

Transcript for “The Mismatch between Family Law and Nonmarital Families”

Featuring Clare Huntington

Hosted by David Chancellor

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[Chancellor] Hello, you’re listening to a podcast from the Institute for Research on Poverty at the University of Wisconsin Madison. I’m Dave Chancellor.

For this, our November 2015 podcast, we’re going to be talking about family law with Clare Huntington, who is an Associate Dean for Research and a Professor of Law at Fordham University. Professor Huntington is interested in how family law, and related institutions that support it, do not align with needs of many of today’s families, particularly given a shift in marriage trends in the United States.

[Huntington] So we’ve had a real change in the United States over the last couple of decades where marriage used to be -- most people got married. It was not correlated with income. And now we’ve really moved to a place where upper income families, certainly people with college education, tend to get married. People with sort of moderate amounts of education also get married although they are also somewhat more likely to divorce. But lower income individuals are much less likely to ever get married. And so, as a result, we’re now having many, many children who are born to unmarried parents. In fact, 40% of children are now born to unmarried parents and that’s heavily concentrated among lower income families, but is also starting to spread actually into middle income families and actually a little bit into upper families as well.

[Chancellor] In considering how well family law “works,” Huntington notes that it can present all sorts of challenges for families. And, while this may even apply to married families – the model that family law is arguably based on – the challenges are even greater for nonmarital families.

[Huntington] For married families, it presents all kinds of problems. Certainly when they get married, it tends to work ok. But for when families get divorced, there are all kinds of ways in which the legal system can exacerbate acrimony between couples. But, for all of its faults with marital families, the real problem is when you try to take family law and apply it to nonmarital families. And that’s really what I’ve been talking about is this fundamental mismatch is we have a lot of assumptions about what families are based on married families and then we use that and apply that to unmarried parents and it really just doesn’t work.

[Chancellor] Further, Huntington argues that it is not just the laws themselves that matter – such as those that encompasses the legal rules about marriage, divorce, and child support – but also the broader context in which the laws operate.

[Huntington] It's also the institutions that we have to help families negotiate changes. So family court. It's also the norms that we have around what do we think mothers do, fathers do, what's the place of children? It's also much more broadly the structures and policies we have that really set the table for family life

[Chancellor] From Huntington's perspective, the basic problem is not so much that family law treats married and unmarried families the same, but that it treats these families so differently.

[Huntington] For example -- this mostly affects fathers -- for a man, if he is married to the mother of his child. If he's not married to mother of his child, he's not automatically considered a legal father and instead he has to take some affirmative step, sign what's usually called a voluntary acknowledgment of paternity or there are other things as well. So first of all, he has to sort of prove himself up but then also the custody rules are very different. And so, in 15 states, if a child is born to unmarried parents, the mother automatically gets sole custody of the child.

In family law, we really treat -- I'm using gender specific terms here, in part because nonmarital families tend to not, have not made an explicit plan to have a child. So it is usually then a mother and a father and I'm using then the counterpart for married families although married families can certainly be two men and two women. But in a married family it tends to be mother, father, and child. And that's how the law treats them as a whole, during the marriage, but even after the marriage. The law says, look, this child has two parents and it's the law's role to facilitate a relationship between both parents and the child. In nonmarital families, that's just not the case at all. Instead it's much more about shoring up the relationship between the mother and the child. And then the father is very much on the side. And, it's really up to him about whether or not he can insert himself back into the family, but the law doesn't make it easy and doesn't automatically just treat him like he's a family. Instead the family is mother, child eh, father.

[Chancellor] And, while an unmarried father certainly has a right to seek out a custody order, Huntington says if we put ourselves in the shoes of some of these fathers, there are real barriers to actually getting that order.

[Huntington] For fathers, they need to go to court and for many of these fathers court is not a place they associate with good outcomes. It's a place, many of these fathers have involvement with the criminal justice system so they associate court with that. They also have a child support order that was issued through a court and that child support order is quite onerous. They don't see the court as a problem solver or a positive source. Also, they have to go, they have to file papers, they have to navigate the whole system. Now, there are resources within the court to help these fathers. I don't want to make it sound like a, they can't go, or b it's so incredibly onerous. But it's not easy. And moreover, in many states there are actually two different systems. The child support order could be issued through an administrative agency who just issues the child support order but doesn't have to or isn't allowed to decide on custody, so they have to deal with

one whole agency to deal with the child support order but then they have to go to court to deal with their custody order. So as you might imagine, this is time consuming, this is difficult, there's a lot of bureaucratic hassle.

