker);
 - by a statement of the child's parents and
 - by a statement of the child himself or herself.

To avoid problems in practice, in addition to the general principles, the law introduced recently specific ways of dealing the problems: for instance *case conferences, creating individual plans of child protection etc.*

However, if there are *close relatives* of the child who are willing and able to provide care for the child personally, *preserving family ties will always take precedence over adoption by a non-relative* (Section 822, NCC).

2. Adoptable Child

The child is adoptable when:

- a. the parents informed consented to adoption of the child by known or unknown adopters (so-called non-direct consent, consent in advance);
- b. the parents' parental responsibility has been terminated;
- c. the parents have been legally deprived of their right to give a consent to adoption;
- d. the court has ruled on the non-interest of the parents;
- e. the parents are unknown; or
- f. the child is a real orphan or from so-called baby-box (see above, III.).

3. Consent by the Parents or their Non-Interest

3.1. Consent by the Parents

The new regulation primarily modifies *requirements of parental consent* (Section 809 et seq., NCC) and the option of *consent withdrawal within three months after it was given* (Section 817, NCC) or *its expiration within 6 years* (Section 816, NCC). *The child's mother* may give consent to the adoption after the expiration of six weeks from the delivery of child, i.e. after the *puerperium* (Section 813, NCC). *The child's father* is allowed to give consent *any time* after the child's birth. *The child's parents under 16 are not allowed to give consent to adoption* (Section 811, Paragraph 1, NCC); any consent would be completely irrelevant. As a novelty, the law introduces the rule that the court may, while depriving the parents of their parental responsibility, also decide *on the depriving of the parental right to give consent to adoption* (Section 873, NCC).

Since 1998, *the rights of putative father are protected* as well. The law provides that *„if paternity could not be determined pursuant to the legal presumptions, the child, the mother and the man claiming to be the father may request that the court determine paternity“* and *„the child cannot be adopted until the court's ruling on the paternity suit filed by a man who claims to be the father of the adopted child takes effect“* (cf. Section 783, NCC and Section

830, NCC). The law was inspired by the case *Keegan v. Ireland* (no. 16969/90) decided by the European Court of Human Rights.

3.2. Non-Interest

As regards *parents' non-interest*, the law provides for a variety of situations, such as situations where a parent stays in an undisclosed location (Section 818, Paragraph 1c, NCC) or shows clearly no interest in the child thus permanently culpably breaching his or her parental obligations (Section 819, NCC). The law establishes *a presumption of apparent non-interest*, when non-interest lasts at least three months without any instruction, advice and assistance from the part of the state authority (Section 820, NCC).

The issue of non-interest must be *examined by the court in special proceedings* preceding the adoption. The aim of the *special proceedings on adoptability* is to determine whether the child is adoptable or not. Parties to the proceedings are the parents of the child and the child. Such proceedings are not necessary when the parents have already given the direct consent to the adoption or the so-called non-direct consent (in advance consent), or if the parents were deprived of their parental responsibility or of the right to give a consent to the adoption, etc. The law provides that *non-interest of the parents must be examined by the court in special proceedings on adoptability even if the parents are minor*.

4. Consent by the Child

Thanks to the international conventions' focus on the rights of a child, the Czech law makers had to improve the position of minor children, both as adoptees and minor parents of adoptees (see above, 3.1.).

The law requires – as a rule – *an informed consent by the adoptee*. *The child's participation rights* guaranteed by international conventions *have been strengthened*. The law explicitly states a rule (and some exceptions) that *a child over 12 always gives consent to his or her adoption* (cf. Section 806, NCC) and that *he or she may revoke his or her consent to adoption* (Section 808, NCC). If, at the time of the adoption process, the child was of tender years, the *adoptive parents have a duty to inform the adoptee about adoption* as soon as it is appropriate and no later than when the adoptee starts the compulsory school attendance (Section 836, NCC).

5. The Best Interest of the Child and Participation Rights

The adoption of the Convention on the Rights of the Child and other conventions undoubtedly meant a turning point in this field.¹⁷ Thanks to the case law of the Czech Constitutional Court, and in particular thanks to the case law of the European Court of Human Rights, a new perception of children's rights was introduced in the Czech Republic.

Each child, even younger than 12 years, must get all the relevant information in a manner consistent with his or her age and intellectual maturity. The child must also be given room for expressing an opinion. The views of the child must be taken into consideration

¹⁷ See M. Hrušáková *Dítě, rodina, stát* (The Child, Family and the State). (Brno: Masarykova univerzita, 1993).

regardless of age or intellectual maturity. At the same time the court decision must be in the best interests of the child, which need not always correspond with the wishes of the child. However, the court must always take the child's opinion into consideration. In this context *the right of everyone to fair trial should be emphasized*. Each case must be treated individually and in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms that guarantees the right to respect to family life of everyone.

6. The Existence of Prospective Adopters

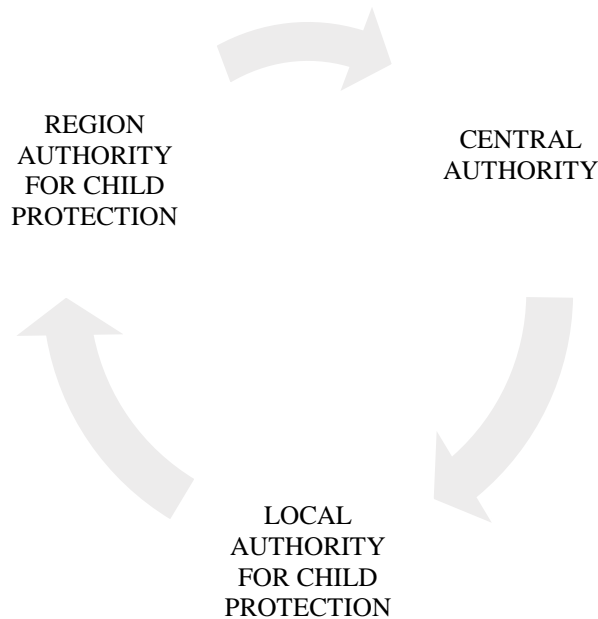
Prospective adopters have to be traditionally of high moral quality, full capacity to legal acts, good health condition etc. They have to be *well-motivated and professionally prepared* for adoption of unwanted or abandoned child of other parents as their own. It is newly recognized that there must be an adequate age difference of at minimum 16 years between adopters and adoptee as a rule (with some exceptions).

Another novelty is that the new law *lifts a ban on adoption among close relatives*. Close family ties used to be traditionally a disincentive for adoption. However, the law makers, being under quite a strong pressure, relinquished this natural, social and legal ban. The law then provides that adoption is excluded among persons who are relatives in the direct line and the siblings *except for kinship based on surrogate motherhood* (Section 804, NCC). It should be noted that medical law has never regulated surrogate motherhood. The new acts passed only recently do not deal with it, either (cf. Act No. 372/2011 Coll., on Health Services, Act No. 373/2011 Coll., on Specific Health Services). However, surrogacy is a reality today. Private clinics, particularly, provide assisted reproduction without a legal regulation.

Discussions regarding *the same sex adoption or adoption by de facto couples* did not lead to any changes in the conception of regulation of *joint adoption*. Only *married couples may adopt a child jointly*, although the Czech legal order regulates registered partnerships of persons of the same sex (cf. Act No. 115/2006 Coll., on Registered Partnership). Besides adoption by a married couple, the law enables adoption by one of the spouse and exceptionally adoption by "another person" (Section 800, NCC).

7. Matching by the State

Adoption mediation *only by the state authorities* consists in searching for children suitable for adoption and in finding suitable adoptive parents for these children (cf. Section 20 et seq. Act No. 359/1999 Coll., on Social and Legal Protection of Children, so-called Children Act). The application of the individuals who are interested in becoming adoptive parents shall be filed with the *district office* which keeps the file documentation about the child and the applicants. When the file is completed it must be forwarded to the *regional office* which does its own matching within the region. If the regional office is not successful the file is sent (in special cases) to *the Office for International Legal Protection of Children*. *Only a designated Central Authority may be involved in inter-country adoption*.



8. Obligatory Pre-Adoption Care

The obligatory pre-adoption care was extended from three months *to not less than six months* (Section 829, NCC).

The new legal rule says that after the parents' consent to adoption and placing of the child in the pre-adoption care of the prospective adopters, *the exercise of parental responsibility of the child's parents is suspended by operation of law* (Section 825, NCC) and the court must appoint a guardian for the adoptee. *The maintenance obligation of the child's parents or other persons is also suspended*, as the prospective adoptive parents are required to have the child with them at their own expense (Section 829, NCC).

9. The Motion and the Court Decision

When pre-adoption care is successful, the adopters are allowed to fill a motion to the court to start the adoption proceedings. *Parties to the proceedings are the future adopters, the child, and, in some cases, the child's birth parents.* Birth parents of the child are parties only when they give the direct consent to the adoption (see 3.1. above). The child's birth parents are not parties to the proceedings on adoption when they have already given so-called non-direct consent (in advance consent), or if they were deprived of their parental responsibility or of the right to give a consent to the adoption, or if the court has decided on adoptability of the child due to their non-interest etc. (see 3.2. above; for more see Act No. 292/2013 Coll., on Special Court Proceedings, mainly Section 427 ff.).

The court decision is always constitutive.

V. EFFECTS OF ADOPTION

The adoption has traditional consequences as adoption of minors has been a full adoption since 1963. It means first of all *a status change (adoption natura imitatur)*. New Civil Code states that:

- ties to natural family cease to exist and
- new ties arise with adopters and their family.

With regard to the *surname of the adopted child*, previously quite a rigid rule strictly ordered the change of the child's original surname to the adopters' surname. This was altered, too. *The court may allow the adoptee to use both surnames together: the old one and the surname of the adopters* (Section 835, Paragraph 2, NCC). *The adopters are allowed to give a child a new first name or add the second one to the previous one.* If the child is older than 15 years, the child must agree with the change.

In cases where the child was foreign born, thanks to adoption *he or she becomes a citizen of the Czech Republic* (see Act No. 186/2013 Coll., on The State Citizenship of the Czech Republic).

Due to the European Convention on Adoption of Children (Revised), the new legislation also establishes *the option of adoption and its circumstances to be kept secret from the child's original family*. The option of secrecy applies for the child's parents and their consent to adoption, too (Section 837, NCC). However, once the child reaches the age of majority and legal capacity, he or she is entitled to know the details of the adoption file (Section 838, NCC). Regardless of this new rule, the traditional regulation on vital registers allows adoptees over 18 years old to inspect the registry books and collections of documents.¹⁸ This provides evidence that adoption has never been explicitly based on the principle of anonymity.

Another new feature of the new regulation passed in connection with the European Convention on Adoption of Children (Revised) is *the possibility for the court to order surveillance on the success of the adoption for a necessary period* (Section 839, NCC).

VI. REVOCATION OF ADOPTION AND RE-ADOPTION

There is *another key change* thanks to the Convention European Convention on Adoption of Children (Revised) concerning the consequences of adoption. *It is a conversion of revocable adoption into an irrevocable one by operation of law if within [or after?]3 years after the adoption order becomes effective.* There is no petition for revocation of adoption allowed as a principle (Section 840 paragraph 2, NCC). An exception applies to situations when the adoption is in conflict with the law. However, the court may decide upon irrevocability of the adoption even before the expiry of three-year period from the adoption order.

The new regulation, following tradition, allows *so-called re-adoption*, an adoption of an already adopted child (cf. Section 843, NCC).

¹⁸ See Act No. 301/2000 Coll., on Registers, Name and Surname.

VII. INTERNATIONAL (INTER-COUNTRY) ADOPTION OF MINORS

International adoption is a complicated formal procedure aiming to ensure *the best interests of the child*. The Conventions mentioned above establish fundamental principles underlying the procedure. Specific details of the procedure may then vary depending on the circumstances and legal framework of the states which cooperate in individual cases.

Adoption intermediation in relation to foreign countries is carried out by *the Office for International Legal Protection of Children*.¹⁹ The Office has been designated a *Central Authority* to fulfill the duties which are imposed by *the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*. No other entity, e.g. the so-called accredited organization, is authorized to deal with international adoptions from or to the Czech Republic.

In addition to acting as an intermediary, the Office provides information on Czech family law and other related issues. When dealing with inter-country adoption, the Office takes appropriate measures to facilitate, follow and expedite adoption proceedings, and to inform the supervising state bodies about the results.

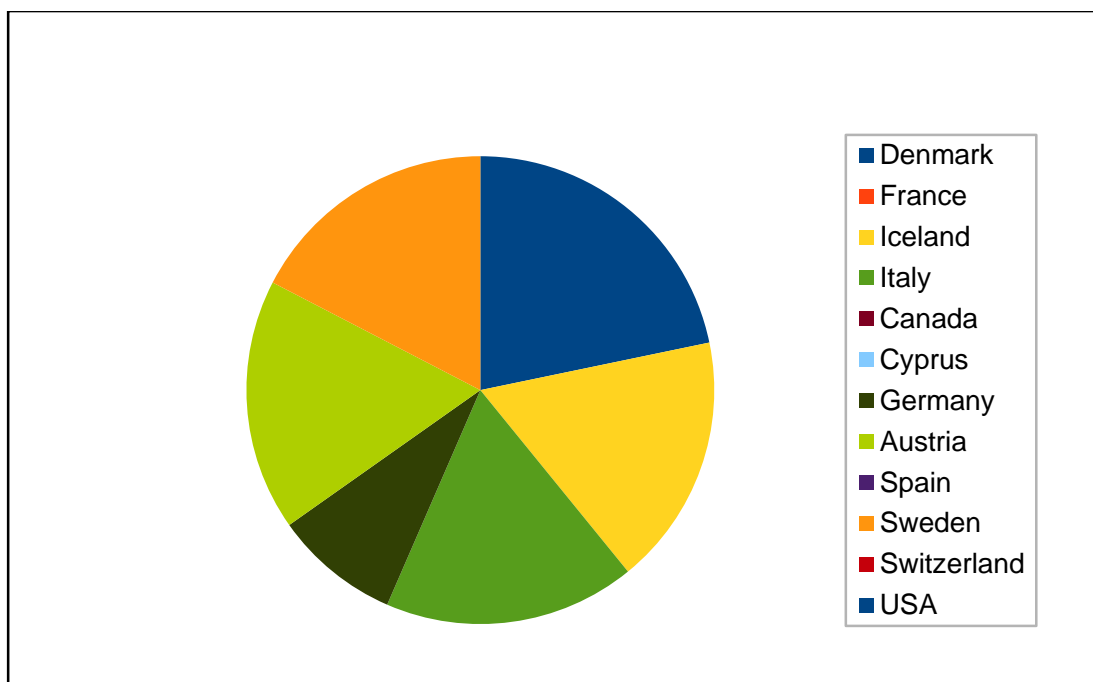
Adoption intermediation involves a two-step process. The Office looks for children who are suitable and eligible for adoption (*adoptable*) and match them subsequently with suitable and eligible adoptive parents. The process of adoption can be started only by an application of the person who wants to become an adoptive parent. When mediating intercountry adoption, the Office cooperates exclusively with the Central Authorities or duly accredited organizations in the contracting states.

