THE CHALLENGE OF AFFORDABLE FAMILY LAW

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Abstract

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.

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. The delays involved in getting to trial increase the costs for litigants using private lawyers.

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.

PART I 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, and how quickly the traffic jam might clear.

Pressures on family law dockets

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.

The reason for the traffic jams is that demand is increasing and the road system cannot cope with the level of demand. The evidence for this is in the available data on increases in litigation in a number of countries which publish statistics on the volume of family law cases. 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] 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

1. National 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

between 1994 and 2000,[3] although this upward trend was evident long before 1994.[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

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Treatments for Family Law Cases in the United States', in Sanford Katz, John Eekelaar & Mavis Maclean eds., *Cross Currents: Family Law and Policy in the US and England* 513 (2000). See also Andrew Schepard, *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.

Parental Responsibility with effect from October 1, 2007.[8]

The effects of these massive increases in litigation about parenting after separation are certainly noticed in the courts. 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.

The impact of delay on litigation costs

One of the outcomes of long delays in the court system to deal with parenting and property disputes is that litigation costs increase. This is because, the longer the delay, the more issues that arise concerning parenting, maintenance and preparation for trial. Those issues – some relatively trivial, others more substantial - may lead to letters being exchanged between lawyers and interlocutory court events seeking Orders to deal with these interim matters. The longer the delay also in getting to a resolution or trial, the more likely it is that family circumstances will change, requiring the need for updated affidavits or amendments to the orders sought.

It follows that one of the collateral effects of overwhelmed courts is to make family law less and less affordable. A protracted dispute is likely to cost a lot more than one which is resolved in an efficient and timely manner.

Governmental responses to demand

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,[9] and in New Zealand that has seen significant reductions in

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

9. See further below, text accompanying notes 63-67.

resources for its family law system.[10] 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.

The argument of this paper

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., and what the way forward might be when governments are unwilling to fund the existing family law system to meet the ever rising demands on it.

I suggest that there are three factors 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 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.

Part II reviews these drivers of demand in the family law system. Part III seeks to explain why some governments at least have turned a deaf ear to the impassioned pleas of family law professionals for more resources. Part IV considers what other solutions might be adopted to achieve more affordable family law – affordable for governments, and affordable for litigants. In

10. Bill Atkin, 'Upheaval in the Family Court of New Zealand', Paper given at the XVth World Conference of the International Society of Family Law, Recife, Brazil, August 2014.

this part I suggest how the family law system might be adapted to cope with the demands placed upon it in an age of so many temporary relationships.

PART II REASONS FOR THE INCREASE IN LITIGATION

The changing demographics of the family

The first reason for the increase in demand 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 Christian tradition that strongly influenced patterns of family formation. Christian teaching emphasises the lifelong nature of marriage. What God has joined together, said Jesus, let no-one separate.[11] Christian teaching in the Catholic tradition offered no option of divorce – although the severity of that rule was tempered by the sophistry and flexibility of Catholic notions of nullity. In Protestant theology, there was some allowance for divorce for fault such as adultery, but there was still a strong emphasis on the idea of marriage as a sacred and enduring commitment.[12] In Britain, for example, the right to divorce was almost entirely theoretical before the mid-nineteenth century.[13] For better or for worse, that view of marriage promoted great stability, although its downside was that it also trapped some people in deeply unhappy and unsafe partnerships. Christian teaching also requires a strong discipline in terms of sexual expression, with both premarital and extramarital sex forbidden.

In post-Christian countries, 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 identifies

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11 Matthew 19:6 (New International Version).

12 Mary Ann Glendon, *State, Law, and Family: Family Law in Transition in the United States and Western Europe* (1977); Roderick Phillips, *Putting Asunder: A History of Divorce In Western Society* (1988). See also, Mary Ann Glendon, *Abortion And Divorce In Western Law* (1987).

13 Lawrence Stone, *Road To Divorce: England 1530–1987*, (1990).

strongly with a religious faith, that faith commitment is not obviously reflected in the stability of American families or in statistics on ex-nuptial births. In many parts of South America, 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.[14] In some South American countries, more people of child-bearing age are living in cohabiting relationships than are married.[15] 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.[16]

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.[17]

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.[18] Half or more of all births are ex-nuptial in

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14. 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).

15. *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.

