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Divorce and Separation

Contributors: Aspasia Tsaoussis

Editors: David S. Clark

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Divorce is technically the formal dissolution of marriage; more broadly conceived it is the catalyst for the increasing family fragmentation characterizing contemporary Western societies. From a societal perspective, divorce reflects the changing societal values and norms concerning marriage, gender, children, parenting, and caregiving. It has brought about significant shifts in the distribution of social welfare and has given new moral and political significance to previously uncharted demographic categories like “single motherhood.”

Closely connected to divorce in many respects, *separation* is often defined by jurists (especially in continental law systems) as “cessation of cohabitation” of the spouses by unilateral or mutual agreement—and in the case of “judicial separation,” by the decree of the court. Evidence that the spouses have been living separate and apart continuously for a statutorily prescribed period constitutes a distinct ground for divorce in both common and civil law systems. This period of de facto separation, whose required duration varies by legal system, renders the presumption of marital breakdown irrefutable.

Divorce Culture

One of the major social changes to characterize the last three decades of the twentieth century was the marked increase in the divorce rate worldwide. In the United States, about half of all marriages end in [p. 431 ↓] divorce, and in Great Britain the ratio of marriages that end in divorce is four out of ten. The rising number of divorces has become a new “cultural universal,” and social scientists examining the impact of family breakdown on the welfare of women and children conduct their research on the presumption that this emerging “divorce culture” is here to stay.

A sweeping “no-fault revolution” dating from the late 1960s radically reformed the grounds for divorce and the requirements for alimony in legal systems around the globe. According to the standard divorce typology, the three most common forms of divorce are no-fault divorce, unilateral divorce, and divorce by mutual consent. If parties choose one of the first two unilateral types, they are not required to prove fault or grounds for divorce beyond a showing of irretrievable breakdown (or irreconcilable

differences). In continental civil law systems, bilateral divorce by mutual consent is socially prevalent. Its summary quasiadministrative proceedings provide the simplest and most inexpensive way to end a marriage. Today most, if not all, national legal systems have a divorce regime that offers the divorcing spouses a choice among these types of proceedings.

Effects of Divorce on Women and Children

The liberalization of divorce law has encouraged divorce by reducing its costs. Over the last thirty years, social scientists have increasingly been concerned with the distributional effects of no-fault divorce on the members of disrupted families. The severe economic losses suffered by divorced women and their children have been extensively documented in what is now an impressive body of literature. Empirical studies conducted since the early 1980s (such as the pioneering work of Lenore Weitzman) consistently show that women on average suffer a significant decline in their standard of living following divorce. The three main reasons for this decline are the following:

- 1. After divorce, an overwhelming majority of women retain physical custody of their children. During the past two decades, all developed nations have reported a dramatic increase in female-headed households. Women's disproportionate responsibility for child care is also the most powerful explanation for the fact that divorced mothers as a group earn significantly less than divorced fathers. Divorced women's revealed preference to maintain direct physical ties with their offspring generally decreases their alternatives over their life course and lowers their probability of participating in the labor market on equal terms with men. This problem is exacerbated by the shortcomings in existing family policies that do not allow working parents to successfully combine workplace and family responsibilities.
- 2. Many divorced men are negligent in paying their court-ordered alimony or child support. In 2003, the U.S. government announced that fathers owed \$96 billion in back child support. Empirical data demonstrate that few divorcing women receive alimony, and those that do receive only short-term "rehabilitative" alimony. Furthermore, child support awards are generally

low and poorly enforced (for example, in the United States, more than half of all divorced women never receive the full amount of child support they are due). The U.S. Congress has twice enacted legislation concerning the collection of child-support payments, including a provision that payments are to be automatically deducted from the absent parent's paycheck. Although the nonpayment levels are lower now than they were in the past, the effect on lifting a larger share of children out of poverty has not been significant.

- 3. The courts have generally treated the husband's postdivorce income (which is often a family's most valuable asset) as property of the husband alone. For example, courts have refused to designate professional degrees earned during marriage as marital property. Thus, in practice, a husband is not required to apply his human capital (that is, the economic value of his ability to produce goods and services in the future) to help his former wife and his children sustain an adequate standard of living. However, in the typical marriage, the wife has enhanced her husband's actual or prospective earnings by providing unpaid family work—and existing divorce statutes prevent her from receiving a fair share of her husband's increased earnings.

Sociolegal Analysis of Divorce

Many studies confirm that after divorce, the lack of financial resources is the major reason that children experience high levels of physical, emotional, and psychological stress. Research has also linked the absence of fathers to child poverty, juvenile delinquency and violence, teenage promiscuity, and child abuse. Fathers' rights activists have suggested that these social problems are aggravated by the marginalization of fathers as a direct result of the almost automatic granting of custody to mothers in contested divorces. Stigmatizing single fathers as deadbeat dads or incapable caregivers who do not assert their parental rights after divorce is just as harmful as perpetuating negative stereotypes about single mothers.