The Office is currently dealing with many adoptions of Czech children by applicants from abroad, and in some cases with adoption by Czech applicants of a child from Slovakia. Every year the Office successfully completes approximately 35 adoption cases. Since the year 2000 some 505 adoption cases have been completed. In practice, children suitable for adoption are children with so called special needs, children from 1 to 5, less often those from 5 to 9, siblings, children from minorities etc. There are more boys than girls.

The number of children given from the Czech Republic to pre-adoption care according to the countries (2000 – 2014) is shown below.²⁰

¹⁹ See www.umpod.cz, available in English, too.

²⁰ © S. Kopecká, lawyer of the Office for International Legal Protection of Children designated a Central Authority.



However, the Czech Republic faces cases of adoptions which are not dealt by the Office for International Legal Protection of Children as Central Authority. In practice the term “*Non-Hague adoptions*” is used which means risky adoptions out of all the above-mentioned conventions. The adoptees come very often from the Democratic Republic of the Congo and from other “*popular destinations*”. [destinations usually means where they end up. Do you mean origins?] The Czech Vital Register Office then must deal with problems concerning foreign public instruments as the Czech Supreme Court has quite a restrained approach to the recognition of adoption orders, especially when the adopters are of the same sex and the child was delivered by a so-called surrogate mother.

VIII. CONCLUSION

As already mentioned, adoption of minors is a traditional institution of Czech family law. It is considered primarily as a status change of the adoptee. That is why adoption should be used only when the minor child cannot live with his or her parents or in his or her family of origin. The new legislation emphasizes the obligation of the state to take care of the natural family: the parents must be provided with a comprehensive assistance and must be warned of the consequences of their non-interest in the child. However, if the court decides on adoption in accordance with the law, the status of the child should not be changed any more. It is a rule. [Do you mean “the status of the child should not be changed any more by rule”?] Let us hope, that new Civil Code meets European standards²¹ as many international conventions were taken into consideration, including the European Convention on Adoption of Children (Revised).

²¹ For more detail see Z. Králíčková ‘New Family Law in the Czech Republic: Back to Traditions and Towards Modern Trend’ in B Atkin (ed) *International Survey of Family Law 2014 Edition* (Bristol: Jordan Publishing, 2009) pp. 71-95.

The Challenge of Affordable Family Law

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President of the International Society of Family Law (2011-2014)

In many parts of the world, family justice systems are overburdened and scarcely able to cope with the increasing demand for dispute resolution arising from the breakdown of family relationships. There are three reasons for this increase in demand: 1) the decline in marriage as the normal context for child-rearing, together with the greater instability of cohabiting relationships; 2) the demise of the idea of sole custody, giving parents a smorgasbord of options for parenting after separation, and more to argue about; 3) the increased involvement of fathers in intact families, which flows on to a desire to be more involved in parenting if the couple separate. The delays involved in getting to trial increase the costs for litigants using private lawyers.

Governments around the world have not funded the family justice system to keep pace with this rising demand. Indeed in some jurisdictions, there have been substantial cuts. This is because of increased pressure on budgets for debt-ridden western countries, prioritisation of the criminal justice system and perhaps also a perception that the traditional adversarial system of family justice represents bad value for public money. This paper considers five solutions to the problem of managing the family justice system with frozen or declining resources: creating different pathways for people to get help, reducing discretion in family law cases, providing guidance to assist resolution in parenting disputes, simplifying procedures for the more straightforward cases which require adjudication, and addressing the need for defensive legal practice to reduce legal costs. Such reforms will make family law more affordable both for litigants and governments.

Introduction

When one is stuck in a bad traffic jam, as is common in the great cities of the world, it is hard to look beyond one's immediate environment. All around is smog and frustration. The cars move at a snail's pace. However urgent may be one's business, there is little that can be done to hasten the process of getting to the destination. The cars stretch out ahead for as far as the eye can see.

The helicopter pilot, who is reporting for the TV news, has the advantage of a different perspective. He or she can see the scale of the problem, look beyond the immediate issue to the bigger picture, and make at least an educated guess about the future – how long it might take to get from A to B, what the cause is of the traffic jam, and how quickly it might clear.

In the parts of the world with which I have most connection, everywhere I see traffic jams in the family law system. Certainly it is so in the English-speaking countries of the OECD: Australia, Britain, Canada, New Zealand, the United States. Courts are overwhelmed not only by the number of cases, but also by the number of self-represented litigants who are trying to navigate their way through the system. Lawyers are frustrated; litigants are frustrated; judges are overburdened, and see no end to the trail of misery queuing outside the doors of their courtrooms.

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 2006.¹ In the same period, divorces had decreased nationally by 3%. There had previously been a 43% increase in custody filings nationally between 1988 and 1995.² In Australia, the number of contact applications nearly doubled between 1994 and 2000,³ although this upward trend was evident long before 1995.⁴ In Britain, contact (visitation) orders increased more than fourfold between 1992 and 2008.⁵

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 2001.⁶ In Denmark, the total number of visitation applications nearly doubled between 1995 and 2000, rising from 6,384 in 1995 to 11,560 in 2000.⁷ 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

¹ Nat'l Center for State Courts, *Examining the Work of State Courts* 29 (2007).

² 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. Shepard, *Children, Courts and Custody* 38–40 (2004).

³ 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.

⁴ 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.

⁵ 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).

⁶ 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 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.

⁷ CivilRetsDirektoratet, *Samvær Børnesagkyndig Rådgivning Konfliktmægling, Statistik 2001* (2002). 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.

with effect from October 1, 2007.⁸

These massive increases in litigation about parenting after separation have passed largely unnoticed even in the few jurisdictions that publish statistics. Their effects are certainly noticed in the courts. Family lawyers and judges around the western world bemoan the fact that courts are overwhelmed with cases, leading typically to 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 also be observed: the call for more resources is increasingly falling on deaf ears in government. Indeed at a time when the demand for resources is ever more intense, some 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, and in New Zealand that has seen significant reductions in resources for its family law system. For years, governments have been enthusiastic about mediation –that is nothing new. What is new is that increasingly, governments are mandating mediation before people will be allowed even to file an application for parenting orders. That has been the case, for example, in Australia since 2006, and has been mandated recently in England and Wales.

I do not claim, and cannot claim, to have the perspective of the helicopter pilot on these traffic jams, but I will try at least in this paper to offer some perspective on it. I suggest that there are three pressures around much of the world that are leading to the traffic jams. The first is the growth in the numbers of parents who need the courts to resolve family disputes. This is predominantly an outworking of the growth in the number of children born to single parents or into unstable cohabiting relationships. The second factor is that the old model on which separation and divorce were premised - the idea that custody should be awarded to one parent to the exclusion of the other, with access to the loser, has irretrievably broken down. There is now a smorgasbord of options for parenting arrangements after separation, and therefore much more room for conflict about parenting. The third factor is that many fathers want to be much more involved in parenting after separation than was the case a couple of generations ago. That translates into more disputes with mothers about the allocation of time between the parents.

§3. The changing demographics of the family

The first pressure arises from changing patterns of family formation and dissolution which have been occurring in much of the post-Christian world. By that expression, I mean those countries which used to have a strong Christian tradition that strongly influenced patterns of family formation, but in which those Christian values no longer seem to have a great deal of influence on behaviour in terms of sex and family life. This includes most of Europe, but not only Europe. While a substantial proportion of the population in the United States identify strongly with a religious faith, that faith commitment is not obviously reflected in the stability of American families. In South America,

⁸ Personal communication from Mariam Khalil, Danish Department of Family Affairs, by email 15th December 2009.

despite the strength of Catholicism and evangelical and Pentecostal movements, there are similar patterns of family formation and dissolution to the post-Christian nations of Europe.

The picture in many countries of the post-Christian world is that marriage is no longer seen as the predominant basis for intimate partnerships and childrearing. In some countries of Western Europe, marriage and cohabitation have now become almost interchangeable in terms of socially accepted forms of family formation.⁹ In some South American countries, more people of child-bearing age are living in cohabiting relationships than are married.¹⁰ 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.¹¹

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.¹²

If the growth in cohabitation as a form of family formation 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 2012.¹³ 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.¹⁴ While more than half of these births across Europe are in cohabiting unions, there are significant variations between countries.¹⁵

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%.¹⁶ 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.

⁹ 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).

¹⁰ *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>.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Office of National Statistics, *Births in England and Wales, 2012*, (2013) at http://www.ons.gov.uk/ons/dcp171778_317196.pdf.

¹⁴ Carl Haub, 'Rising Trend of Births Outside Marriage', Population Reference Bureau (2013) at <http://www.prb.org/Publications/Articles/2013/nonmarital-births.aspx>

¹⁵ *Ibid.*

¹⁶ *World Family Map, 2014*, above n.2 at 19.

The data on ex-nuptial births indicates another trend in family formation which represents a significant challenge to traditional regulation of the family. Many children are being born to single mothers outside of any cohabiting relationship. 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.¹⁷ The figure is the same in Britain.¹⁸ In the USA, between 2006 and 2010, 24% of first births were to women who were neither married nor cohabiting.¹⁹

That the majority of ex-nuptial children are born into cohabiting unions does not mean that they will experience a stable family life. Cohabiting relationships are typically quite short-term.²⁰ People cohabit outside marriage for a range of different reasons. Some people live together with the intention of getting married.²¹ Others may enter a cohabiting relationship with a hope or intention on the part of at least one of them,²² that they will marry, but the relationship does not survive long enough for this to occur. Others reject the idea of formal marriage entirely,²³ but see themselves as being in a committed and ongoing relationship.²⁴

¹⁷ Ibid.

¹⁸ Office of National Statistics, *Statistical bulletin: Live Births in England and Wales by Characteristics of Mother*, 2012 at <http://www.ons.gov.uk>.

¹⁹ 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>.

²⁰ In a study of 11 European countries, Kiernan found that cohabiting relationships which did 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: K. Kiernan, 'Cohabitation in Western Europe', 96 *Population Trends* 25 (1999).

²¹ 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),

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/E0C7AEEEEAE3AD51BCA25789C0023D7EF?opendocument>>.

²² On gender differences concerning cohabitation with a view to eventual marriage, see P. Huang, P. Smock, W. Manning, & C. Bergstrom-Lynch, 'He Says, She Says: Gender and Cohabitation', (2011) 32 *J. Fam. Issues* 876; S. Sassier & J. McNally, 'Cohabiting Couples' Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques', (2003) 32 *Social Science Research* 553; S. Brown, 'Union Transitions among Cohabitors: The Significance of Relationship Assessment and Expectations', (2000) 62 *J. Marriage & Fam.* 833.

²³ For Australian evidence, see S. Buchler, J. Baxter, M. Haynes, & M. Western, 'The Social and Demographic Characteristics of Cohabitors in Australia: Towards a Typology of Cohabiting Couples', (2009) *Fam. Matters* no 82, 22.

²⁴ On the different meanings of commitment, see J. Pryor & J. 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. S. Buchler, M. Haynes, J. Baxter, & M. 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).

Whatever the reason for entering into a cohabiting relationship, the evidence from many parts of the world is that cohabiting relationships break down at a very much faster rate than do marriages.²⁵ This is not particularly surprising as regards childless 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. Data from the Fragile Families study in the US (a major study of a cohort of unmarried and married mothers in 20 large cities²⁶) 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 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.²⁷

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.²⁸ 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.²⁹

²⁵ A. Thornton, W. Axinn, & Y. Xie, *Marriage and Cohabitation* (2007); L. Bumpass & J. Sweet, 'National Estimates of Cohabitation', (1989) 26 *Demography* 615; R. 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; H Glezer, 'Cohabitation and Marriage Relationships in the 1990s', (1997) *Fam. Matters* no 47, 5; S. Nock, 'A Comparison of Marriages and Cohabiting Relationships', (1995) 16 *J. Fam. Issues* 53.

²⁶ 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*, <<http://www.fragilefamilies.princeton.edu/about.asp>>. See also N. Reichman, J. Teitler, I. Garfinkel, & S. McLanahan, 'Fragile Families: Sample and Design', (2001) 23 *Children & Youth Services Rev.* 303, 306.

²⁷ C. Osborne, W. Manning, & P. Smock, 'Married and Cohabiting Parents' Relationship Stability: A Focus on Race and Ethnicity', (2007) 69 *J. Marriage & Fam.* 1345.

²⁸ K. Kiernan & F. 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 A. 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); K. 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).

²⁹ P. Butterworth, T. Oz, B. Rodgers, & H. Berry, 'Factors Associated with Relationship Dissolution of Australian Families with Children', Social Policy Research Paper No 37, 22 and 29, tbl 9 (2008).

The demise of sole custody

The second reason for the traffic jams in family courts is the demise of the idea that what the courts had to do in parenting disputes was simply to determine custody. Fifty years ago, in most western countries at least, issues about custody were dealt with by a once-for-all process of allocation. 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. Both parents were legal guardians at common law, but this meant little, because the powers which were classified as powers of “guardianship” included only such matters as consent to marriage of a minor and inheritance rights in the event of his or her death. Since maternal custody was the predominant pattern, fathers were frequently relegated to a peripheral role in their children’s lives.

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. Once this allocation had occurred, then people could get on with their lives with the past behind them. The old marriage was dead and they could begin anew, repartner, and build a new family life 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 once the issue of custody allocation was decided.³⁰ Only one of the two parents could continue in that role after the divorce. Parental authority was awarded to the sole custodial parent and there was a strong differentiation between the role of the custodial parent and that of the non-custodial parent.

By the beginning of the 1980s, this idea of post-separation parenting gradually began to change. The history of family law reform in the last 30 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. 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 in the early 1980s.³¹ 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.

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 world is emphasising the importance of both parents

³⁰ Irène Théry, ‘The Interest of the Child’ and the Regulation of the Post-Divorce Family’, (1986) 14 *International Journal of the Sociology of Law* 34.

³¹ 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.

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. 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. 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. Nor is it to be the right only of a visitor, as the language of "visitation" might suggest. Fathers, in particular, are no longer to be marginalised by post-separation parenting arrangements.

Consequently, it is no longer the case that family law disputes are binary, either-or propositions. Most family court cases do not present the court with a stark choice between two alternatives. As long as the parents live within a reasonable proximity to one another, there is a range of options for structuring parent-child contact, from limited involvement by the non-resident parent through to shared care. Depending on the law in the jurisdiction, parental responsibility may be able to be allocated and divided in different ways.

With more options, there is more to argue about.