16. Ibid.

17. Ibid.

18. Office of National Statistics, *Births in England and Wales, 2012*, (2013) at http://www.ons.gov.uk/ons/dcp171778_317196.pdf.

Belgium, Bulgaria, Estonia, France, Iceland, Slovenia, Norway, and Sweden. The highest rate is in Iceland at 65% of all births.[19] While more than half of these births across Europe are in cohabiting unions, there are significant variations between countries.[20]

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, the percentage is 76%, Nicaragua, 72% and Brazil, 66%.[21] Some cohabiting couples who have children will go on to marry, but many see no need to do so.[22]

The data on ex-nuptial births indicates another trend in family formation which has an impact upon the demand for dispute resolution between parents. 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.[23] The figure is the same in Britain.[24] In the USA, between 2006 and 2010, 24% of first births were to women who were neither married nor cohabiting.[25]

That the majority of ex-nuptial children are born into cohabiting unions does not mean that they will experience a stable family life. Evidence from many parts of the world indicates that cohabiting relationships are typically quite short-term.[26] People cohabit outside marriage for a

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

20. Ibid.

21. World Family Map, 2014, above n.15 at 19.

22. Lixia Qu, 'Expectations of Marriage among Cohabiting Couples' (2003) *Family Matters* no 64, 36.

23. Ibid.

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

25. 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.

26. 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

range of different reasons. Some people live together with the intention of getting married.[27] Others may enter a cohabiting relationship with a hope or intention on the part of at least one of them,[28] that they will marry, but the relationship does not survive long enough for this to occur. Others reject the idea of formal marriage entirely,[29] but see themselves as being in a committed and ongoing relationship.[30] For others who live in the present without necessarily seeking to plan the future, the intimate partnership may just be a relationship for the time being, with the move from living apart to living together occurring mainly for pragmatic reasons such as saving on rent.[31]

Whatever the reason for entering into a cohabiting relationship, the evidence is that cohabiting relationships break down at a very much faster rate than do marriages.[32] This is not particularly surprising as regards childless couples, for the nature of much non-marital cohabitation is that

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cohabitation were higher in other countries, but in no country other than East Germany did the majority of cohabiting partnerships survive for ten years: Kathleen Kiernan, 'Cohabitation in Western Europe', 96 *Population Trends* 25 (1999).

27. 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), at www.abs.gov.au.

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

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

30. On the different meanings of commitment, see Jan Pryor & Josie Roberts, 'What is Commitment? How Married and Cohabiting Parents Talk About Their Relationships', (2005) *Family Matters* no 71, 24.

31. Scott Stanley, Galena Kline Rhoades and Howard Markman, 'Sliding Versus Deciding: Inertia and the pre-marital cohabitation effect' (2006) 55 *Family Relations* 499; Gordon Carmichael and Andrea Whittaker, 'Living Together in Australia: Qualitative Insights into a Complex Phenomenon' (2007) 13 *Journal of Family Studies* 202.

32. Arland Thornton, William Axinn, & Yu Xie, *Marriage and Cohabitation* (2007); Larry Bumpass & James Sweet, 'National Estimates of Cohabitation', (1989) 26 *Demography* 615; Renata Forste, 'Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.', (2002) 4 *J. L. & Fam. Stud.* 91; Helen Glezer, 'Cohabitation and Marriage Relationships in the 1990s', (1997) *Fam. Matters* no 47, 5; Steven Nock, 'A Comparison of Marriages and Cohabiting Relationships', (1995) 16 *J. Fam. Issues* 53.

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 cities[33]) 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.[34]

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.[35] In an Australian study, the odds of a cohabiting couple with children breaking up was more than seven times as high as a

33. 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 Nancy Reichman, Julien Teitler, Irwin Garfinkel, & Sara McLanahan, 'Fragile Families: Sample and Design', (2001) 23 *Children & Youth Services Rev.* 303, 306.

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

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

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.[36]

The reality is, then, that a substantial proportion of children in post-Christian nations are born into, or as a consequence of, temporary relationships. Many are born to single mothers without the fathers present in the home, and whose relationship with the father ceased before birth. Other children are born into cohabiting relationships which will not long endure. Before those children have reached adulthood, they may well experience a number of different family constellations, with mothers forming and later ending other live-in relationships and giving birth to other children.

