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Promoting Parental Involvement and Reducing Conflict in Post-Dissolution Families: The Role of Custody Decision Rules

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Two interrelated goals have dominated U.S. policy discussions about child custody in recent years. The first goal aims to promote the continued involvement of both parents in their children’s lives after family dissolution. The importance of this goal has played a role in many recent developments in U.S. custody policy: the increased use of mediation to resolve disputes, the emphasis on parenting plans (ideally based on parental agreement), “friendly parent” provisions in custody statutes disfavoring uncooperative parents, the importance of parental alienation as a custody factor, and prominence of shared parenting in policy discourse. Some of these developments are also linked to the second goal, which focuses on the importance of cooperation between separated parents and the harmful impact on children of conflict between parents—and particularly the harm of children’s exposure to family violence. A broad consensus of policymakers and practitioners who deal with child custody embrace these goals. Their importance is evident in the recent report on custody policy and practice by a Think Tank made up of prominent American experts on child custody, sponsored by the Association of Family and Conciliation Courts (AFCC).

Each of these goals is grounded in research that indicates that after divorce, children do best when both parents continue to be actively involved in their lives—as long as the parents can maintain a minimal level of cooperation. Although divorce necessarily results in unwelcome changes for most children, minimizing the disruption of parent-child relationships reduces its harmful consequences. Reduced contact with a parent after divorce is associated with poorer adjustment in children; thus cooperative shared parenting relationships are optimal. But shared parenting between parents who cannot cooperate is not beneficial to children. Much research supports that exposure to conflict between their parents is associated with poor outcomes for children.¹

Often these goals are compatible: Parents can be encouraged to cooperate in devising a workable parenting plan that will facilitate harmonious co-parenting after divorce. Indeed

¹ This conclusion is supported by many studies, beginning with Mavis Hetherington’s important study of divorce. See also research on court-ordered joint custody.

the mutual act of executing a parenting plan likely promotes cooperation as the plan is implemented in the reconstituted family. For parents who need assistance in reaching agreement, mediation provides the framework for cooperative resolution of disagreements about future arrangements through a process in which the parents take responsibility for reaching accord. Longitudinal research indicates that custody mediation is associated with long-term positive outcomes for children, including greater sustained involvement by fathers in their children's lives.²

Custody experts promoting policies aimed at achieving the goals of cooperative shared parenting generally assume that parents will be able to make their own custody decisions and that the most important role of policymakers and professionals is to support and encourage them in fulfilling this task. This is sensible, given that the adjudication of child custody inherently represents a failure of cooperation between parents and often involves intense conflict. But the reality is that some parents fail to reach agreement about custody arrangements even in mediation and turn to courts to assist them in resolving these painful disputes.

When this happens, the experts have little to offer on how the judicial process can best function to avoid undermining contemporary goals. The Think Tank report, for example, endorses the best interest of the child standard for resolving custody disputes, and suggests some factors that either research or clinical practice suggest are important considerations for the judge in making individualized case-by-case decisions. The best interest standard has been the dominant custody decision rule for more than 40 years in the United States, and from the beginning it has been subject to scathing criticism. That experts such as the AFCC Think Tank favor this standard suggests that a) their focus is predominantly on promoting parental decision-making and b) that they do not think any alternative rule better advances the key goals they endorse.

On my view, policies promoting parental decision-making and cooperation are desirable but it is also important to have a custody rule that reduces the harms of adjudication and, to the extent possible, furthers the aims of custody law of promoting the “stable, healthy and continuing contact with both parents”³ in the future. The best interest standard fails on both counts. As I explain below, this vastly indeterminate standard almost insures that

² Robert Emery and colleagues have done the most comprehensive longitudinal research on mediation.

³ Marsha Pruett and Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*-AFCC Think Tank Report at 2.

parents' hostility toward one another will increase in the process of adjudicating custody, while providing no guidance for judges struggling with custody decisions. This is particularly unfortunate because another rule, the American Law Institute approximation rule is more compatible with the goals of reducing conflict, promoting cooperative parenting and using solid social science research as a basis for custody decisions and arrangements.⁴

The best interest of the child standard directs judges to base the decision on the factors that in the individual case are relevant to a custody decision that will promote the child's welfare. Under standard formulations of the standard, judicial discretion is virtually unlimited. Even where particular factors are emphasized—such as qualities of the child and of each parent, and the nature of each parent-child relationship—judges face daunting challenges in seeking to evaluate evidence based on these factors and make a custody decision. First, assessing the accuracy of evidence (and particularly qualitative evidence about relationships and parental competence) may be extremely difficult in a situation in which the family is in crisis and each parent is motivated to present evidence in a way that furthers his or her custody claim. Further, the various factors are incommensurable, and judges have little basis for weighing and comparing the conflicting evidence offered of each parent's strengths and deficiencies. (What if the parent with a closer bond to the child is less emotionally stable?)

Judges routinely turn to mental health professionals (MHPs) to assist them in making these difficult decisions, and seem to believe that MHPs have the expertise to evaluate families, assess the accuracy of parents' accounts, compare parental strengths and weaknesses and make recommendations about the custody arrangement that will best promote the child's welfare. But as eminent social scientists have persuasively demonstrated, MHPs are not capable of performing these functions and, in seeking to provide the assistance asked of them by courts, they often go beyond the bounds of their knowledge and expertise.⁵ Moreover, these professionals, like everyone else, have personal biases and professional perspectives that shape how they evaluate family information and the opinions they reach—and social science knowledge is simply insufficient to guide their conclusions. For example, one MHP may have a strong preference for shared parenting, while another views stable continuity of the primary-caretaker-child bond as essential, and has a strong aversion to

⁴ Principles of the Law of Family Dissolution, sect. 2.08

⁵ See generally Timothy Tippins & Jeffrey Wittman, *Empirical and Ethical Problems with Custody Recommendations*, 43 FAM. CT. REV. 193 (2005); Robert Emery, Randy Otto & William Donahue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCH. SCIENCE IN THE PUBLIC INTEREST 1 (2005).

exposing children to interparental conflict. Both positions have some grounding in social science research but the two MHPs may emphasize different evidence and have different opinions about custody. Ultimately, scientific research cannot guide judges in applying the best interest standard in most cases. Of necessity, the decision will be based on either the judge's endorsement of the MHPs' opinion or the judge's own values, preferences and biases regarding the custody arrangement that promotes the child's welfare.

Sanguine (or resigned) acceptance of the best interest standard is particularly troubling because application of the standard undermines the goals of promoting the ongoing cooperative involvement of both parents in their children's lives. First, as an indeterminate standard in which the outcome of adjudication is uncertain, the best interest standard fails to deter litigation and strategic behavior by parents, and does not promote cooperative planning and decision making. More importantly, the best interest standard virtually invites each parent to produce any evidence of the other parent's deficiencies that could plausibly be deemed relevant to custody. Statutory factors focusing on the quality of the parents (and of parenting) and of the parent-child relationship encourage the production of this kind of evidence. Adjudication under the best interest standard is almost destined to generate hostility between the parents that may severely impair their ability to develop a cooperative relationship in parenting their child post-divorce.

Ironically, the problem has become exacerbated by two custody factors that have become prominent in recent years partly because they embody the key goals of custody policy described above. Against the backdrop of the indeterminate BIC standard, custody battles increasingly have focused on claims of parental alienation and domestic violence. These allegations are often legitimate but, because they carry substantial weight, may sometimes be used strategically.

* * *

The ALI approximation standard is a superior legal rule for resolving custody disputes in part because it is more compatible with the aims of custody law. Under the ALI standard, in most cases, the parents continue to share decision-making authority, with the allocation of physical parenting time based on the family's past practices. Current research suggests that

fathers perform about one third of child care;⁶ thus, a typical custody order under the approximation standard would provide that the child reside with the father one third of the time (shared parenting under most definitions). If the parents have shared caretaking responsibility equally before dissolution, their custody arrangement will be much like joint physical custody. Even the parent who has had minimal involvement with his children will usually be awarded parenting time, in recognition of the benefit to the child of maintaining a relationship with both parents.

Basing custody on past parental caretaking promotes continuity and stability in the child's relationships and environment, preserving caretaking arrangements with which both the child and the parents are familiar. Approximation is grounded in developmental knowledge that confirms the importance of the bond between the child and the caretaking parent, but also in research emphasizing the critical role of fathers both before and after dissolution.

The approximation standard potentially can promote cooperation between the parents and reduce some of the conflict and hostility associated with adjudication. First, as a more determinate rule, the A.L.I. standard discourages litigation and encourages the parties to reach agreement because they have a rough sense of the outcome of adjudication. Beyond this, parties are not encouraged to marshal evidence of one another's failings as parents. Instead, relevant evidence focuses on concrete factual behavior that establishes the family's past caretaking practices and routines. Evidence of parental competence or the quality of the parent-child relationship is only admissible in cases in which one parent is alleged to be unfit to care for the child.⁷ Although obtaining accurate family information in the midst of divorce will always be difficult, courts can more accurately evaluate objective and quantitative evidence of caretaking than the qualitative relationship and competence factors that dominate under the best interest standard. Further, a proceeding that focuses on concrete behavioral evidence is less likely to leave lasting scars that make future cooperation difficult. In most cases, parents are not permitted to claim that the other parent's capacities are inadequate, or that the allocation of parenting responsibility that both parents accepted in the intact family was so deficient that it should be dramatically revised.

⁶ Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?* 37 DEMOGRAPHY 401, 411 (2000).

⁷ Proof of serious domestic violence constitutes unfitness under presumptions in most states. See state-by-state ANALYSIS ON CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE, A.B.A COMM. ON DOM. VIOLENCE (2008) at <http://www.abanet.org/domviol>.

Approximation is likely to promote future cooperation between the parents in another way. Co-parenting arrangements that build on the parents' past caretaking experience are more likely to function smoothly than those in which parents undertake unfamiliar roles. Each parent is likely to be comfortable and competent in his or her pre-divorce roles and accepting of the other parent's competence to continue in that role. For example, parents who have co-parented fully before divorce are likely to have confidence in each other's parenting capacities. In contrast, a primary caretaker may be skeptical about the other parent's caregiving skills and that other parent may not be able to anticipate whether he can accommodate these new responsibilities into his life in a satisfactory way. Some research evidence indirectly supports this prediction. In their comprehensive study of custody decisions and arrangements, Robert Mnookin and Eleanor Maccoby found that families with joint custody orders tended to drift over time toward an arrangement in which the child lived predominately with the mother.⁸ When the study was conducted in the 1980s, shared parenting in intact families was less common than it is today, and the finding may suggest that parents as well as children were more comfortable with their pre-dissolution roles than with the preferences they express at the time of divorce.

Fairness is not the primary goal of the child custody decision but parents' sense that they have been treated fairly may affect their acceptance of the arrangement and inclination to cooperate with one another in the future. Under traditional law, involved non-custodial fathers have resented the diminishment in their parental status and effective disenfranchisement, which may have contributed to their withdrawal from their children. The approximation standard provides a fair basis for the allocation of parenting time. When two parents have fully shared parenting responsibilities in the intact family, neither can reasonably complain that the arrangement should not continue post-divorce. On the other hand, a primary caretaker may resent being coerced to share parenting responsibilities with a parent who previously focused on his work and not on family responsibilities.

Finally, the approximation standard will reduce the misuse of social science and clinical testimony in custody proceedings. In most cases, there should be little need for psychological evaluations or testimony, and MHPs who do participate will be more motivated to offer observations within the scope of their expertise. For example, controversial

⁸ See ROBERT MNOOKIN & ELEANOR MACCOBY, DIVIDING THE CHILD, 162-70 (1992).

expert testimony on parental alienation, based on the flimsy research with little scientific merit, will not be admissible.⁹

The approximation standard does not resolve the difficult challenge of adjusting co-parenting arrangements to flexibly respond to children's developmental needs over time. Only parents planning and working together cooperatively are likely to meet this challenge. But no custody rule is likely to function more effectively than the A.L.I. standard to promote parental cooperation, limit the lasting harms of adjudication and result in stable satisfactory parenting arrangements.

⁹ See discussion in Scott & Emery, *supra* note 8.

When Two Worlds Collide? The Rolls Royce of Theory Meets the Jalopy of the Real World: the UK (England and Wales) Experience

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Abstract

In this paper we present a set of programmes being trialed in England and Wales which have been informed by an evidence-based psychological theory, Behavioural Modelling Training . They are: an on-line film-based, interactive programme; a parenting plan; a taught group intervention; a structured joint interview. The programmes are underpinned by the same theory and have been designed to reinforce each other via the different modes of delivery. Both presenters have been involved in researching and developing these programmes. We will describe the programmes and underpinning theory. Next we will reflect on the real-world challenges involved when best practice—ie, theoretically informed interventions—meets the actual agendas of parents, professionals and political systems.

Introduction

Family law has been subject to significant and complex changes over recent decades. In England, as elsewhere, there has been a significant shift from formal legal process and adjudication of disputes, supported by legal aid, towards private ordering and dispute resolution. At the same time the state has continued, if not expanded, its attempts to shape parental behavior, notably in relation to the ‘good divorce’ and continuing parental responsibility and shared parenting. Diduck captures this dual approach with the concept of ‘dejuridification’, that is, “[t]raditional forms of legal regulation have been replaced by forms that appear to rely less upon the formal adjudication of rules and direct coercion of norms than upon approaches that permit, or demand, individuals to take personal responsibility for organising their family lives in socially and politically ‘acceptable’ ways” (2003:2). The main focus of those efforts has been the promotion of mediation and other forms of dispute resolution. Increasingly, however, attention has been given to a parallel technology – that of parent education for separated or divorced parents. There is now a very wide range of programmes spanning basic education to therapeutic programmes designed variously to facilitate or enforce contact and support coparenting (see Hunt 2005 for a review).

For some this transformation is to be celebrated. Singer (2009:363), for example, welcomes a “paradigm shift” from a “law-oriented and judge-focused adversary model” to a more “collaborative, interdisciplinary, and forward-looking family dispute resolution regime.” For Singer this includes the emphasis on “capacity-building processes that seek to empower families to resolve their own conflicts”, with judges in the role of motivating families to engage and to monitor compliance and progress. (2009:364).

However, the growth of parent education programmes has attracted criticism. John Eekelaar (2009, 2010) has argued that programmes are likely to be ineffective whilst also being intrusive. Felicity Kaganas (2010:270) views programmes as particularly oppressive to women, characterising them as an alternative means by which the state can coerce mothers, not just into allowing contact against their better judgment, but doing so in a ‘conflict-free’ way.

In this paper we explore some of these arguments using a theoretically-informed ‘Rolls Royce’ intervention for litigating parents as an exemplar. Our analysis has broader implications for the scope and effectiveness of parenting education as a mechanism through which the state can transmit messages about family life and attempt to reshape behaviours.

Parenting interventions in England and Wales

Parent education for litigating parents has expanded rapidly since the Children and Adoption Act 2006 enabled family courts to refer litigating parents to ‘Contact Activities’ to support child contact with the non-resident parent. In 2012 more than 18,000 adults attended Parenting Information Programmes (PIP). Whilst the effectiveness of the PIP was modest (Trinder et al 2011), the government-appointed Family Justice Review (Family Justice Review Panel 2011) recommended that PIP continue to be developed. The government endorsed the FJR’s recommendations, including a commitment to considering how to make such programmes available to parents as part of pre-court dispute resolution processes (Ministry of Justice and Department for Education 2012). Subsequently the government commissioned an evaluation of an extended version of the PIP - the SPIP Plus pilot.

The SPIP Plus intervention

The SPIP Plus pilot (Trinder et al, forthcoming) was a court-referred programme, available for parents litigating over contact and residence (access and custody). SPIP Plus aimed to assist parents to reach child-focused arrangements and to establish effective

communication patterns. It placed much more emphasis on teaching and practicing skills compared to the earlier PIP. The core skills were:

- *Staying Calm*: self-regulation to prevent/reduce conflict, stress levels, listen and respond when communicating
- *Learning to Listen*: for ‘active’ constructive listening
- *Being Clear, Sticking to the Point, Sticking to the Rules, and Speaking for Yourself*: communication and conflict management skills; principles and techniques for responding in a non-confrontational way.

The programme was based on behavioural modelling training (BMT) - one of the most widely used, well-researched and highly regarded psychologically based training interventions. BMT is itself based on Bandura’s (1977) social learning theory. The key elements of BMT are:

- Attention – “I get it”
- Retention - “It sticks”
- Rehearsal – “I’m practising”
- Transfer – “I am applying it...to new situations”
- Motivation – “I can change, things will improve”

The SPIP Plus programme included four elements or stages.

1. SPIP session. A four-hour mixed gender group, but where the former couple attended different groups. The SPIP session covered basic communication skills for keeping children out of the middle and managing potential conflict.

2. *Getting it Right for the Children* online programme for parents to complete at home. GIRFC sought to develop and expand the basic skills introduced in the group session. GIRFC uses filmed scripted scenes of five different families in commonly occurring post-separation scenarios. The scenarios show the parents interacting ineffectively, then interacting effectively and then each character (the two parents and the child) reflects on their feelings and intentions, and the impact of their and the others’ behaviour.

3. A scripted ‘Plus’ session attended by both parents together, subject to suitability screening. The intention was to consolidate any progress and to move the couple on to the next necessary step: to attempt to implement any progress together. During the meeting, building

on BMT principles, the role of the providers was to provide feedback as they identified, supported and applauded the use of skills evidenced during the Plus encounter.

4. A mediation information and assessment meeting (or MIAM) where the provider explained the purpose of mediation and encouraged the parents to consider proceeding into mediation rather than requiring the court to resolve the dispute. The parents could then proceed to mediation to negotiate an agreement, make their own arrangements or return to court.

The evaluation

The evaluation of the pilot sought to identify whether the revised SPIP was more effective than the original PIP intervention or the standard court pathway evaluated in 2011. The research design involved a telephone survey of 251 SPIP parents (including attenders and non-attenders of the Plus element) matched to the previous samples of PIP attenders and standard pathway parents. Qualitative interviews with 25 SPIP Plus parents and focus groups with SPIP deliverers provided insight into the SPIP experience.

The results

The quantitative outcome data suggests SPIP was modestly successful, at least in relation to contact arrangements, compared to the previous PIP and the standard court pathway. SPIP resulted in more cases being closed with arrangements in place and, especially where parents attended the whole SPIP Plus programme, more children having more contact. Parents were more likely to report that their child was happy with arrangements. But there was little, if any, impact on the parental relationship outcomes that the programme was designed to target. The only exception was that parents reported that the other partner was more likely to stick to agreements.

The qualitative interviews highlighted how diverse the parent experience of SPIP Plus was, with some parents achieving significant change, some parents taking away some learning points and other parents finding the programme irrelevant. In broad terms, the group session was useful in raising awareness, whilst the joint Plus session could be useful, even transformative, in re-establishing communication for some parents.

At the same time, there were significant problems with ensuring compliance with the full programme, despite the programme being court mandated. Fewer than half of parents accessed the online programme that was intended to consolidate earlier learning. Those parents who did use the programme were broadly positive, with 67% finding it useful.

However only 48% (or fewer than a quarter of referrals) found it relevant. Similarly, only four out of ten cases in which parents attended the initial SPIP group sessions went on to complete the joint Plus session and MIAM. Parents' reactions to being referred to SPIP Plus were diverse – from those who were positive about attending, to others who did not feel it was necessary or desirable. Many parents were not aware that they would have to attend a joint session with their ex partner until they had started the programme and, for some parents, having to attend a joint meeting was a source of anger or concern. There was also evidence that providers freely adapted or entirely departed from the scripted material and thus undermined programme integrity. Finally, only a quarter of parents attending the Plus session did go on to mediate afterwards with most returning back to court.

Discussion

Despite being a high quality theoretically-informed programme, the SPIP Plus pilot achieved rather modest success, though not on the target variables and there were significant problems with compliance. Some of those issues could be addressed by better targeting and implementation. However, some appear inherent in the process. Rather than being intrusive or oppressive to women as Eekelaar and Kaganas suggest, what is more striking about the programme is how able parents were to resist both its reach and its messages. What is also notable is the degree of resistance posed by the practitioners charged with delivering the programme. One fruitful means of interpreting this is a 'realist governmentality' approach outlined by Stenson (2005) and McKee (2009). Rather than viewing governing as a straightforward top-down approach through which the state can radiate its messages, a realist governmentality approach emphasizes messiness, complexity and unintended consequences. That approach appears to reflect our data but poses challenges for policy-makers who wish to transform or shape parental behavior.