The increasing involvement of fathers

In addition to these factors, it appears that in many countries fathers have been far more willing to be involved in post separation parenting than was the case a couple of generations ago. Over time, there have been significant changes in the ideal of fatherhood, with a greater emphasis on emotional closeness and active involvement with the children. This has led to greater involvement in parenting in intact relationships, with a consequential impact upon fathers' attitudes towards post-separation parenting.³² Despite the rhetoric of equality, more fathers want to assist in the parenting role after separation than to take over as primary carer.³³

Fathers' desire for greater involvement after separation can be seen in research in a number of countries. For example, Fabricius and Hall found in their interviews with college students who had experienced parental divorce that both men and women reported that their fathers had wanted more time with them than they had or their mothers wanted them to have. Forty-four per cent reported that their fathers had wanted them to spend equal time with them or more.³⁴

There is similar evidence from studies in Australia. In one study, 41% of fathers contacted in a random telephone survey of divorced parents in 1997 indicated that they were dissatisfied with the residence arrangements for the children. Two-thirds of this group said that they wanted to be the primary residence parent, the remaining third wanted to have equal time with their children. On

³² Carol Smart, 'Towards an Understanding of Family Change: Gender Conflict and Children's Citizenship', (2003) 17 *Australian J. Fam. L.* 20.

³³ Carl Bertoia & Janice Drakich, 'The Fathers' Rights Movement: Contradictions in Rhetoric and Practice', (1993) 14 *J. Fam. Issues* 592 (presenting interviews with members of fathers' groups in Canada).

³⁴ William Fabricius & Jeff Hall, 'Young Adults' Perspectives on Divorce: Living Arrangements', (2000) 38 *Fam. & Concil. Cts. Rev.* 446.

average this was about five years after the divorce. The study also indicated a very high level of dissatisfaction with levels of contact.³⁵

In another Australian study of a nationally representative sample of separated parents, interviewed in 2001, three-quarters of the non-resident fathers indicated dissatisfaction with the amount of contact they had. 57% of fathers indicated that they had nowhere near enough time with their children and a further 18% said they did not have quite enough time with their children.³⁶

This does not mean, of course, that there has been a complete change in fathers' attitudes towards post-separation parenting. Many fathers drop out of their children's lives after separation or, in the case of fathers who never lived with the mother, do not pursue active engagement with the child. That is clear from a significant body of American research,³⁷ although levels of contact have increased in recent years.³⁸ Australian research also shows a significant level of paternal disengagement. In 1997, Australian Bureau of Statistics data based on reports of resident parents indicated that 30% of children saw their non-resident parent less than once per year, or not at all.³⁹ Thirty-six per cent of non-resident fathers who were interviewed in 2001, had not seen their youngest child in the last 12 months.⁴⁰

Yet as the Australian research shows, disengagement does not necessarily mean disinterest. Only 20% of those fathers with no contact interviewed in 2001 considered that the level of contact was about right. Most wanted time with their children.⁴¹ There have been similar findings in Britain. In

³⁵ Bruce Smyth, Grania Sheehan, & Belinda Fehlberg, 'Patterns of Parenting After Divorce: A Pre-Reform Act Benchmark Study', (2001) 15 *Australian J. Fam. L.* 114.

³⁶ Patrick Parkinson & Bruce Smyth, 'Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia', (2004) 16 *Child & Fam. L. Q.* 289. The greatest levels of satisfaction for both mothers and fathers were with shared parenting arrangements. The data came from the Household Income and Labour Dynamics in Australia survey (HILDA). Interviews were conducted with 13,969 members of 7,682 households. It is not only fathers who want more time with their children. Mothers also want to see more contact between the children and their fathers. In this study, although the majority of resident mothers expressed satisfaction with the contact arrangements, 25% reported that they thought there was nowhere near enough father-child contact taking place, and a further 15% said there was not quite enough contact. Only 5% thought that there was too much contact: *Id.*, at 297.

³⁷ Judith Seltzer, 'Relationships between Fathers and Children Who Live Apart: The Father's Role after Separation', (1991) 53 *J. Marriage & Fam.* 79; Frank Furstenberg, Christine Nord, James Peterson & Nicholas Zill, 'The Life Course of Children of Divorce: Marital Disruption and Parental Contact', (1983) 48 *Am. Soc. Rev.* 656; Judith Seltzer & Suzanne Bianchi, 'Children's Contact with Absent Parents', (1988) 50 *J. Marriage & Fam.* 663; Joyce Munsch, John Woodward, & Nancy Darling, 'Children's Perceptions of Their Relationships with Coresiding and Non-Coresiding Fathers', (1995) 23 *J. Div. & Remarriage* 39; Susan Stewart, 'Nonresident Parenting and Adolescent Adjustment: The Quality of Nonresident Father-Child Interaction', (2003) 24 *J. Fam. Issues* 217.

³⁸ Paul Amato, Catherine Meyers, & Robert Emery, 'Changes in Nonresident Father-Child Contact From 1976 to 2002', (2009) 58 *Fam. Rel.* 41.

³⁹ *Australian Bureau of Statistics, Family characteristics survey, 1997*, Catalogue No. 4442.0 (1998).

⁴⁰ Parkinson & Smyth, *supra* note 36.

⁴¹ Parkinson & Smyth, *ibid.*, at p.299.

one study, 76% of fathers who never saw their children were dissatisfied with this.⁴² There are numerous reasons why fathers lose contact with, or disengage from their children.⁴³ The main factors are serious conflict in the relationship with the mother,⁴⁴ leading to maternal gateclosing;⁴⁵ repartnering, and responsibilities to children in the new family;⁴⁶ physical distance;⁴⁷ feelings of disenfranchisement by the legal system;⁴⁸ and limited financial resources.⁴⁹ Most of these men would want a much greater involvement in the children's lives if their circumstances were different.

Traditional processes of adjudication

At least in common law countries, processes of adjudication were not designed to cope with the kinds of disputes that are now clogging the courts. Traditional models of adjudication in family courts were built around the typical custody dispute, in which both parents were seeking the primary care of the children, relegating the other parent to the role of the visitor. American scholar Andrew Schepard writes that

“courts conceived of a custody dispute much like a will contest. The parents' marriage, like the decedent, was dead. Parents, like the heirs, were in dispute about the distribution of one of the assets of the estate — their children...The goal of the proceeding was a one time determination of custody 'rights' which created 'stability' for the future management of the asset.”⁵⁰

If that was the role of the court, then traditional adversarial processes, applying strict rules of evidence, were not necessarily an inappropriate way to adjudicate between warring parents. It remains so in cases where fact-finding about such issues as child sexual abuse or other serious allegations are at the heart of the dispute between the parents.

Nonetheless, it has long been recognized that a trial system based upon adversarial processes is not well-suited to family cases in which the desirable outcome for most families will be an ongoing

⁴² Bob Simpson, Peter McCarthy, & Janet Walker, *Being There: Fathers After Divorce* 32 (1995).

⁴³ For a review of the literature in the American context, see Solangel Maldonado, 'Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent' (2004-2005) 153 *U. Pa. L. Rev.* 921, 962-982.

⁴⁴ James Dudley, 'Increasing our Understanding of Divorced Fathers who have Infrequent Contact with their Children' (1991) 40 *Fam. Rel.* 279; Geoffrey Greif, 'When Divorced Fathers Want no Contact with Their Children: A Preliminary Analysis', (1995) 23 *J. Divorce & Remarriage* 75.

⁴⁵ Liz Trinder, 'Maternal Gate Closing and Gate Opening in Postdivorce Families', (2008) 29 *J. Fam. Issues* 1298.

⁴⁶ Wendy Manning, Susan Stewart, & Pamela Smock, 'The Complexity of Fathers' Parenting Responsibilities and Involvement with Nonresident Children', (2003) 24 *J. Fam. Issues* 645.

⁴⁷ Dudley, *supra* note 44; Greif, *supra* note 44.

⁴⁸ Edward Kruk, *Divorce and Disengagement: Patterns of Fatherhood Within and Beyond Marriage* (1993); Sanford Braver & Diane O'Connell, *Divorced Dads: Shattering the Myths* (1998).

⁴⁹ Bruce Smyth, 'Postseparation Fathering: What Does Australian Research Tell Us?' (2004) 10 *J. Fam. Stud.* 20, 30-33; Anne Skevik, 'Absent Fathers' or 'Reorganized Families'? Variations in Father-child Contact After Parental Break-up in Norway', (2006) 54 *Sociological Rev.* 114.

⁵⁰ 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, 395.

relationship between both parents and the children.⁵¹ Yet the adversarial system remains a norm in many common law jurisdictions, even if the trial itself takes place in a specialist family court setting. Alastair Nicholson, the former Chief Justice of the Family Court of Australia, has argued that major reform of the adversarial process is necessary to address “the weaknesses of the traditional processes that allow the parties via their legal representatives (where they have them) to determine the issues in the case, the evidence that is to be adduced and the manner of its use”.⁵² Looking back over sixteen years as Chief Justice, he wrote that:⁵³

“These weaknesses have been exacerbated in recent years as the proportion of litigants who represent themselves has increased. Judges find themselves being presented with reams of unnecessary material, usually dwelling on events long past, adult rather than child focused, and replete with allegations about what each party is alleged to have done to the other. Witnesses are called who can provide little or no relevant information, and trials become lengthier and more expensive. The relationship between the parties — if it is not already in tatters — deteriorates to the extent that they are unable to effectively co-parent their children in the future to any extent without hostility.”

These are probably not problems that are unique to trials in Australia.

Government responses to the pressures on the courts

It would be foolish to try to present an overview of how governments around the world have responded to these pressures. No doubt their approaches have varied. What can be said however is that governments do not seem to have shown enormous enthusiasm towards the idea of appointing yet more judges, and building more courthouses.

This is in part due to competing priorities. A Family Justice Working Group in Canada made this observation in 2013:⁵⁴

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.

In other jurisdictions, the financial problems of debt-ridden governments have led to severe cuts in the public funding available for family law disputes. In Britain, for example, there has been a major overhaul of the family justice system in the last couple of years. This was largely in response to the Norgrove Review, but also from a desire to achieve significant budgetary savings. Legal aid for family

⁵¹ Gregory Firestone & Janet Weinstein, ‘In the Best Interests of Children: A Proposal to Transform the Adversarial System’, (2004) 42 *Family Court Review* 203.

⁵² The Hon. Alastair Nicholson, ‘Sixteen years of Family Law: A Retrospective’, (2004) 18 *Australian Journal of Family Law* 131, 144.

⁵³ *Id.*, 144–45.

⁵⁴ 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.

law matters has been severely curtailed. Victims of domestic violence may still get legal aid, and there is some financial support for family mediation, but the most part legal aid is no longer available to litigate private family law disputes.⁵⁵ The Court system has been restructured and private family law matters are now to be dealt with by lay magistrates unless they involve circumstances of sufficient complexity to be dealt with by a District Judge or Circuit Judge.⁵⁶

In addition there have been many other major reforms to the family justice system. From April 22 2014, people wanting to commence court proceedings in most private family law matters in England or Wales are required to attend a Mediation Information and Assessment Meeting (MIAM).⁵⁷ There are exceptions, such as where a party claims there is evidence of family violence or there are child protection concerns involving the local authority, or there are circumstances of urgency. An exemption applies also if a mediator certifies the case is not suitable for mediation.⁵⁸

The problem for governments is that some of the same factors that are driving an increase in demand in the family courts are also driving demand for welfare supports for single parent households and creating other costs for government – for example in terms of health services.⁵⁹ There may also be a perception that family law represents bad value for money, and that putting more resources into adjudication is a poor investment of scarce public funds. To draw from the analogy of traffic again, if one builds a new freeway to relieve pressure on a congested road, the result may not be that the existing level of traffic is divided between the old road and the new. It may be, instead, that more people choose to use cars and so the overall burden on the road system increases, until both roads become congested again. Resource constraints, expense and delays within the family law system have a deterrent effect that makes it more likely that only serious disputes will be taken to court. The same constraints cause people to settle, or give up. If there is a greater supply of judges, if decisions are reached more quickly and the system is less costly for participants, then the demand for adjudicated solutions may increase.

And so there is now a ‘perfect storm’ in terms of the crisis in the family law system in many countries. This paper will elaborate on these conditions that are creating the storm, and then offer some ways to navigate it.

Towards different solutions

Uniformly, cuts to family law programmes, or simply a failure to maintain and increase resources, has been met by criticism and complaint from family law professionals. That is highly

⁵⁵ These changes were brought in by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. The definition of domestic violence is, however, very wide. It is defined to mean “any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other”. See Schedule 1, Part I, s.12(9).

⁵⁶ For details, see <http://www.justice.gov.uk/downloads/family-justice-reform/schedule-to-allocation-and-gatekeeping-guidance.pdf>.

⁵⁷ *Children and Families Act 2014*, s.10; *Family Procedure (Amendment No. 3) Rules 2014*.

⁵⁸ *Family Procedure Rules 2010*, as amended in 2014, rule 3.8.

⁵⁹ P Parkinson, ‘Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State’ (2011) 45 *Family Law Quarterly* 329.

understandable. Something important is lost when they are savage cuts to legal aid. Such cuts further exacerbate the problem of access to justice. People involved in family law disputes are not necessarily willing participants. Some make choices to litigate; others do not. The victim of domestic violence and the mother who is seeking to protect her child from sexual abuse, may have little choice but to engage with the legal system to seek protection orders. When there are long delays in getting a hearing, or the cost of doing so is more than a person could possibly afford, then the safety of people – and in particular women and children – is put at risk.

There are also significant costs involved in withdrawing legal representation and assistance from family courts. Inevitably, more people will represent themselves. Fewer cases will settle, and each case will take longer because the court must deal with one or both parties who have no understanding of evidence or procedure, and what issues are, and are not, likely to be relevant in a particular case. The greater the number of people who do not have access to affordable legal advice and representation, the greater will be the pressures on the judges, and consequently the delays in the system.

Furthermore, family lawyers are rightly less sanguine about the benefits of mediation than those who have less experience 'at the coalface' with high conflict families. Not only is there the issue of screening out cases for mediation which are not suitable because of violence or other imbalances of power,⁶⁰ but there is a danger too in mediation's forward-looking focus. In the desire to help the parties reach agreement, a mediator may minimise the significance of histories of violence or abuse, and risk factors associated with ongoing parent-child contact.⁶¹ Because mediators are not fact-finders and do not have an investigatory or adjudicatory role, concerns about safety are all too easily overlooked.

The demand for more resources is therefore entirely legitimate. Yet such appeals regularly fall on deaf ears within government. It ought perhaps to be assumed that governments understand the implications for the family justice system of reductions in publicly funded legal assistance, but are not persuaded that it is value for taxpayers' money to keep funding an expensive system to the level it demands to operate effectively on its own terms. Instead, the response of governments, at least in some countries, has been to try to create other systems for resolving family disputes, and to leave those who cannot resolve disputes by agreement to fend as best they can in an overburdened and under resourced family court system. The very difficulty and expense of litigating creates its own pressures to settle. By failing, or refusing to fund the family law system to the extent needed to make timely and well considered decisions, governments are engaging in a form of rationing to drive people to resolve their problems in other ways.