For children born into single-parent households, there is the potential for a dispute about parenting arrangements between the mother and father from the day the child is born. The instability of cohabiting relationships further adds to the potential for parenting disputes, and a some high-conflict parents may well continue to have disputes about parenting arrangements or child support for much of their children's minority.

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

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

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.[37] 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.[38] 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,

37. 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.

38. 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.

many European countries made joint parental responsibility the default position in the absence of a court order to the contrary.[39]

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 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 parenting 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

The third factor is that in many countries fathers have been much more willing to be involved in post-separation parenting than was the case a couple of generations ago. Over time, there have

39. These trends are reviewed in Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (2011), chapter 3.

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.[40] Despite the rhetoric of equality, more fathers want to assist in the parenting role after separation than to take over as primary carer.[41]

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.[42]

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 average this was about five years after the divorce. The study also indicated a very high level of dissatisfaction with levels of contact.[43]

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

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[40] Carol Smart, 'Towards an Understanding of Family Change: Gender Conflict and Children's Citizenship', (2003) 17 *Australian J. Fam. L.* 20.

[41] 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).

[42] William Fabricius & Jeff Hall, 'Young Adults' Perspectives on Divorce: Living Arrangements', (2000) 38 *Fam. & Concil. Cts. Rev.* 446.

[43] Bruce Smyth, Grania Sheehan, & Belinda Fehlberg, 'Patterns of Parenting After Divorce: A Pre-Reform Act Benchmark Study', (2001) 15 *Australian J. Fam. L.* 114.

with their children and a further 18% said they did not have quite enough time with their children.[44]

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,[45] although levels of contact have increased in recent years.[46] 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.[47] Thirty-six per cent of non-resident fathers who were interviewed in 2001, had not seen their youngest child in the last 12 months.[48]

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

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[44] 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.

[45] 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.

[46] Paul Amato, Catherine Meyers, & Robert Emery, 'Changes in Nonresident Father-Child Contact From 1976 to 2002', (2009) 58 *Fam. Rel.* 41.

[47] Australian Bureau of Statistics, *Family characteristics survey, 1997*, Catalogue No. 4442.0 (1998).

[48] Parkinson & Smyth, above note 44.

about right. Most wanted time with their children.[49] There have been similar findings in Britain. In one study, 76% of fathers who never saw their children were dissatisfied with this.[50] There are numerous reasons why fathers lose contact with, or disengage from their children.[51] The main factors are serious conflict in the relationship with the mother,[52] leading to maternal gateclosing;[53] repartnering, and responsibilities to children in the new family;[54] physical distance;[55] feelings of disenfranchisement by the legal system;[56] and limited financial resources.[57] Most of these men would want a much greater involvement in the children's lives if their circumstances were different.

PART III GOVERNMENTAL RESPONSES TO THE GROWTH IN LITIGATION

The response of governments to this increase in the number of people with family law disputes can best be understood against the background of the problems involved in traditional processes of adjudication.

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[49] Parkinson & Smyth, *ibid*, at p.299.

[50] Bob Simpson, Peter McCarthy, & Janet Walker, *Being There: Fathers After Divorce* 32 (1995).

[51] 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.

[52] 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.

[53] Liz Trinder, 'Maternal Gate Closing and Gate Opening in Postdivorce Families', (2008) 29 *J. Fam. Issues* 1298.

[54] Wendy Manning, Susan Stewart, & Pamela Smock, 'The Complexity of Fathers' Parenting Responsibilities and Involvement with Nonresident Children', (2003) 24 *J. Fam. Issues* 645.

[55] Dudley, above note 52; Greif, above note 52.

[56] Edward Kruk, *Divorce and Disengagement: Patterns of Fatherhood Within and Beyond Marriage* (1993); Sanford Braver & Diane O'Connell, *Divorced Dads: Shattering the Myths* (1998).

[57] 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.

The adversarial 'custody' trial

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."[58]

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 relationship between both parents and the children,[59] and in which there may be continuing issues to resolve over the years. The traditional modes of adjudication coped well enough with a limited number of divorces requiring what for most would be one-for all decision-making about who would have custody, but they have proved hopelessly inadequate for dealing with the volume of breakups in modern post-Christian countries, and the ongoing disputes of the minority of high conflict families.

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

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58. 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.