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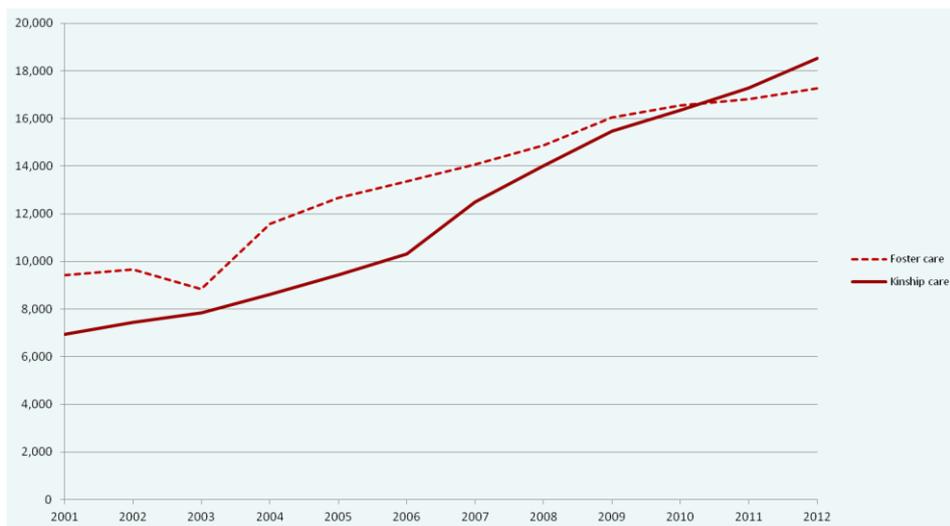


Professor Marie Connolly

Whose responsibility is it? Supporting the needs of informal kinship care

Across cultures and over known human history, children have been looked after and supported by people other than their parents. From basic childcare for busy parents to the raising of orphaned children, extended family has been the foundational safety net for children. Yet this elemental expression of relationship between family members has been tested in recent centuries as modern society has become more complex and, arguably, increasingly at odds with traditional values and the structures which support them. Households have trended toward being two-wage dependent, the number of single parents has increased in Australia, divorce has become more commonplace, and family size has decreased¹. Whilst there have been substantial gains in terms of overall health and the establishment of basic human rights (including the rights of children), broad social and economic trends may have unintentionally led to the undermining and fragmentation of traditional family structures that support children and families.

Over the past twenty years there has been an important shift in Australia toward the use of extended family systems to support and care for vulnerable children. Australia has increasingly come to rely upon family members to care for their more vulnerable relatives due to the recognition that the developmental, cultural and spiritual needs of children can best be met within families². In 2010, for the first time in Australia, statutory kinship care overtook foster care in the statutory care statistics (from Kiraly 2013):



Yet Australia has paid very little attention to the nature and scope of the caregiving activities of extended family. Indeed, there has been fairly scant attention paid to this substantial and growing population internationally, leaving Australia with very little information about how to effectively utilize traditional extended family support to achieve better outcomes for vulnerable children.

¹ Australian Institute of Family Studies (2013; 2004)

² Connolly, M. & Morris, K. (2012) *Understanding child and family welfare: Statutory responses to children at risk*. Palgrave: London.

In general, research into kinship care has generally not kept pace with its growth as the preferred placement option for children who cannot live with their parents³. Policy and practice responses have generally not been informed by strong evidence creating serious gaps in knowledge that could better inform decision-making. In their systematic review, Winokur and colleagues noted that the best available evidence on kinship care did not actually meet the standard required of a systematic review. They nevertheless believed that “practitioners and policymakers benefit more from examining poor evidence than no evidence at all”⁴, and so they included studies that would not have otherwise been included. Most of the 62 studies that were included in the review were conducted in the US. One Australian study was included (Tarren-Sweeney 2006). Overall, these writers argue the need for rigorous quantitative and qualitative research that focuses specifically on children’s outcomes.

Informal kinship care

Although governments across the industrialized world now prioritize kinship care as the preferred care option for children who cannot live with their parents, and states typically have such a policy explicitly enshrined in law and practice, the majority of kinship carers are not supported by the government, either financially or with social services^{5,6}. In part this is because of the complex tensions that exist in terms of family rights and responsibilities, and the role of the state in supporting familial care. Whether the state is considered to have obligations or responsibilities for children within informal kinship care creates complex debate, particularly when placed alongside the role of the family to care for its children. Australia and nations with similar social service systems (NZ, UK, US, Canada) tend to take what has been termed a ‘residual’ approach to child protection and the care of vulnerable children. That is, the sanctity of the family is paramount, and services for parents and children tend to be provided only when substantial child safety concerns are already present rather than delivering preventive social support services before such concerns become manifest. In such systems the vast majority of out-of-home care is not provided by state child protection systems but is, instead, provided by families and supportive adults functioning outside this system. Within this residual approach the wholesale movement toward more traditional forms of family support has seen few resources being made available for a sizable population of non-statutory kinship carers and the children they raise. Still fewer resources have been dedicated to the larger population of families where extended family provide essential support functions such as day care, financial assistance, housing and transportation.

In terms of research most studies on kin have focused almost exclusively on grandparents. While grandparents, particularly grandmothers, may be the largest group of kinship caregivers, there are also many aunts, uncles, cousins, and siblings, friends and neighbours who raise children who cannot be cared for by their parents. Increasingly non- family are being utilised for support and placement services, but almost no research has been conducted with this population, nor have the few services that have been developed been tested for efficacy and/or effectiveness with respect to child outcomes. International research suggests that informal childcare arrangements “...are the substance or glue of communities”⁷. Despite this, we know little about the potential of well-supported kinship care in terms of building important “webs of reciprocity”⁸ that promote health and well-being for children. Informal care arrangements cross class, cultural, and racial boundaries,

³ Winokur, M. Holtan, A. & Valentine, D. (2009). Kinship care for the safety, permanency, and wellbeing of children removed from the home for maltreatment. *Cochrane Database Systematic Review*.

⁴ Ibid, p.11

⁵ Geen, R. (2004). The evolution of kinship care policy and practice. *Future of Children.org*

⁶ Brennan, D. et al. *Grandparents raising grandchildren: Towards recognition, respect and reward*. SPRC: Sydney

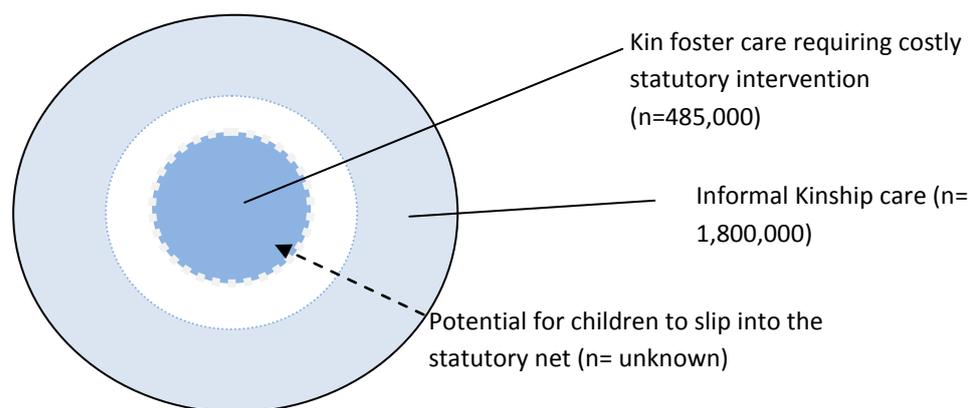
⁷ Geen, R. (2004, p.9)

⁸ Holland, S. et al (2011). Everybody’s Business? A research review of the informal safeguarding of other people’s children in the UK, *Child Soc.* 25 (5) p. 409.

yet little is known about how they can best be effective for addressing child vulnerabilities in an increasingly complex world.

The shift in Australia toward the use of extended family systems to care for vulnerable children has included both biological kin carers, and also kith carers – friends and supportive people within the child’s social network. Vulnerable children may therefore be living with members of their extended family, or they may be living with unrelated adults who are known to them. Within this context the question of who has responsibility for informal kinship care becomes much more complex. We know very little about the informal care of children – how these children are faring within informal systems of care and how this care impacts on their longer-term outcomes. Australia’s residual child protection response by States and Territories utilizes kith and kin care, but without the necessary support systems that would strengthen better outcomes for these particularly vulnerable children.

US research⁹ indicates that there may be as many as 1,800,000 US children in these private informal care arrangements (with an additional 485,000 who are involved with child welfare services). Living below the statutory radar, it is not known how vulnerable these children in informal care are. It is likely that many will nevertheless share characteristics of America’s most vulnerable, those children in statutory intervention. If only 15% of the more vulnerable children living in informal kinship care were to reach statutory attention the statutory kinship care population would double¹⁰:



This would place an untenable strain on statutory services that are already struggling to respond to child protection service demand. It could be argued therefore, from a demand perspective, that broader government support of informal care could be beneficial to both the state and the families involved. In Australia children within informal kinship care arrangements remain largely unrecognized, unmeasured and officially invisible. Currently Australia is unable to participate or contribute to the contentious international debate about informal care of vulnerable children and the interface it has with formal systems of care. It is nevertheless likely that some of the children in informal kinship care will share similar characteristics and vulnerabilities of those children receiving statutory interventions. A stronger focus on prevention and supporting the needs of kinship placements could prevent those more vulnerable children slipping into the statutory net.

⁹ Ehrle, J., Geen, R. & Clark, R.L. (2001). *Children cared for by relatives: Who are they and how are they faring*. The Urban Institute: Washington DC

¹⁰ Geen, R. (2004)

Advancing kinship research and development in Australia

Australia has paid very little attention to the nature and scope of informal kinship care and the interplay between informal and formal support networks needed to strengthen good outcomes for vulnerable children. Taking the opportunity to influence policies guiding kinship care and support at its three major levels (extended family support, informal kinship care, and formal kinship care) is extremely important as the realities of unsupported care can have significant future ramifications both in terms of children's outcomes and the need to support this population into adulthood. This requires a greater emphasis on prevention and initiating programmes of research that would support the development of evidence-informed support services for the large and substantially underserved population of extended family and supportive adult caregivers in Australia. Developing multi-level, evidence-based support service specifically geared toward extended family and the unique issues they face has the potential to strengthen the 'webs of reciprocity' and the broader safety net for children at risk. To do so, however, would require a reengineering of kinship care support in Australia that goes beyond the current focus on statutory kinship care.

Across international jurisdictions governments give effect to their prevention mandates through the support of more generalized parenting programmes such as Incredible Years and Triple P (Positive Parenting Programs). Such programs are seen to have early intervention benefits that prevent problems before they become entrenched. Learning from the broad success of Triple P and its provision of tiered systems of support provides some insight into how the diverse needs of kinship carers might be addressed with respect to the universal needs of extended family support providers, the needs of families with more serious child/family vulnerability, and the needs of children at risk of harm. As with Triple P, a suite of flexible delivery interventions of increasing intensity for kinship carers could create better support their needs at differing levels:

- A population approach to the support of kin carers and their children – reaching as many people as possible with a focus on prevention;
- The development of resources – kinship support practice frameworks, resources and interventions that are clinically trialled and tested;
- Coordinating support for organizations and practitioners that will create a stronger evidence-informed kinship care practice environment;
- Create effective means of communicating kinship care support in ways that are accessible across kinship carer populations;
- Creating evaluation cultures that support the ongoing development of the integrated system of support for kinship carers.¹¹

This kind of integrated programme across the primary, secondary and tertiary levels of intervention has the potential to provide a stronger systemic response that recognizes the interplay between formal and informal support for kinship carers. By normalizing the issues that confront kinship carers it has the potential to strengthen family care without stigmatizing interference in the lives of families needing support. Drawing upon emerging techniques from applied social research could inform frameworks and services that address the unique needs of extended family, many of whom are deeply involved in the lives of Australia's vulnerable children. Intervention research has the potential to map directly on to the public health model (primary prevention, secondary prevention, tertiary care). Using this approach, the wider population of extended families and friends supporting the parenting and other needs of vulnerable children would be provided universal services and resources (primary prevention), those who are identified as having more serious concerns and needs could be offered more targeted services (secondary prevention), and those with the most serious concerns are provided intensive family support services specifically focused

¹¹ Adapted from Triple P: Positive Parenting Program: *Small changes, Big differences*, <http://www.triplep.net/glo-en/find-out-about-triple-p/triple-p-in-a-nutshell/>

on the unique needs of the family. Currently in Australia the needs of kinship families are minimally understood, particularly those providing informal care. If Australia wishes to support the life chances of vulnerable children in informal care settings, and avoid the risk of them slipping into the statutory net, it is important that we look at new ways of supporting them. Creating tiered responses that utilize formal and informal systems of support within a framework of shared responsibility is one way of doing that.

Intergenerational Solidarity (I): Elder Care and Family Law in the Low Countries

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Abstract

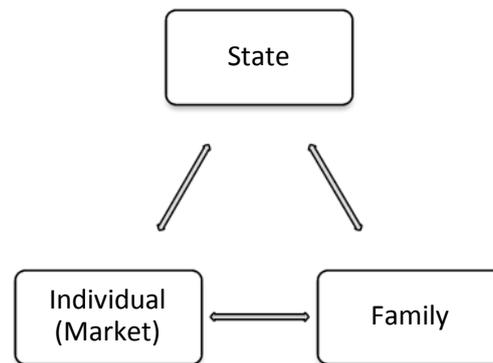
This paper discusses the governance of elder care in the Low Countries, from an intergenerational family law perspective. Its purpose is to highlight the role the legal framework currently attributes to families with regard to elderly care, compared to the roles attributed to respectively the individual and the State, in Belgium (Flanders) and the Netherlands. We will elaborate that distribution successively for financial care and for functional care.

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Renegotiating Governance



In all Western welfare states, care for the elderly is divided between the individual (who buys care on the market), the families and the State – leaving aside the role that may be attributed explicitly or implicitly to (charitable) care by civil society organisations.

The balance in attribution of tasks of elder care differs between societies and epochs, and according to needs and resources.

Particularly the (non-)attribution of care tasks to families may strengthen (or weaken) intergenerational solidarity and interdependency. At the least implicitly, the policy and legal framework conveys a message on the actor considered most appropriate to provide elder care. Bluntly put, a focus on the individual would mirror a liberal policy, a focus on the family a Christian-Democrat policy and a focus on the State a socialist policy.

In literature, the Belgian – particularly Flemish – policy and legal framework is considered to encourage intergenerational solidarity within families. The Dutch framework in contrast is referred to as rejecting the ideal of intergenerational solidarity to the benefit of State provision of elderly care on a general, equal and individual basis.

The question arises how governance of elderly care may need negotiation in light of dramatic geographic trends we will now shortly point at.

1. Demographic context

The demographic context for this paper is the *double ageing* of the population, which is the combined effect of

- the increase of the *old-age-dependency ratio*, due to the decline of the fertility rate and the increase of life expectancy. The old-age-dependency ratio is the ratio of the (economically inactive) population aged 65 years and over, compared to the (economically active) 15-64 years old;

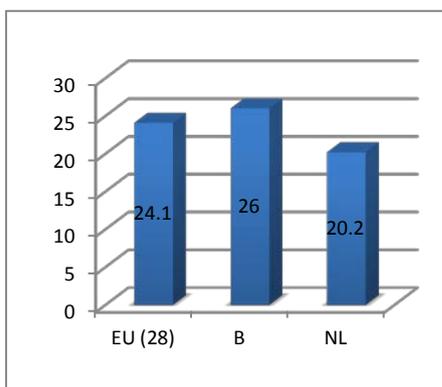


Figure 1. Old-age-dependency ratio 2003

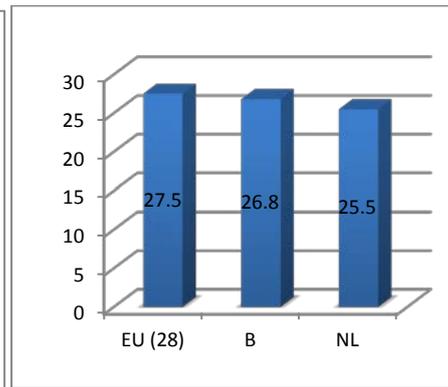


Figure 2. Old-age-dependency ratio 2013

- the relative increase of the *very old-aged* (those aged 80 years old or above) within the group of the old-aged.

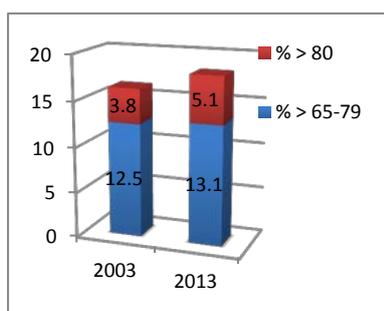


Figure 3. Population EU (28)

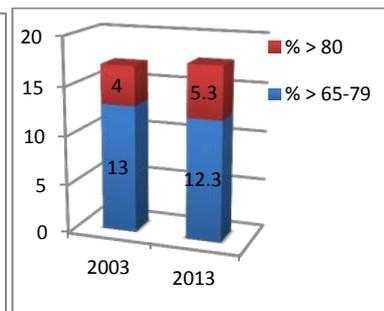


Figure 4. Population B

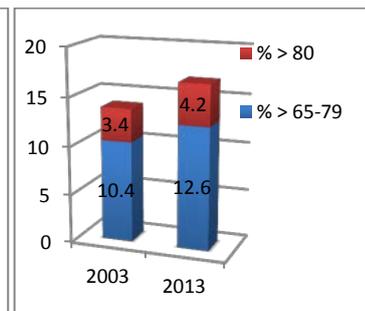


Figure 5. Population NL

A continued double ageing is expected in the EU, particularly with regard to the very old-aged. Belgium and the Netherlands are no exception to this expected trend, although the Netherlands is one of the least aged countries in Europe.

On the macro-level, the population is thus decreasing and ageing. On the micro-level, families are characterised by relatively many vertical ties (e.g. parents, grandparents and great-grandparents) and relatively few horizontal ties (e.g. siblings, cousins).

Another trend is that the old aged in the Low Countries (prefer to) continue being cared for in their familiar surroundings as long as possible. One of the reasons therefore may be the comparatively higher cost of residential care though.

To state the obvious: in all welfare states concerns arise over the sustainability of the social security systems wherein a continuously decreasing active population is responsible of financing the care of a continuously increasing group of old-aged. The lack of necessary resources particularly puts public pensions and healthcare under pressure.

Renegotiating elderly care may therefore compel a shift from the state to the families.

2. Plan

We will consider two forms of care or solidarity in this paper.

In section 4, we will elaborate on financial care. Financial care encompasses the increase of the available income for the elderly (to buy care on the market). Such increase can be achieved both directly through the allocation of income and indirectly through the decrease of (tax and other) burdens.

In section 5 we will consider in-kind care or functional care, and the ways in which such care is encouraged or discouraged.

The division between financial care and functional care will be the main division in the paper and the distribution of care between the individual, the family and the state will subsequently be elaborated.

Division of care may be direct, in that the elderly only subordinately have access to respectively family and state care in case they cannot provide for themselves.

Division of care is achieved indirectly in case the cost of directly accessible care is repayable, for example through subrogation of rights by government agencies.

We will only research intergenerational (or ‘vertical’) family care for the elderly, by adult (grand)children. We will not elaborate ‘horizontal’ solidarity within a couple or other union.

Continental law systems still – yet decreasingly – distinguish private and public law. We have written this paper from a private family law perspective, but will focus on the interrelation with public family law, particularly social security law and tax law.

1. Financial Care

1.1. Pensions

1.1.1. Three-tiered Pension System

Both in Belgium and in the Netherlands, a three-tiered pension system is in force.

The first tier is the public or legal pension.

The Belgian legal pension is a *retirement pension*, organised in the social security system and dependent on professional (or equated) activity. It is available upon reaching the age of 65 years and is calculated on the basis of one's professional (or equated) income in the years of professional (or equated) activity. This pension therefore aims at both guaranteeing a minimal standard of living and at safeguarding the retention of the higher individual standard of living of the person concerned during his professional career. The pension amounts to 75 % (married with dependent spouse) or 60 % (others) of the revalued yearly income on a ratio compared to a 'normal career'. A minimal threshold is guaranteed upon reaching a minimal number of labour (or equated) days.

The Dutch legal pension is an *old-age pension* (AOW, *Algemene Ouderdomswet*), organised through a national insurance scheme independent of any professional activity. It is accessible upon reaching the age of 65 years and two months, which age will be raised to 67 by 2023. It is a flat-rate pension, not dependent on the former professional income. The pension amounts to 50 % (married or in household), 70 % (single) or 90 % (responsible for dependent persons) of the net minimum wage, if the maximum of 50 years of insurance payments is reached. The pension is reduced with 2 % per non-insured year.

In both Low Countries, reaching the pensionable age also gives access to specific allowances or benefits, for example a rental benefit in the Netherlands.

Both Low Countries have developed a policy framework that encourages employees to build up a *supplementary pension*, which is the *second tier*. Supplementary pensions are built up in pension funds or insurance schemes with contributions from both employer and employee. They aim at safeguarding the standard of living after the age of retirement. The

available capital or interest upon retirement thus is calculated on the basis of career and income. The supplementary pension scheme is not compulsory, but governments try to encourage it through social security and tax shelters and by stimulating collective agreements at the level of individual companies or employment sector. At the end, the individual employee finances it – the contribution by the employer indeed is considered to be part of the remuneration.

The *third tier* pension is even more directly a responsibility of the individual. Particularly the Belgian government offers a tax shelter for individual contributions to a *pension fund or pension insurance scheme*, of which the capital or interest is accessible upon reaching the age of 65 (or even 60 yet under less favourable conditions). Such schemes are accessible for everyone, independent of economic activity. The objective again is to safeguard the individual standard of living.

1.1.1. Additional Objective Threshold: Guaranteed Minimum Income

Both Belgium and the Netherlands have *social assistance scheme* that guarantees an *objective* minimal income for the elderly (> 65 years), sc

- the income guarantee for elderly in Belgium (IGO – *inkomensgarantie voor ouderen*) resp.
- the supplementary income scheme for the elderly in the Netherlands (AIO – *aanvullende inkomensvoorziening ouderen*).