How then should family lawyers respond to these pressures? Of course we can and will continue to make the case for a well resourced and effective family justice system which will allow all cases which need to be heard by a judge to be adjudicated in a timely and cost-effective manner. There is a certain proportion of cases that cannot be resolved except through legal processes. They may not

⁶⁰ See e.g. Nancy Johnson, Dennis Saccuzzo & Wendy Koen, 'Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect', (2005) 11 *Violence Against Women* 1022.

⁶¹ Zoe Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?' (2007) 21 *Australian Journal of Family Law* 87.

all need a judicial resolution, but they will at least need the evidence-gathering and expert involvement that can, in due course, lead to a settlement. For the most part, these are cases involving serious issues of fitness to parent: cases of coercive and controlling domestic violence, serious child abuse, mental illness, drug and alcohol addiction, or other factors that could put children at risk.

However, that is far from all the cases that, typically, are filed in family courts around the world. There are many disputes between fit parents, most of which will, eventually be resolved without adjudication, but at high cost to the parties – if they are paying for private lawyers - and to the government in terms of the public costs of the legal system. In relation to these cases, in particular, we must also be willing to think laterally, and to accept that governments may choose not to prioritise family law disputes over other pressing demands for extra public expenditure. That means we must be involved in thinking outside the square.

Three directions for reform may assist in reducing the traffic jams.

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, and lawyers on different sides have different perceptions.

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 traffic jams, 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).⁶² 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.

⁶² 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).

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 litigation⁶³ and, in many jurisdictions, it is a requirement before a case can proceed to trial. However, because mediation is 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 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.⁶⁴ 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.

The paradigm shift in family dispute resolution

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,⁶⁵ 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 Australian Family Relationship Centres

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.⁶⁶ 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.

⁶³ On the development of family mediation in North America, see Connie J.A. Beck & Bruce D. Sales, 'A Critical Reappraisal of Divorce Mediation Research and Policy', (2000) 6 *Psychology, Public Policy and the Law* 989.

⁶⁴ In Australia, see Family Law Pathways Advisory Group, *Out Of The Maze: Pathways To The Future For Families Experiencing Separation* (2001).

⁶⁵ 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.

⁶⁶ See further, Patrick Parkinson, 'The Idea of Family Relationship Centres' (2013) 51 *Family Court Review* 195.

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 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.

The Centres are intended to be highly visible. The Government launched the Centres with a major advertising campaign. The Centres were required to find a location that is central for the community being served, being in the places that people go to for their shopping and other business needs. Leaflets about the centres can be found in such places as doctors' surgeries, out of school care services, and community health centres. Referrals also come, of course, from family lawyers. The centres achieved a high level of public awareness very quickly indeed.

The role of FRCs in post-separation parenting

One of the aims of the FRCs is to achieve a long-term cultural change in the pathways people take to resolve disputes about parenting arrangements after separation. The concept behind the FRCs is that when parents are having difficulty agreeing on the post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one. If no other solution can be found, the dispute may need to go to an adjudication by someone who can make a binding decision; but it should not be seen as a legal issue from the beginning.

While there are some variations in the model around the country, parents inquiring at the FRC are usually offered an individual session with an adviser to receive initial, basic advice about options and sources of help for dealing with whatever problems might have led them to call into the Centre. If the parent needs help with working out post-separation parenting arrangements, then the adviser will explain about mediation. While many people who come into the centres have recently

separated, some may have separated years before, but are coming because of ongoing difficulties with the parenting arrangements. The kinds of issues which might be covered with a person who has recently separated would be information about how to apply for welfare support payments if needed; applying for child support; and referral to sources of support for people with personal safety concerns. Of course, the relevant agencies would remain the most appropriate source of detailed advice on such matters as child support or welfare benefits.

Mediation in the FRCs

The primary service offered by the FRCs is mediation. Part of the package of reforms introduced in 2006⁶⁷ was to make pre-filing mediation compulsory in most cases. 'Family dispute resolution', as it is called in the legislation, is now a requirement before a person can file an application for parenting orders in court, unless a person is exempted on application to the Court or screened out as unsuited to mediation.⁶⁸ The grounds of exemption include a history of family violence or the risk of it.⁶⁹ Parents may be screened out as unsuitable for mediation on that ground or if for other reasons, the mediator decides that a parent is unable to negotiate freely in the dispute.⁷⁰ People can go to any mediation service they choose; but the advantage of the FRC is that it is free (for the most part) and readily available.

Pre-mediation screening is an important part of the process, as it is for all mediation services. Another requirement prior to engaging in mediation at a FRC is likely to be attendance at a parenting after separation seminar. The information sessions may cover such issues as the way people deal with separation emotionally; the need to separate the parents' conflicts from issues about the children; the value of a parenting plan; what helps children get through the divorce process; what harms them; how parenting arrangements need to take account of the needs of children at different developmental stages; options for structuring post-separation parenting arrangements; shared parenting, and when shared parenting is contra-indicated; the issue of children's participation in decision-making about arrangements; sources of help to deal with domestic violence and child protection issues; and comparing mediation and litigation as options for dealing with disputes about the children.

The main focus for mediation in the FRC must be on parenting issues. However, financial matters may also be discussed in mediation as long as the primary focus is on resolving the parenting arrangements. This is because it is often impossible to separate the division of property from the discussion of where the children will live. The initial model was that the mediation was free for up to 3 hours (excluding the pre-mediation session with each participant). Thereafter, it was means tested. The parents could return for a further 3 hours of free mediation on two further occasions in a two year period, as long as the mediation was dealing with new issues.

⁶⁷ *Family Law Amendment (Shared Parental Responsibility) Act 2006*, amending the *Family Law Act 1975*.

⁶⁸ *Family Law Act 1975*, s.60I.

⁶⁹ *Family Law Act 1975*, s.60I(9).

⁷⁰ *Family Law Regulations 1984*, regs. 62(2), 62A).

Funding cuts by the government have meant that a small fee per hour may be charged in some circumstances. However even with these funding cuts, the mediation services are at a very low cost to participants, and for many they are still free.

The provision for ongoing family mediation is part of the philosophy of the FRCs. The goal of the mediation is not to reach a final resolution of all the issues for the long-term. There is really no such thing as final arrangements with children. There are too many things which can and do change, both for the parents and in terms of children's needs. Rather, the goal of mediation in FRCs is to help parents work out parenting arrangements for the time being. In an initial mediation, within a few weeks or months of separation, it is hoped that at the very least, short-term parenting arrangements can be put in place that allow both parents to remain involved in caring for the children, and that these will then form the basis of more enduring arrangements.

Another reason for allowing more than one free or heavily subsidised mediation in any two year period is to allow for experimentation and reality-testing. Mediators can suggest an arrangement that works for other parents in similar circumstances, and the parents can just try it for a few weeks or months. The opportunity to come back for further free mediation encourages this kind of experimentation.

The FRCs have a particular role to play in the resolution of disputes about alleged contraventions of court orders. Experience in the courts has shown that at least some contravention disputes concern problems which arise from court orders, frequently made by consent, which are either unworkable or which have become unworkable as circumstances have changed.⁷¹ The FRCs offer an option to help resolve these cases.

At the conclusion of a mediation, a certificate may be given if the parents have been unable to agree and one parent wants to take the matter to court. A certificate is required when filing an application in court unless a ground for exemption is claimed. A certificate may also be given if the mediation did not proceed because the other person was unwilling to participate, or if the family dispute resolution practitioner decided that mediation would not be appropriate in the circumstances.

Success of the Family Relationship Centres and other support services for families

The FRCs are intended to achieve a long-term cultural change in the pathways people take to resolve disputes about parenting arrangements after separation. This is a twenty-year plan for cultural change. One of the most important measures of the FRCs' success in relation to parenting after separation will be in the extent to which non-resident parents (mostly fathers) are able to maintain involvement with their children, and the extent to which conflict between parents after separation is reduced.

Even if the success of FRCs can only be measured in the long-term, they achieved measurable success very quickly. There has been a reduction of about 32% in court filings in

⁷¹ Family Law Council, *Improving Post-parenting Order Processes* (Canberra, 2007).

children's cases in that five year period.⁷² 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.⁷³

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 resources.⁷⁴ 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

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 a large number of cases will be the subject of judicial decision, and 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, for where there is a broad discretion, the law casts only an uncertain shadow. Judges may reasonably disagree on the appropriate outcomes of individual cases, and although experienced practitioners may learn to predict outcomes with a certain degree of reliability, the complex messages concerning people's "entitlements" conveyed by the courts through the process of adjudication become simplified into some basic categories of case in order to make negotiations easier.

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

⁷² Patrick Parkinson, 'The Idea of Family Relationship Centres' (2013) 51 *Family Court Review* 195.

⁷³ Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu et al, *Evaluation of the 2006 Family Law Reforms* 50 (2009).

⁷⁴ 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.

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.⁷⁵ For example, a centrifugal law of family property division would give the parties fixed entitlements, such as equal shares in all the property acquired after the marriage other than by gift to one party, by inheritance or as an award of damages for personal injury, subject to a power to vary those equal shares on application by one of the parties.⁷⁶ Centripetal laws give judges a discretion to vary the terms of a person's will after death where a dependant has not been adequately provided for. Centrifugal laws would provide that the surviving spouse and dependent children should receive fixed proportions of the estate.

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 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 the division of family property on separation. The community property regimes, or deferred community property 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.

The problem that many jurisdictions now face is that the rules governing property division on divorce no longer provide a legal basis for addressing many of the issues of those in intimate partnerships involving cohabitation without *de iure* marriage. The general law on property ownership may well be sufficient to deal with disputes involving couples without children, but it will often be inadequate to deal with the problem of role differentiation in families raising children.

Child support is an area 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. While such a system comes at a significant cost to the government, it offers affordable family law. 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.

⁷⁵ The terminology of centripetal and centrifugal law is derived from Galanter M, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 *J of Legal Pluralism & Unofficial Law* 1.

⁷⁶ This is the position under community property regimes.

In Canada, some degree of predictability has also been achieved through the Spousal Support Advisory Guidelines.⁷⁷

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 sound and sophisticated appellate guidance, usually the cases which reach the highest courts involve parties with substantial wealth.⁷⁸ These cases are atypical, and may do little to assist those who need affordable family law. 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.⁷⁹ That perpetuates the extremely discretionary nature of the jurisdiction, and leads to unaffordable family law. Affordable family law is law that helps people resolve their disputes with limited legal advice.

It is not as straightforward to promote certainty in children's cases as in financial matters. For 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. The assumption which underlies the approach of drafting legislation for judges to decide cases is that others can thereby "bargain in the shadow of the law".⁸⁰ However, the cases decided by judges are atypical. In Australia, only about 6% of all parenting cases that are commenced in the courts end up in a judgment following a trial,⁸¹ and the experience in other jurisdictions is similar. Decision-making in children's cases is fact-driven. Litigants cannot bargain in the shadow of the law if the law casts no shadow.

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 legislation supported by opportunities for education and dispute resolution. Through its Family Relationship Centres, Australia has developed a community-centric approach to family dispute resolution rather than a court-centred approach in which mediation is offered as an exit ramp off the litigation freeway. In these centres, education is provided about developing child-focused parenting arrangements and mediation is offered either free of charge or at a very low cost.

⁷⁷ C. Rogerson & R. Thompson, *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice Canada, July 2008). See also C. Rogerson & R. 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.

⁷⁸ In England and Wales, see e.g. *White v White* [2001] 1 AC 596; *Miller v Miller*; *McFarlane v. McFarlane* [2006] 2 AC 618.

⁷⁹ See e.g. *Bishop & Bishop* [2013] FamCAFC 138 at [28]; *Bevan & Bevan* [2014] FamCAFC 19 at [92].

⁸⁰ Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', (1979) 88 *Yale Law Journal* 950.

⁸¹ Data provided by the Family Court to the Family and Community Affairs Committee of the House of Representatives: *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003), at p.7.

Such a community-centric approach needs to be supported by carefully drafted legislation that provides norms and guidelines which can help shape the way people view what it means for parents to live apart.⁸² 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, 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,⁸³ a consensus statement has been written

⁸² 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>.

⁸³ See for example the Family Court Review special issue of 2011 edited by Jenn McIntosh and the responses published the following year: M. 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; P. Ludolph, 'The Special Issue On Attachment: Overreaching Theory And Data' (2012) 50 *Family Court Review*, 486. See also P. Ludolph & M. Dale, 'Attachment in child custody: An additive factor, not a determinative one' (2012) 46 *Family*

reflecting a large body of expert opinion in the field.⁸⁴ 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.⁸⁵

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.⁸⁶

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 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.⁸⁷ 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.

Law Quarterly, 1; L. Nielsen, 'Woozles: their role in custody law reform, parenting plans and family court' (2014) *Psychology, Public Policy, and Law*; Cashmore J and Parkinson, P, 'The Use and Abuse of Social Science Research Evidence in Children's Cases' *Psychology, Public Policy and Law*.

⁸⁴ R. 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.

⁸⁵ Pruett, M., McIntosh, J. & Kelly, J. (in press). Parental separation and overnight care of young children: Consensus through theoretical and empirical integration: Parts I and II. *Family Court Review*.

⁸⁶ See the following articles, to be published in the January 2015 issue of the *Family Court Review*: P. Parkinson, & J. Cashmore, 'Reforming Relocation Law – An Evidence-based Approach'; the response by Rollie Thompson, 'Presumptions, Burdens And Best Interests In Relocation Law'; the reply: P. Parkinson, & J. Cashmore 'Reforming Relocation Law: A Reply To Prof. Thompson'.

⁸⁷ Family Law Act 1975 (Cth) s.65DAA(5).

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 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.⁸⁸

In Denmark, the County Governors' Offices are given a lot of responsibility for resolving disputes and making orders.⁸⁹ 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.

⁸⁸ Svend Danielsen, 'The Scandinavian Approach: Administrative and Judicial Resolutions of Family Conflicts', in Marie Thérèse Meulders-Klein (ed.), *Familles et Justice* 139 (1997).

⁸⁹ 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.

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.⁹⁰ 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.

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.

d) Cost-effective resolution

A third reform to make family law more affordable would be to have measures designed to limit legal costs. How this is done no doubt depends on the legal system of the country. It is a particularly challenging problem for countries with a tradition of adversarial litigation in which the judge acts as a neutral arbiter of cases presented by the parties.

There are two particular challenges for reducing legal costs in an adversarial system. The first is to address the factors that drive defensive legal practice. For years, there has been discussion about 'unbundled' legal services, and providing limited representation to clients. This can cause significant difficulties in terms of protecting oneself from professional negligence claims. Full representation involves the lawyer in understanding all aspects of the case, carefully reviewing all documents given by the client to assess their relevance, going through documents disclosed by the other side, and either briefing counsel or personally representing the client at court events.

Offering limited representation may well mean not spending the time to understand all aspects of the case and to review all documents for relevance. It may mean relying largely on client-authored letters and affidavits, and just giving them a little polish, rather than drafting these documents oneself. This carries all kinds of risk which may deter lawyers from engaging in this kind of limited representation.