59. Gregory Firestone & Janet Weinstein, 'In the Best Interests of Children: A Proposal to Transform the Adversarial System', (2004) 42 *Family Court Review* 203.

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".[60] Looking back over sixteen years as Chief Justice, he wrote that:[61]

> "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 rising demand

There are no doubt great variations in how governments around the world have responded to the pressures arising from increased demand. What can be said is that governments do not seem to have shown enormous enthusiasm towards the idea of appointing yet more judges, and building more courthouses to a degree necessary to ensure that traditional systems of adjudication function effectively, and resolve disputes in a timely manner.

Court systems that were built to deal with a limited number of divorces, and to make presumptively once-for-all allocations of the children to one parent or the other, have certainly evolved to meet the demands of the many people seeking to resolve disputes in the aftermath of temporary relationships. One response has been to push family law work down to the lower tiers of trial courts. Australia offers an illustration. Prior to 1975, family law disputes other than maintenance issues were dealt with at the highest level of trial court – the Supreme Court of each State or Territory. In 1975, a new federal court, the Family Court of Australia, was created. It

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60. The Hon. Alastair Nicholson, 'Sixteen years of Family Law: A Retrospective', (2004) 18 *Australian Journal of Family Law* 131, 144.

61. Id, 144–45.

commenced operation in 1976. It was created as a superior court of record, at the same level as the Supreme Courts of the states and territories – and at a fairly similar level of cost in terms of judicial salaries and pensions.

By 1988, the volume of work had become such that the Family Court began to delegate certain judicial functions to officers of the Court – registrars and 'judicial registrars' - who did not have judicial tenure or as high salaries. In 2000, the government set up a Federal Magistrates Court, now called the Federal Circuit Court, with a jurisdiction mainly in family law. It deals with most family law cases, leaving the Family Court as a trial court for complex cases and as an appeal court for the family law system.

Yet even with such strategies, there are limits to which governments have been willing to fund the expansion of the court system. This is in part be due to competing priorities. A Family Justice Working Group in Canada made this observation in 2013:[62]

> 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,[63] but also from a desire to achieve significant budgetary savings. Legal aid for family 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 for the most part legal aid is no longer available to litigate private family law disputes.[64] The Court

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[62] 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.

[63] Family Justice Review, *Final Report*, (November 2011); Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A system with children and families at its heart*, (Feb. 2012).

64. 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,

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.[65]

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).[66] 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.[67]

These kinds of reforms are in response to a sense that the growth in the cost to government of family law disputes is simply unsustainable. 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 support for single parent households. The temporary nature of so many family relationships also creates other costs for government – for example in terms of health services.[68] There may also be a perception that family courts represent bad value for money - 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.

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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).

65. For details, see http://www.justice.gov.uk/downloads/family-justice-reform/schedule-to-allocation-and-gatekeeping-guidance.pdf.

66. *Children and Families Act* 2014, s.10; *Family Procedure (Amendment No. 3) Rules* 2014.

67. *Family Procedure Rules* 2010, as amended in 2014, rule 3.8.

[68] Patrick Parkinson, 'Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State' (2011) 45 *Family Law Quarterly* 329.

It follows that one position within government may well be to hold that 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. Resource 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.

On this view, it is best 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.

And so there is now a 'perfect storm' in terms of the crisis in the family law system in many countries. Demand is, it seems, ever-increasing, systems of adjudication which are largely unsuitable to deal with ongoing family relationships have only slowly evolved to deal with the new situation, and are often unable to cope. Governments are freezing or cutting resources for the courts that deal with family disputes. This storm has the potential for real harm to the lives of vulnerable parents and children unless new solutions are found to reduce levels of conflict and scope for disputation between former couples.

The downside of downsizing

Uniformly, cuts to family law programmes, or simply a failure to maintain and increase resources, have been met by criticism and complaint from family law professionals. That is understandable.

Something important is lost, for example, when there are savage cuts to legal aid. Such cuts further exacerbate the problem of access to justice. As John Eekelaar and Mavis Maclean have pointed out, giving people information about the law is no substitute for giving them professional

legal advice about their personal circumstances. Creating online information portals, and other such resources, can go only so far to assist people.[69]

It should be noted that people involved in family law disputes are not necessarily willing participants. Some make choices to litigate; others do not. The victim of domestic violence may have little choice but to engage with the legal system to seek protective 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 little 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,[70] but there is a danger too in mediation's forward-looking focus and in the pressure to compromise. 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.[71] Because mediators are not fact-finders and do not have an investigatory or adjudicatory role, concerns about safety are all too easily overlooked.