Those schemes are only accessible as a last resort, in case the old-aged is not entitled to a full legal pension due to his substandard career resp. years of insurance *and* does not reach a threshold amount with his income *and* has no other income of his own or from members of his household.

Under the Belgian Act, a default guaranteed income applies to the old-aged who shares his main residence with one or more other persons. The default guaranteed income is multiplied by 1,5 for the old-aged not sharing his main residence. In either case, the old-aged also benefits a flat-rate heating allowance.

Importantly, (grand)children with whom the old aged lives are never considered as persons with whom he shares his residence. Also, their income is never taken into account to calculate the available income of the old-aged. The maintenance the old aged receives from his descendants with whom he does not share his residence is also exempted for the calculation of the allowance. The old aged logically furthermore is not required to institute

maintenance proceedings against his descendants and neither is the income allowance repayable by them to the social assistance services.

In the Netherlands, a specific default guaranteed income applies to single elderly, who do not constitute a household. An adult child with whom the old aged lives, is never considered a person with whom he constitutes a household. An adult grandchild, with whom the elderly lives, is only exempted in case the old aged (or the grandchild) is assessed to be in need of care. The (grand)children's income in that case is not taken into account. The maintenance the old aged receives from descendants with whom he does not share his residence is *not* exempted for the calculation of the allowance. The old aged however is not required to institute maintenance proceedings and the allowance is not repayable to the social assistance services.

In sum, the schemes here discussed offer a subsidiary protection vis-à-vis social security schemes and individual (pension) savings or insurance schemes. They are however not subsidiary towards family solidarity, except to some extent in the Netherlands. Moreover, there is no financial disincentive for the old aged living in their descendants' (only in the first degree in the Netherlands) household.

1.1.1. Additional Subjective Threshold: Standard of Living

Both Low Countries guarantee a *subjective* minimal income, sc an income that allows maintaining the standard of living the old aged had before reaching the pensionable age. This guarantee is offered through a private law maintenance obligation.

The Belgian Civil Code encompasses a reciprocal maintenance obligation between all relatives in the descending and ascending line, irrespective of the degree of relationship, and between parents-in-law and children-in-law. These obligations are supplementary to the maintenance obligation between (ex-)spouses. Maintenance on the ground of affinity is supplementary to maintenance between relatives, albeit that matrimonial property law may influence this hierarchy of claims. The old-aged must claim maintenance from his relatives in the nearest degree of relationship first, and in case of similar degrees from his descendants before his ascendants. Multiple maintenance debtors in the same line and degree must only contribute proportionally to their ability to pay; they can anyhow exercise a right of recourse between them. A maintenance claim can also be made against the estate of a deceased (married) descendant leaving no descendants of his own.

In the Netherlands, a maintenance obligation only exists between parents and children (first degree of relationship) and parents-in-law and children-in-law (first degree of affinity). This obligation is also supplementary to marital or post-divorce support. A claim may cumulatively exist vis-à-vis adult children(-in-law) and parents(-in-law) of the old-aged, and the contribution will then be determined by court in function of their ability to pay.

The maintenance obligation only exists in case of need, but the applicable threshold is subjective, in that ‘need’ is determined in function of the standard of living in view of the social situation (‘social standing’) of the maintenance creditor.

The need must be involuntary and the old-aged may generally be expected to first claim benefits under the applicable social security and social assistance schemes, to exhaust income from capital or even to mobilise capital.

The maintenance obligation generally is a cash obligation. The maintenance creditor may also agree to accept benefits in kind, for example a right of habitation. In case of the maintenance debtor’s inability to pay, the courts in both Low Countries may order him to provide lodging for the creditor in his home and to provide the necessities there. We are not aware of case law applying this possibility. It anyhow seems contrary to the right to respect for private life of both parties concerned.

Tax deduction applies to 80 % of (the value of) maintenance paid on a regular basis in Belgium, on the condition that the maintenance creditor is not a member of the debtor’s household. In the Netherlands, tax deduction is not provided for.

In the Netherlands, dishonourable behaviour by the maintenance creditor towards the debtor is a ground for reduction – even to zero – of the maintenance claim. Such ground does not exist in Belgium. Nevertheless, the parent of even an adult child may be divested of parental authority, and will thus be excluded from maintenance and inheritance claims.

There is almost no case law with regard to maintenance obligations vis-à-vis the old aged and it remains unclear why this is so. One reason may be that the individuals and the state provide the necessary. Secondly, the family seems willing to provide maintenance or the necessities on a voluntary basis. Thirdly, some literature points at the reluctance of the elderly to petition the courts in case their children do not offer help voluntarily. Such claim may prove to be counterproductive, for example for the contact between grandparents and (minor) grandchildren. Particularly in Belgium, the abolishment of the maintenance obligation

between adult parents and children has therefore been advocated. We hesitate to subscribe to those proposals, in light of the increasing pressure on social security schemes. Abandoning maintenance obligations should at the least be substituted with a policy on functional care.

1.1.1. Tax Shelters

The tax policies of both countries aim at reducing the tax burden for the old aged.

In Belgium, a tax shelter firstly applies to the 1st tier pension, in that a flat-rate amount is exempted from taxes. Secondly, only 80 % of the maintenance received is considered to be taxable income. Thirdly, tax benefits apply to payments received after reaching the pensionable age under the 2nd and 3rd tier pension schemes.

In the Netherlands, supplementary tax credits apply for the elderly. Beside, they are exempted from paying the premium for the 1st tier pension. The tax-exempted capital is also increased. Received maintenance is taxable income without exemption.

1.1. Health Care Benefits

The increasing life expectancy causes increasing needs of health care.

Both Low Countries provide for a generalised insurance system under their social security schemes on the one hand. The affordability of health care insurance for the elderly is guaranteed in that scheme.

On the other hand, benefit schemes for elderly with reduced ability for self-care also exist in both countries.

1.1.1. Two-Tiered Health Care Insurance System

The health care system in both Low Countries consists of a social security scheme on the one hand (first tier) and private insurance schemes on the other (second tier).

The first tier health insurance systems of the Low Countries accommodate elderly in quite different ways.

The Belgian health and infirmity insurance scheme (ZIV, *ziekte en invaliditeitsverzekering*) is based on a compulsory insurance either as employee (or equated) or as dependant with derived rights.

There is a nomenclature of medical expenses that are partly or fully reimbursable to the patient.

Elderly can benefit from three specific regimes. Firstly, they may qualify for increased reimbursement. Secondly, the threshold of the maximum amount of patient co-payment is put lower. Once the ceiling of the non-refundable part of medical expenses is reached, further medical expenses will be fully reimbursed. Thirdly, flat-rate benefits are granted for some forms of care, for example incontinence products and professional residential care. Remarkably, no flat-rate allowances are awarded in case care provided by relatives in their home.

In the Netherlands, the first tier insurance consists of two different pillars.

The *first pillar* encompasses the exceptional medical expenses act (AWBZ, *Algemene Wet Bijzondere Ziektekosten*), under which long-term care for the elderly, the disabled and the chronically ill is funded. Insurance is compulsory under a national insurance scheme. An assessment centre (CIZ, *Centrum indicatiestelling zorg*) decides on the categories of care the elderly is entitled to, and for the provision of which he may choose between care in kind (ZIN, *Zorg in natura*) or a patient fundholding (Pgb, *Persoonsgebonden budget*), with which he can buy care on the private market. A system of patient co-payment is in force, and a ceiling applies in function of income. Importantly, *usual care* is excluded from reimbursement under the AWBZ during a maximum of three months. Usual care is the normal, daily care considered to be offered between partners, parents and children and other adults who constitute a household. This exclusion is a disincentive for adult children to care for their parents in their home. Furthermore, reimbursement is excluded in case the old aged receives *informal care*. Informal care is long-term care a member of the social network offers outside a professional context and that exceeds usual care. It includes usual care exceeding three months by adult children with whom the elderly constitutes a household. Informal carers are not under any obligation to provide care. The incentive of €200,00/yearly they may apply for, probably will not outweigh the AWBZ-reimbursement the elderly would receive in case he does not receive informal care.

The *second pillar* of the Dutch first tier insurance consists of the health care insurance act (Zvw, *Zorgverzekeringswet*). This compulsory insurance scheme is financed through both a flat-rate contribution and an income-dependent contribution. It allows access to a nomenclature of basic medical expenses. A system of co-payment and compulsory own-risk

excess apply. Dependent on the insurer, the policy offers care in kind, reimbursement or a combined regime.

In both countries, the second tier of the health care insurance system consists of collective or individual insurance schemes, often offered as employee benefit and that are fairly widespread. In the Netherlands, this system is intertwined with the Zvw, for employers sometimes negotiate reduced flat-rate contributions.

1.1.1. Specific Benefits for Elderly

In Belgium, two specific benefits for the elderly exist.

On the federal level, the old aged may apply for an allowance for help to the elderly (THAB, *tegemoetkoming voor hulp aan bejaarden*). The amount of the allowance is determined in function of the ability for self-care, the household situation and the income of the elderly. Importantly, maintenance received from descendants is not considered as income. The maximum allowance is about €6.500,00/year.

In Flanders, a compulsory care insurance scheme is in force, which allows applying for a flat-rate allowance of € 130,00/month for non-earmarked non-medical care. Both (informal) home care and residential care qualify for the allowance. The scheme seems neutral vis-à-vis family care. It is also independent of the income of the old-aged.

In the Netherlands, elderly can apply for support and assistance under the Social Support Act (WOM, *wet maatschappelijke ondersteuning*) with a view of enabling them to stay in their home as long as possible. We leave aside whether that policy is advisable, in view of the housing shortage. WMO is organised on a municipal level and along the same lines as the AWBZ, that is: the scheme is supplementary to usual and informal care and available only as a last resort.

1.1. Conclusions

In sum, social security schemes in both Low Countries precede individual financial responsibility. Social assistance schemes on the contrary are generally only accessible in case an individual cannot provide for himself. Financial family solidarity only applies either as a last resort or with a view of guaranteeing a higher standard of living to the old aged. Under the Netherlands' AWBZ and WMO, family solidarity somewhat precedes state care.

The aforementioned qualification of the Belgian system as supportive of intergenerational solidarity, and of the Dutch system as rather granting rights on an individual basis, also seems wrong.

To the contrary, in Belgium maintenance by descendants is never taken into account – even if paid voluntarily – for the calculation of pensions and health care benefits. The elderly is not expected to appeal upon his relatives before applying for state allowances or benefits.

In the Netherlands, maintenance voluntarily paid by descendants is taken into account for the calculation of the AIO-pension supplement. Moreover, usual and informal care by members of the social network is taken into account with regard to the AWBZ and WMO benefits. Whereas members of the social network cannot be compelled to provide informal care, an irrefutable presumption of provision of usual care by persons with whom the elderly constitutes a household applies. A functional rather than legal concept of ‘family’ applies. An AWBZ and WMO-reform planned for 2015 even more strongly relies on the family.

The relative unimportance of financial family solidarity however does not allow drawing conclusions on the importance of functional solidarity, which we will now elaborate.

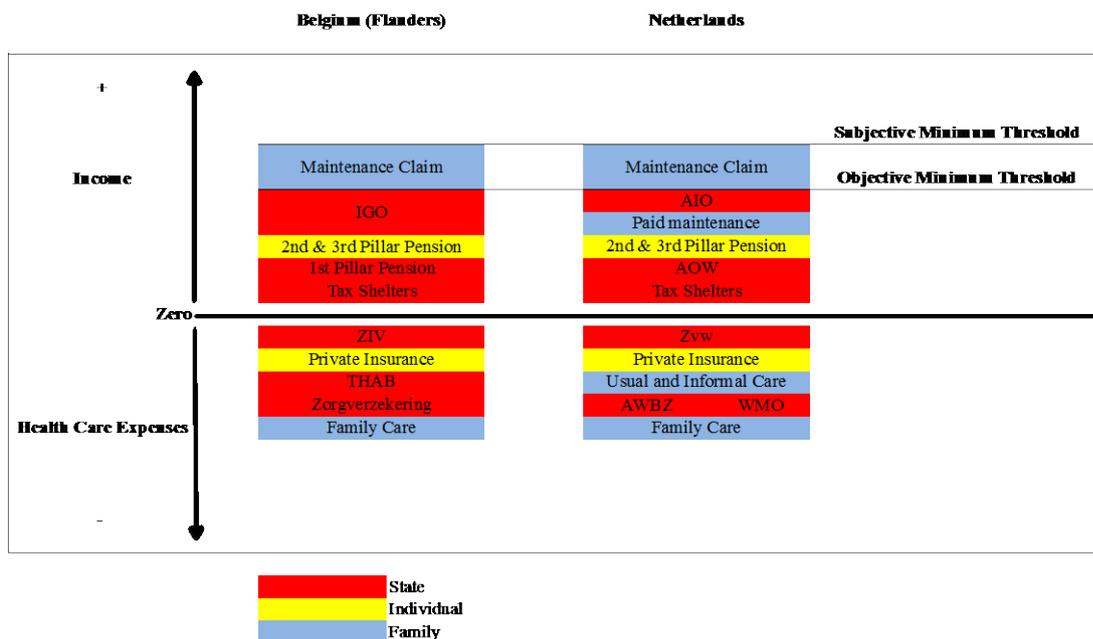


Figure 6. Financial Care in the Low Countries

1. Functional Care

In this section we will research which division of tasks exists between the individual, the family and the state with regard to functional care. We consider to be functional care, all activities aiming at supporting the elderly in conducting his daily life, be it at his home, in a (grand)child's home or in residential care. Functional care can consist of house and garden help, personal care, transport, meal delivery and so on. Our main focus again will lie on intergenerational family solidarity.

Neither Belgium nor the Netherlands directly provides for family law obligations of functional care by (grand)children towards (grand)parents. Article 371 of the Belgian Civil Code provides in general that children and parents owe respect to each other at all ages, but the Supreme Court has confirmed that the law contains no specific sanctions in case of non-respect.

1.1. Incapacitated Adults

Both the Low Countries' civil codes contain provisions regarding powers of attorney in general and powers of attorney with regard to health care decisions. Only the Belgian civil code also contains provisions on enduring powers of attorney. No specific (dis)incentives apply to appointing relatives as an agent.

Both systems contains provisions on decision-making by next-of-kin in absence of powers of attorney, particularly with regard to medical care. The Belgian Patient Rights Act successively appoints as next-of-kin, in absence of a partner: an adult child, one of the parents, an adult brother or sister. The Dutch act without hierarchy refers to a parent, a child, a brother or sister in absence of partner. In other fields of law, a more functional approach exists. The person who is considered *de facto* to be best placed to make a 'substituted judgment' is considered as next-of-kin. A person however never is obliged to make decisions as next-of-kin.

Judicial determination of incapacity and the institution of guardianship have been reformed in both Belgium and the Netherlands in 2014. The role of family members has been strengthened in both countries.

In Belgium, a particular role is allocated to close relatives or persons that are responsible for the daily care of the elderly or that assist the elderly and his environment in such care. They constitute the informal social network of the old aged. They may be heard as

witness in the proceedings and are preferably appointed as guardian(s), but are not obliged to accept such appointment. Moreover, close relatives appointed as guardian are allowed to appoint a successor. Finally, only partners or close relatives may petition for judicial determination of incapacity of squanderers. The act does not clarify which relatives are “close” relatives, but delimitation to relatives in the first (parent and children) and second degrees (grandparents, grandchildren, siblings) seems logical in view of other statutory provisions.

In the Netherlands, three different institutions of guardianship are in force. In absence of a partner, one of the parents, children, brothers or sisters is successively preferred as guardian. He is not obliged to accept the appointment. In case he accepts it, less formal requirements will apply vis-à-vis a “professional” guardian. Finally, relatives up to and including the fourth degree may petition the court with regard to a judicial determination of incapacity.

Members of the informal social network that have been appointed as guardian may benefit a remuneration of generally 3 % (Belgium) or 5 % (Netherlands) of the income of the incapacitated person. Close relatives are not excluded from that remuneration, but the courts may reduce or deny it by reference to their familial duties.

1.1. Providing Care

As described in section 4, both Low Countries’ policies primarily aim at providing the elderly with income allowing them to buy care on the market. Differences between both countries exist with regard to the positioning of family members as informal carers vis-à-vis both the state and the market.

1.1.1. Government Family and Home Care Systems

The Belgian system contains no hierarchy between state support, informal care and usual care. Functional in-home care is available (in Flanders) under the family and home care service (*gezinszorg – aanvullende thuiszorg*) by approved companies in a subsidised market system. The contribution by the elderly depends on his household situation and income. The elderly will be considered as cohabiting even if he constitutes a household with ascendants or descendants, but the income of the latter and maintenance received are always exempted for the calculation of the household income.

The Netherlands' health care system is peculiar with regard to functional care. Both under the AWBZ (section 4.2.1) and under the WMO (section 4.2.2) care in kind may be offered to the elderly, but the latter may opt for a patient fundholding instead. However, neither care in kind nor a fundholding is accessible to cover *usual care* the elderly is entitled to. Usual care is expected from adult children with whom the elderly constitutes a household. They cannot be compelled to provide the necessary care but their refusal will not render AWBZ or WMO-care accessible. *Informal care* is functional care by members of the household that exceeds a three months period, or by descendants with whom the elderly does not constitute a household, even during the first three months. Informal care that is actually provided is not covered by AWBZ or WMO. Yet contrary to usual care, the elderly is not excluded from AWBZ and WMO-benefits in case his relatives do not provide informal care. Paradoxically, the old-aged may use his patient fundholding in the AWBZ or WMO to pay care provided by a family member under certain conditions. Family members may therefore first refuse to provide informal care voluntarily, so as to render AWBZ and WMO-benefits accessible for the old-aged, and then be paid for provided informal care.

1.1.1 Rewarding Family Members for Informal Care

Differences between both countries exist with regard to rewarding care received from family members, so the positioning of family members vis-à-vis the market.

In Belgium, the flat-rate allowance for non-medical care (*zorgverzekering*, € 130,00/month) constitutes a non-earmarked fundholding for the old aged and may be paid to a descendant, but such payment may cause complications with regard to inheritance law described hereinafter.

In the Netherlands, the informal care may apply for a flat-rate incentive of € 200,00/year. Moreover, earmarked payments are possible under a WBMZ or WMO-fundholding.

Family members may also enter into a Care Agreement with each other, also outside the scope of the abovementioned health care schemes. Particularly in Belgium, concluding a Care Agreement is promoted in legal literature. Remuneration is possible on a flat-rate basis and payment can be deferred so as to create a claim against the estate for the informal carer. Beside the danger of qualification as taxable income of the remuneration, attention also must

be had for complications in inheritance law, particularly in case the amount of the reward is not market-oriented.

Gifts and bequests are another way to reward a family member for the care he provided, without having to determine the reward in a market-oriented way. The advantage of a gift over a bequest is that in case of a gift charges and conditions may be agreed upon that define the care the donor may expect from the donee. The gift is revocable in case the care so defined is not provided by the donee. These techniques are also available in case of a bequest, but of course are less enforceable. A bequest moreover is subject to (higher) taxes.

Both in Belgium and in the Netherlands, forced heirship rules apply to descendants. The reserved portion is more strongly protected in Belgium than in the Netherlands. Such system reduces the freedom of the elderly to use gifts or bequests to reward the descendants that provided care. Furthermore, a risk of requalification as gift exists with regard to the non-market oriented remuneration paid under a Care Agreement.

Another disadvantage of default and forced heirship rules is that descendants receive equal shares of the estate, regardless of the care they have actually provided to the deceased. Not providing informal care also is not a ground for disqualification as heir in the Low Countries. Only the Netherlands' civil code provides for a solution. An adult child (including a stepchild or child-in-law) or grandchild of the deceased may summon the estate in payment of a lump sum to fairly compensate the work he performed in the deceased's household and for which he did not receive a suitable reward. All the probate and non-probate benefits from the estate to which the applicant is entitled, are deducted from the lump sum insofar they can be qualified as remuneration for the work performed. The lump sum is a debt of the estate and is not taxable as inheritance. However interesting this possibility seems, it is applied with restraint. For example, the work performed must have reduced the applicant's earning capacity and thus is monetised. However, the civil code does not compel the court to award a market-oriented lump sum, but only a fair compensation.

	Belgium (Flanders)	Netherlands
Informal Care Allowance	€ 130/month	€ 200/year
Informal Care Agreements	Generic, Zorgverzekering	Generic, AWBZ, WMO
Gifts & Bequests	Weak	Strong
Lump Sum from Estate	No	Yes
Default & Forced Heirship	Strong	Weak

Figure 7. Rewarding Informal Care in the Low Countries

1.1.1 Care Leave and Career Break Schemes

Both Low Countries' social law (labour law and social security law) specifically accommodate functional care by family members through care leave and career break schemes. Financial compensation generally only is available in Belgium, not in the Netherlands. The schemes mentioned below exist beside generic schemes of flexible working hours, distance working and voluntary part-time work. The employee is entitled to part-time work without the consent of his employer only in the Netherlands.