It follows that if engaging in litigation is to become more affordable, then there need to be clear rules about the limits of a lawyer's liability in professional negligence. Lawyers will continue to practice defensively if the risks of professional negligence applications outweigh the benefits to the lawyer and his firm in offering unbundled services.

⁹⁰ 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.

The second area of reform that may be needed – if the issue of professional negligence is resolved - is to impose on lawyers a statutory duty to conduct family law litigation in a cost-effective manner in order to achieve a timely resolution of the dispute. In addition, courts need to be given whatever powers they require to manage the case rather than being passively responsive to the case as run by one or other of the parties.

That in turn, would give courts greater authority to refuse interlocutory applications that involve issues that are tangential to the case, or are unlikely to progress the matter towards resolution. Some lawyers engage in litigation by attrition, by generating interlocutory issues for the court that delay bringing the matter to trial and deplete the financial resources of the other side. The courts cannot allow themselves to be used as pawns in this legal game, for even if cost is no issue to at least one of the parties, the court must be conscious of all the other litigants in the queue, waiting for their day in court.

Conclusion

In western countries, the decline in the popularity of marriage as the means of family formation when two people live together in an intimate relationship and have children, has had devastating effects in terms of family stability, which has in turn led to enormous pressures on the family law system. Because cohabitation, even when there are children, is much more unstable than marriage, and because children are increasingly being born into single-parent households, there is an ever-rising number of parents who have the potential to be involved in a dispute about parenting or child support. For many parents, that potential arises from the moment the child is born because they are no longer in an intimate relationship.

Governments in western countries face a lot of other financial pressures. Family instability generates many other costs - not least for welfare budgets, as more mothers in particular, seek state assistance in the aftermath of separation or after the birth of a child.

**“As the Family Goes”:
Achieving Moral and Legal Pluralism by Prioritizing Marriage
By Lynn D. Wardle¹**

“As the family goes, so goes the nation, and so goes the whole world in which we live.”-
Pope John Paul II²

I. Introduction: Families: The Source of War or Peace in the World

Two of the universal conditions in the world are marriage and war. I propose that there is an *inverse correlation* between marriage and war: the more healthy traditional marriage there is the fewer wars there are and will be. War is the result of intolerance of differences and of the failure to respect pluralism. Marriage and healthy traditional marital families usually foster tolerance and promote pluralism. Trends in society toward avoidance and abandonment of marriage, and the weakening of the culture of marriage, foreshadow increased conflict and violence in the world. One of the major influences that is weakening and subverting the culture of marriage is the redefinition of marriage to include same-sex relationships. This paper suggests that that redefinition of marriage is a sign of evolving conditions that will facilitate and foster violence and conflict: wars.

Our world has seen repeatedly the havoc, destruction, and suffering that results from intolerance of and hostility against individuals, groups of individuals and societies because of their different values, beliefs and priorities. The list of just the most recent examples of deadly, widespread violence that has been driven by intolerance of persons and groups of persons because of their differences is very long, indeed. As Appendix I shows, in the first seven months of this year, 2014, conflicts raged in seven regions of the world -- around Israel, Nigeria, Pakistan, Syria, Iraq, Central African Republic, and Eastern Ukraine (Donbass) – that caused more than 1,000 deaths each and that together took the lives of more than 46,000 people.³ Last year, more than 120,000 persons were killed in the ten deadliest armed conflicts that raged in the world in 2013.⁴ In the past fifteen years (since 1999) there have been at least

¹ Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, USA. This paper is based upon a presentation made at the XVth World Conference Of the International Society of Family Law In Recife, Brazil on August 6-9, 2014.

²John Paul II, *Apostolic Pilgrimage to Bangladesh, Singapore, Fiji Islands, New Zealand, Australia and Seychelles, Homily of John Paul II*, Perth (Australia), 30 November 1986, available at http://w2.vatican.va/content/john-paul-ii/en/homilies/1986/documents/hf_jp-ii_hom_19861130_perth-australia.html (seen 4 May 2015); see also Pope John Paul II, *As the family goes, so goes the nation . . .*, My Catholic Family, May 16, 2012, available at <http://www.my-catholic-family.com/280/pope-john-paul-ii-as-the-family-goes-so-goes-the-nation/> (seen 4 May 2015).

³ *List of ongoing armed conflicts*, Wikipedia, available at http://en.wikipedia.org/wiki/List_of_ongoing_military_conflicts (seen 20 July 2014).

⁴ *Id.*

nine major armed conflicts in the world that each caused at least 1,000 deaths per year while they lasted, and a cumulative death toll of more than 303,000 persons.⁵ Thus, in our lifetimes, hundreds of thousands of persons, if not millions, have died in brutal, deadly conflicts that have been driven by hostility towards or between groups with different beliefs, values and ways.⁶

The focus of this paper is not on war, *per se*, but on where attitudes of hostility, hatred and violence have their origin -- on the environments that nurture hatred, hostility and violence. One might be tempted to conclude that such terrible conflicts have little to do with families and family law. Indeed, it is common to hear that such violent crises are driven by large, societal influences like politics, economic factors, the public media, national and international political and religious organizations, etc.; and that avoidance of such conflicts or the peaceful resolution of them depends upon similar large, macro-level national and international remedies.

However, in this paper I propose that such terrible, deadly conflicts ultimately have their most common, most lethal and most powerful origins in micro-level, local, domestic institutions – *mainly* flawed and dysfunctional families and distorted, dangerous values nurtured in such families. Attitudes, values, and propaganda disseminated within and through families that foster hostility towards members of other groups, that inflate differences, demonize those who are different, and demean and disparage those who hold or practice different values, beliefs and ways foster the kind of home-grown enmity that produces most violent conflicts and cause great human suffering and many deaths. Values inculcated or transmitted in the family that glorify killing, and foster marginalizing, degrading, debasing, and harming others who are different threaten and cause terrible destruction of others, in the short-run. And, ironically, in the long-run, those family-fostered values also lead to the self-destruction of the individuals, families, groups, societies and States that hold them.

However, families also can be and often are the source of the avoidance and resolution of conflict between different groups and those who are different or hold different values. Attitudes and skills of preventing, accommodating, and reconciling differences and disputes among different persons, groups, societies and nations begin in families with the values taught and learned in the home. Families and family values are the well-spring source of the attitudes, values, priorities, and behaviors that can foster respect or disrespect towards others that can facilitate or impede congenial, cooperative pluralism in any society. Indeed, no long-lasting peace or amicable co-existence between groups of individuals with different values and behavioral priorities is possible unless the families in those groups embrace and nurture respect for differences, different values, different peoples, and pluralism. It is in families that the seeds of cooperation or war are sown.

We learn the values and ways of war or peace first and foremost in the family. Professor Aner Govin of Bar-Ilan University has noted:

The idea that our moral sense is essentially connected to early ties of dependency between the child and his or her caregiver is not new. It was

⁵ *Id.*

⁶ *Id.*

proposed by John Bowlby's attachment theory and Carol Gilligan's ethics of care. Both theories emphasize the importance to moral development of the early relations between mother and infant. However, the ideas of attachment theory and ethics of care have not received the centrality in moral psychology appropriate to their importance.⁷

Ultimately, then, war and peace usually are the fruits of families and family values. One kind of families and family values fosters conflict, hostility, aggression and violence. Another kind of families and family values fosters tolerance, cooperation, mutual respect, and conflict resolution. That is why so many world leaders have agreed with the axiom declared by Pope John Paul II: "As the family goes, so goes the nation, and so goes the whole world in which we live."⁸ Many other religious and civic leaders agree. LDS Church President Gordon B. Hinckley stated: "A nation will rise no higher than the strength of its homes. If you want to reform a nation, you begin with families"⁹

This paper will explain briefly the reasons why families are the most important source of the ideas, attitudes and values that lead to either conflict or cooperation, to war or peace. It describes how cognitive development requires the internalization of information and experience in order to develop knowledge, understanding, and the capacity to see and respect multiple perspectives. Just as most humans learn to crawl, walk, run, and speak in their families, so also healthy (or unhealthy) relationship skills and values begin, grow, and develop most significantly in the family. Magnified to a societal or State level, those values, attitudes and behaviors learned first within the family contribute to, foster, or cause war or peace.

This paper will also review evidence that marriage, marital families, marital child-bearing, and marital child-rearing are the family forms and relations that seem most likely to generate pluralism. The evidence causes us to wonder whether the greater proportion of married couples and married parents there are in any society correlates with a greater likelihood that the attitudes, values and practices that foster cooperation and pluralism will flourish? Conversely, does a greater proportion of non-marital relationships and non-marital child-bearing and child-rearing correlate with greater prospects for attitudes, values and practices that produce and foster conflicts?

In the end, marriage and marital families are the best means to reconcile the potentially conflicting universalities and singularities in our lives and our societies, including the moral and legal tensions of pluralism.

II. Pursuing Priorities and Pluralism – Families and The Difficult Balance

⁷ Aner Govrin, *The ABC of moral development: an attachment approach to moral judgment*, 5 *Front. Psychol.* (article 6) at 1 (2014), doi:10.3389/fpsyg.2014.00006, available at <http://journal.frontiersin.org/Journal/10.3389/fpsyg.2014.00006/abstract> (last seen 1 August 2014), citing Bowlby, 1944, 1953, 1958, 1980; Gilligan, 1982; Gilligan and Wiggins, 1987.

⁸ Pope John Paul II, *Apostolic Pilgrimage . . . , Homily of John Paul II, supra* note 1.

⁹ Gordon B. Hinckley, *This Thing Was Not Done in a Corner* (October 1996), available at <https://www.lds.org/general-conference/1996/10/this-thing-was-not-done-in-a-corner?lang=eng> (seen 1 August 2014).

One of the dilemmas faced by persons who try to live ethical lives is the conundrum of the conflicting demands of their individual value priorities and moral pluralism. To have certain values and to try to live according those values by deliberately pursuing priorities that reflect those values is essential for any person to have a reflective, purposeful, meaningful, successful life. Likewise, all successful associations, organizations and societies have and try to implement on-the-ground (day-to-day) policies that embody shared core values; societies, like individuals, have values and priorities based upon those values.

A. At the same time, things that matter most matter differently to different persons and to different groups of persons. Most modern societies are pluralistic. “Pluralism” refers to “toleration or acceptance of the coexistence of differing views, values, cultures, etc.”¹⁰

Because differences about things that are important are so pervasive in many categories of social grouping (religious, ethnic, political, ideological, etc.) in modern societies, it is essential for any society to accommodate, appreciate, and foster respectful interaction with and among persons who have different values. Respectful co-existence of persons with diverse values, viewpoints and priorities is required in any modern liberal democratic society.

Thus, both priorities and pluralism are as essential to have a decent, tolerant, effective and harmonious democratic society as they are for individuals to have meaningful, successful lives. For individuals, groups, societies and nations to peacefully co-exist and effectively interact, they must recognize and find ways to tolerate and accommodate persons, groups and states that embrace different values, even contrary beliefs.

Democracy provides the political process fairness that both allows and fosters some degree of pluralism. That is the genius of democracy.¹¹

However, process-pluralism (political democracy) alone is not enough. Successful pluralism in any integrated democratic society requires a degree of substantive respect for persons holding different viewpoints and values that affirms their equal dignity as persons.

Where is that kind of respect, tolerance and support of pluralism generated, learned and fostered? First and foremost, in the family. It is learned through family interactions with parents and siblings and extended family members who understand and are committed to the value of pluralism, and who respect and practice pluralism. They demonstrate differences in a context of trust.

There are many weighty reasons why giving priority in law to healthy traditional marriage, marital childbearing, marital childrearing and marital families can not only be

¹⁰ Oxford English Dictionary Online, *pluralism*, available at <http://www.oed.com/view/Entry/146193?redirectedFrom=pluralism#eid> (seen 30 July 2014).

¹¹ The genius of liberal democracies is that they are designed so that the laws reflect (through democratic processes) the policy values that matter most to most of the people who are subject to laws enacted by those governments. By giving all interested persons an equal vote to directly influence the constitution of the government and at least representationally to influence the formulation of the legal policies, liberal democracies provide fair and inclusive pluralistic processes for establishing governmental priorities.

reconciled with cultivating respect for moral pluralism and commitment to legal pluralism in contemporary societies. Likewise, failure of the state to support and strengthen healthy traditional marriage, marital childbearing, and marital child-rearing weakens both society and the State, and dooms them to greater intolerance, conflict and, sooner or later, destructive failure.

Healthy traditional marriage, marital childbearing, childrearing and families provide the greatest security for, the most nurturing seedbed of, and the best environmental greenhouse for fostering the healthy development of moral and legal pluralism. Indeed, it is in healthy traditional marital families that pluralism is first learned, best nurtured, and most fully and safely experienced. In such families husbands and wives learn to get along with each other, parents and children learn to appreciate each other, and to value and care for other family members, including the most diverse, dependent and inconvenient (very aged, young, or incapacitated) family members. As we learn in stable families to accept the differences between family members, and to value family members whose views, values, practices and behaviors diverge from or even clash with our own, we begin to develop the capacity to tolerate and get along with persons and groups with such differences in society in general. Thus, the destabilization and disintegrative reconceptualization of marriage and of marital childbearing, childrearing and families that is occurring in many nations today, may foretell dark days ahead for pluralism.

Thus, as Pope John Paul II famously said: “As the family goes, so goes the nation, and so goes the whole world in which we live.”¹² Of course, communities are not completely self-sufficient, but they depend upon exterior sources of values for the community life that sustains them. For stable societies and states, strong, healthy marital families are the key, crucial source of those values that sustain and integrate the larger community and the state. As people learn to value and respect difference with in their marriages and within their families, they learn to accept and foster pluralism in society. Healthy traditional marital families (founded on healthy gender-integrated marriages) provide the best opportunities for individual, familial, and social health, happiness, prosperity and peace.

While family structures such as healthy traditional marriage, marital child-bearing, and marital child-rearing foster and facilitate pluralism, they do not guarantee or secure pluralism. Many other factors mix with family structures to influence amity or hostility, peace or war in any society or State. The positive influence of healthy traditional marriages within any society may be weakened and even overcome by powerful negative factors, such as forceful political and social propaganda, economic and cultural pressures, and various forms of social, economic and political crisis. Nevertheless, over time, it is unlikely that any of these negative factors has as profound or as sustained an influence upon the cultivation of pluralism in any society as do healthy traditional marriages, marital child-bearing and marital child-rearing.

So, to help foster pluralism in society, we must strengthen healthy traditional marital families by fostering strong, healthy normative family foundations. While all families are imperfect, and in these days of grave stresses upon families some dysfunction, abuse, and

¹² Pope John Paul II, *supra*, note 1.

failure probably occur in all family systems, pluralism seems to be generated most successfully and flourish the best in States and societies with an abundance of strong, healthy traditional marital families.

III. The Comparative Advantages of Healthy Traditional Marriage, Marital Childbearing and Marital Childrearing, or Why Societies That Support Healthy Traditional Marriage Flourish and Why Societies That Do not Support Healthy Traditional Marriage Flounder.