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69. John Eekelaar and Mavis Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (2013) 183-201.

70. 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.

71. 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; Liz Trinder, Alan Firth & Christopher Jenks, **"**'So Presumably Things Have Moved on Since Then?' The Management of Risk

The demand for more resources is therefore entirely legitimate. Yet given 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.

PART IV TOWARDS DIFFERENT SOLUTIONS

How then should family lawyers respond to these pressures on the traditional justice system? 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 all need a judicial resolution, but they will at least need the evidence-gathering and expert involvement that can, in due course, create the conditions for 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, these cases involving fitness to parent are 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. Even the cases which settle often do so at a 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.

Five directions for reform may assist in reducing the traffic jams. These are creating different pathways for people to get help, reducing discretion in family law cases, providing guidance to

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Allegations in Child Contact Dispute Resolution", (2010) 24 *International Journal of Law, Policy & Family* 29.

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.

Creating alternative pathways for people to get help

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

Seeing a parenting dispute 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).[72] 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

72. 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).

therefore to create alternative pathways to people to get the help they need if the known pathway – through lawyers – is no longer available to the same extent.

This requires a fundamental rethinking of the structural place of mediation within the family justice system. Mediation for families after separation developed first as an alternative to litigation[73] 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 the role of mediation being 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.[74] 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 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. 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,[75] in Australia, the

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

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

75. 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

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.[76] There are now 65 Centres all over the country, approximately one for every 300,000 of the population, in all the major population centres and regions. The first of them opened in July 2006.

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

Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts', (2006) 65 *Maryland Law Review* 82.

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

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. 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. 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 2006[77] 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.[78] The grounds of exemption include a history of family violence or the risk of it.[79] 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.[80] 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

77. *Family Law Amendment (Shared Parental Responsibility) Act* 2006, amending the *Family Law Act* 1975.

78. *Family Law Act* 1975, s.60I.

79. *Family Law Act* 1975, s.60I(9).

80. *Family Law Regulations* 1984, regs. 62(2), 62A).

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.

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. 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.[81] 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

81. Family Law Council, *Improving Post-parenting Order Processes* (Canberra, 2007).

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 children's cases in a five year period.[82] 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.[83]

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 due to their lack of financial resources.[84] This shows that the FRCs offer a means of assisting that large body of people who cannot realistically afford

82. Parkinson, above n.76.

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

84. 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.

private lawyers but who also do not qualify for state-funded legal assistance or feel able to represent themselves in litigation. Resources of this kind can provide help to families in dispute that is affordable, reducing significantly the number who seek an adjudicated solution.

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 [85] 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 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.[86] For example, a

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

[86] The terminology of centripetal and centrifugal law is derived from Marc Galanter, "Justice in Many Rooms:

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 to deal with a disparity in earning capacity as a consequence of role division within the relationship. 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. 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 it is well-designed.

In Canada, some degree of predictability has also been achieved through the Spousal Support Advisory Guidelines.[87] These guidelines distinguish between cases where the spousal support is

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Courts, Private Ordering and Indigenous Law" (1981) 19 *J of Legal Pluralism & Unofficial Law* 1.

[87] Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice Canada, July 2008). See also Carol Rogerson & Rollie Thompson, 'The Canadian Experiment with Spousal Support Guidelines', (2011) 45 *Fam.L.Q.* 241.

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.

The division of family property on separation is another area where there is a lot of scope for centripetal laws. 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 worst of all worlds is a highly discretionary system such as in England and Wales and Australia. In these jurisdictions, 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.[88] 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, or giving guidance on outcomes.[89] That perpetuates the extremely discretionary nature of the jurisdiction, increases the likelihood that cases will be adjudicated, exacerbates delays because of the volume of litigated cases, and leads to unaffordable family law. Affordable family law is law that helps people resolve their disputes themselves, or with legal advice.

Providing guidance to assist resolution in parenting disputes

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

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

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

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 negotiate settlements in the light of what, they are advised, courts will do. However, in Australia, only about 6% of all parenting cases that are commenced in the courts end up in a judgment following a trial,[90] and the experience in other jurisdictions is similar. These cases disproportionately involve issues of domestic violence, child abuse, drug and alcohol addiction and mental illness. They are not typical of cases and so offer limited guidance for the resolution of those cases that do not involve issues of fitness to parent.