In Belgium, every employee has access to a generic Career Break or Time Credit scheme on the one hand. The system is accessible upon reaching a certain length of service and applies throughout the whole professional career. First, the employee is entitled to a full time, half-time or 80 % Career Break Without Motive during the applicable equivalent of 12 full time months. On top of that, a system of Career Break With Motive applies, under more flexible conditions. A maximum of 36 months Career Break – either full time, half-time or 80 % – is accessible to employees with a view of providing palliative care, or assistance or care to a seriously ill family member (see hereinafter). In both schemes, employment protection applies and the employee is entitled to return to his former function. During the Career Break, the employee receives a flat-rate allowance from the National Employment Office, amounting to more or less one third of the minimum wage. The Flemish Government in some cases adds an incentive premium.

On the other hand, every Belgian employee is entitled to Care Leaves. Care Leave is comparable to the abovementioned Career Break With Motive, but applies on top of it. First, the employee is entitled to palliative Care Leave of 1 (+ 1) month per patient, either full-time or half-time or 80 %. The patient for whom the employee applies for Care Leave does not need to be a family member or a member of the household. Second, a Care Leave scheme exists to assist, or care for, a seriously ill household or family member. A family member is relative or in-law up to and including the second degree. The need for care may be social, familial or psychological. The employee is entitled to a Care Leave of maximum 12 (full-time) or 24 (half-time or 80 %) months. Employment protection applies. Beside, the same allowances apply as under the generic Career Break schemes.

In case a Belgian employee would opt to provide care to both his parents, the Career Break and Care Leave can amount to 74 months full-time leave, with an allowance and an incentive premium.

The situation is quite opposite in the Netherlands. On the one hand, every employee is entitled to Short Care Leaves to care for a relative in the first degree only. He is only entitled to maximum twice his weekly working time per 12 months. The employer is obliged to continue paying 70 % of the wage.

On the other hand, a system of Long Care Leaves applies. Under that scheme, an employee is entitled to a leave to care for a relative in the first degree who suffers a life-threatening illness. He is entitled to only six times his weekly working time per 12 months and gives access only to maximum continuous period of 12 weeks during which the employee must continue to work half-time. Employer and employee may agree otherwise. Since 2013, no provision is made for an allowance for the employee in any case.

Until 2013, an employee could opt in a tax privileged savings scheme that was partly co-funded with public resources: the Life-Course Savings Scheme. In case of unpaid leave, he then had access to these savings, but only for a *numerus clausus* of motives. The system was introduced in 2006 and already abandoned and not replaced in 2012. As per 1 January 2013, employees have unconditional access to their savings balance.

Belgium (Flanders)		Netherlands	
1 + 1 month	Palliative Care Leave	Short Care Leave	2 weeks
12/24 months	Medical Care Leave	Long Care Leave	6 weeks
12 months	Career Break w/o Motive		8 weeks
36 months	Career Break w Motive		
74 months			

Wage
Allowance
No Compensation > 2013

Figure 8. Care Leaves & Career Breaks in the Low Counties

1.1. Providing Lodging

As already mentioned in section 4.1.3, in both Low Countries a descendant in theory can be ordered to provide lodging to his ascendant in his home, in case he is unable to pay. We are not aware of any such court order.

The law in both Low Countries however contains certain (dis)incentives for providing lodging to an ascendant in one's home. They apply cumulatively with the (dis)incentives described in section 5.2.

1.1.1. Tax Policy

With regard to the Belgian tax policy, a flat-rate tax exemption amounting twice the exemption for dependent children is awarded to descendants who constitute a household with a dependent ascendant and provide necessities for him in their home. Whether an ascendant is dependent, is determined in function of his income. First tier pensions are exempted as income to a large extent. Moreover, the condition of providing necessities is applied leniently. On the other hand, tax deduction for maintenance paid to the ascendant is excluded

in case the ascendant is a member of the household. This disincentive however does not outweigh the incentive of the tax exemption.

The situation is different in the Netherlands. Instead of a flat-rate tax exemption, a scheme of tax deduction applies. Only a *numerus clausus* of care expenses can be deducted, upon proof of payment. The scheme is only available in case the parent is dependent on care by his child, that is: if he would otherwise need professional or residential care. A threshold amount is applicable, dependent on the household situation. Moreover, the *numerus clausus* of deductible expenses is limited as per 2014. The Dutch policy therefore is less favourable than the Belgian.

1.1.1. Social Security and Social Assistance Schemes

Lodging an ascendant in one's home generally does not affect the entitlement of either party to social security or social assistance allowances. The amount of allowances received may however vary.

Both in Belgium and the Netherlands, constituting a household with an adult child generally does not affect the amount of the first tier pension and the minimum pension (IGO and AIO). Only in the Netherlands a reduction of the AIO is applied in case the elderly lives with his grandchild, except in case he is assessed as being in need of care. Beside, in Belgium an old aged may enter into a registered partnership with a (grand)child and will then be considered as cohabiting.

In Belgium, constituting a household with a child or grandchild does not affect his health care benefits, particularly the THAB. In the Netherlands, usual and informal care will be taken into account in the AWBZ and WMO. Beside, only the income of a child, and not that of a grandchild, is exempted in the calculation of the elderly's contribution in the AWBZ and WMO.

Providing lodging to an ascendant may negatively or positively influence the social security allowances of the descendant too. We hereinafter elaborate the example of unemployment benefits.

In Belgium, constituting a household with any other person has as a consequence that the unemployed will receive an allowance as cohabitant and not as single person. On the

other hand, if he cohabits with an ascendant with limited resources, he may also apply for a higher allowance as head of a household.

In the Netherlands, the unemployed constituting a household with a parent in principle remains a single person for the purpose of the unemployment benefit. In case of constituting a household with a grandparent, he will be considered as cohabitant and receive a reduced allowance.

1.1. Conclusions

The Belgian and the Netherlands' policies on functional care constitute a complex patchwork from which no clear-cut conclusions can be drawn. The absence of a uniform approach in the policy and legal framework has a proven negative impact on the subjective well-being of the age group 50-64. It is therefore advisable to elaborate a univocal policy and legislative framework.

Government in both Low Countries generally stimulates informal care, but both incentives and disincentives exist in case family members provide informal care.

In Belgium, a broad concept of the family is applied, including relatives and in-laws up to and including the third degree and sometimes also the social network. Providing care and lodging by family members is generally stimulated, or at the least not dissuaded, through tax, labour law and social security measures. The availability of up to 74 months of Care Leave of Career Breaks however reduces the acquisition of social security rights by the informal carer, due to his substandard career. No compensation for informal carers exists in that regard, and this is detrimental particularly for women. Generally speaking, Belgian government is thus favourable to intergenerational solidarity.

In the Netherlands, the disincentives seem to outweigh the incentives. Incentives for intergenerational solidarity are mostly limited to first-degree relatives and even then are poor. Providing care and lodging is not stimulated though tax law and Long Care Leaves are not compensated at all since the Life-Course Savings Scheme was abandoned. Future policy measures moreover seem to convey an ambiguous message. On the one hand, government intends to more heavily rely on the family and the social network in the framework of the WMO and Care Leave schemes. On the other hand, even family members in the first degree would be equated with cohabitants with a view of determining the amount of allowances the

elderly receives. But generally, the Netherlands' government seems to further depart from individualisation of rights and relies on the family and social network.

1. General Conclusions

In literature, four “patterns” in the policy and legal framework have been defined to determine whether a system is based on public care or rather on family care. Both the Belgian and the Netherlands' systems seem to almost equally contain characteristics of the four patterns. One general trend however is a shift towards family care. As mentioned above, it is important to opt for, and elaborate, a univocal policy.

Strong family and social relationships prove to be important factors with regard to subjective well-being. Functional rather than financial care in those relationships protects and improves life satisfaction.

It therefore seems that governments should elaborate a policy to stimulate and support informal personal care. On the one hand, such policy must take priority over providing care in kind through government agencies – which will anyhow never make informal care redundant. On the other hand, it seems unadvisable to legally oblige members of the family or the social network to perform informal care, as is indirectly the case in the Dutch AWBZ and WMO. Government may rather support informal carers, for example by accommodating their (indirect) remuneration or at the least by the acquisition of social security rights. Informal care thereto needs to be monetised to some extent.

Beside, lawmakers could consider adopting two general provisions on family obligations. First, a rather symbolic provision could determine that family members owe each other assistance (comp. art. 371 Belgian Civil Code). Second, disqualification from financial or functional care by family members should be possible in case of dishonourable behaviour.

The concept of the family seems to shift from a legal, institutional one towards a functional one in the context of functional care. This functional concept however is not in line with the legal definition of the family with regard to maintenance obligations and inheritance law. Coordination of the policies on financial care and on functional care therefore is necessary. Focusing on functional care may also allow abandoning duties of financial care between family members.

The need for a new policy seems all the more important in light of the expected increasing care needs of an ageing population preferring to stay at home or in the environment of the family or social network as long as possible. One way of addressing the housing shortage for example can also be to stimulate intergenerational households. For example, different policy measures (urban planning, incentive premiums etc.) exist in Flanders to encourage “kangaroo houses” whereby descendants house their ascendants.

1. References

[For final version]



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**SESSION 2 – Finance and the Family:
Reworking Economic Relationships**

SPEAKERS’ BRIEFING PAPERS

**Kristi Slack, University of Wisconsin Social Work,
USA**

Tess Ridge, University of Bath, UK

Anne Barlow, University of Exeter, UK

Tone Sverdrup, Oslo University, Norway

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Economic Resources and Child Maltreatment: Recent Evidence on Potential Causal Links

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Abstract:

Limited access to economic resources is highly correlated with child maltreatment and child protective services (CPS) involvement. Yet, research has made little progress toward understanding the nature of these associations and whether they are causal. This paper highlights recent evidence from two studies that suggest that associations between access to economic resources and child maltreatment are likely causal. We then describe preliminary results from a large-scale experiment that is currently taking place in Milwaukee, WI, in which families at risk of CPS involvement are randomly assigned to receive an intervention focusing only on economic resources. Early findings suggest considerably less subsequent CPS involvement among some treatment group families. Implications for public policy aimed at preventing child maltreatment are discussed.

Introduction:

Child maltreatment is a costly public health problem. Recent estimates suggest that the average lifetime cost of child maltreatment ranges from approximately \$210,000 to \$1,200,000 (in 2010 dollars) for incidents of nonfatal and fatal child maltreatment, respectively (Fang, Brown, Florence & Mercy, 2012). With such high costs at stake, there is a striking dearth of evidence on the causes of child maltreatment. The vast body of research on child maltreatment etiology involves correlational study designs and/or statistical techniques that elude identification of causal risk factors. In this research, we focus on one of the most common correlates of child maltreatment—family income—and address the question of whether it has a causal relationship with various indicators of child maltreatment.

A decades-long literature offers evidence of an inverse association between family income and child maltreatment (Berger, 2004; Gelles, 1992; Jones & McCurdy, 1992; Sedlak & Broadhurst, 1996; Sedlak et al., 2010); and of a positive association between poverty status or welfare receipt and child maltreatment (Coulton, Crampton, Irwin, Spilsbury & Korbin, 2007; Coulton, Korbin, Su & Chow, 1995; Drake and Pandey, 1996; Paxson and Waldfogel, 2002; Slack, Holl, Lee, McDaniel, Altenbernd & Stevens, 2003). However, evidence of a causal relationship between income/poverty and child maltreatment is almost nonexistent.

Randomized controlled trials of either income-reducing or income-enhancing interventions have rarely involved child maltreatment outcome measures, and few studies have been conducted that apply rigorous techniques for isolating income's exogenous impact on child maltreatment. Two recent studies have taken steps toward achieving this end.

Study #1 (Berger, Font, Slack & Waldfogel, 2014):

Data are drawn from the Fragile Families and Child Well-Being (FFCW) study, a longitudinal birth cohort study that began in 1999 and comprises a nationally representative sample of non-marital urban births and a comparison sample of marital urban births. Parents of the child were interviewed at the time of birth, and again when the child is 1, 3, 5, and 9 years of age. The initial sample included 4,898 children. We use observations from the 3-, 5-, and 9-year interviews of this study for a possible sample of 14,694 person-waves. Our analysis sample drops observations (person-waves) for individuals who were not interviewed, who lacked earnings information for the present wave or prior wave, or were missing information on CPS involvement. This resulted in 7,378 observations of 3,119 individuals.

We measure child maltreatment using parent reports of involvement with Child Protective Services (CPS). In the age 5 and 9 interviews of the FFCW, mothers were asked whether they had any contact with child protective services since birth (for age 5) or the prior wave (for age 9). Mothers who answered in the affirmative were asked to provide the date of their most recent CPS contact. From the date information, CPS involvement is attributed to the wave, which immediately succeeded the contact date. Consequently, we are likely underestimating the prevalence of CPS involvement at wave 3, given we only know the date of most recent contact at waves 4 and 5. Because CPS is unlikely to contact a family regarding a "screened-out" child maltreatment report, this measure likely identifies families that were the subject of a CPS investigation or assessment. We refer to families responding affirmatively to this item as being "CPS-involved."

The primary predictor for this study is post-tax and transfer family income, which we construct in two ways. First we estimate pre-tax income as the sum of all reported earned and unearned income for the mother (and the spouse, if applicable). This includes wages in addition to cash income from social assistance programs (TANF, SNAP, SSI, and unemployment compensation) and child support payments received by the mother. We refer to this measure as our naïve income measure. However, because this measure fails to account for potential resource sharing by nonmarital cohabiting partners of the mothers, we also use a

second income measure which was constructed, with some imputed data, by the FFCW study team to measure of gross household income. We refer to this measure, which we believe more fully captures actual family income, as our enhanced income measure. This is our preferred measure.

In our construction of both the net income measures and the EITC amount, we follow closely the strategy delineated by Dahl and Lochner (2012).¹ The conservative estimate of income, as a sum of parts, can be broken down into earned and unearned income, which makes it appropriate for calculating tax liabilities. However, the second income measure does not differentiate earned and unearned income, and thus the estimated liabilities based on the conservative income estimate were used for both measures. Our EITC measure, which serves as the exogenous source of variation in income (instrument) in our instrumental variables models for each income measure is the combined state and federal EITC amount for which each respondent would be eligible, given their reported income, number of dependents, and state of residence. This assumes full take-up of the EITC, though prior estimates have suggested that take-up rate for the EITC among eligible families is approximately 80-87% (IRS, 2002; Schulz, 1994). Income and EITC variables are converted to 2009 dollar amounts and modeled in log form.

We use person-wave observations of the FFCW sample in combination with data on yearly maximum benefits for state and federal Earned Income Tax Credits (EITCs) to model the effect of income on child maltreatment outcomes. Our estimation strategy consists of two parts: (1) standard ordinary least squares (OLS) regressions (linear probability models) with a set of controls, to estimate the effect of income directly; and (2) instrumental variables regression models, where individual-level EITC benefit is used as an instrument for income. Both sets of models are estimated using both pooled cross-sectional models and individual fixed-effects models.

Our IV results (with and without fixed effects) are suggestive of a causal link between income and CPS involvement such that an exogenous work- conditioned increase in income is associated with a decreased probability of experiencing a CPS investigation. Our findings suggest that there may be a causal link between income and CPS involvement.

¹ To construct post-tax and transfer income measures, we used TAXSIM (National Bureau of Economic Research, 2012) to estimate tax liability based on the first (naïve) income measure. The estimated tax liability— which can be a positive or negative amount, as it takes into account all refund credits for which the respondent would be eligible—is then deducted from each income measure to approximate post tax and transfer income.

Study #2 (Cancian, Yang, & Slack, 2013):

Wisconsin implemented a Title IV-A Waiver in 1997-98, which involved experimentally testing a full pass-through and disregard of child support paid on behalf of families receiving TANF benefits. The original Child Support Demonstration Evaluation (CSDE) was implemented statewide, and all TANF participants were randomly assigned to either a full pass-through and disregard group or a partial pass-through and disregard group. For those in the experimental group, every dollar of current child support paid by the nonresident father was passed on to the mother, and the child support was disregarded in determining her TANF cash benefit.

Families in the experimental group received more child support as a mechanical effect of the policy; however, assignment only affected resources for those receiving TANF cash benefits and child support in the same month. Because TANF participation in Wisconsin tended to be short, and child support receipt among TANF participants irregular, differences in total income were fairly modest. Among families with nonmarital children, those in the experimental group received an average of \$101 more child support in the first year of the experiment and \$102 more in the second year; among those with a child support order at assignment, the amounts were \$180 and \$174. While the difference in income is fairly modest, it provides an opportunity to test the causal effects of an increase in child-support income on child maltreatment.

We limit our analysis to 13,062 mothers of nonmarital children in the original CSDE sample who entered W-2 during the first 10 months of Wisconsin's TANF program, beginning in September 1997. We track these mothers in the administrative data for a period of 2 years from the time that they entered TANF and were assigned to the experimental (full child support) or control (partial child support) group. Our basic approach is to compare the experimental and control group members with regard to the rate of screened-in reports of child maltreatment. If additional child support income reduces the likelihood of child abuse and neglect, we should observe lower rates of maltreatment reports among the experimental group than among the control group.

We find that mothers in the experimental group, who therefore received more child support income, are less likely to have a child subject to a screened-in report for child maltreatment. The experimental group is estimated to be about 10 percent less likely (i.e., an odds ratio of .88 to .89) than the control group to have a screened-in maltreatment report.

With about 20 percent of families having a child with a screened-in report, this means that families eligible to receive all the child support paid on their behalf are estimated to be about 2 percentage points less likely to have a screened-in report than families who receive partial child support payments.

Milwaukee RCT Preliminary Findings:

Project GAIN (Getting Access to Income Now; Slack & Berger) is designed to prevent child abuse and neglect by assisting families at risk for child maltreatment in accessing economic resources, reducing financial stressors, and increasing stability for the children and adults in the home. The target population for the GAIN intervention is families who have been reported to and investigated by child protective services (CPS) in Milwaukee, but for whom no ongoing services are provided (i.e., cases closed following an initial assessment). Rates of re-report among families deflected from CPS are quite high and many of these families will have CPS cases eventually opened (Drake, Jonson-Reid, Way & Chung, 2003). Key features of GAIN include (1) a comprehensive eligibility assessment for an array of public and private economic supports and assistance accessing these resources, (2) collaborative work with a GAIN financial support specialist to identify financial goals and steps to achieve them, and improve financial decision-making, and (3) in some cases, access to one-time emergency cash supplements to alleviate immediate financial stressors. The combination of these three “pillars” of the model are predicted to increase family financial stability and income level, which in turn are predicted to improve family functioning overall (e.g., reduced parenting stress and mental health problems, improved parenting skills and self-efficacy).

Preliminary data from the first year of randomization do not show an ITT effect on subsequent CPS involvement.² However, for the subgroup of families (~15%) who have a history of CPS involvement prior to the index report that generates randomization, the ITT effect is quite large. Specifically for those families with at least one prior substantiated CPS report, the treatment and control group have rates of subsequent investigated CPS reports over a one-year period of 15.8% and 25.8% ($p < .05$), respectively. The rates of subsequent substantiated CPS reports are 2.3% and 4.2% for the treatment and control groups, respectively (NS), and the rates of subsequent placement of one or more children are 3.6% and 4.1%, respectively (NS). Given that the particular subgroup for whom the intervention

² A substantial proportion of the treatment group was not able to be located (~40%) upon referral to the GAIN Program and approximately 30% of the located treatment group members declined to participate in the program. TOT estimates are not yet available.

appears to be most effective is, arguably, a group that generates higher administrative and program costs for CPS, these findings are particularly noteworthy.

Implications for Child Maltreatment Prevention Policy:

Despite the wealth of evidence that family income and poverty status are correlated with child maltreatment, it is unknown whether economic factors play a causal role in this association. The flipside of this question can be stated as: “*How much maltreatment prevention can be achieved by intervening with at-risk families around economic stressors?*” If we knew whether and the extent to which economic support interventions reduce child maltreatment, and for whom such interventions are most effective, this would bring enormous value in the development of a comprehensive prevention infrastructure.

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Child Maintenance and Child Poverty

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The issue of care, contact and child maintenance is complex and one that is often informed by a rhetoric of ‘children first’ or the ‘best interests of the child’ while in reality children's needs and rights are easily overlooked. Child maintenance in many countries including the UK has been a field of policy that has been subject to constant change and reform, modifying and evolving in response to diverse social and political pressures, often without any clear understanding of how such reforms are likely to impact on children's lives, well-being and their relationships with their parents. I have argued that to develop a child-focused analysis of child maintenance three key criteria are necessary, first; does child maintenance policy address the alleviation of child poverty. Second: do child maintenance policies reduce or exacerbate conflict between parents. Third; how equitable are policies between children (Ridge, 2005). Previous comparative analysis of UK and Australian child maintenance policy from this perspective found a high risk of risk of child poverty for children in lone parent households, a low rate of adequate and reliable child maintenance arrangements and children caught in the middle of relationships between their parents and between their parents and the state (ibid). In this paper I want particularly to focus on the issue of poverty and parental relationships from a child's perspective, to explore through children's voices their experiences, needs and concerns. This approach is situated within the new sociology of childhood which has shown that children are active moral and social agents, with their own perspectives and experiences to recount, (James and Prout, 1997; Mayall, 2002). Previous research with children in poor families has shown that they play an active role in managing and coping with poverty in various settings, including in the family, at school, and in friendship and social activities (Ridge, 2002; Ridge, 2003). As the UK is once again undergoing controversial reform of the Child Maintenance system this is a good opportunity to set out some of the key issues facing low-income children in relation to cash and care.