In recent years, there have been many apparent changes in socially acceptable living arrangements and sexual morals that signal potential decrease in social recognition of the value of marriage and the weakening of the institutions of marriage and marital families. These include:

- “Cohabitation in the United States has increased by more than 1,500 percent in the past half century.”¹³ In 2010, “the unmarried partner population numbered 7.7 million . . . and grew 41 percent between 2000 and 2010, four times as fast as the overall household population (10 percent).”¹⁴

- The percentage of women who cohabited before marriage was only 11% in 1965-1974; by 2004-2008 it had risen six-fold to 66%.¹⁵

- In 2010, over forty percent (40.8%) of all children born in the United States were born out of wedlock, up one-third since 2000, when there had been a *thirteen-fold* increase in the number of non-marital births just over 50 years.¹⁶

¹³ Meg Jay, *The Downside of Cohabiting Before Marriage*, N.Y. Times, April 14, 2012, available at http://www.nytimes.com/2012/04/15/opinion/sunday/the-downside-of-cohabiting-before-marriage.html?pagewanted=all&_r=0 (seen 13 February 2013).

¹⁴ UNITED STATES CENSUS BUREAU, HOUSEHOLDS AND FAMILIES 5 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (seen 13 February 2013). In 2010, 6.6% percent of all households in the US were unmarried households, a 27% increase from (5.2% in) 2000. *Id.* at 3.

¹⁵ NATIONAL CENTER FOR FAMILY AND MARRIAGE RESEARCH, TRENDS IN COHABITATION: TWENTY YEARS OF CHANGE, 1987-2008 2 (2008), available at http://ncfmr.bgsu.edu/pdf/family_profiles/file87411.pdf (seen 13 February 2013). See also Jay, *supra* note __, at __.

¹⁶ CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORT 8 (2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf (seen 13 February 2013). However, childbearing by unmarried women had declined for two years in a row. *Id.* See also Stephanie J. Venture & Christine A. Bachrack, *Non-marital Childbearing in the United States, 1940-1999*, National Vital Statistics Report, Vol. 48, No. 16. at 39 (October 2000) (CDC, National Center for Health Statistics, National Vital Statistics System) (rate of children born out of wedlock rose dramatically from 1940-1990, non-marital births increased 1300 percent from 1940-1994, and birth rate for unmarried women rose 600 percent; rates have leveled off since 1990; increase in number of single women and their increased birthrate contribute to problem). See also Table 9, *Non-marital Childbearing* <<http://www.cdc.gov/nchs/products/pubs/pubd/hus/tables/2001/01hus009.pdf>>

- The marriage rate has fallen. It has fallen rather steadily (with a few blips) since 1972 when the marriage rate was 10.9 per 1,000 population.¹⁷ In 2009, the marriage rate was 6.8 per 1,000 population, down from 8.3 in 2000, and from 9.8 in 1990.¹⁸

Due to low fertility rates, a “demographic winter” is descending upon many affluent nations. British historian Niall Ferguson calls this imminent demographic change the greatest “sustained reduction in European population since the Black Death of the 14th Century.”¹⁹ For example, Germany is poised “to lose the equivalent of the population of the former East Germany in the first half of the 21st century,” and by 2050 it is estimated that 60% of Italians living will have no brothers, sisters, cousins, aunts or uncles.²⁰ It has been reported that last year, more adult diapers were sold in Japan than baby diapers. Escalating old-age-dependents-to-worker ratios will create severe economic crisis in many nations. In fifteen European nations the rate of fertility is 1.3 or below, and a birthrate of 1.4 or 1.5 means that the population will decrease by one-third each generation; in some European nations births are down to about *one-half* the replacement level (of 2.1 births per couple).²¹ The economic implications of the growing old-age- dependency ratios (the number of aged pensioners to working-aged pensioners) are severe. It is dubious whether there will be enough workers willing and able to pay enough taxes to continue the levels of public support for the aging populations of most nations in Europe.

¹⁷Table 1. Marriage and Marriage Rates, United States, 1940-1993, in Monthly Vital Statistics Report, Vol. 43, No. 12(S), July 14, 1995 <<http://www.cdc.gov/nchs/fastats/pdf/4312s-t1.pdf>> (Viewed July 1, 2002).

¹⁸ UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, MARRIAGES AND DIVORCES—NUMBER AND RATE BY STATE: 1990 TO 2009 1 (2012), *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0133.pdf> (seen 13 February 2013).

¹⁹ Niall Ferguson, “Eurabia?”, N.Y. Times Magazine, April 4, 2004, *available at* <http://www.nytimes.com/2004/04/04/magazine/04WWLN.html> (seen December 26, 2012).

²⁰ GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD 22 (2005), portions available at http://books.google.com/books?id=as-RjoKdUkgC&pg=PA16&source=gbs_toc_r&cad=3#v=onepage&q&f=false. *See also* Eurostat Statistical books, Figures for the future 126-29 (2012 ed.), available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-32-12-152/EN/KS-32-12-152-EN.PDF (seen February 12, 2012) (sub-replacement birth rates and longer-living aging population); Eurostat Statistical books, The EU in the world 2013 at 29-40 (bulging dependency ratios); *European Birth Rates Reach Historic Low in Part Because of Recent Fall in Eastern Europe*, Medical News Today, Sept. 8, 2006, available at <http://www.medicalnewstoday.com/medicalnews.php?newsid=51329> (seen October 3, 2006).

²¹ *Id.* Between 1990 and 2001, the birth rate dropped profoundly (in some cases nearly in half) in all of the fifteen nations of Eastern Europe except Albania. *Id.* *See also* The World Bank, “Fertility rate, total (births per woman),” available at <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN> (seen February 11, 2013)(reporting 2008-2011 birth rates and trends for all nations). In 2010 Eurostat reported that the overall fertility rate in the EU is only 1.7, well below replacement. Eurostat, Demography Report 2010 at p. 27, available at <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/documents/Tab/report.pdf> (seen February 11, 2013). *See also* GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD *passim* (2005).

- The divorce rate in the United States has stabilized at an extremely high level. In 2009, the divorce rate was 3.4 per 1000 people,²² significant higher than 2.5 in 1965.²³ The divorce rate has declined a bit from a high of 4.7 per 1,000 population in 1990, which is the silver lining, but some of that may have shifted to divorce-equivalent break-ups of non-marital cohabitations.²⁴

- After decades of growth of intercountry adoption since World War II, the number of intercountry adoptions have dramatically declined, in the U.S. and globally. For example, in 2004 there were nearly 23,000 intercountry adoptions in the US; in 2011 there were just over 9,000. The same trend exists in most other nations.²⁵

All of these developments and trends hold significant risk for the quality and stability of marriages and marital families. Most (not all but most) of the disintegrating trends are related to the disintegration of marriage. Marriage is the key; good marriages are cornerstones of sound, healthy, happy families and strong societies. Marriage is the key; if marriage continues to disintegrate children, families and society will continue to struggle and suffer and weaken. If marriage is revitalized, children, families and society will flourish and strengthen and prosper. As Baroness Deech (former law professor and Principal of St. Anne's College, Oxford) declared in the House of Lords: "It is marriage that makes all the difference."²⁶

Living side-by-side in the same country, same city, and same generation are children who do and will enjoy unprecedented advantages and opportunities—superior health, education, financial support, stable families, safety, minimal risk of crime and at-risk behaviors, love, nurture, guidance, relationship satisfaction, job prospects, and socialization—and children who are and will be significantly disadvantaged comparatively in terms of their health, education, financial support, family instability, victimization, at-risk behaviors,

²² UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, MARRIAGES AND DIVORCES—NUMBER AND RATE BY STATE: 1990 TO 2009 1 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0133.pdf> (seen 13 Feb 2013).

²³Table 1. Divorces and annulments and rates, 1940-1990, Monthly Vital Statistics Report, Vol. 43, No. 9(S), March 22, 1995 <<http://www.cdc.gov/nchs/fastats/pdf/43-9s-t1.pdf>> (Viewed July 1, 2002).

²⁴ See generally Sally C. Clarke, *Advance Report of Final Divorce Statistics*, CENTER FOR DISEASE CONTROL AND PREVENTION, MONTHLY VITAL STATISTICS REPORT Vol. 43, No. 9 (March 22 1995), available at http://www.cdc.gov/nchs/data/mvsvr/supp/mv43_09s.pdf (seen 13 February 2013). Some experts predict that half of all marriages now will end in divorce. Stephen J. Bahr, *Social Science Research on Family Dissolution*, 4 J. L. & Fam. Stud. 5, 5-6 (2002) (the divorce rate in America rose dramatically from 1965-1980, but since 1980 has declined nearly 14 percent; about 50% of all marriages are predicted to end in divorce). See further Andrew J. Cherlin, *Marriage, Divorce, Remarriage* 53 (rev. ed. 1992) (noting dramatic increase in divorce rates in 1960s and 1970s).

²⁵ See generally *Intercountry Adoption Statistics*, Sept. 30, 2011, DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, available at http://adoption.state.gov/about_us/statistics.php (last visited 4 February, 2012).

²⁶ Baroness Deech, *Marriage-Debate*, House of Lords debates, 10 February 2011, available at <file:///C:/wardle/Publications/Articles&Chs/1103%20Baham%20Conseq%20Fam%20Disintegrate/RES%20Deech%20Speech%2010%20Feb%202011%20%20House%20of%20Lords%20debates%20%28TheyWorkForYou.com%29.htm> (seen 14 March 2011); 'Baroness Deech added: "Statistics show that the best thing for children is to live with two married parents." *Id.* See further Jessica Elgot, *We must prioritise saving marriage, says Deech*, February 10, 2011, available at <http://www.thejc.com/news/uk-news/44964/we-must-prioritise-saving-marriage-says-deech> (seen 4 May 2015).

prospects for criminal behavior and incarceration, deprivation or impaired love, nurture, guidance, reduced relationship satisfaction, job prospects, and socialization. One factor, more than any other (perhaps more than most others combined) separates those two groups of children. That is whether the children are raised by their married parents.

Chief Rabbi (of the UK) Lord Sacks concurred, noting:

Children lucky enough to be born into strong families are advantaged in almost every area for the rest of their lives: school attendance, educational achievement, getting and keeping a job. They will earn more. They will be healthier. They will be more likely to form strong families of their own. Children who do not have that good fortune will be disadvantaged for the rest of their lives.²⁷

Marriage is the cornerstone and the moral core of the family and thus generates the moral baselines and standards for society in many ways. In conjugal marriage and the marital family most persons learn the most poignant lessons about how to live in meaningful relationships.²⁸ Marriage links genders, and generations. Marriage is not only the most critical bridge and bonding connection in society, it is the instrument of the most important moral transformation of individuals. Marriage transforms strangers and their families into kin, turns men into husbands and women into wives, gives security for the creation of new generations, and thereby connects the generations. Marriage cultivates a morality of kinship love and sacrifice, to balance the morality of stranger competition and acquisition we learn in most of our other human relations.

Spouses generally have healthier relationships than singles, divorcees, separated, dating and cohabitants; they experience less domestic violence, less victimization of other kinds; they are physically sexually, and emotionally more satisfied, and enjoy more personal happiness and better mental health and physical health, more income and more wealth.²⁹

Four of these many troubling social trends and pressing problems are critical and need priority in remediation. They are non-marital cohabitation, child-bearing out of wedlock, unilateral, no-fault, easy-fix, easy-out divorce, and same-sex marriage.

First, non-marital cohabitation is perhaps the most serious because it is so easily slid-into, so socially accepted and encouraged, and it so often leads to the others. The increase in non-marital cohabitation not only suggests a comparative diminution in the value of marriage by this generation but cohabitation before marriage is associated with increased instability and break up of subsequent marriages by the partners. Only 44% of those who first cohabit marry

²⁷ *Id.* column 366; accord William Rees-Mogg, *Reward Marriage and Rescue British Society*, TIMES (London), Feb. 18, 2011, at 27.

²⁸ See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. Rev. 1 (1991).

²⁹ See, e.g., Linda J. Waite and Maggie Gallagher, *The Case for Marriage* 47-52, 75-78. 152-58. 162-68 (2000)

the cohabiter and stay married for at least 10 years, where 68% of those who marry without cohabitation will have marriages that last 10 years or longer.³⁰

While the belief is common that living together before marriage is a way to insure compatibility before marriage, and, thus, to reduce the chance of divorce after marriage,³¹ the data tells a very different story. “Couples who cohabit before marriage (and especially before an engagement or an otherwise clear commitment) tend to be less satisfied with their marriages — and more likely to divorce — than couples who do not.”³² As Dr. Meg Jay from the University of Virginia put it:

Researchers originally attributed the cohabitation effect to selection, or the idea that cohabiters were less conventional about marriage and thus more open to divorce. As cohabitation has become a norm, however, studies have shown that the effect is not entirely explained by individual characteristics like religion, education or politics. Research suggests that at least some of the risks may lie in cohabitation itself.³³

Second, childbearing out of wedlock, once an uncommon, socially stigmatized problem, now is socially accepted and accounts for nearly half of all childbirths each year in America.³⁴ While the stigma has evaporated, there remain some profound disadvantages for the children born and raised out of wedlock. Those in include higher rates of poverty, lower rates of educational achievement, higher incidence of juvenile delinquency, lower rates of self-confidence and self-esteem.³⁵ These disadvantages not harm the child significantly, but they translate into a myriad of heavy social burdens and high public costs.

The Institute for American Values in 2008 reported that Public costs to American taxpayers of non-marital child-bearing and of marital break-up in the United States, total at least \$112 billion each year for American taxpayers (similar to annual cost of War in Iraq)

- \$70 Billion federal tax dollars and

³⁰ CDC, Vital and Health Statistics, Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth Series 23, No. 28, February 2010) available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf (seen 3 Mar 2010). See pp. 12-14

³¹ Jay, *supra* note __, at __.

³² *Id.* at __.

³³ *Id.* at __.

³⁴ Roger Clegg, *Latest Statistics on Out-of-Wedlock Births*, The Corner, October 11, 2013, available at <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clegg> (seen 4 May 2015) (“Preliminary data indicate that 40.7 percent of all 2012 births were out-of-wedlock”); Michelle Castillo, *Almost half of first babies in U.S. born to unwed mothers*, CBSNews, March 15, 2013, available at <http://www.cbsnews.com/news/almost-half-of-first-babies-in-us-born-to-unwed-mothers/> (seen 4 May 2015) (forty-eight percent of first births occurred outside of marriage).

³⁵ See generally Castillo, *supra* note 33 (more married men and women are “highly satisfied” with their lives than are singles of the same-age).

- \$42 Billion state and local tax dollars each year.
- Reduction of family fragmentation by just one percent would save taxpayers about \$1.1 billion each year.³⁶

Of course, prior generations had children out of wedlock, engaged in premarital sex, and premarital and non-marital cohabitation, and at various times the marriage rate has fallen, and the rate of divorce has increased.³⁷ Thus, the recent changes in this regard constitute only a difference in the degree, scope or quantity of these behaviors and conditions. However, that difference is not unimportant, and relates to the very important notion of *critical mass* in democracy.³⁸ At some point, the deviation from the norm of marriage and family stability can alter the norm and impact human behavioral choices that impact not only those who make those choices but which harm future generations, also. While the law could provide incentives or disincentives that could impact upon cohabitation and child-bearing-out-of-wedlock, it is likely that other social influences have a greater immediate impact than legal policies have.