In 1987, Mary Ann Glendon asked why no-fault divorce became “no-responsibility” divorce. She and others proffered several explanations for the dramatic increase in social problems related to divorce. One overriding factor is the primacy of individualism in Western societies. In 1991, Nobel Laureate Gary Becker placed emphasis on

bargaining power within marriage and upon divorce: wherever no-fault divorce rules were introduced, they significantly worsened the bargaining positions of wives relative to husbands and thus had negative effects on the terms of divorce settlements. Under traditional fault regimes, the spouse who most wanted to exit the marriage had to “purchase” the right to exit. Children were protected mainly by the leverage of the “innocent” spouse, who could withhold consent to a fault divorce until all economic and childrelated disputes were settled by private agreement.

Feminist legal scholars posit that women's financial problems after divorce reflect the gendered division of household labor during marriage and the asymmetric dependency of wives on husbands. Feminist theory generally attributes the devaluation of women's unpaid work to the public-private dichotomy. This is most clearly illustrated in the deeply embedded and universal cultural norm of the homemaker. It is no coincidence that the women most hurt by no-fault divorce worldwide are those who invested in traditional, long-duration marriages. Another indication is the persistence of gendered arrangements in dual-worker households: most empirical studies show that married men are not performing a fair share of household tasks or child-rearing responsibilities. Promising signs come from research in the burgeoning field of “the new home economics,” suggesting that the higher a wife's earnings, the greater her bargaining power in the marriage. Several studies indeed confirm a slight increase in the housework provided by husbands in response to wives' higher earnings. At the same time, it has been shown that women increase their labor force participation as an insurance mechanism against the eventuality of divorce.

Several empirical studies have focused on the effect of legal reforms on the divorce rate. The empirical evidence has been mixed. Some economists have argued that the switch to no-fault divorce brought about no significant change in the divorce rate, because marriages only end when it is efficient for both spouses to divorce—and this depends on alternatives to marriage, and not on the divorce regime. However, other studies that have isolated the effect of the legal variable from other demographic factors have found that no-fault divorce has raised divorce rates significantly. In recent years, social scientists have turned their attention to a related strand of research: the fast-rising percentages of wives who initiate divorce proceedings. Women today are more likely to seek divorce and are less likely to remarry than men are. They are also less

interested in marrying, and when they marry, they do so at a later age. All these trends relate to women's fast-increasing labor force participation since World War II.

Divorce Litigation

The bulk of divorce-related litigation concerns the distribution of marital assets, both tangible (for example, real estate and businesses) and intangible (for example, children, stock options, one spouse's interests in the other's retirement plan, disability and social security benefits). In all jurisdictions, spouses are permitted to treat certain types of earnings and assets as "separate property." Most problems involve the division of [p. 433 ↓] property accumulated during marriage. In their attempt to make efficient allocations of intangible marital assets, courts have over the years refined their tools of measurement and valuation. For example, American courts have increasingly turned to economics, applying different formulas to calculate the present (at divorce) value of future benefits or to divide the contingent property interests in stock options. This is still an evolving area of the law, since new and complex legal issues may arise in the circumstances of each individual case.

Courts have not yet devised a uniform manner in which to approach the issues of valuation of intangible assets. However, a considerable body of case law was produced that had considerable impact on legislation: most jurisdictions have given more expansive definitions of what constitutes marital property. Finally, social science research on the postdivorce psychological and emotional problems of children has enriched both courts and legislatures with interesting theories that help decision makers regulate conflicts arising from child custody and visitation.

Legislative Reforms

To reverse the damage wrought by no-fault laws, policy makers have taken initiatives to strengthen marriage and curb the divorce rate. In the United States, fatherhood programs in the late 1990s were among the first major policy responses in this direction. Similarly, covenant marriage legislation has been enacted in Louisiana (1997), Arizona (1998), and Arkansas (2001). A couple bound by covenant marriage vows may only

divorce for such marital offenses as adultery and abuse. However, even in these three states, where this type of “marriage plus” is legal, a very small number of couples have opted for it. Nevertheless, family advocates have raised awareness as to the importance of premarital counseling as a significant deterrent of divorce, and several states are operating marriage-related pilot programs or are offering welfare recipients financial incentives to marry. Yet another proposal under consideration in many state legislatures involves the modification of no-fault laws, although this idea has faced political objections: the return to fault-based schemes would in a sense force people to remain married and thus violate their civil liberties. Some theorists have called for a privatization of marriage law, based on the premise that ex ante contracting between the spouses can protect those at highest risk of overinvesting in marriage-specific capital.