[Chancellor] Huntington says that, given these sorts of issues, a lot of fathers will say, "I'll just work it out with the mother." And that might work if the mother is willing to let him see the child, but it gives a lot of power to the mothers.

[Huntington] Sociologists use this term called maternal gatekeeping which means that the mother gets to decide in the absence of a custody order, which many of these families don't have, the mother decides whether or not the father is going to see child. And she oftentimes keeps the father away for very good reasons. Maybe there's a history of domestic violence or whatever it might be, but she can also keep the father away for less sympathetic reasons, particularly she will often keep the father away if she herself is in a new relationship. The new partner may get jealous of the father so it's just easier for her to keep the father away while the new relationship is going on. But meanwhile, the child is not seeing his or her father.

[Chancellor] When nonresident fathers who were never married to the mother are squeezed out like this, as a result of established family law, it can reinforce certain negative ideas about their role in relation to their children.

[Huntington] We really have a norm now for married parents where both mothers and fathers are seen as breadwinners and caretakers. And the family law system really reinforces that if the parents get divorced, that both parents have some amount of time with the child so they both, it reinforces their role as caregivers, but then they both have to be breadwinners. The days of lifetime alimony are long gone so fathers are going to typically, it's typically the fathers, are going to pay child support but mothers are generally going to go back to work and they both together make the money to support the child. But the problem for nonmarital families is that we just treat the fathers as breadwinners, just a paycheck, in the words of the people in the study done by Kathryn Edin and Timothy Nelson. So the idea is that we just monetize their relationship as opposed to really seeing them as caregivers. And these fathers have a tremendous amount of love and attention and care to give to their children and we really need to take that seriously and to make space for that relationship.

[Chancellor] Professor Huntington says when we talk about how family law can be made to work better for unmarried parents and their children, we can think of changing rules and changing institutions themselves.

[Huntington] For rules, one of my somewhat more out there suggestions or proposals is that we develop something called a coparent status, so instead of saying that parents are married to each other, and marriages can be dissolved anyway, we instead say that when a child is born, both parents assume a new legal status of coparent. And they are a parent to a child and a coparent to the other adult, and this comes with certain rights and responsibilities and it's a way of institutionalizing these families. So that's one, a second would the custody rules absolutely should be changed so that the default rule, the fifteen states that have this rule should abolish it so that mothers don't automatically get sole custody simply by virtue of being unmarried. Then

the child support system also needs to be revamped so it acknowledges that many of these fathers have very limited economic means and simply are not going to be able to pay. They're not shirking child support, they are simply not able to pay child support in meaningful amounts and we need to be acknowledge that. So, those are some changes to the rules.

The institutions are one of the places are one of the places where I think we can really make a lot of changes. I just don't think family court is an effective institution for a lot of these families and yet families really need help, just in the same way a divorcing family does, making the transition from, in the words of Patrick Parkinson who's a family law scholar in Australia, parenting together to parenting apart. So, how can we help this family transition from a family that's based on a romantic relationship between the parents to a family that's based on a coparenting relationship between the parents. Also from Australia is this very promising model called the family relationship center. It's a community based free mediation program that helps parents very quickly, as they're separating, just come up with a sort of quick and dirty agreement about who's going to do what over the next six months. Not trying to resolve all problems for all time, but just 'how are we going to manage this transition?' And then maybe they come back after six months and maybe renegotiate. But the idea is to just help them get in the habit of cooperating and doing all of this outside of the court system.

[Chancellor] One of the goals of a system like this is to reinforce the idea that both parents matter and that both parents should have a relationship with the child.

[Huntington] The idea is that the parents would need to work together in order to raise this child and that they take each other seriously as a parent and also try to work on their own relationship because we really know this from research actually coming out of the IRP, that fathers are more likely to see their children if the father can maintain a good relationship with the mother. And so what we need to do is really to be thinking about that parent-parent relationship and not just the parent child relationship.

[Chancellor] With nonmarital families becoming far more common, Huntington says her biggest message is that we should move away from thinking that nonmarital families are really so different from marital families.

[Huntington] Instead we should see this as parents who care about their children and we need a system that helps parents maintain relationships with their children and with each other as coparents. And we have that now, albeit non-perfect, but we have now that for married families who get divorced and we need to develop a similar system for unmarried parents who end their relationship.

[Chancellor] Thanks to Clare Huntington for talking with us. For more on her work in this area, you can look for her 2014 book, *Failure to Flourish: How Law Undermines Family Relationships*, which is available from Oxford University Press.

Thanks for listening to a podcast from the Institute for Research on Poverty.