Third, there is a great need for divorce reform.

The adoption of unilateral no-fault-easy-out-quick-fix divorce and the redefinition of marriage to eliminate the gender-integrating male-female requirement both involve a profound change in the vision of marriage as a social institution. They are a metaphysical earthquakes in shared social understanding. They both constitute a serious threat to the institution, definition, and integrity of marriage. They may be connected: The eruption of the movement to legalize same-sex marriage occurred just a generation after general adoption of unilateral no-fault divorce in America, when the first generation of the children of the new “no-fault divorce ethic” were becoming young adults. That timing suggests an intergenerational effect on the valuation of marriage linking the devaluation of marriage inherent in the unilateral no-fault divorce regime and the devaluation of marriage inherent in the legalization of same-sex marriage.

“There is ‘widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce.’ Survey after survey of public opinion reports that Americans believe that divorce is too easy, especially divorce of couples with children. . . .”³⁹ The current regime of largely unregulated unilateral no-fault divorce in the United States is troubling for many reasons. Among them:

³⁶ BENJAMIN SCAFIDI, *THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING* 5-6, 17-21 (Institute for American Values, et al., ed., 2008).

³⁷See, e.g., *Historical Statistics of the United States, Colonial Times to 1970*, Pt. 1 (1975); *id.* at Series A160-171 (marital status by age and sex, 1890-1970); Series B28-35 (illegitimate live births and birth rates); *id.* at Series B214-215 (marriage rate 1920-1970); *id.* at Series B216-220 (divorce 1920-1970); see also *Statistical Abstract of the United States* (2000) at *, Table No. 57 (unmarried couples 1980-1999); *id.* at *, Table No. 85 (unmarried mothers 1990-1998); *id.* at *, Table No. 149 (Marital status and marriage order of women, 1965-69 & 1990-94).

³⁸See *infra* Part IV.C.2.

³⁹ Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties & Possibilities*, 33 *Fam. L.Q.* 783 (1999).

1. Divorce is ***almost always*** a traumatic, harmful experience, for adults, and *especially* for children.
2. Divorce *sometimes* is the best available option.
3. Seeking divorce is, *first*, a cry for help for a sick marriage; most sick marriages can be healed without divorce.
4. Lawyers are the gatekeepers of divorce, and should, *first*, seek, encourage, attempt, and resort to marriage-healing alternatives; yet most lawyers bend over backwards to avoid giving advice that would discourage their clients from seeking divorce.

Thus, the American system of unilateral, no-fault divorce-on-demand is dysfunctional and counter-productive in terms of supporting marital and family integrity. However, repeal of no-fault divorce probably would not remedy the problem. Instead, adoption of a system of careful, rational modifications to the divorce system would produce the best results. For example, given priority and preference in the legal process to divorce-by-mutual-agreement over unilateral divorce could make important improvements including dis-incentivizing avoidable conflicts and litigation. Similarly, some non-judgmental, non-threatening pre-filing counseling might be required so that the parties could obtain valuable information and have the time and opportunity consider seriously alternative solutions to their marital problems before crossing the Rubicon of filing for divorce.⁴⁰ Mandatory waiting periods also have proven very effective to give parties the time to explore and find other solutions to their marital problems in many jurisdictions.⁴¹ Similar approaches have proven dramatically successful in

⁴⁰ See, e.g., *Should You Consider Pre-Divorce Counseling?* Cooley & Handy, Attorneys at Law, PLC, available at <http://www.cooleyhandy.com/news-articles/should-you-consider-pre-divorce-counseling.html> (seen 4 May 2015). There are a variety of pre-divorce therapeutic counseling strategies and approaches.

A new type of therapy, intended to address these issues before a complaint for divorce is filed, is called “discernment counseling.” Bill Doherty, a professor in the family social science department at the University of Minnesota, created this therapy. Discernment counseling aims to help struggling couples decide whether to divorce or remain married and was recently the subject of an article published in the Wall Street Journal. Dr. Doherty found that, in most divorcing couples, there is a spouse who is “leaning in” (wanting to stay in the marriage) and one that is “leaning out” (wanting out of the marriage). The therapy is focused on assisting the “leaning out spouse” to determine whether or not leaving the marriage is the correct choice. The therapy also assists the “leaning in” spouse to develop and utilize effective coping skills in accepting divorce as an outcome.

Id.

⁴¹ See, e.g., Nancy J. Bickford, *Mandatory Waiting Period in Divorce*, available at <http://www.bickfordlaw.com/mandatory-waiting-period-in-divorce.html> (seen 4 May 2015).

This so-called “waiting period” in divorce [in California] is meant to give spouses the time and opportunity to reconcile and possibly change their minds about going through with the dissolution. It also gives the parties time to retain a divorce attorney, investigate issues related to parenting of the children after divorce, and to gather important financial documents in preparation for a settlement or trial.

Id. See also Wayne Thomas, *Texas Divorce Laws & Waiting Periods*, Legalzoom, available at <http://info.legalzoom.com/texas-divorce-laws-waiting-periods-26051.html> (seen 4 May 2015) (60-day waiting period in Texas); April M. Townsend, *Mandatory Waiting Period for Divorce*, available at

Australia via Family Relationship Centres.⁴² Procedural changes that give priority to the welfare of the children (and to the voice and perspective of the child) in the divorce process and afterward are needed.

Divorce often is the result of many complex factors. Personal, familial, social, economic, educational, and many other influences can promote or discourage an individual's or couple's decision to divorce. For example, Harvard Professor William Julius Wilson has noted that "[t]here is a strong association between rates of marriage and both employment status and earnings at any given point in time"⁴³ Thus, not only may direct divorce-procedural-and-substantive-laws impact the divorce rate, but indirectly many other circumstances, considerations and elements bear upon the decision to divorce.

Finding a way to help individuals who are struggling in marriage to find solutions to their problems without unnecessarily divorcing should be a national priority. While divorce may be a necessary and preferred solution to some problematic marital situations (such as those involving physical abuse, extreme mental abuse, etc.), in most cases there are other possible solutions that should be fully considered and carefully explored before resorting to divorce. Not only do the married parties, and *especially* their children pay a heavy price for divorce, but usually society itself also is weakened and injured by divorce.

Marriage benefits not only adults and society, but it greatly benefits children. Children of married couples benefit from greater family income and are less likely to experience poverty. In contrast, American "[c]hildren in single-parent homes are more than five times as likely to be poor, regardless of parental education level. They also are more likely to drop out of high school, spend time in prison, abuse drugs and alcohol, and have an unwed birth."⁴⁴ The 2014

<http://www.ulmerlaw.com/blog/2013/03/mandatory-waiting-period-for-divorce.shtml> (90-day waiting period before divorce in Pennsylvania).

⁴² See Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, 51 Fam. Court Rev. 105 (2013).

Family Relationship Centres (FRCs), are community-based services in Australia, funded by the Australian Government, which seek to provide support to parents going through family difficulties, in particular, those who have either separated from the other parent or who are contemplating separation. FRCs provide information, advice, referral and mediation. There are 65 centres all over the country, with one servicing approximately every 300,000 of the population.

Id.

⁴³ Rachel Sheffield, *Marriage Won't End Poverty. But It Will Help (A Lot)*, The Daily Signal, July 31, 2014, available at <http://dailysignal.com/2014/07/31/marriage-wont-end-poverty-will-help-lot/> (viewed 1 August 2014). See further Jonathan Gardner & Andrew Oswald, *How is mortality affected by money, marriage, and stress*, J. Health Econ. (2004), available at http://faculty-course.insead.edu/popescu/UDJCore/XtraMaterial/singles_mortality.pdf (seen 4 May 2015) ("Marriage . . . has a large effect on mortality risk, even after controlling for a set of health controls (including measures of psychological distress).").

⁴⁴ Sheffield, *supra* note 39.

Index of Culture and Opportunity compiled by the Heritage Foundation, links marriage with overcoming poverty and dependence and with opportunity for economic upward mobility.⁴⁵

The unwed birth rate in the United States has been steadily rising for all races since at least 1970, and for the past decade it has continued to increase at the overall rate of 6.7% annually.⁴⁶ That bodes ill for those children and their communities because,

[c]ontrolling for other differences, children in female-headed families are more likely on average to enter school *behind* their peers in math, reading readiness, and socio-emotional skills – a gap our schools are often *unable to close*. As a result, these students are *less likely to graduate from high school and less likely to enter and graduate from, college*. Children from female-headed families are also more likely on average to be arrested and more likely on average to become unmarried parents in their teen years or in their twenties or thirties – thereby creating a cyclical effect that pushes non-marital birth rates ever higher.⁴⁷

Another study by business school professors in the United States noted that persons from strong families tend to succeed more often and more notably in business than others. Noting the extraordinary success of Asian Americans in business in America, compared to other ethnic groups, they explained:

Not only do families use their financial resources to protect their firms against business downturns, but they can turn to family members to find capital to launch new ventures. This pooling of capital by families has been particularly successful in fostering the proliferation and growth of Chinese family businesses (Fukuyama, 1995; Light & Gold, 2008). Bates (1997) reported that Asian Americans borrow three times more frequently from family and friends than do white Americans. Similarly, Young and Sontz (1988) found that only 24% of Hispanic grocers received financial help from family and friends when starting their businesses, but 57% of Korean grocers received such help. The U.S. census in 1987 reported that only 7% of African Americans borrowed money from spouses, family, or friends to start a new business, but Asian Americans did so 23% percent of the time.⁴⁸

From 2001 to 2011, the marriage rate dropped by 10.3 marriages per 1,000 unmarried women ages 15 and older, as this chart from the Heritage Foundation shows.⁴⁹ The rate of marriage for American women is just *half* of what it was just forty years ago. In his essay, As

⁴⁵ The Heritage Foundation, The 2014 Index of Culture and Opportunity, available at <http://index.heritage.org/culture/> (viewed 1 August 2014).

⁴⁶ *Id.* at *Unwed Birth Rate*, available at <http://index.heritage.org/culture/unwed-birth-rate/> (seen 1 August 2014).

⁴⁷ Ron Haskins, *The Crisis of Non-marital Childbearing*, *id.* (emphasis added).

⁴⁸ W. Gibb Dyer, Elizabeth Nenque and E. Jeffrey Hill, *Family Matters: Family Capital and its Influence on Entrepreneurship and Self-Employment* (February 2012) .

⁴⁹ *Marriage Rate*, in The 2014 Index of Culture and Opportunity, available at <http://index.heritage.org/culture/> (viewed 1 August 2014).

Marriage Goes, So Goes the American Dream,⁵⁰ the distinguished sociologist Professor W. Bradford Wilcox notes that “**The retreat from marriage disadvantages children, especially children from poor and working-class homes most affected by this retreat, as they move into adulthood.** Children whose parents fail to get, and stay, married to one another are more likely to end up pregnant as teenagers, to run afoul of the law, to flounder in school, and to end up idle as adults”⁵¹ Likewise, “[t]he retreat from marriage fuels growing social and economic inequalities” because numerous studies show that “less-educated Americans are less likely to get and stay married.”⁵² For example, “[a] recent study from Harvard economist Raj Chetty and his colleagues . . . indicates that in predicting whether poor children have upward mobility, ‘the strongest and most robust predictor is the fraction of children with single parents.’”⁵³ Thus, the fact that today “only about half of the nation’s adults are currently married, and that about half of the nation’s children will spend some time outside an intact, married home,” is cause for real concern about the life-opportunities for adults and children in many families.

By the same token, the high divorce rate also is a sign of dysfunction and distress in American families. The number of divorces per 1,000 population has stabilized at about four for over a decade (and before it it ranged between about five and four per thousand from 1980-2000, after two decades in which the divorce rate had nearly tripled (from 1960-1980) from about two to over five per thousand.⁵⁴ The modest reduction in the divorce rate in recent years, however, probably reflects less relationships stability of couples than the rise in non-marital cohabitation, in which parties may break-up without a formal, recorded divorce because they never had a formal, legal marriage. Of course, similar high divorce rates exist in most western nations. As Professor Emeritus Robert Spaemann of the University of Munich has succinctly stated: “The divorce statistics for modern Western societies are catastrophic.”⁵⁵

The decline in marriage rates has correlated with the increase in cohabitation rates. In 2011, the U.S. Census Bureau reported that 7.6 million opposite-sex couples were cohabiting without marriage, including more than 3 million with minor children.⁵⁶

Of course, the decline in marriage and rise in divorce and cohabitation mean that more children are being born and raised out of marriage. Today, approximately forty percent (40%) or more of children born in the United States today are born to an unmarried mother. Likewise, the percentage of American children living with a single-parent has more than doubled since

⁵⁰ W. Bradford Wilcox, *As Marriage Goes, So Goes the American Dream*, in *The 2014 Index of Culture and Opportunity*, available at <http://index.heritage.org/culture/marriage-rate/> (viewed 1 August 2014).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Divorce Rate*, in *The 2014 Index of Culture and Opportunity*, available at <http://index.heritage.org/culture/> (viewed 1 August 2014).

⁵⁵ Robert Spaemann, *Divorce and Remarriage*, in *First Things*, August/September 2014, at 17.

⁵⁶ See *America’s Families and Living Arrangements: 2011, Table UC1*. United States Census Bureau. November 2011, available at <http://www.census.gov/hhes/families/data/cps2011.html> (seen 1 August 2014).

1970 and currently more than one-fourth (about 27%) of all children live with only one parent.⁵⁷

The steady decline in the marriage rate is deeply disturbing because marriage is associated with better life opportunities for those involved, including better education and higher income. For example, marriage and welfare are inversely associated. As Robert Rector has put it: “Welfare breaks down the habits and norms that lead to self-reliance, especially those of marriage and work. It thereby generates a pattern of increasing inter-generational dependence.”⁵⁸ Thus, the stagnant rate of Americans who live in poverty (constantly between about 12 and 15 percent (12-15%)) for almost fifty (50) years may also reflect the weakening of the culture of marriage in the United States during that same period.

IV. Some Selected Factors That Weaken Traditional Marriage, Marital Childbearing and Marital Childrearing: the Spread of Same-Sex Marriage

The positive influence of healthy traditional marriages within any society may be weakened and even overcome by powerful negative factors. For example, in times of crisis (such as economic crisis, military crisis, civil unrest, spiritual malaise, etc.) the influence of marriages as well as the rate and stability of marriage may be weakened.

As marriage is a cultural institution, many other cultural factors influence marriage. Culture can profoundly impact the rate, stability, qualities, and effectiveness of marriage. That is why it is important to have healthy traditional marriage supported by many sub-groups in society (such as religious communities, educational communities, employers, other associations, extended families, etc.), as well as by the state.

