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Family Laws and Delivery of Justice

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INTRODUCTION

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

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

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

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

Marriage, divorce and custody laws

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

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

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

a) Divorce as the dissolution of the family

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

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

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

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

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

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

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

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

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

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

b) The emergence of the enduring family

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

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

c) The transformation in custody law

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

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

[7] Théry, supra note 5, at 356.

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

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

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

In different ways, similar ideas came into the law throughout much of Europe within a decade. In France, for example, the law of parenting after separation was based upon the principle of coparentalité from 1993. [11] A common legislative approach which has had the effect of encouraging joint custody has been one of non-intervention. Instead of allocating custody as one of the matters to be dealt with in granting a divorce, joint custody is deemed to continue after separation unless one parent seeks a court order to the contrary. This was how joint custody became the norm in Sweden[12] and Finland[13] from the early 1980s onwards,[14] and is now the position in the other Scandinavian countries as well.[15] A similar approach was adopted in Germany by the Gesetz zur Reform des Kindschaftrechtes, 1997,[16] which amended the Civil Code to provide that the parents have joint parental responsibility during the marriage and unmarried parents may agree to joint parental responsibility by formal declaration.[17] This joint

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

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

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

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

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

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

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

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

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

Australia adopted similar reforms to England in 1995.[19] The language of 'custody' was replaced with the language of residence and contact orders, and parental separation or divorce did not, of itself, result in any changes to parental responsibility except to the extent that the court so ordered. The position evolved further with the 2006 amendments to the Act. Now courts may make orders concerning with whom the child will live and how much time the other parent will spend with the child.[20]

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

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

a) Encouraging the involvement of both parents

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

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

[19] *Family Law Reform Act* 1995.

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

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

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

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

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

France offers one example. The principle of "coparentalité," established in 1993, was strengthened by legislation enacted in 2002.[23] In particular, this legislation made clear that alternating residence (where the child spends an approximately equal amount of time with each parent) is an option. The background to this reform is that while amendments made in 1993 established the principle of joint parental authority after separation, the legislature, at that time, rejected the idea of alternating residence.[24] However, some judges were persuaded to fix a

[21] Mo. Ann. Stat. §452.375.

[22] See, e.g., Cal. Fam. Code § 3020.

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

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

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

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

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

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

The 2006 legislation in Australia reflected these international trends. One of the objectives of the Family Law Act, as amended by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006, is to ensure that "children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child." This is importantly balanced by another object of the legislation, the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent.

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

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

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

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

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

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

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

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

[30] *Family Law Act* 1975 s.60CC(2A).

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

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