In Europe and Australia, most efforts seem to be directed at bolstering the enforcement of the existing statutory framework on child support, postdivorce distribution of marital assets, and child custody. The legislative and judicial preference for joint custody rules is another example of a measure that would enhance the enforcement of child support orders, by keeping divorced fathers continuously involved in their children's upbringing (both emotionally and financially). The greater use of mediation procedures could also help reduce conflict in contested divorce cases. Finally, many countries have considered restructuring their welfare system, shifting to universal family support and introducing needs-based policies to keep single-parent families above the poverty line. The Swedish family support system is widely hailed as the most functional and comprehensive; thus, it can serve as a model in this direction.

Informal and Legal Separation

The separation of spouses may either be informal or formal (legal). In the informal type of separation, which may or may not lead to divorce, the bonds of matrimony between husband and wife are severed for an indefinite period of time, during which they no longer reside in the same household and no longer share the *animus* of maintaining a home together. In the second formal type of legal or judicial separation, the parties are still married to each other in all respects except “bed and board” (*a mensa et thoro*). In such cases, the rights of cohabitation and marital intercourse have been suspended.

This type of ecclesiastical separation had for centuries figured prominently in canon law, having exerted a strong influence on the development of divorce law in the West. Up until the nineteenth century, when divorce was not available, it remained an important institution in civil law systems. Together with annulment of marriage, separation was [p. 434 ↓] a mechanism that the Roman Catholic Church used to alleviate the harshness of its indissolubility rule.

Legal separation is an alternative for people who cannot continue to live together as husband and wife, but who do not want dissolution of their marriage (for example, for religious reasons). In the common law, there is usually a separate statutory provision that empowers the divorce court to grant a divorce from bed and board (for example, in cases where one spouse is guilty of adultery, cruelty, and other inappropriate marital conduct). If the court grants a “bed and board divorce,” it has the authority to change the decree to an absolute divorce after a statutorily prescribed period if the parties have not become reconciled. If a married couple agrees to live apart for a lengthy period in contemplation of divorce, the spouses may sign a separation agreement settling property, custody, and child support issues between them.

It is clear that the distinction between these two types of separation gives rise to vexing questions of interpretation that the courts resolve by looking to the intention of the spouses: if the spouses have no intention of resuming marital relations (as in the common law's “living separate and apart”), then they are declared separated. If, on the contrary, the spouses are residing temporarily in different places for economic or social reasons but intend to continue to be bound by the moral and social duties of marriage, they may not be considered separated. Finally, if one spouse has left the marital domicile without the consent of the other spouse, without justification, and without intent to resume marital cohabitation, the court considers it desertion.

Alternatives to Marriage

A sociological approach to separation would conceive of it as “trial divorce,” in the same way that cohabitation can be characterized “trial marriage.” Statistical data reveal rising cohabitation rates in Europe, Australia, and North America. Recent findings suggest that couples are not cohabiting only as a matter of “trying out” their relationship prior

to marriage, but because they are consciously substituting cohabitation for marriage. Nevertheless, cohabiting unions are more likely to dissolve than marriages, and they are also less effective in protecting the interests of women. More generally, the social norms governing separation are more fluid and responsive to social change than those governing divorce.

It seems that the contractual elements of marriage continue to make it a good mechanism for inducing longterm family investments. Marriage-like institutions are recruited to regulate division of property and financial support between unmarried partners upon their separation (“palimony” is the counterpart of alimony for cohabiting partners). It is characteristic that where courts have recognized cohabitation contracts in the United States to award palimony upon separation (for example, *Marvin v. Marvin*, 18 Cal. 3d 660, 1976), they have done so under contract rather than family law. For example, separation agreements are generally binding on the courts, unless they find them to be unconscionable.

The evolution of family law worldwide reflects a strong tendency toward the regulation of cohabiting unions (the enactment of “registered partnership” and “civil partnership” legislation in Europe and the legal approach to “de facto relationships” in Australia are characteristic). Legislatures and courts are recognizing the hitherto privileged rights of married partners in property, inheritance, and adoption as rights that also belong to unmarried partners cohabiting in heterosexual or same-sex unions. In most legal orders, the current trends in family law seem to converge toward a common orientation: giving partners greater freedom of choice to stipulate the terms under which they will live together or apart.

AspasiaTsaoussis

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See also

- [Children](#)
- [Family Relationships, Doctrinal Issues in](#)
- [Family Relationships, Economics of](#)
- [Family Relationships, Sociology of](#)

- [Feminist Legal Studies](#)
- [Individualism](#)
- [Marriage and Civil Unions, Same-Sex](#)
- [Marriage and Informal Unions](#)

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