It also is important to recognize that social and cultural conceptions, changes, and reconceptualizations of marriage may profoundly influence the value and stabilizing effects of marriage. It is important to consider the collateral effects of major changes in the meaning and understanding of marriage.

As the attached Appendix I shows same-sex marriage is permitted today in only seventeen nations -- less than ten percent (10%) of the nations of the world. All but two of those nations are in Western Europe or North America, and the two other nations are both former colonies of European nations that have legalized same-sex marriage. As Appendix I also shows, in the United States, same-sex marriage has been legitimately adopted by legislatures or voters in only eleven states; but courts (mostly federal courts) have ordered the legalization of same-sex marriage by judicial decree in at least twenty-five additional states. Thus, the overwhelming majority of nations (and the people in over half of the states) prefer and preserve the traditional understanding of marriage as the union of one man and one woman. That provides a solid foundation upon which to build strong marital families. But it guarantees

⁵⁷ *Single-Parent Households* in The 2014 Index of Culture and Opportunity, available at <http://index.heritage.org/culture/single-parent-households/> (viewed 1 August 2014).

⁵⁸ Robert Rector, *Self-Sufficiency*, in The 2014 Index of Culture and Opportunity, available at <http://index.heritage.org/culture/> (viewed 1 August 2014).

nothing. Each society and culture (and community and family) must decide for itself how to value, protect and promote marriage and marital families. Such positive policy choices must lead to actions (like those noted above) in order to have the chance to encourage and foster strong, healthy marriages.

V. *Conclusion: The Unanswered Questions*

The thesis of this paper is that peace and tolerance of pluralism in a community are collateral benefits of healthy marriages and marital families. Such marriages and families usually embody, exemplify, teach, and foster the ability and willingness to get along with others who are different, or who different ideas, values, and practices. Thus, it is in the interest of the entire community to foster healthy, stable, and happy marriages.

In order for marriage to work, couples contemplating and attempting marriage must believe that their marriage will be successful. As William James put it:

“A social organism of any sort whatever, large or small, is what it is because each member proceeds to do his own duty with a trust that the other members will simultaneously do theirs. Wherever a desired result is achieved by the co-operation of many independent persons, its existence as a fact is a pure consequence of the precursive faith in one another of those immediately concerned.”⁵⁹

Social institutions constantly evolve. Marriage has changed in many ways through the centuries and millennia. The most significant changes in social institutions usually occur gradually, by evolution rather than revolution. However, the redefinition of marriage to include same-sex couples in addition to traditional male-female couples is a revolutionary rather than evolutionary change.

Dramatic, sudden, revolution change may undermine the viability of a social institution by separating it from the social and moral order that underlies and sustains the institution. As Professor Fukuyama noted: “Communities, whether nuclear families or liberal democracies, are not self-sufficient, but they depend upon an exterior source of values for the community life that sustains them.”⁶⁰

There are many unanswered questions about the consequences of legalizing same-sex marriage. These include, for example:

- What effects will redefinition of marriage (to include same-sex marriage, herein “SSM”) have upon the institution of marriage?
- What effects will redefinition of marriage (SSM) have upon families, and especially upon children?

⁵⁹ William James, *The Will to Believe* 24 (1896, 1912) (in Part IX).

⁶⁰ Francis Fukuyama, *The End of History and the Last Man* __ (1992).

- What effects will redefinition of marriage (SSM) have upon adult relationships, especially between men and women, and on women?

It would be very risky, dangerous and unwise to fundamentally reconfigure and reconceptualize a social institution as foundational and critical to the welfare of individuals, families and societies as is marriage without full discussion and free discussion through and in the proper democratic processes. Both as to the substance of the policy revision (to permit same-sex marriage with full legal marital effects) and as to the procedure (to do so by judicial fiat rather than through political processes that reflect the will of the people), the movement to legalize same-sex marriage through judicial litigation is severely flawed. Let us hope that wise heads can bring restraint and reason to the issue before the matter is thrown over a cliff.

Appendix I

The Legal Status of Same-Sex Marriage and Unions in the World and in the USA

Lynn D. Wardle

28 January 2015⁶¹

A. Legal Allowance of Same-Sex Unions Globally (of 193 Nations / UN):⁶²

Same-Sex Marriage Generally Legalized in up to Seventeen (17) of 193 Nations (less than 10%)*:

The Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), *South Africa** (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), *Brazil** (2013?), UK-England/Wales (effective summer 2014) and UK-Scotland (effective c. late 2014); Luxembourg (effective January 2015).⁶³ (Also in some particular sub-jurisdictions, municipalities, or states in, e.g., Mexico and the USA)

Same-Sex Non-Marital Unions Mostly Equivalent to Marriage Allowed in Ten* (10) Other Nations (of 193):

⁶¹ Compare *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, available at <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (seen 16 June 2014); Jennifer C. Pizer & Sheila James Kuehl, *Same-Sex Couples and Marriage, Model Legislation for Allowing Same-Sex Couples to Marry or All Couples to Form a Civil Union* (The Williams Institute August 2012); *Status of Same-Sex Relationships Nationwide*, Lambda Legal, August 19, 2011, available at <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last viewed 20 August 2011); See Lambda Legal, *Recognition of Same-Sex Couples Worldwide, Recognition of Same-Sex Couples in the United States*, September 12, 2011, available at http://data.lambdalegal.org/publications/downloads/fs_recognition-of-same-sex-couples-worldwide.pdf (last seen 9 July 2012); Bea Verschraegen, *The Impact of European Family law on National Legal Systems*, Vol. 2, Central and European Countries after and before the Accession at 63, 63-65 (___ ed. 2011).

⁶² See *Gay Marriage Around the World*, Pew Research, Dec. 19, 2013, at <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/#allow> (seen 140703) The Pew Forum on Religion & Public Life, *Gay Marriage Around the World*, Feb. 8, 2013, available at <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World-2013.aspx> (seen 130214). The British House of Commons voted to legalize SSM on Feb. 5, 2013. It is expected to pass another vote in the House of Commons and in the House of Lords by Summer 2013. Id.

⁶³ Categorization of some nations is difficult. For example, South Africa legalized “Civil Unions” which can be created by way of “marriage” and can be called “marriages,” but the Marriage Act was not amended and still only allows male-female marriage. See Civil Union Act 17 of 2006(s. Afr.) (available at: <http://www.info.gov.za/view/DownloadFileAction?id=67843>). Likewise, same-sex marriage is permitted in Brazil in 10 of 26 states, and since May 2013 civil registrars were directed to perform same-sex marriages, but the legal status of that directive of the National Judicial Council is debatable. SSM is allowed in sub-jurisdictions of some other nations (e.g., thirteen states in the USA, Mexico (City). (# = law passed but not yet in effect). See *uxembourg approves same sex marriage*, Yahoo! News (18 June 2014), available at <http://news.yahoo.com/luxembourg-approves-same-sex-marriage-203510157.html> (seen 18 June 2014).

Ecuador, Finland, Germany, Slovenia, Andorra, Switzerland, Australia, Austria, Ireland, Liechtenstein.⁶⁴

Same-Sex Partnerships (Formal but Not Equal to Marriage) Allowed in at least Five (5) More Nations: *See, e.g.,* Colombia, Croatia, Czech Republic, Hungary, Israel.

B. Legal Rejection of Same-Sex Marriage Globally:

Same-Sex Marriage NOT Allowed in 176 Sovereign Nations (all but 17 noted above).

At Least Forty-six (46) of 193 Sovereign Nations (24%) Have Constitutional Provisions Explicitly or Implicitly Defining Marriage as Union of Man and Woman (Prohibiting SSM):

Constitutions of: Armenia (art. 32), Azerbaijan (art. 34), Belarus (art. 32), Bolivia (art. 63), Brazil (art. 226), Bulgaria (art. 46), Burkina Faso (art. 23), Burundi (art. 29), Cambodia (art. 45), China (art. 49), Columbia (art. 42), Cuba (art. 43), Democratic Republic of Congo (art. 40), Ecuador (art. 38), Eritrea (art. 22), Ethiopia (art. 34), Gambia (art. 27), Honduras (art. 112), Hungary (art. M, Constitution/Basic Law of Hungary (25 April 2011) (effective Jan. 2012); Japan (art. 24), Latvia (art. 110 - Dec. 2005), Lithuania (art. 31), Malawi (art. 22), Moldova (art. 48), Mongolia (art. 16), Montenegro (art. 71), Namibia (art. 14), Nicaragua (art. 72), Panama (art. 58), Paraguay (arts. 49, 51, 52), Peru (art. 5), Poland (art. 18), Romania (art. 44), Rwanda (art. 26), Serbia (art. 62), Seychelles (art. 32), Somalia (art. 2.7, draft Constitution 2012); Sudan (art. 15), Suriname (art. 35), Swaziland Constitution (art. 27), Tajikistan (art. 33), Turkmenistan (art. 25), Uganda (art. 31), Ukraine (art. 51), Venezuela (art. 77), Vietnam (art. 64). (At least 12 of these imply dual-gender (“men and women have/may”).) See also Hong Kong Bill of Rights of 1991 (art. 19); Spain (art. 32, but 2005 SSM law upheld Nov 2012 anyway).

Examples: Article 24, Constitution of Japan: “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. . . .” Article 110, Constitution of Latvia: “The State shall protect and support marriage—a union between a man and a woman, . . .” Article 42, Constitution of Columbia: the family “is formed . . . by the free decision of a man and woman to contract matrimony” Uganda Constitution, Art. 31: “Marriage between persons of the same sex is prohibited.” Nigeria passed a law criminalizing SSM on May 30, 2013 - (<http://jurist.org/paperchase/2013/05/nigeria-house-approves-bill-criminalizing-same-sex-marriage.php>).

C. Legitimate Legal Allowance of Same-Sex Unions in the USA in Eleven (11) of 50 states + DC + 8/564 Indian Tribes) – plus Judicial Mandates for Marriage in 25+ Other States:

⁶⁴ See note re: SSM/CUs in South Africa and Brazil. Some nations with SSM also allow SSCUs. Some local jurisdictions as Greenland & in some states or provinces in Mexico, the USA, & Venezuela allow SSCUs.

Same-Sex Marriage Legal by Legislative or Voter Choice in Eleven (11) USA States (+ DC) + about 26 other states w/ SSM / crt orders:⁶⁵

Vermont (2009), New Hampshire (2010), New York (2011), Maine (ballot 2012), Maryland (ballot 2012), Washington (ballot 2012), Delaware (2013), Minnesota (2013), Rhode Island (2013), Hawaii (2013); Illinois (law June 2014); – plus the District of Columbia (2010), +8 (of 566) U.S. Indian tribes - the Coquille, Suquamish, Odawa Tribes, Santa Ysabel, and Pokagon Band of Potawatomi Tribe, Colville, Cheyenne and Arapaho Tribes of Oklahoma, and Leech Lake Tribal Council.⁶⁶

First judicial decree mandating same-sex marriage in Massachusetts in 2004. See also, e.g., Connecticut (judicial order 2008), Iowa (judicial order 2009), California (July 2013, judicial order not appealed), New Jersey (judicial order 2013); Oregon (judicial decree June 2014), Pennsylvania (judicial decree 2014), Indiana (judicial order 2014), etc.

Same-Sex Civil Unions Equivalent to Marriage Legal in Two (2) Additional US States:

Nevada (2009), & Colorado (2013) (+ several other states with SSM).⁶⁷

Same-Sex Unions Registry & Specific, Limited Benefits in One (1) Additional US Jurisdiction

Wisconsin. *Some States with SSM or CU also allows limited benefit relations – HI (1997).*

D. Legal Rejection of Same-Sex Unions in the USA:

Same-Sex Marriage Prohibited by State Constitutional Amendment (SMA) in Thirty-one (31) States (60%) (including CA - disregarded by court, and HI where amendment gave legislative control):

Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, # Idaho, Kentucky,* Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio,* Oklahoma,* Oregon, South Carolina, South Dakota,

⁶⁵ National Conference of State Legislatures, *Same-Sex Marriage Laws*, March 19, 2015, available at <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (seen 4 May 2015). “Before the U.S. Supreme Court ruling on Oct. 6, 2014, declining to hear cases on same-sex marriage, 31 states had either constitutional or statutory provisions that explicitly defined marriage as between a man and a woman and just 19 states and the District of Columbia allowed same-sex marriage. Now, at least 37 states and D.C. recognize same-sex marriage.” *Id.*

⁶⁶ Voters approved SSM in 3 states in 2012 (ME, MD, & WA). In at least 6 of the states where SSM now is legal it was the result of judicial decree or initiative (MA, IA, CA, CN, NJ, NM & poss VT).⁶⁶ (# = law passed but not yet in effect). A trial court in New Jersey ruled that it was unconstitutional for the state to not permit same-sex marriage; the state Supreme Court denied a stay pending appeal on grounds that the state was unlikely to prevail on appeal, and then the Governor withdrew the state’s appeal. See Lynn Wardle, *Mich. St. L. Rev. Apps*

⁶⁷ Some states – including HI, IL, NV & DC – also allow heterosexual couples to enter CUs also. Washington offers both SSM and SSCU until June 2014 when it will be available only to persons over 62. Several states that had civil unions now have SSMs instead. VT, CN, NH, RI & DE; some have both. See NCSL, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, July 26, 2013, at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (seen 130802).

Tennessee, Texas,* Utah,* Virginia,* and Wisconsin.⁶⁸ (* pending appeal or order invalidating SSM ban) (#ssm approved by legislation)

Same-Sex Civil Unions Equivalent to Marriage Prohibited by State Constitutional Amendment in Twenty (20) USA States (40%):

Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

The total vote rejecting same-sex marriage in votes on the 31 state marriage amendments combined was over 61% (as of November 2012).

Same-Sex Marriage Prohibited Without Constitutional Amendment (by statute or common law) in Thirteen (13) Additional States.

= law is not yet in full effect.

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⁶⁸ SMA passed in May 2012 in NC (61%); SMA rejected for first time by voters in MN in 2012; initiatives or referenda legalizing SSM approved by voters in ME, MD, and WA in 2012.). Voters have constitutionally banned SSM in 31 states by adopting SMAs. (In AZ voters first rejected SMA in 2006 then approved SMA in 2008; in ME voters first rejected SSM in 2009 then approved in 2012). In 17 of the 26 “blue states” that voted for Obama in 2012 only male-female marriage was then legal: Hawaii, California, Oregon, Nevada, Colorado, New Mexico, Minnesota, Wisconsin, Illinois, Michigan, Ohio, Pennsylvania, Rhode Island, New Jersey, Delaware, Virginia, and Florida. Bill to legalize SSM in IL fails 130530. In 2008 voters in California passed Prop 8 a constitutional amendment barring SSM but it was ruled unconstitutional in a dubious by a federal district court opinion. State officials refused to appeal and the Supreme Court of the United States ruled that the sponsors of Prop 8 lacked standing to appeal. *Hollingsworth v. Perry*, 5700 U.S. ___ (2013).