The paper explores how low-income children mediate their relationships between separated parents around money and care in the context of their everyday lives in lone-mother working households. It examines the relationship between children and mothers, children and fathers, and the potential tensions between the needs of children, parents and the state. The paper draws on data from a longitudinal qualitative research study ‘*The Family Work Project: Earning and caring in low-income households*’ (with Professor Jane Millar: see web

reference) which followed a sample of lone mothers and their children for 5 years from when the mothers started low-income work after spending a period of time out of work and claiming social assistance (see website below for full list of papers arising from this study). Lone mother activation into employment has been a key policy tool in recent years in the UK for addressing childhood poverty, and reducing the costs of supporting lone mother households on the public purse. The aim of the research was to explore from the perspective of both lone mothers and their children how families negotiate the everyday challenges of sustaining low-income employment and manage work and care over time.

Overall findings indicated that over the 5-6 years of the study there was considerably variability and instability in employment circumstances, including periods of unemployment, job changes and periods of sick leave. Although most mothers were positive about work there was also some ambivalence about stress, time costs, financial insecurity and future prospects. Financial reward from work was evident for some and a clear improvement on previous levels of income from social assistance. However, these were still low-income families and there were signs of financial insecurity and increased indebtedness due to flux and change in employment and family circumstances (Ridge and Millar, 2008).

A key finding from the research was the active and engaged role that children played in family life. Sustaining work over time had meant that many of the families had adapted and changed their everyday family practices to incorporate the challenges and demands that employment presented. In this way, employment sustainability had become a 'family-work project', one that actively involved the family as a whole and not just the individual mothers concerned (Millar and Ridge, 2013). Therefore children were playing active roles within families, taking on new responsibilities and experiencing new demands on their time, with regard to increased self and sibling care. Children's perspectives on their mothers' employment revealed both positive and negative dimensions of change; work for them promised much but did not always deliver. However, the fear of a return to poverty if work was lost was driving children's attempts to accommodate and manage change despite the dissonance for many between their perceptions of financial advantage for themselves and their families, and their concerns about changes in family time and the physical and emotional costs of managing employment for their mothers. These key factors, poverty, changing family time and family practices and increased responsibilities are central to understanding how children experienced and negotiated their needs in relation to their parents.

Along with work and relationships of care, receipt of child maintenance payments was an important issue for many of the families. There were a range of different experiences with regard to child maintenance in the study, for some families' 'child support' (as it was then called) played a key role in helping to sustain employment. But others experienced considerable difficulty establishing child support payments, and many did not receive any financial support from former partners. A small group of mothers had made private arrangements, but these tended to be characterised by erratic and often inadequate and changeable payments. In only one case was the arrangement working well. Payments in kind were made for some and these included help with school items. But payments were rarely regular or reliable. Some children who were in contact with their fathers received pocket money or other financial help directly. However, again this could be irregular and difficult to negotiate.

Interviews with children revealed a range of issues that highlighted the complexity of emotional, financial and practical circumstances that they found themselves in. These included children's anxieties about adequacy and security of income, both for their parents and for themselves; the negotiations undertaken by children with regard to seeking financial support from either parent, the strategy of moderating their needs and lowering expectations when under financial duress and the challenges of making contact work in the context of children's social needs, and complex work related care arrangements.

Managing money

Living on a low income means that children do not have easy access to their own money. Previous research with children shows that they are well aware of their economic circumstances and try to moderate and manage their needs with a range of strategies including going without and lowering expectations (Ridge, 2002). The children in this study were extremely anxious about money, especially not having enough money for their own or their family's needs. Debt was a major concern for many of these families and although mothers were working they tended to be in poorly paid and often highly insecure employment. As a result children were often being careful not to put increased financial pressure on their mothers, while nonetheless striving to maintain their own social activities and engagement with friends and peers, which all cost money. An alternative source of money for children could be their NRPs but children were uncomfortable about asking their fathers for money for things - even everyday things like help with school items and trips.

Where there were irregular or inadequate payments of child support into the household children were trying to go directly to their NRPs, for money to support their needs at home and at school, this worked for some but for others it was a risky venture and sometimes resulted in conflict. Asking for money could create tensions between children and their fathers and sometimes payment was perceived to have strings attached.

When this strategy failed or where children were unable to gain adequate financial support they moderated their needs by trying to do without and lowering their expectations, rather than put pressure on either of their parents. Throughout the study there was evidence that children tended to moderate their needs rather than put pressure on their mothers for money, and this was also extended to fathers where children felt that they had little money. Where children were old enough to work they often took some form of employment if it was available, although in very deprived areas there were little opportunities for children to work.

Making contact work

Contact and engagement with NRPs was variable throughout the study and over time. Where there was some form of contact established children tended to take on some of the role of maintaining contact, and were often involved in negotiating aspects of their own financial support whilst also trying to manage their father's expectations of contact arrangements. Because their mothers were working children were often experiencing childcare outside of the home. These care arrangements could be complex, involve dense schedules of care and often needed to be regularly attended to secure their places, and facilitate their mother's employment. These created potential points of tension between parents as fathers did not necessarily support their former partners being in work. Children also had their own clubs and activities to accommodate, where keeping contact with peers and joining in with shared opportunities for play and socialising were important aspects of children's lives and developing social capital. These children generally lived busy lives, attending to their own needs and the needs of their families to effectively sustain work and care. However, these arrangements could be in tension with NRP's expectations of contact and children felt that this could cause conflict both between their parents and between them and their parents. As a consequence, children were often trying to please both of their parents in a situation where their own changing social needs, for example, to spend more time with friends, were easily disregarded. This longitudinal research also showed that children's social needs and

expectations change over time and these evolving needs risked coming second to sustaining contact arrangements that were linked to financial agreements.

The findings provide an opportunity to capture children's voices and concerns over time as they negotiate their relationships with their parents, and experience the family challenges that can be generated between the demands of low-income work and family life and their own needs and concerns as they grow and change. The paper highlights the importance of understanding parent child relationships and child maintenance from a child-focused perspective, particularly in relation to low-income children. These are least likely to be heard and most likely to be in need of financial support from both parents. Child maintenance can be a vital element in addressing child poverty, and in the UK plans for the private ordering of child maintenance may remove some of the most economically vulnerable children's financial security and well-being away from any state scrutiny and control. Furthermore linking financial support too closely to contact can draw children into complex arrangements which have a monetary component as well as a caring one. We can see from this research, which engages directly with children's own accounts, that children can come under pressure from either parent to continue or discontinue arrangements for reasons which do not necessarily prioritise children's own wishes and needs.

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Valuing care?
Relationship generated economic disadvantage, autonomy and the role of family law

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Abstract

Drawing on empirical studies on marriage, cohabitation and the law in the UK, this paper will consider how family solidarity is constructed within different relationship styles from legal and social norm perspectives and consider what the role of private family law and social welfare law is and/or should be where relationship generated economic disadvantage remains a reality for children and their carers on relationship breakdown in the 21st century.

Introduction

This paper will first consider from a UK perspective how family solidarity is constructed within different relationship styles from legal and social norm perspectives and go on to consider what the role of private family law and social welfare law is and/or should be, where relationship generated economic disadvantage remains a reality for children and their carers on relationship breakdown in the 21st century, yet principles of autonomy and private agreement are attractive to legal discourse.

Meanings of solidarity

The European term ‘solidarity’ encapsulates the mutual support and obligations which family life encompasses from a moral perspective and which will often be reflected in legal regulation. It is a way of defining the glue of interdependency which holds families together whilst at the same time creating a conceptual governance of the manner in which family members are expected through social, cultural and moral (as well as legal) norms to deal with one another. However, its basis in social, cultural and moral norms also means that what we expect family solidarity to be or to represent changes over time and will vary by place and culture. This in turn means the legal embodiment of the rights, duties and remedies which spring from it may be amended in tune with such changes and variations, or alternatively, may be left in place to try to reinforce key aspects of ‘old-style’ family solidarity in the face of undesirable change.

Many aspects of family solidarity have their roots in the patriarchal married family, where marriage was institutional and gendered roles for each spouse were clearly defined.

Husbands and fathers headed and were breadwinners for the whole family; whereas wives and mothers had responsibility for homemaking and child and elder care. The move to companionate marriage within Western societies and then to partnership or joint-enterprise marriages rather than clearly gendered breadwinner- homemaker/caregiver marriages has reduced but not removed the economic and often still gendered interdependency in such relationships, where rational decision-making around caring and career choice can also be complicated by the parallel emotional relationship and commitment as well as everyday practicalities. The economic interdependence and the acknowledged common purpose of what we might term the family business of caring within marriage is, though, recognised by family law in the way it regulates married couples on relationship breakdown, giving entitlement to a share of matrimonial assets. Systems of community of property (whether immediate or deferred) have always had in place an equal sharing principle of entitlement to matrimonial assets on relationship breakdown³ which is supplemented by the right to apply for maintenance (alimony) to meet other need. In England and Wales, there is discretionary redistribution of assets on relationship breakdown under the Matrimonial Causes Act 1973. However, this has shifted through judicial activism from a purely welfare-based system to meet post-separation needs of the weaker economic spouse to a starting point of entitlement to equal sharing of matrimonial assets, where such assets exceed needs on divorce, whilst leaving in place a safety-net where needs will be met from any available assets in lower asset cases.⁴

Lord Nicholls in *White v White* set out the radical new thinking⁵-

‘If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.’

This development was based on a principle of non-discrimination where financial and non-financial contributions to a marriage are to be equally valued on divorce, and which specifically rejected earlier approaches where protection of property and individual liberty

³ See further E. Cooke, A. Barlow and T. Callus, *Community of property: a regime for England and Wales?* 2004, Bristol: Policy Press.

⁴ See *White v White* [2001] AC 596 at 605 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

⁵ *White v White* [2001] AC 596 at 605.

trumped any notion of marriage as a substantively equal partnership.⁶ It was also notable in its move away from the language of a welfare-style dependency construction of a wife's needs towards a new entitlement basis, with entitlement having been earned through unpaid caregiving.⁷ In *Miller; Mc Farlane*, it was accepted that in addition, relationship generated disadvantage could be compensated for on divorce, where one spouse had given up a career to undertake the caregiving, whilst the other's career had thrived. Thus at the beginning of the 21st century, family solidarity within marriage was constructed by law to reflect marriage as a site of equal partnership centred around the family business of caring, a construction which was extended to same-sex Civil Partners by the Civil Partnership Act 2004.

This though left exposed the lack of recognition of solidarity within other family relationships, particularly heterosexual cohabitation, which often mirrors marriage in the British context and is widely accepted by the British public as a valid partnering and parenting lifestyle choice.⁸ The 2012 data from the Office for National Statistics confirm couples living together without being married are the fastest-growing type of family in the UK, with 30 per cent of all births in 2012 being to cohabiting couples. Yet there is very different treatment of recompense for relationship generated disadvantage on cohabitation breakdown, usually suffered through caregiving even though similar (often gendered) divisions of labour are undertaken around breadwinning and caring, with mothers more likely than fathers to give up work or go part time. Here, property law rather than any family law redistribution of family assets governs, supplemented by child maintenance and limited ability to remain in the family home whilst the youngest child is under 18. The adult partner's needs do not afford any financial remedy on breakdown and despite both Scottish⁹ and Irish¹⁰ legislation providing financial remedies in such cases on a similar but less generous basis than applies to married couples, the English Law Commission's 2007 proposals to recognise the need to redress relationship generated disadvantage in the cohabitation context have been rejected by government.¹¹ Given the numbers of couples and children who live in this way (often falsely believing they have the same rights and remedies as married couples due to a widespread common law marriage myth, not least because they

⁶ See A. Diduck, "'Fairness and Justice for All?' The House of Lords in *White v White*" [2001] *Feminist Legal Studies* 173.

⁷ J. Eekelaar, "Back to basics and forward into the Unknown" [2001] *Fam Law* 30.

⁸ See A. Barlow and J. Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 (3) *CFLQ*, pp. 328-338.

⁹ Family Law (Scotland) Act 2006.

¹⁰ [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#).

¹¹ *Cohabitation: the financial consequences of relationship breakdown*, Law Com No 307, CM 7182, (2007) London: TSO. Government has rejected cohabitation law reform in announcements in 2008, 2009, 2011 & 2013.

are treated as married for the purposes of tax credits and welfare benefits)¹², there is a clear attempt to hold onto old notions of solidarity in order, it is said, to avoid undermining marriage. To cohabit without marrying is seen as a clear choice for which no family solidarity can be recognised in law, in contrast to the position revealed by research where social norms have clearly shifted to accept cohabitation relationships as a valid and valuable partnering and parenting choice¹³ and where the same moral obligations to care for wider family are often taken on as they would be in respect of a married relationship.¹⁴ Thus here solidarity exists and is of benefit to society, yet is invisible or wilfully ignored by government and certainly remains unrecognised in private family law terms.

Meanings of autonomy

The non-discrimination principle within financial remedies on divorce has not gone unchallenged. Indeed, it arguably triggered a backlash by those who wished to see property protection and individual liberty reassert its dominance in this sphere. This took the form of a call for enforceable pre-nuptial agreements and greater recognition of special financial contributions which if it became accepted could move the division of assets away from equality.¹⁵ The discourse around what was effectively a retrenchment from the non-discrimination principle used the trump card of autonomy. It came to the fore in the developing case law around the lack of enforceability of pre-nuptial agreements in English law. *Radmacher v Granatino*¹⁶ featured a German heiress married to French investment banker turned academic who had two children and who had lived their married lives in London. Although pre-nuptial agreements were not binding in English law (but could be taken into account) and despite the Law Commission looking at their status at the time, the Supreme Court held by a majority that the agreement should be upheld, placing Mr Granatino (who as an academic was the weaker economic spouse and had done a large share of the child care) in effectively the same position as a cohabitant, despite the fact that he had signed an agreement in German which he did not speak without taking legal advice as he had been urged to do prior to the wedding. As a man of the world he had exercised his autonomy to sign the agreement and likely understood its nature sufficiently not to render it void. The

¹² See further A. Barlow and J. Smithson, above n 6 on the widespread common law marriage myth.

¹³ A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law*, 2005, Oxford: Hart.

¹⁴ M. Maclean and J. Eekelaar, 'The obligations and expectations of couples within families: three modes of interaction' (2004) 26 *JSWFL* 117.

¹⁵ *Charman v Charman* [2007] EWCA Civ 503.

¹⁶ [2010] UKSC 42

only dissenting Supreme Court Justice, Lady Hale, was the only woman on the bench and has argued extra-judicially that autonomy should not trump fairness:

‘[I]t comes back to what we think marriage is and is for. Is it simply a private arrangement from which each can walk away when they want and without regard to the consequences for the other? Or is it a status in which we all have an interest? Do we want to encourage responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners and their children and their elderly or disabled relatives, and can be properly compensated for this if things go wrong? I continue to hope that we do. But I wonder whether we really believe in equality in marriage.’¹⁷

Nationally representative empirical research also shows that whilst the public in England and Wales are in favour of being able to make a pre-nup, and think they are appropriate in certain circumstances, they are concerned about their ultimate fairness in longer marriages where it is difficult to predict the future and particularly where there are or have been children.¹⁸ The Law Commission, having had its remit extended to look not only at marital agreements but to also consider non-matrimonial property and needs, has just reported and is recommending enforceable nuptial agreements, providing they are not used to contract out of provision for financial needs.¹⁹

Conclusion

We are in an era where we are playing out the rewriting of the gender contract, but have yet to reach an ungendered level playing field. In the UK context, this is being done without putting in place proper systems of affordable and good quality child care which enables people who have children to make more truly autonomous choices around how to organise work and childcare. Many social norms around ‘being a good mother’ involve staying at home at least part-time when children are young and in terms of financial rationality, women still most often earn less and so become the parent whose work is sacrificed to the family business of caring. Whether or not to value caregiving in private family law has divided feminist thinking. Some such as Deech,²⁰ argue to value it highly encourages gold-digging and marriage and childcare as a career which should be

¹⁷ B. Hale, ‘Equality and autonomy in family law’ (2011) 33(1) *JSWFL* 3-14, at p 12.

¹⁸ A. Barlow and J. Smithson, ‘Is modern marriage a bargain?’ (2012) 74(3) *CFLQ* 305.

¹⁹ Law Commission, *Matrimonial Property, Needs and Agreements*, 2014, LAW COM No 343, London: TSO.

²⁰ R. Deech, ‘What’s a woman worth’ [2009] *Fam Law* 1140.

discouraged. Others such as Hale, see the choice of how to organise the child care without fear for the future as a vital ingredient of what family law should be doing in both the married and unmarried contexts:

‘It is not only in [the child’s] interests but in the community’s interests that parents, whether mothers or fathers and spouses, whether husbands or wives, should have a real choice between concentrating on breadwinning and concentrating on home-making and child-rearing, and do not feel forced, for fear of what might happen should their marriage break down much later in life, to abandon looking after the home and the family to other people for the sake of maintaining a career.’

Whilst the autonomy argument is neat and attractive, it arguably does not do justice to the messiness of family life and the far from unfettered bargains that are struck in the best interests of the family, which according to Hale also serve the best interests of wider society.

Property relationship in marriage and cohabitation in Scandinavian countries – law, policy and social norms.

Professor dr. juris Tone Sverdrup

The Nordic countries are characterized by high labour force participation among women combined with a relatively high fertility rate. This is the result of an active family policy adopted by the Nordic governments. At the beginning of the twentieth century, the idea of equality between family members received strong support and significant legal differences disappeared – both between children born in and out of wedlock, and between husband and wife. From the 1960s onwards, women's entry into the labour market was promoted by paid parental leave and expansion of kindergartens, but also by depriving them of the legal safety net of spousal support after divorce and certain social benefits. More recently, fathers' participation in child care has been encouraged by providing them with paid parental leave reserved exclusively for the father, as well as more rights in child law.

This promotion of gender equality has been successful in the way that the full-time housewife is a thing of the past in all of the Nordic countries, and the difference in employment rates between women and men is markedly lower than the average in the 27 European Union member states (about four percent higher for men, compared to 12 percent in EU). However, gender equality has not been fully attained, as about 40 percent of employed women are working part-time. Women still undertake a larger portion of child care and household chores than men in the Nordic countries.

This imbalance leads to an unequal capital accumulation in many relationships. When a spouse or cohabitant undertakes more than her share of the “unprofitable” tasks in the family – childcare and the coverage of consumption expenses – she could end up with owning no appreciable assets even after a long relationship. The two parties' work efforts may be equal at any given moment, yet inequality is generated over time because the work performance of one is consumed while that of the other is invested.

Even though the general law of property often produce such unfair outcomes for spouses and cohabitants, the effect is much more palpable in cohabitation than in marriage.

The marital property regimes in the Nordic countries are the result of law reform cooperation that led to almost identical regulations in the beginning of the twentieth century. The essence of this so-called “deferred community property” regime is separation of property

during the marriage and the division of assets upon dissolution. Upon divorce, assets are divided according to fixed rules, regardless of whether or not maintenance is granted. However, the scope of the equal division rule differs. In Sweden, Denmark, Finland and Iceland the net value of virtually all property is divided equally upon divorce. In Norway, division is limited to assets acquired during the marriage, as the value of assets that can be traced back to premarital assets; gifts and inheritance are exempted from division. The Danish property regime will probably be amended in a similar way in the foreseeable future. The most striking common feature of the three items exempt from equal division is that the other spouse is not presumed to have contributed to the property's acquisition. Thus, we can see a development where the justifications and conditions for property division are more closely linked to the contributions of the spouses, than to their needs.

About one in four of all couples are cohabitants in the Nordic countries and the proportion of births outside marriage is about 50 percent. Cohabitants own their property separately during the relationship, and they are not required to provide for each other during the relationship. However, specific items of property – like the common residence – are frequently owned jointly, as both parties have contributed directly to their acquisition. In Norway co-ownership can be established on the basis of indirect contributions, as well.

Sweden is the only Nordic country where assets can be divided equally upon dissolution of the cohabiting relationship. According to the present Swedish Cohabitation Act 2003, the value of the family home and household goods is divided equally upon termination as long as these items are acquired for joint use. In the other Nordic countries, each keep their property and only a limited possibility to grant compensation exists. Finland is the only country to codify special family law rules to avert unjust enrichment. The Finnish Act on the Dissolution of the Household of Cohabiting Partners from 2011 applies to couples who have lived in a shared household for at least five years or have children together. According to the Act compensation may be granted if a cohabitant has assisted the other in accumulating his or her property.

In Denmark and Norway, non-statutory rules to avert unjust enrichment developed through Supreme Court practice in the 1980s. In Denmark, compensation may be granted if the cohabitant enables, to a significant degree, the other party to create or preserve a considerable fortune. In Norway, the cohabitant must have provided the other party with a significant financial benefit in order to receive any compensation and the granting of

compensation must be reasonable. These case-law rules have proved to be ill-suited to correct imbalances in the settlements after cohabitation in both Denmark and Norway, partly due to the fact that compensation is rarely granted. In my view, there is a need for legislation.

Unmarried cohabitation – even lifelong – is now socially acceptable in all of the Nordic countries. This social acceptance has changed the entire nature of the legislative issue. Today, a cohabitant can always decline marriage, or require a favourable pre-nuptial agreement as a condition for marrying. As a result, the financially vulnerable party in the relationship has more or less lost the safety net that marriage represents. Today, the argument that cohabitants can simply marry lacks any real impact in the Nordic countries, as the reluctant party always have a realistic right to veto.

