

Family Instability and Children's Health

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One of the most difficult issues that governments around the world have had to consider is whether and how to recognise non-marital cohabitation. In some countries of Western Europe, marriage and cohabitation have now become almost interchangeable in terms of socially accepted forms of family formation.¹ In some South American countries, more people of child-bearing age are living in cohabiting relationships than are married.² In Peru for example, in 2012, 38 percent of all adults between the ages of 18 and 49 were living in cohabiting relationships; only 24 percent were married. In Columbia in 2009-10, the rates were 35 percent cohabiting and 20 percent married.³

Marriage remains the most common form of couple relationship within Western Europe, but the gap between marriage and cohabitation as a family form is narrowing. For example figures from 2006 show that in France, 26 percent of adults in the 18 to 49 age range were cohabiting, while 39 percent were married. In Sweden, 25 percent were cohabiting and 37 percent were married.⁴

If the growth in cohabitation were confined to childless couples it would not represent a major transformation in family life. Cohabitation could be seen then as a form of trial marriage or precursor to marriage. However increasingly, cohabitation is a context for childrearing. This can be seen in the increase in ex-nuptial births. In Britain, 47.5% of all births occurred outside of marriage in 2012.⁵ Half or more of all births are ex-nuptial in Belgium, Bulgaria, Estonia, France, Iceland, Slovenia, Norway, and Sweden. The highest rate is in Iceland at 65% of all births.⁵⁵ More than half of these births across Europe are in cohabiting unions, although there are significant variations between countries.⁶

Rates of ex-nuptial births are particularly high in certain South American countries. According to one comparative study, 84% of births in Columbia occur outside marriage. In Peru, it is 76%, Nicaragua, 72% and in Brazil, 66%.⁷ Some cohabiting couples who have children will go on to marry (as the capstone to their committed relationship rather than the

foundation stone); but many see no need to do so.

These demographic changes create challenges for many jurisdictions because marriage has traditionally provided the structural framework for the family law system. Marital property and spousal maintenance rights are premised upon marriage, and remedies become available upon separation and divorce. Spousal maintenance, while it has more than one rationale, has traditionally been conceived as a remedy available to an innocent party in the event of a divorce for fault. Typically the guilty husband was held to his promise of lifelong support for his wife, a promise which was given effect through lifelong maintenance.

Cohabiting couples make no such promises of lifelong support to each other, and moving in with someone does not create the same kind of legal commitment as standing before a religious or civil celebrant and taking solemn vows in the presence of witnesses. Nor is there, in cohabitation, necessarily any justification for treating property acquired in the course of the parties' cohabitation as shared, in the way that we understand marriage to be a socio-economic partnership.

Typically, jurisdictions have responded in three ways to this conundrum. The first is to adopt an assimilationist approach in which informal heterosexual and same-sex relationships are treated as equivalent to marriage after a certain time. This is the position, for example, in Australia and New Zealand. In Australia, with one or two minor exceptions, there are essentially no differences between marriage and informal cohabitation in any area of law, once the parties have lived together for more than two years or have a child. That means that the property and maintenance consequences of marriage apply to both heterosexual and same-sex cohabiting relationships.

The second approach is to allow people to register their partnerships without getting married. In the Netherlands for example, marriage is open to both heterosexual and homosexual couples, and registered partnerships have almost the same effects as marriages. They provide an option for both heterosexual and homosexual couples as well.⁸ The consequence of choosing neither to marry nor to register one's partnership is that the relationship does not attract marriage-like consequences.

The third approach is to recognise cohabiting relationships for some purposes but to leave property rights on the breakdown of the relationship to the general law. Recognition of cohabiting relationships has long been a feature of social security law in many jurisdictions, for example. Governments have taken the view, understandably, that a person should not be able to claim unemployment or sickness benefits without taking account of the income of a cohabiting partner, just as would be the case if the couple were married. To do otherwise is to impose a marriage penalty. Such jurisdictions have ad hoc recognition for cohabiting relationships across a range of other areas of law, but stop well short of full assimilation.

One of the greatest problems for family law systems is the growth in the numbers of children whose parents live apart. This is not obvious from divorce statistics, because in many jurisdictions divorce rates are either stable or falling, in part due to the decline in the popularity of marriage. However, as more and more couples have children in the context of non-marital cohabitation, the divorce statistics become less and less relevant as a marker of relationship breakdown.

People cohabit outside marriage for a range of different reasons. Some people live together with the intention of getting married.⁹ Others may enter a cohabiting relationship with a hope or intention on the part of at least one of them,¹⁰ that they will marry, but the relationship does not survive long enough for this to occur. Others reject the idea of formal marriage entirely,¹¹ but see themselves as being in a committed and ongoing relationship.¹²

Whatever the reason for entering into a cohabiting relationship, the evidence from many parts of the world is that cohabiting relationships which do not result in marriage break down at a very much faster rate than do marriages.¹³ This is not particularly surprising as regards childless.

Reference

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