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.

Such carefully drafted legislation needs to provide norms and guidelines which can help shape the way people view what it means for parents to live apart.[91] 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

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[90] 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.

[91] 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.

of development; and that parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.[92]

Beyond these statements of general principle which can be contained in legislation, 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. Published advisory booklets or sample parenting plans can help provide people with formulae for working out their own parenting arrangements. To be effective, these need to be widely available and preferably, published by an official government agency such as the Ministry of Justice or its equivalent.

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 (e.g. 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

[92] See further, Patrick Parkinson, 'The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience' Dalhousie LJ in press.

young children staying overnight with non-resident parents,[93] a consensus statement has been written reflecting a large body of expert opinion in the field.[94] Other 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 research.[95]

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 agreement on a range of issues.[96]

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,

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[93] See for example the Family Court Review special issue of 2011 edited by Jenn McIntosh and the responses published the following year: Michael Lamb, 'A wasted opportunity to engage with the literature on the implications of attachment research for family court professionals', (2012) 50 *Family Court Review* 481; Pamela Ludolph, 'The Special Issue On Attachment: Overreaching Theory And Data' (2012) 50 *Family Court Review*, 486. See also Pamela Ludolph & Milfred Dale, 'Attachment in Child Custody: An Additive Factor, not a Determinative One' (2012) 46 *Family Law Quarterly*, 1; Linda Nielsen, 'Woozles: their Role in Custody Law Reform, Parenting Plans and Family Court' (2014) *Psychology, Public Policy, and Law*; Judith Cashmore and Patrick Parkinson, 'The Use and Abuse of Social Science Research Evidence in Children's Cases' *Psychology, Public Policy and Law*.

[94] Richard Warshak, with the endorsement of 110 researchers and practitioners listed in the Appendix. 'Social Science and Parenting Plans for Young Children: A Consensus Report'. (2014) 20 *Psychology, Public Policy, and Law*, 46.

[95] Marsha Kline Pruett, Jenn McIntosh, & Joan Kelly, 'Parental Separation and Overnight Care of Young Children, Part I: Consensus through Theoretical and Empirical Integration' (2014) 52 *Family Court Review* 240; Jenn McIntosh, Marsha Kline Pruett & Joan Kelly, 'Parental Separation and Overnight Care of Young Children: Part II: Putting Theory into Practice' (2014) 52 *Family Court Review* 256.

[96] See the following articles, to be published in the January 2015 issue of the Family Court Review: Patrick Parkinson & Judith Cashmore, 'Reforming Relocation Law – An Evidence-based Approach'; the response by Rollie Thompson, 'Presumptions, Burdens And Best Interests In Relocation Law'; the reply: Patrick Parkinson, & Judith Cashmore, 'Reforming Relocation Law: A Reply To Prof. Thompson'.

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.[97] These factors 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 sort to encourage shared care.[98] 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.

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.

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

[97] Family Law Act 1975 (Cth) s.65DAA(5).

[98] See Parkinson, above n.92.

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.[99]

In Denmark, the County Governors' Offices are given a lot of responsibility for resolving disputes and making orders.[100] 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. 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. 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.[101]

Another example of innovative practice is the Oregon informal domestic relations trial in Deschutes County, Oregon.[102] This involves a form of trial in which the rules of evidence are

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

[100] 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.

[101] 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.

[102] See further, http://courts.oregon.gov/Deschutes/services/famlaw/Pages/Informal-Domestic-Relations-Trials.aspx.

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.

Minimising incentives for defensive legal practice

A final reform to make family law more affordable would be to have measures designed to limit legal costs by addressing 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 if they provide unbundled legal services. 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.

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. Other factors have also contributed to a substantial increase in court filings.

Governments in western countries face a lot of other financial pressures and in many jurisdictions, funding for the family justice system is not rising commensurately with demand. Consequently, it is necessary to rethink what we are doing in family law – to redesign the system. There will always be some cases that require adjudication, but not necessarily in the form it traditionally takes. It is time to rethink our centripetal and discretionary approach to family law, and to adopt new strategies to make it more affordable.