A cohabitation contract is not a suitable alternative to legislation. In the market, both parties expect to gain from a transaction. A cohabitation contract, on the other hand, determines the division of their future assets. The conclusion of such a contract is a zero-sum game where one will lose and one will win. Furthermore, market mechanisms do not operate between two cohabitants. They have already established a relationship, and are not replaceable market actors. A cohabitant cannot deselect the other party just because the conditions in a cohabitation contract are unfavourable. It should come as no surprise that only 15 - 20 percent of the cohabiting couples conclude agreements aimed at regulating financial consequences upon termination.

Along with rising divorce figures, women's increasing participation in the labour force and cohabitation, the trend in legal policy is to replace the broader terms of solidarity and need, with more explicit economic justifications, such as compensation for contributions made during the relationship and losses suffered. Thus, it is fair to say that spouses and cohabitants are increasingly emerging as independent individuals in family law.

As long as the vast majority of marriages were dissolved by death, all assets were divided equally upon termination, and very few couples lived in unmarried cohabitation, it was not that important to have systematic knowledge about the inner life of relationships. But today, when only part of the assets is divided equally by fixed rules, or gains and losses are measured in each individual case, it is vital to know what economic behaviour one can typically expect from spouses and cohabitants.

It is impossible to assess the impact of family law provisions without making some assumptions about the economic mechanisms that normally manifest themselves in couple relationships. A few examples will illustrate this point:

- (1) When only assets created during the marriage are subject to equal division, as is the case in Norway (and many other European countries), the law does not take into account the situation where the favourable financial position of one spouse at the beginning of the relationship is an impediment to capital accumulation during the relationship. If one of the spouses brings a paid off house into the marriage, it would probably seem natural for the couple to apply most of their disposable income to current expenses. The spouse without property will benefit from “free housing” during marriage, but will be hard hit when nothing is saved for equal division upon termination. To prevent this from happening, the non-owning spouse must put aside part of his or her income during the marriage. But how many spouses would do such a thing in practice? Spouses form a consumption unit, they eat the same food, have the same responsibility their children’s expenses, go on the same holidays etc., and my guess is that quite a few couples adjust their level of consumption to the fact that basic investments, like a family home, are already available. As a result, the non-owning spouse will go empty-handed out of even a long-lasting marriage.
- (2) The concepts and mind-set of private law are primarily developed with a view to market relationships, and could therefore fall short when applied to two parties in a couple relationship. In the market, one service is contractually conditioned upon a counter service, and transfers normally occur directly between the parties. In marriages and cohabitations, the interrelationship between the parties’ individual contributions is not of a contractual nature, it is not grounded in legal obligations but in actual commitments. As a starting point, both partners have an initial responsibility to provide child care and financial support. If one party undertakes either of these efforts, it proportionately affects the amount of effort the other has to undertake. Thus, when one cohabitant undertakes more than his or her share of the unprofitable consumption tasks in the family he or she enables the other party to invest more. The cohabitant could therefore have made an indirect contribution to the acquisition of goods. The usage of private law terminology may lead to overlooking the fact that spouses and cohabitants form such a collective unit were contributions frequently are of an indirect nature. Private law concepts and reasoning are developed with regard to the market, and if family law practitioners (and scholars) look upon the couple relationships through the goggles of the market, they will only see two persons and not the collective unit. The collective unit has no name in family law. As a result, indirect contributions could easily become invisible.

- (3) When granting compensation on the basis of unjust enrichment in cohabiting relationships, the question arises at what point a cohabitant has covered more than her or his share of the family's consumption expenses. Two principles could guide the debiting of consumption expenses: either one can deduct *half* of the expenses, or one can charge expenses according to *ability*, that is, in proportion to the size of each of the spouses' respective work efforts. The two methods lead to the same result if the spouses' total work efforts (paid and unpaid work) are equal. But let us have an example where the cohabitants share domestic work and childcare equally, and the one's income is markedly higher than the other's. In such cases one has to choose between the two methods of calculating the indirect contribution. In my view, the calculation according to ability better tracks the economic behaviour in cohabitation. As mentioned, the parties must eat the same food, live in the same house and go on the same holidays. In other words, they form a consumption unit. The one with the higher income will pull the total consumption expenses upward, and due to the fact that they are "locked" to consume more or less the same, it seems unfair if half of the family's total consumption expenses are to be debited against the cohabitant who has the lower income.

However, in 2011, the Norwegian Supreme Court held that a cohabitant had to pay more than half of the family's consumption expenses in order to have contributed to the surplus acquired during the relationship. The court did not provide any explanation for its decision, it is apparently so self-evident that it need not be said explicitly: The cohabitants have in fact consumed half the material goods each, and therefore they should "pay" for just as much – in other words, the contractual principle that service should equal counter-service seems to prevail.

- (4) Legal reasoning concerning the conclusion of agreements seems to lose some of its validity when the individual service and counter-service are not mutually conditioned. Let us for example suppose that the female cohabitant entrusts an amount of inheritance money to the disposal of her male cohabitant, thus enabling him to purchase a boat. Sometimes, it would be unnatural for her to state explicitly that her contribution was not meant as a gift or a loan, or to insist on a contract formalising co-ownership. Even in situations where explicit reciprocity is acceptable and natural, the conditions are not always clear. If her partner paid for the children's education with his inheritance money, she would for example consider it a gift etc. The reluctance to freeze one item in such a delicate and fluid system of balance is understandable. Rational behaviour is often to keep such questions open at least for some time, and maybe until the relationship ends. But more importantly, due to the fact that many contributions occur indirectly, it could be difficult or impossible for the cohabitant to ensure a reciprocal service by means of a contract.

In the Nordic countries, spouses and cohabitants are increasingly emerging as independent individuals in a family law context, and for that reason it is important to know what economic behaviour one can expect in those couple relationships. It is obvious that spouses and cohabitants – to varying degrees – form a work unit, as well as a consumption and investment unit, and for that reason, the financial position of one party can hardly avoid being influenced by the other's. The above examples should illustrate how important it is to be critical when applying private law concepts and mind-sets in marriage and cohabitating relationships. In my opinion, family law researchers have an important task in identifying the economic mechanisms and norms that typically prevail in couple relationships, and – if necessary – develop new legal concepts that captures "the logic of marriage" and "the logic of cohabitation" on the economic level.



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International Network on
New Families; New Governance

**‘Changing forms and styles of ‘Family Solidarity’
Workshop**

**University of Notre Dame – 27th & 28th
March 2014**

**SESSION 3 – Transmission of Messages about
Families: Legal and Moral**

SPEAKERS’ BRIEFING PAPERS

Marsha Garrison, Brooklyn Law School, USA
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Fostering Marriage and Family Responsibility Through Norm Creation: The U.S. Experience

By Marsha Garrison, Brooklyn Law School

Law works best when its commands are consistent with prevailing cultural norms. But can law makers modify prevailing norms or establish new ones? Of course, all law serves to express normative values. When legislatures establish, for example, new penalties for child-support nonpayment, they express the view that child support is an important personal obligation, a view they hope parents will voluntarily adopt. But can law makers add impact through measures such as education, exhortation, or similar forms of “soft” law? In other regulatory fields, such measures are common. Many of the examples come from the field of public health, where we are regularly educated about health hazards and bombarded with information aimed at promoting healthy choices.

Family law, too has employed exhortation and education. In the United States today, virtually all jurisdictions provide parent-education classes for divorcing couples, many of them mandatory. These programs are responsive to the vast trove of social-science evidence showing that parental conflict negatively affects the children in their care; they aim to affect individual parenting behavior and parenting norms.

The spread of these programs has been rapid. An early 1990s survey found that parent- education programs were in use in 17% of U.S. counties; by 1998, close to 50% of counties provided some form of parent-education program (Geelhoed et al. 2001) And a more recent survey indicates that 46 states currently offer parent education (Pollet & Lombreglia, 2008).

But, as the authors of a recent meta-analysis recently concluded, “we do not know whether or not the[se programs] . . . are effective.” (Sigal et al. 2011). Why don’t we know? “[T]he lack of convincing evidence of program effects is due to methodological limitations in the evaluations.” *Id.* Virtually all programs have been established without control groups; many evaluations have relied on very small samples or poor evaluative measures; no evaluations have measured long-term effects.

Most exhortative and educational strategies have suffered from similar defects, making evaluation of their worth difficult if not impossible. However, the U.S. federal government’s recent initiatives to promote marriage and responsible fatherhood represent not

only an ambitious effort to promote stable, harmonious family life through education and exhortation but also one of the rare programs that has been designed to facilitate high-quality evaluation. These initiatives offer us the opportunity to assess whether education and exhortation can play a useful role both in changing individual behavior and in promoting particular relational norms.

The federal effort consists of two components. The “Healthy Marriage Initiative” aimed at providing individuals and couples with information on the value of marriage in the lives of men, women, and children; it has also offered and tested marriage-skills education to reduce conflict and increase both relationship satisfaction and longevity. The “Responsible Fatherhood” initiative has used media campaigns that emphasize the importance of emotional, physical, psychological, and financial connections of fathers. It has also offered educational services focused on parenting, problem-solving skills, and conflict resolution (Solomon-Fears 2014).

The federal government has invested substantial amounts of money in these programs. Funding was initiated in FY 2001 and has been continuous over that period; since 2011 Congress has annually appropriated \$150 million per year to these programs on a pro rata basis (Solomon-Fears 2014). Critics have questioned whether this price tag can be justified. As a senior researcher at the Center for Economic and Policy Research put it, "I think there are some things government does well. This is not one of them." (Clark 2011).

Admirably, the programs have, from the outset, included a rigorous evaluation mandate. Some of the evaluations are now complete, and they offer several lessons about the potential for soft, exhortative strategies in family law.

The Building Strong Families (BSF) project offered voluntary relationship skills education and other support services to unwed couples expecting or who have just had a baby; the program aimed to increase relationship quality, stability and father involvement. A recently completed evaluation reviewed program results across eight research sites, all of which randomly selected applicants into either the BSF program or a control group which received no services. Bottom line, the BSF program failed:

After three years, BSF had no effect on the quality of couples’ relationships and did not make couples more likely to stay together or get married BSF had no effect on couples’ co-parenting relationship; it had small negative effects on some aspects of

father involvement. . . . BSF had no effect on the family stability or economic well-being of children; however, the program led to modest reductions in children's behavior problems

Wood et al. 2012:viii-xii. Perhaps most discouragingly, the BSF program actually produced small reductions in the likelihood that couples remained together and that fathers regularly spent time with their children or provided them with substantial financial support. *Id.*

Why would this happen? The evaluators theorize that BSF may – appropriately – have “helped some couples with negative or hostile relationships recognize this fact and break up sooner than they otherwise would have.” But another factor, they suggest, is that the program's emphasis on “the need for fathers to ‘step up’ and be more responsible . . . may have led some men to believe they could not meet those expectations and to instead withdraw from these relationships.” *Id.*:xiii.

Research examining negative impacts at one BSF program site supports the evaluators' hypothesis. “BSF fathers in that site were more likely than control group fathers to blame themselves—and especially their own financial, criminal justice, and substance abuse problems—for a relationship breakup, even though their objective outcomes related to earnings, arrests, and substance use were no worse than those of control group fathers.” *Id.*

The BSF results are sobering. They remind us that any regulatory strategies can backfire and produce results far from those intended.

However, two relationship-skills education programs, very similar to BSF but serving low- and moderate-income *married* couples have shown far more positive outcomes.

The Supporting Healthy Marriage (SHM) program was much like the BSF program. But compared to the control group, this program group showed significantly higher levels of marital happiness, lower levels of marital distress, greater warmth and support, more positive communication, and fewer negative behaviors and emotions in their interactions with their spouses. Men and women in the program group also reported less psychological abuse in their relationships and slightly lower levels of psychological distress. However, program participation did not significantly affect whether couples stayed married at the 12-month follow-up point (Hsueh et al. 2012).

A relationship skills program for married military couples, PREP for Strong Bonds, did achieve a lower divorce rate one year after program participation. At one site, the control group divorce rate was literally three times higher (6.2%) as compared to the program group (2.03%) (Stanley et al. 2010). There were also significant positive effects in the program group on communication skills, confidence, bonding and satisfaction (Clearinghouse for Military Family Readiness). Interestingly, separations were equally common in the control and intervention group; the researchers note that a six-month assessment “allowed us to identify the current relationship status for 15 of the 25 couples who were separated at the one year point. Among these 15 couples, most intervention couples who had separated had reconciled whereas most control couples who had separated had gone on to file for, or finalize, a divorce.” (Stanley et al. 2010). This is certainly the most encouraging result of any produced thus far by the federal initiatives.

The PREP program’s positive results did not hold up at another intervention site, however. At this second site, there was a significant effect only on communication skills in the program group (Clearinghouse for Military Family Readiness). The divorce rate was actually higher among the program group (three) than the control group (one), although the small number of divorces makes this result difficult to interpret (Stanley, undated).

In evaluating the reasons for these differences, the PREP researchers note that PREP services were delivered by chaplains at Site 1, which might have affected the results. But they suggest that couple characteristics played a more important role. Couples at Site 1 were, on average, lower income, younger, and married for a shorter time; husbands had lower military rank and higher rates of deployment (Clearinghouse for Military Family Readiness). In sum, the researchers theorize that Site 1 couples were more in need of relationship education and that the PREP program had an impact because it gave this higher risk population the skills it needed. .

Of course, the results for these studies of married couples represent short-term effects. It is unclear if they will persist over the longer term. Fortunately, the SHM project is ongoing; the effects of SHM on longer-term outcomes — including effects on divorce and separation, parenting, father engagement, and child well-being two and a half years after couples enrolled in the study — will be explored in subsequent reports.

What explains the variation in outcomes across these relationship-education programs? The authors of the BSF evaluation conclude that:

One contributing factor may be the relatively low levels of trust and commitment among low-income, unmarried parents. . . . Partners who are less committed. . . may be more reluctant to do the hard work that relationship improvement may require. . . [D]ifferences in the characteristic of married and unmarried parents may also play a role, such as higher rates of economic disadvantage among unmarried parents and the more frequent occurrence of having children with different partners. These additional stresses may make it difficult . . . to focus on putting their newly learned relationship skills to work.

Wood et al. 2012:xiii. In sum, the researchers suggest that *higher risk plus lower trust and commitment* translates into a smaller likelihood of success. This explanation runs counter, at least to some extent, with the results of the PREP evaluation, where higher risk translated into greater success. Only if marital status plays a powerful role can these varying conclusions be harmonized.

A variety of studies supports the conclusion that marital status is associated with greater sharing and perceived relational commitment. But personal characteristics also seem to play a far more powerful role than relationship status in determining relationship longevity (Garrison, 2014). We can conclude only that the jury is still out and hope that forthcoming evaluations of the Healthy Marriage and Responsible Fatherhood programs shed light on these crucial questions.

We can be confident, however, that law makers interested in norm creation through education must carefully calibrate the program to the audience. Certainly, “programs serving unmarried parents should give careful attention to the messages they convey to fathers and be sure that goals for good parenting and partnering are presented to fathers in ways that make these goals appear realistic and attainable.” Wood et al 2012:xiii. Equally important, such programs should not be established unless coupled with high-quality evaluation. Only programs that work are worth funding.

Nonetheless, the limited evidence suggests that educational strategies and even exhortation are worth testing and evaluating.

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THE UNIVERSITY OF
NEW SOUTH WALES



“Understanding How Parties Involved in Family Law Parenting Disputes in Australia Use Information in Family Dispute Resolution”

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Abstract

This paper discusses an interdisciplinary project funded by the Australian Institute of Judicial Administration to investigate how parties to post-separation parenting disputes use information in family dispute resolution processes (mediations). The paper explains how the project will use empirical research with parties to family law mediations to explore their experiences of using information sources, and to identify issues and challenges they face in obtaining, evaluating and using information during a time of legal need.

Introduction

It has been acknowledged that informed participation in the legal system is integral to a democratic society (Scott, 2000), however very little is actually known about the acquisition and use of information during times of legal need. Consequently, lawyers, government agencies and other community groups supporting the legal information needs of individuals and families have a limited evidence-base to inform the design and delivery of the support and services they provide.

In 2013, the Australian Institute of Judicial Administration funded this pilot study to help better understand how parties involved in family law parenting disputes in Australia use information to inform their experience of family dispute resolution. The intention of the project is to:

- Contribute to the development of a new knowledge base outlining the information experiences of consumers of family law information and dispute resolution services.
- Establish good practice guidelines for the design and delivery of information services that support the needs of parties involved in family dispute resolution processes for the resolution of parenting disputes.

The following research question guides the project: *What are the information experiences of people engaged in a family law parenting dispute that is going through family dispute resolution?*

What is family dispute resolution (mediation)?

Mediation is a dispute resolution process that is “an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited (or no) authoritative decision-making power” (Moore, 2003, 8). Reforms were made to the Australian *Family Law Act, 1975* (Cth) (‘the Act’) in 2006 to ensure an emphasis on the use of mediation like processes prior to the initiation of court proceedings. Litigated proceedings are now considered a last resort, and parents engaged in post-separation parenting disputes are not permitted to file proceedings to have their matter determined by a Family Court until evidence is provided to the court that they have attended family dispute resolution, or they are exempted from attendance (*Family Law Act, 1975* (Cth), s. 60(I)). Since 2006, family mediation has generally been known as ‘family dispute resolution’ (FDR). The term ‘family dispute resolution’ is defined in section 10F of the Act as “a process (other than a judicial process): (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and (b) in which the practitioner is independent of all the parties involved in the process.” This definition emphasises FDR as a process that is ‘helping’ and non-adjudicative. Whilst a range of informal approaches to dispute resolution, including counselling or conciliation, can satisfy this broad definition, mediation is the key form of FDR currently being used in Australia under the legislation.

Given the current systemic emphasis in Australia on participation in a family dispute resolution process when parents are in a post-separation dispute about parenting arrangements, and given the informal, private and confidential nature of family dispute resolution, it is critical that parents have access to clear information that they understand, and that they are informed by the “shadow of the law”, when they enter mediation.

An Outline of the Project

This project builds upon the small but growing body of work that explores people's legal information use. Studies in this area have tended to focus on the way law students (Kerins, Madden & Fulton, 2004; Jones, 2006) and lawyers (Davidson, 2010; Markri, 2008) engage with legal information. The project's research extends this body of work by exploring legal information use from the perspective of the consumer of family dispute resolution services. The research builds upon the few current Australian studies in this area, such as Scott's (2000) work into how people use the internet to access legal information in their everyday life, and Edwards and Fontana's (2004) literature review into the legal information needs of older people. The current project focuses on the information experiences of individuals during a family law parenting dispute, an area of the family law system that is regulated by the *Family Law Act, 1975* (Cth).

In informal dispute resolution and family law literature, there has long been recognition of the significance of the "shadow of the law". This concept was first coined by Mnookin and Kornhauser who, in their seminal work in the *Yale Law Journal*, refer to the impact of the law on negotiations and dispute resolution processes, and the role of the law in the formation of "private ordering". As Mnookin and Kornahuser observed, one of the primary roles of law is in "providing a framework within which divorcing couples can themselves determine their ... rights and responsibilities" (1978-1979, 950).

The "Shadow of the Law" in Family Law Matters

This project is particularly concerned with the concept of the "shadow of the law" and how parties experience the shadow of the law in the form of information about post-separation parenting issues and family dispute resolution.

The project has conducted two significant literature reviews to inform its analysis and empirical research. The first concerned an information audit about the various forms of information that are available to parties about family law and family dispute resolution in Australia, and a review of the legal literature on party engagement with legal information. The second was a review of the literature on the concept of the "shadow of the law". It is beyond the scope of this paper to present the findings of both reviews, so we have chosen to focus on the literature on "the shadow of the law".

Mnookin and Kornhauser (1978-1979) suggested a bargaining model to consider how court rules and procedures affect the bargaining process and to what extent the law characterises private ordering. The concept of ‘the shadow of the law’ was introduced through describing the bargaining model, in which parties are said to be influenced by the following factors in out of court negotiations:

(1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behaviour.

The concept of ‘the shadow of the law’ is relevant to parts (2) and (3), that is the bargaining endowments created by legal rules indicating the court outcome if the parties fail to reach an agreement.

The literature review confirms the importance of this research. It found that:

- Most literature assumes the ‘shadow of the law’ to be a complete theory whereas it was intended to be a catalyst for further empirical research into the impact of the law on bargaining parties. This research contributes to building knowledge about the operation of the theory.
- A number of challenges to the shadow of the law theory emerge from the literature, including the fact that the theory overstates the role of the law, assumes a top down model, and also assumes a perfect understanding of the law (Batagol and Brown, 2011). This research contributes to a rigorous analysis of these challenges.
- It has been suggested that the benefit of the shadow of the law is only truly available to ‘parties who have access to good legal advice and skilled representation’, and that consequently, power imbalances, lack of access to legal information, inability to afford lawyers and inexperience in negotiation affect the ability of a party to negotiate (Field, 1998, 244). This research will assist with assessing this assertion.

Research Method and Data Collection Technique

The project is adopting a qualitative research approach because through qualitative research we will be able “to get at the inner experience of participants, to determine how meaning is formed through and in culture, and to discover rather than test variables” (Corbin

& Strauss, 2008, 12). Specifically, the research will use in-depth semi-structured interviews for data collection in order to obtain information about participant's views, opinions and experiences (Arksey & Knight, 1999). Our concern is not the content of the family law information that is sourced, but rather participants' experiences and strategies in accessing legal information as they traverse the family dispute resolution process.

The project is funded at this stage as a pilot study or proof of concept. It will test and validate the overall design of the research including the data collection instrument (that is, the interview), the data analysis process and the overall quality and nature of the findings obtained. It is intended that the project will provide seeding evidence for funding for an extended project.

As a proof of concept project, a small sample size will meet the project's objectives. Whilst most full-scale qualitative studies involve between 20 and 50 participants to ensure all variation in experiences has been uncovered (Williamson, 2002; Douglas, 1985), this pilot study will interview 12 recruited participants.

Participants will be adults aged 18+ who are based in Brisbane and are currently involved in a family law matter concerning the negotiation of post-separation parenting arrangements through family dispute resolution. It is a requirement of the funders for ethical reasons that there is no family violence dimension to the disputes in our sample. The participants will be recruited through the Family Relationship Advice Line (FRAL) that is operated by Relationships Australia Queensland (RAQ).

All interviews will be audio recorded and transcribed verbatim for data analysis. The analysis process will be iterative in nature. The researchers will seek to find connections among keywords, phrases and concepts within and between each interview. In addition, analysis will consider the concepts and themes by looking at the tension between what participants are saying and the emotion they express (Rubin and Rubin, 2005, 210).

Relationships Australia Queensland has provided ethics approval for the project. Consideration of the project's ethics application is still ongoing by the Ethics Committee of QUT, however, and for this reason the project has been delayed in commencing data collection. We are therefore unable to report on any preliminary results at this time, as had been hoped.

Conclusion

The intention of this project is to obtain empirical qualitative data to contribute to the building of a new knowledge and evidence-base concerning the use of legal information and the “shadow of the law”, particularly in the context of parenting disputes that are being resolved through family dispute resolution. In the long-term, the project aims to inform Australia’s government agencies and other organizations about optimal practices for the design and implementation of information policy and services. The overall intention of the project is to contribute to improving approaches to information provision in the Australian family law system in order to assist parties to family law parenting disputes to better navigate that system, and particularly to inform their participation in family dispute resolution.

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Chasing Shadows: online information and advice on family law disputes

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This paper is concerned with the increasing role of online sources in disseminating information relevant to the resolution of family disputes.

Historically, we know that people are highly likely to characterise issues associated with family breakdown as ‘legal’ issues¹ and therefore to access a lawyer to help resolve them. This is one of the trends that led Mnookin and Kornhauser to argue back in the 1970s that even those who resolved issues related to family breakdown without recourse to the courts were ‘bargaining in the shadow of the law’.² The likelihood that individuals would at least seek some advice from lawyers meant that privately negotiated settlements were likely to be influenced to some degree (albeit variable) by the norms and principles enshrined in contemporary law.

However, there is reason to believe that, as a source of information and advice, the internet is assuming great significance in relation to family disputes. In the UK around 80% of the population are estimated to be internet users³ and recent studies have found evidence that an increasing number of people are attempting to use the internet to help them resolve a range of justiciable problems.⁴ Although expanding access to and familiarity with computer technologies and the internet are important factors in this developing trend, there are also other reasons for suggesting that online information sources are potentially of particular importance to those experiencing family justice problems.

First, in England and Wales state funding for legal advice on private family disputes was almost entirely withdrawn in April 2013 as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Consequently, self-help and private agreement or self-representation in court is now a necessity for many and the audience for non-legal sources of advice, including – perhaps even especially – those found online, has grown accordingly.

¹ Legal Services Board (2012) Understanding Consumer Needs From Legal Information Sources: Final Report. Available at: <https://research.legalservicesboard.org.uk/wp-content/media/2012-Legalinformation-sources.pdf>

² R Mnookin and L Kornhauser, ‘Bargaining in the shadow of the law: the case of divorce’, (1979) *Yale Law Journal*, 88(5), 950-997.

³ National Audit Office (2013), *Digital Britain 2: putting user’s at the heart of government’s digital services* The Stationery Office: London.

⁴ National Audit Office, 2013; Pleasence, P., Balmer, N, Patel, A., Cleary, A., Huskinson, T., Cotton, T. (2011), *Civil Justice in England and Wales: Report of Wave 1 of the English and Welsh Civil and Social Justice Panel Survey*, Legal Services Commission: London.

Secondly, recent years have seen a proliferation of websites carrying information of potential relevance to those embroiled in family disputes. As noted below, these websites are disparate and extremely varied in purpose, content and audience but their existence expands the opportunity for individuals in need of information and/or advice to seek it online.

This paper argues that, in the UK at least, there is a concerning deficit in current awareness of the use and usefulness of such sources. Three reasons for this argument are outlined below.

1. Chasing shadows

The first concern arises from the unbounded range and diversity of potentially relevant online resources as identified in a survey of online resources that I recently conducted. Certainly there is a plethora of online law firms offering various legal service packages which harness the power of technology to increase efficiency and cost-effectiveness to greater or lesser degrees. These are the new face of traditional legal advice which Susskind has long predicted will eventually signal ‘the end of lawyers’,⁵ at least as we know them. Though some of these online law firms appear to operate as genuine social enterprises,⁶ the websites of others do present concerns. Some disseminate apparently free and neutral advice through pages which, upon inspection, are really thinly veiled ‘winnowing’⁷ attempts to convince the user that their expert (and costly) legal advice is urgently needed. But not all online sources of potential interest are examples of natural commercial developments in response to technology and my research suggests that online legal services represent the thin end of the wedge.

An array of voluntary sector organisations present online information and/or advice to individuals engaged in family disputes. In some instances the motives and objectives of these organisations are neutral and benign but in others they are intended to advance particular agendas and the messages they present are loaded accordingly, though not always transparently. Additionally, online ‘communities of experience’ for parents, such as the UK’s tremendously successful Mumsnet, now provide rich opportunities for the ‘crowd sourcing’ of information among their members.

⁵ R Susskind, *The end of Lawyers: Rethinking the nature of legal services* (Oxford University Press, 2010).

⁶ An example from the UK is Wikivorce, which reports having over 3000 visitors each day.

⁷ R Smith and A Paterson, *Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution* (University of Strathclyde, 2014) p 41. Available at:

http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face_to_Face.pdf

As a consequence of all this it is increasingly difficult to capture or predict the range of messages which individuals could now be exposed to in the course of their efforts to find appropriate and workable solutions to family problems. The ‘shadow of the law’ which once influenced much family dispute resolution decision making is increasingly elusive. Even if individuals think they are bargaining in the shadow of the law, the information they receive about the relevant law is something there is little control over, or even knowledge of. States and stakeholders must engage in a seemingly endless exercise of ‘chasing shadows’ if they are to have any understanding of the messages which may now be shaping expectations and solutions in the course of family dispute resolution.

Of course, one might well ask whether anything has really changed here. After all, when Mnookin and Kornhauser presented their theory of ‘bargaining in the shadow of the law’ they acknowledged that partly untameable factors such as cultural values and personal preferences would always exert some influence on perceptions of justice and subsequent negotiations. It is suggested, however, that the range and the accessibility of advice and information offered online is unprecedented and there is a burgeoning risk of exposure to misleading, inaccurate and potentially damaging messages which may lead to decision-making that is unfair, or even detrimental to children.

2. Exploiting the potential of online information and advice

The second concern is that neither the potential nor the limitations of the internet as a tool for the resolution of private family law disputes is properly understood at present and this is an obstacle to the future development of effective and accessible resources. A limited body of work has grown up around the capacity for the internet to provide very useful public legal education and our Legal Services Board has identified considerable public enthusiasm for the provision of a recognisable online legal advice service which would encompass identification of problems, the legal frameworks affecting them and potential resolution strategies.⁸

In the UK there have been limited efforts made to evaluate the content of some online resources for legal problems, though there is nothing yet which focuses specifically on resources for family disputes.⁹ Neither do we have much evidence on how people use family

⁸ Legal Services Board, 2012 (above).

⁹ Smith and Paterson, 2014 (above); Advice Now, 2006, Reviewing and Scoring Information Resources. Available at: <http://www.advicenow.org.uk/about-us/evaluation-and-research/reviewing-and-scoring-informationresources,10050,FP.html>

law sources, though the general evidence we have on internet use, unsurprisingly, reveals that not everyone has the digital literacy skills which enable them to make judgments about good and bad sources of advice and information.¹⁰ Perhaps most interestingly, there is research pointing to an unwillingness to use the internet as a tool to resolve important disputes among otherwise well practised web users.¹¹ In spite of all this, the UK government and other organisations are already investing in the development of online tools to aid family dispute resolution. The Department for Work and Pensions has invested substantial funds in the development of a range of support sources for separated families which are either exclusively or partly internet based.¹² The DWP has also launched its own online app - ‘Sorting Out Separation’ - to promote family dispute resolution.

There is much to be gained from research designed to achieve a greater understanding of which messages are most effectively transmitted and received through the internet and why, as well as the practical utility and shortcomings of existing and developing online resources. For one thing, such research would facilitate a better understanding of some of the ways in which undesirable messages might be accessed, thereby equipping government and other interested groups to take action to challenge and counter such messages. Such research would also facilitate the development of optimum models and platforms for delivering online support for family disputes, ensuring that innovation funds and efforts are not wasted.

3. The potential costs of efficiency in online resources

The third concern derives from the potential for some of the recently developed holistic and progressive interventions in the family justice system to become marginalised as efficient online dispute resolution systems are developed.

A striking feature of online resources relevant to private family disputes is the extent to which most of them are focused on either law and legal process or relationships and non-legal dispute resolution strategies, rather than a combination of both. Even those jurisdictions, such as the USA, with the most well-developed scholarship on and exploitation of online

¹⁰ E Sillence & P Briggs. Please advise: using the Internet for health and financial advice.

Computers in Human Behaviour, (2007) 23(1), 727-748; S Rieh, On the Web at Home: Information Seeking and Web Searching in the Home Environment, (2004) *Journal of the American Society for Information Science and Technology*, 55(8):743–753.

¹¹ C Denvir, N Balmer & P Pleasence, *Surfing the Web: Recreation or Resource? Exploring how young people in the UK use the Internet as an advice portal for problems with a legal dimension*. (2011) *Interacting with Computers*, 23(1) 96-104.

¹² Department of Work and Pensions (2013), Press release: Government funds new innovative support for separated parents (10th April 2013): <https://www.gov.uk/government/news/government-funds-newinnovative-support-for-separated-parents> (accessed 19/03/2014).

resources for justiciable disputes focus predominantly on legal processes. Yet one of the most important developments in the delivery of family justice has been the (partial) recognition that resolving conflict can be as important as achieving settlement (whether through the courts, mediation or private agreement) and the subsequent development of interventions such as separated parenting programmes. Awareness of the importance of adequate safeguarding checks has also grown. The inadequacies, and potential risks, of a highly settlement driven legal process¹³ might well be replicated, or even consolidated, in the development and delivery of online tools to support family dispute resolution. Indeed, it is possible that the more efficient and streamlined the online tool, the higher the risk that users will not be exposed to any safeguarding checks or constructive conflict resolution strategies.

This is not to suggest that it is not possible to develop online tools which guide individuals through family disputes in ways which fuse reliable information, effective settlement strategies, effective conflict resolution strategies and safeguarding mechanisms. Rather, the point is that considerable thought should be invested in developing and evaluating such tools and there is little evidence that they currently exist.¹⁴

Conclusion

Online resources present a great threat even as they hold enormous potential in relation to transmitting empowering messages about how family disputes can be resolved.

But what does all this mean in terms of the state's role in transmitting messages about family life? The state used to facilitate, through funding, the transmission of messages through so that people could bargain in the shadow of the law. It has begun to withdraw from that role and the replacement sources of message transmission online are unregulated, unevaluated and, largely, uninformed in terms of what works for families. This is concerning from the perspective of access to justice because families who do not have the means to access formal legal advice but do have the means to access the internet have been abandoned to the wilderness of free online resources without any protection from inadequate advice.

Of course, a state which is clearly committed to promoting private ordering and marginalising the role of the law in resolving family disputes (as the UK government is)

¹³ See L Smith and L Trinder, '*Mind the gap: parent education programmes and the family justice system*' (2012) *Child and Family Law Quarterly*, 24(4) 428-451.

¹⁴ A recent international survey of online legal services and advice tools is illuminating on this point. See R Smith and A Paterson, 2014 (above).

might not be concerned at this prospect. However, it is submitted that there are several reasons why the state ought to be concerned.

First, having provided funds to support online resources for family disputes, the state is proactively involved in promoting this new sphere of advice and information transmission. There must be a consequent responsibility to monitor the quality of the content of online resources as well as its usefulness. Equally, given the UK government's strong emphasis on getting the public to engage with the internet,¹⁵ efforts ought to be made to identify any potentially harmful messages about post-separation family arrangements dispute resolution which are being projected.

Secondly, it is suggested that poor awareness of the online resources individuals are/are not being exposed to could have ramifications for the family justice system itself which run counter to state efforts to 'delegalise' family disputes by promoting private agreement. Currently, we are not only unaware of the information people might be receiving through online resources, but we also lack awareness of the approaches to problem solving they might be exposed to. If individuals are more likely to access and/or make use of online resources which promote use of the legal process (for whatever reason) rather than alternative dispute resolution mechanisms or private negotiations, they could in turn be more likely to litigate. Moreover, they might well litigate armed with unclear or inaccurate information, unrealistic expectations or combative app

¹⁵ See The Cabinet Office, Government Digital Strategy, 2012.

Parenting in Stepparent Families: Parental Responsibilities for More Than Two Parents as a Possible Solution for the Dutch Situation

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1. Introduction

In 2012 the Second Chamber of the Dutch Parliament debated the bill ‘Automatic legal parentage for the female partner of the biological mother’. In the course of the debate, several MPs posed questions about the parental role and legal position of the third parent in families with more than two parents – so-called multi-parent families. The question rose how the actual role of the third parents could be legally imbedded. In order to provide an answer to these questions the Dutch Ministry of Security and Justice commissioned a research into the legal regulation of and the de-facto situation with the parenting in the stepparent families and planned lesbian families with known donor. The research¹⁶ has been conducted by a multidisciplinary team of researchers of the VU University of Amsterdam, the University of Groningen, and the Utrecht University.

2. Research design

The research includes a combination of a legal comparative study of the experience in England and Wales with attributing parental responsibilities to more than two parents; a study of the Dutch legal regulation of parental responsibilities in multi-parent families and an empirical research into de-facto situation of multi-parent families in the Netherlands. In this paper I will only cover the empirical research related to the step-parent families in the Netherlands.

¹⁶M.V. Antokolskaia, W.M. Schrama, K.R.S.D. Boele-Woelki C.C.J.H. Bijleveld C.G. Jeppesen de Boer en G. van Rossum, *Meeroudergezag: een oplossing voor kinderen met meer dan twee ouders? Een empirisch en rechtsvergelijkend onderzoek*, Den Haag, 2014 WODC, Ministerie van Veiligheid & Justitie, 2014, 246 p.

3. Research questions

The purpose of the empirical research is to get a picture of the correlation between the legal status and the de-facto parental roles in the stepparent families and to find out what various actors think of the current legal regulation and how they envisage the ideal one.

Therefore the following research questions need to be answered through empirical research.

1. What is the legal status of the three parents in the Dutch step-parent families? How are legal parents, how have parental responsibility?
2. What are the actual parental roles of the three parents in the Dutch step-parent families?
3. To what extent the actual parental roles of the parents correspond with their parental status?
4. Do parents in the Dutch step-parent families and professionals working in this field experience problems as a result of the current legal regulation of parental responsibility? If yes, what are these problems?
5. Do parents in the Dutch step-parent families and professionals working this field feel the need to change the current legal regulation of parental responsibility?

4. Empirical research method

This empirical research combines two complimentary methods: a quantitative study (online questionnaire) and a qualitative study (interviews with parents, grown-up stepchildren and professionals). The qualitative study involves face-to-face in-depth interviews with eleven (step)parents, four grown-up children, and fifteen professionals and representatives of parents' interests organizations. The quantitative study involves a computer-assisted survey with 302 divorced parents and stepparents, selected from an internet panel.

5. Results of the empirical research

The sample

The quantitative research sample included 302 respondents participating in the computer-assisted survey: 93 stepparents (31%), 151 resident parents (50%) and 58 non-resident parents (19%). 85% of the resident parents are mother, 83% of non-resident parents are fathers. 76% of the stepparents are stepfathers and 24% are stepmothers. The 302 respondents have in total 527 children.

The majority of these families is a stepfather family (76%), compared to 24% stepmother families. 66% of the families only include children of the resident and non-

resident parent, these families could be called ‘simple’ stepparent families. In 23% of the cases the picture is more complicated because the resident parent has not only children from the previous relationship, but also children with the new partner (the stepparent of the children from the previous relationships). Some situations are even more complicated as almost half of the stepparents (46%) has children from a previous relationship. In 25% of the cases there children reside in the family of the resident parent and the stepparent. That means that in these families the parents have a double role: they are at the same time resident parents of their own children and stepparents of the children of their partner from the previous relationship.

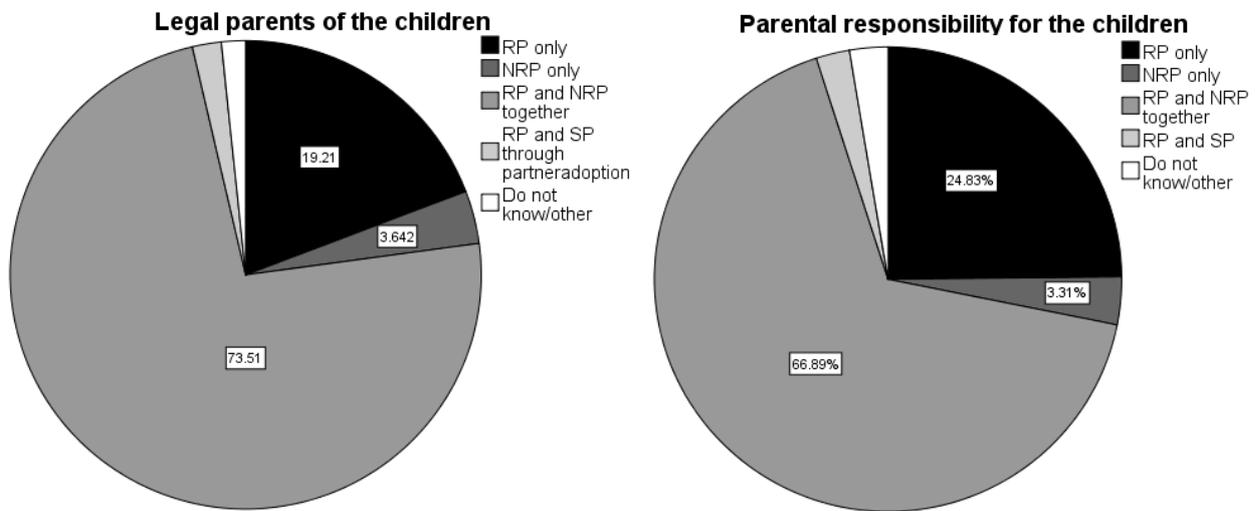
The legal status of the parents

Before their separation, the majority of the resident and non-resident parents were married (80%). 93% of the resident parents are the legal parents of the children. This is no surprise as the 85% of the resident parents are mothers, who are according to Dutch law, legal parents as a matter of law.¹⁷ In relation to the non-resident parents only 74% of our sample has the status of legal parent. Stepparents are legal parents (via stepparent adoption) only in 2% of the cases.

In 67% of our sample the resident and non-resident parent exercise joint parental responsibility. The explanation for this rather high percentage is that since 1998 joint parental responsibility automatically continues in case of divorce or separation of the parents. In 25% of the sample only the resident parent is charged with parental responsibilities, and in 3,5% of the cases only the non-resident parent has parental responsibility. Stepparents exercise joint parental responsibility together with the resident parents only in 2,5% of the cases. This is also no surprise as – in contrast to the English law – the Dutch law does not allow attribution of parental responsibilities to more than two persons. That means that a stepparent can obtain parental responsibility only at the expense of the non-resident parent.

¹⁷ Art. 1:198 Dutch Civil Code.

Figure 25. *Legal parentage and parental responsibility (N= 302, rp= resident parent, sp= stepparent, nrp= non-resident parent)*



Actual parental roles

The actual parental roles are delineated on the basis of self-reporting and reporting by other respondents (the respondents are asked to define their role by choosing one of the given options) and a combined variable, based on a number of variables such as the time spent with the child, participation in activities of the child, involvement in decision-making, child maintenance and contacts between the respondent’s family and the child.

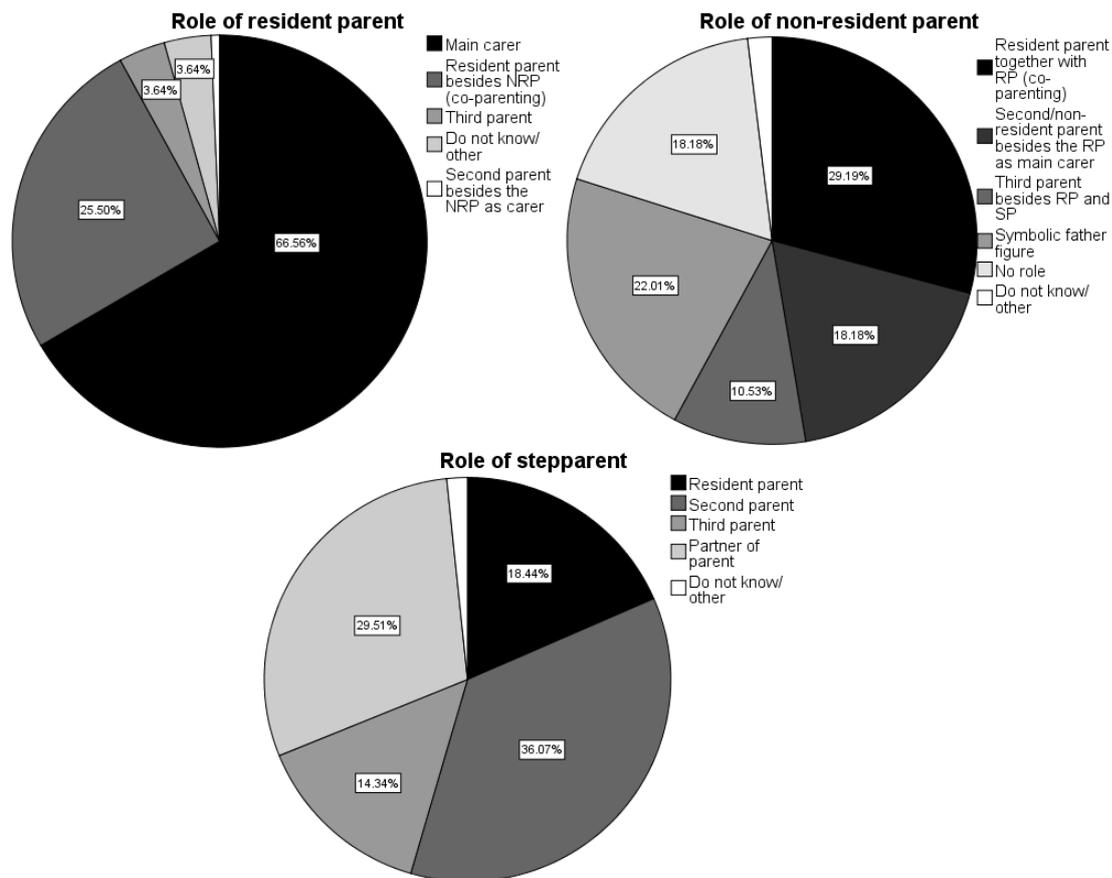
The respondents qualify the resident parents mainly (67%) as primary caregivers and 25% share the role of the primary caregiver with the non-resident parent in a shared residence arrangement. 84% of the resident parents maintain the child financially. In 77% of our sample children have strong ties with the family of the resident parent.

29% of non-resident parents raise their children together with the resident parent in a shared residence arrangement and define their role as equal to that of the resident parent. 18% of the non-resident parents describe their role as a ‘second parent after the resident parent’ whereas 10% qualifies as the ‘third parent after the resident parent and the stepparent’ and 22% as a symbolic parent. 18% of the non-resident fathers is reported to play no role in the life of the children. Therefore about 50% of the non-resident parents play a significant role in the life of their children, while the other 50% play a minor role or no role at all. There are also substantial differences regarding the time the child spends with the non-resident parent. In one third of our sample the children spend two or more days a week with the non-resident

parent, while 53% of the children meet the non-resident parent less than once a month or never. Only 29% of the non-resident parents takes part in decision making in relation to the child with the resident parent. Only 51% contribute to the maintenance of the child and only in 39% of the cases the child has contact of the family of the non-resident parent.

Also the role of stepparents is perceived as wide-ranging: 18% of the stepparents are seen in a role equal to that of the resident parent; 36% - as 'second parent after the resident parent; 30% - as partner of the resident parent and 14% as 'third parent after the resident and non-resident parent. 13% of the stepparents are reported to take important decisions related to the child together with the resident parent and with the exclusion of the non-resident parent. 76% of the stepparents contribute to the maintenance of the child.¹⁸ In 67% the children have regular contact with the family of the stepparent.

Figure 29. Parental roles of the three different types of parents involved in raising the children



¹⁸ Under the Dutch law stepparents have the same obligation to maintain the stepchildren belonging to their household as legal parents.

Correlation between legal status en parental roles

An important question is whether the actual and legal roles of the parents correspond. This is the case for the status en the roles of the resident parents. The comparison of the legal status and the parental roles of the non-residents parent and stepparents reveals significant discrepancy.

On the one hand, only 50% of the non-resident parents actually fulfil a similar role as the resident parent or have a substantial role in the lives of their children, whereas another 50% fulfils little or no role at all. On the other hand, about 50% of the stepparents fulfil a role equal to that of the resident parent or have a substantial role in the lives of the children. For both non-resident parents as well stepparents, this suggests a substantial divergence in 50% between the legal parental status and the actual parental role in daily-life. This discrepancy is remarkable and makes might be seen as incentive to change the law.

How parents and professionals see the situation ideally?

If parents were allowed to choose who should be attributed with parental responsibility, this study shows clear differences between the wishes of the three parents. Stepparents choose parental responsibility for themselves together with the resident parent (37%) or for the resident parent together with the non-resident parent (27%). The resident parent generally prefers parental responsibility for themselves together with the stepparent (34%) or for themselves alone (29%). 74% of the non-resident parents prefer to have parental responsibility together with the resident parent and another 12% wishes parental responsibility for themselves alone. Generally, little disagreement is reported between the resident and non-resident parents. When asked who should have parental responsibility after the decease of the resident parent, most resident parents choose the stepparent (44%), 22% choose parental responsibility exclusively for the non-resident parent and another 14% opted for the stepparent together with the non-resident parent. In case of death of the non-resident parent, the majority would prefer parental responsibility exclusively for the resident parent (66%). In case of death of the resident parent, 32% of the stepparent wishes parental responsibility for themselves, 29% for the non-resident parent and 21% for the stepparent and non-resident parent together.

On the whole both the parents and the professionals do not see the discrepancy between the legal and actual position of the stepparent and non-resident parent as a major problem. In case of death of a resident parent they indicate that the current law could cause

problems for a relatively small number of cases. The respondents do not appear to have major law reform wishes and see both advantages and disadvantages of attribution of parental responsibility to more than two persons at the same time. The non-resident parents mostly have a constructive attitude towards the involvement of the stepparent in the life of their children, but do not want the position of the stepparent to be legally embedded.

6. Conclusion: Should legislation be changed?

The discrepancy in almost 50% of the sample between the legal status and the actual parental roles of the stepparents and the non-resident parents in stepparent families calls the legislator to consider whether the current legislation is in need for change. Various legislative responses could be thought of.

Parental responsibility for the stepparent at the expense of the non-resident parent

The attribution of parental responsibility to the stepparent at the expense of the non-resident parent - when the non-resident parent does not play a significant role in the life of the child, and the stepparent does - seems to be the most simple and straightforward way to tackle the discrepancy. However, in the Netherlands this measure is politically unfeasible. Automatic continuation of parental responsibility after divorce is a result of a recent development of family law¹⁹ towards equal rights of both parents during and after the separation and cannot be easily reversed.

¹⁹ Before 1995 legislation only made parental responsibility available to married parents and only as long as the marriage continued. However 1984 the Supreme Court decided that an impossibility to continue joint parental responsibility after divorce transgresses article 8 ECHR (HR 4 May 1984, NJ 1985, 510) In 1986 the same conclusion was drawn in respect of the impossibility of joint custody for unmarried parents. (HR 21 March 1986, NJ 1986, 585). In 1995 joint parental responsibility after divorce, upon the joint application of both parents, was for the first time introduced in Dutch legislation (Act of 6 April 1995, On Custody and Access, Stb. 240. This Act entered into force on 2 November 1995 (Act of 6 April 1995, On Custody and Access, Stb. 240. This Act entered into force on 2 November 1995). At the same time an unmarried parent also became eligible for joint custody. This novelty was more or less based on decades of developing case law. In 1998 joint custody after divorce was transformed from a mere option into the main rule since then it has become automatic, 'unless the parent or one of the parents have requested the District Court to determine that, in the best interests of the child, custody should be awarded to only one of them' (Act of 30 October 1997, Stb. 506. Entered into force on 1 January 1998). In 1999 the Supreme Court delivered a judgement determining that a request of one of the parents for sole custody, even when combined with a lack of good communication between the separating spouses, is insufficient for deviating from the generally applicable joint custody. The best interests of the child will only justify sole custody 'if the communication problem is such that it brings about an unacceptable risks that the child would be crushed between the parents, and that the improvement in the communication between the parents is not foreseeable within a nearby future' (HR 10 September 1999, NJ 2000, 20). In 2009 this rule was codified (Wet tot wijziging van, onder meer, Boek 1 van het Burgerlijk Wetboek in verband met invoering van gezamenlijk gezag voor een ouder en zijn partner en van gezamenlijke voogdij van 30.10.1997, Stb. 1997, 506, entered into force 01 Januari 1998, Stb. 1997, 564

Parental responsibility for three parents

The diversity of parental roles of the stepparents and non-residence parents within the sample leads to a conclusion that if the Dutch legislature would consider the attribution of parental responsibility to more than one parent at the same time, parental responsibility should not be attributed to stepparents automatically. The initiative should always come from the stepparents and parents themselves. Building on the experience of England and Wales, one can think of parental responsibility agreements of all three parents and parental responsibility orders.

Limited parental responsibility for the third parent

Another possible response could be attributing limited parental responsibility to the stepparent. Thereby the Belgian law could provide for an inspiration.

Specials status for the stepparent

Another idea is to create a special status for the stepparent, for instance, a specific new form of guardianship.

**Legal Recognition for the Relationships of Same-Sex Couples:
Are There Two Americas?**

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*“We are living in this era of two Americas, where LGBT people
living in certain states ... have much greater access to ... marriage”.*

--- Sarah Warbelow, Human Rights Campaign (Caldwell, 2014).

The legal contexts of same-sex couples' lives have changed dramatically in the United States in recent years (Ball, 2010; Klarman, 2013). Fifty years ago in the United States, all but one state – Illinois – criminalized consensual same-sex sexual behavior, and almost all same-sex couples felt the need to remain hidden in order to avoid persecution. As little as 25 years ago, 14 states still had sodomy laws on the books, and many lesbian and gay people were still in the closet. By the time the last sodomy laws were overturned by the US Supreme Court in *Lawrence v. Texas*, in 2003, legal recognition of same-sex marriages had been established in the Netherlands, and civil unions for same-sex couples had become available in Vermont. The first legally recognized marriages of same-sex couples in the United States were celebrated just 10 years ago, in 2004, in Massachusetts. In the United States today, same-sex couples live openly together, their marriages are recognized in 17 states and the District of Columbia, and attorneys are actively litigating for marriage equality in jurisdictions across the country.

What differences do these rapid changes make? This manuscript provides a brief guide to issues posed by variations in current laws relevant to same-sex relationships in the United States. The discussion below focuses entirely on civil marriage. First, the impact of legally recognized marriages upon those who are allowed by law to undertake them, upon their children, and upon others around them is discussed. The presentation emphasizes differences between the experiences of same-sex couples who are and those who are not living in jurisdictions that recognize their marriages. Following this, the focus shifts to some less widely discussed benefits of legal marriage that are enjoyed by heterosexual couples but not by lesbian and gay couples in the United States today. Given the complex patchwork of law and policy across the country, this discussion will emphasize ways in which even same-sex couples with legally recognized marriages are disadvantaged by the current patchwork of

marriage laws. Overall, the discussion considers some reasons why marriage equality matters, and also why true marriage equality anywhere in the United States requires marriage equality everywhere across the country.

Are There Two Americas?

While marriage equality is sometimes described as sweeping the country, it is, however, still a right enjoyed by only a minority of lesbian and gay Americans. Many lesbian and gay people live in states that neither recognize their relationships nor offer other important protections for non-heterosexual citizens (Joslin & Minter, 2012). In referring to this unequal distribution of rights among lesbian and gay people living in different parts of the United States, some have proposed the idea of “two Americas”. This notion suggests that, in one part of the United States, lesbian and gay citizens have many of the rights enjoyed by heterosexual citizens, but in other parts of the country, this is not the case. The contrast is drawn, for example, between lesbian and gay people who are living in Massachusetts, where their marriages are legally recognized, and where they are protected by laws against employment discrimination, and those living in Mississippi, where the law regards life partners as legal strangers to one another, and where there are no laws barring employment discrimination based on sexual orientation. The concept of “two Americas” is intended to draw attention to the fact that, while dramatic legal changes have taken place in some jurisdictions, the pace of change is uneven, and not all lesbian and gay Americans have been equally affected.

What impact does legal recognition of same-sex marriages have in the United States today? Some benefits to those whose marriages are recognized in law are well known. Because Americans take for granted so many of the benefits of marriage, however, it can be easy to overlook at least some of them. To refresh memory, a brief sketch of some benefits is provided below. As even a cursory overview reveals, those excluded from legal recognition of their relationships are disadvantaged in many ways relative to those whose relationships are recognized in the law.

Inasmuch as the American legal tradition privileges marriage, tangible benefits based on the legal recognition of marriages abound (Polikoff, 2008). Many of these directly benefit the couples whose marriages are recognized in law. For instance, legal recognition often allows spouses to obtain home and auto insurance coverage at preferential rates. Married couples may obtain health insurance for both spouses through either spouse’s employer.

Spouses need not testify against one another in court. When relationships between spouses sour, legal recognition for marriage provides for an orderly path to divorce. When a spouse dies, legal recognition for marriages carries with it inheritance rights for the surviving spouse. All of these and many other rights are taken for granted by heterosexual couples when they marry (Wolfson, 2004). In jurisdictions that recognize the marriages of same-sex couples, these and other tangible rights are also accorded to married same-sex couples.

Benefits of legal recognition of the marriages of same-sex couples are particularly important for those who are parents (Wolfson, 2004). When a heterosexual couple is married and a child is born, both parents are usually accorded legal status as parents, regardless of whether or not they are both biologically linked with the child. Likewise, when a married heterosexual couple adopts a child, both members of the couple are accorded legal status as adoptive parents. The law's recognition of both parents helps them to provide for their child. Moreover, if one parent dies or if the parents' relationship ends, legal bonds between children and both parents will be protected by law. In jurisdictions that recognize their marriages, these benefits are available to married same-sex adoptive parents.

Not only parents, but also their children benefit when the marriages of same-sex couples are recognized in law (Patterson, 2009). Some of the benefits to children are tangible. When couples are recognized as being married, it is easier for them to obtain health insurance coverage for their children through both employers. When couples are recognized as being legally married, this also affects parentage determinations. When both members of a married couple are recognized as a child's parents, the law offers protections for children in case of parental illness, disability, or death. In jurisdictions that recognize the marriages of same-sex couples, these important benefits are available to children of lesbian and gay as well as heterosexual married couples.

Less tangible benefits of legally-recognized marriages are also important both to parents and to children. The knowledge that important family relationships are respected and recognized in law helps adults and children to feel valued, respected, and secure (American Academy of Pediatrics, 2002). Legal recognition for the marriages of same-sex couples can legitimize their relationships and enhance social support for them in the communities where they live. In jurisdictions where marriages of same-sex couples are recognized by law, these benefits are open to them and to their children.

Legal recognition for the marriages of same-sex couples also benefits sexual minority youth and other sexual minority individuals who do not marry. Regardless of sexual orientation, many youth grow up anticipating that marriage and children will one day be important parts of their adult lives. Like other young people, many lesbian and gay youth hope to marry same-sex partners of their choosing and to have children some day (Patterson & Riskind, 2010; Riskind & Patterson, 2010). Legal recognition for the marriages of same-sex couples provides role models for lesbian and gay adolescents, and helps such youngsters to grow up knowing that their dreams about marriage and family can come true. In addition, there is evidence that legal recognition for the marriages of same-sex couples is associated with better physical and mental health among sexual minority individuals, regardless of whether they are or are not partnered (Hatzenbuehler, O’Cleirigh, Grasso, Mayer, Safren & Bradford, 2012).

Society at large also benefits when the marriages of same-sex couples are recognized in law. When the marriages of same-sex couples gain recognition in new jurisdictions, the wedding industry gets a boost, and substantial revenues flow into local economies (Konnoth, Badgett & Sears, 2011). When legally married couples are responsible for one another and for their children, the need for public assistance is also reduced. Through reduction in the need for income supports, supplemental food programs, and subsidized medical care, the family members and communities around married same-sex couples receive benefits. When the law recognizes the marriages of same-sex couples, communities as well as individuals may benefit (Badgett, 2009).

Even in the light of clearcut benefits, the idea that legal recognition for relationships of same-sex couples may be harmful still remains. Will legal recognition of the marriages of same-sex couples result in lower rates of marriage or higher rates of divorce among heterosexual couples? Will legal recognition for the marriages of same-sex couples somehow result in more non-marital births? Research to date reveals that none of these outcomes has taken place (Badgett, 2009). When states offer legal recognition for the marriages of same-sex couples, no harms of any kind have been documented.

In sum, there are strong arguments for the notion of “two Americas”, one with and one without legal recognition for the marriages of same-sex couples. The benefits of marriage are multiple, and – when available - they accrue to same-sex as well as to opposite-sex couples, their families, and their communities. Some affect only a few people, but others are

likely to influence many if not all members of affected communities. Some benefits are tangible in nature and involve access to discounts or the accumulation of assets. Others are no less important for being less concrete. Legal recognition for the marriages of same-sex couples is apparently a change in policy that harms nobody and benefits all.

Beyond Two Americas

As clearcut as some differences between the experiences of same-sex couples who can and those who cannot marry appear to be in the United States today, there are other ways in which they remain similarly disadvantaged. The patchy and limited nature of marriage equality laws across the country has some less well known but still important effects on all same-sex couples. With a tiny handful of exceptions, heterosexual couples who marry in one state can expect to have their marriages recognized in other states, as well. This expectation enables them to move freely across state lines without concern for legal recognition of their marriages. Such unfettered mobility is essential to success in many careers, and it makes leisure as well as business travel possible without jeopardizing recognition of one's marriage. Because the marriages of same-sex couples are recognized in some but not all states, however, even married same-sex couples who live in jurisdictions that provide legal recognition for their marriages may discover obstacles to their freedom of movement (Wolfson, 2004).

Thus, even though some same-sex couples live in locales that afford both state and federal recognition of their marriages, and others do not, all are nevertheless disadvantaged by the fact that such legal recognition is denied in many jurisdictions. Consider, for example, a gay couple who live in Northern Virginia and work in Washington, DC. After they undertake a legally recognized marriage in the District of Columbia, and travel back across the Potomac River on their way home, they change from being legally married to being legally single. Each day thereafter, the couple awakens in their home as two single men who are legal strangers to one another, only to become legally married again when they arrive at work, and to return to unmarried status once again upon returning home. If one member of the couple should become ill or die while at work, the other will be recognized as his lawfully wedded spouse, able to make significant decisions on his behalf. If, on the other hand, one of the men fell ill or died at home, the other will be treated by the law as a nonrelative with no rights or responsibilities for his care. No such difficulties are experienced by the recently married heterosexual couple living next door to these men.

There are many other examples of difficulties imposed by the complicated patchwork of legal recognition for the relationships of same-sex couples in the United States today (Wolfson, 2004). Consider a gay couple living in New York, where their marriage is legally recognized. One of the men is offered a promotion if he moves to the company's office in Atlanta. The man accepts, but Georgia does not recognize his marriage, so his husband has difficulty obtaining health insurance. As another example, consider a lesbian couple who has married in Iowa and then decided to relocate. After the couple moves to Oklahoma, their relationship falls apart, and they decide to divorce. Because Oklahoma law treats the women as single, they cannot obtain a divorce without returning to Iowa together. Or consider a married same-sex couple from California, who simply want to enjoy a road trip across the country. As they drive into Nevada, their marriage is no longer valid, but can be considered under the rubric of Nevada's domestic partnership law. By the time they get to Kansas, the various state laws they encounter will have categorized them as married, single, in a domestic partnership, and/or in a civil union. Both in occupational domains and in personal life, the unevenness of legal recognition for the marriages of same-sex couples is an obstacle to mobility.

Thus, even lesbian and gay people who live in marriage equality states such as California and New York have not yet received fully equal rights as American citizens. It is true that same-sex couples who have been married and reside in California or New York enjoy state and federal marriage benefits, and it is true also that these can be substantial. On the other hand, as the examples above suggest, same-sex couples do not yet have the same freedom of movement that heterosexual couples enjoy within the United States. True equality under the law for lesbian and gay couples will only be achieved when they too can be sure that their marriages will be recognized in every one of this country's jurisdictions.

Conclusions

In summary, legal recognition for the marriages of lesbian and gay Americans matters for many reasons. Some of the reasons are given in law; under current state and federal laws, married couples receive many benefits. In the United States, the law not only favors those who marry, but also their children, and the people around them. Because legal recognition for the marriages of same-sex couples has no impact on the marriages of other people, marriage equality appears to benefit many while harming none. True marriage equality

anywhere, however, requires marriage equality everywhere. As society becomes more inclusive of same-sex couples, many stand to benefit.

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