



## **Child Support, Poverty and Gender Equality: Policy Considerations for Reform**

**"Share The Care"**  
GENDER EQUALITY & SHARED  
FAMILY RESPONSIBILITY IN  
THE CARIBBEAN

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## **Introduction**

There is already state investment in the resolution of issues of primarily financial support to the care of children. This investment is evident in justice processes including legal aid programmes as well as in public assistance programmes. However state involvement is predicated on the assumption and indeed active encouragement that parents carry the main responsibility for the care of children. This position is a historical one, where the state sought to devolve responsibility for the care of families squarely onto the private sphere.

In the Caribbean, this burden is a particularly feminized one as women are the primary caretakers of children, a fact coded into the language of 'female-headed households'. Such households are not usually ones where women are understood as the primary authority figures with the presence of a residential partner. Rather, the singular feature of such households is the absence of a residential adult man living in partnership with the woman head. Single women-headed households now account for almost half of all households in many parts of the Caribbean.

There is much sociological literature which speaks to the centrality of women in social reproduction, including the seminal and aptly titled study 'My Mother who Fathered Me'. These studies document the burden of care, women's survival strategies, the phenomenon of male familial mobility and multiple households. This reality is not an uncontested one. While women headed households signify to some extent women's relative autonomy they also carry the higher likelihood of experiencing poverty and the transmission of inter-generational poverty. It is not just the draw down on resources which social reproduction entails that creates the likelihood of poverty, but also the gendered reality of many Caribbean women who work in the least paid sectors of the economy.

The care of children necessarily then involves something of a struggle between mothers and non-residential fathers for defining and attaining adequate levels of financial contribution to the care of children. In this struggle, the courts and particularly the magistrates' courts are key arbiters of disputes over monetary flows. Significantly, they are also sites of social values about the allocation of responsibility for the care of children.

There are few areas where the courts are used more than for resolution of child support disputes. Most people's interactions with the court system, with the concepts of justice and rule of law, are tied up in working out parental obligations for caring children- be it financial and/or custodial. Yet this is a system attended by deep dissatisfaction. Users of the court system complain about inadequate and discriminatory laws, delay, low level awards, inefficient administration, distant and hostile judicial officers and impunity for non-compliance with court orders. These complaints remain mostly unaddressed. Law reform in the Caribbean in this area has been at best, piecemeal but more generally absent.

The inadequate legal framework is matched by a social protection system that pays little attention to the needs of single parent low income households. Child care is not only a peculiarly feminised experience in the Caribbean; it is also a privatised responsibility with only limited experience of the state with a role to support families and children who live in poverty. There is little by way of public assistance or social protection programmes aimed specifically at alleviating the experience of poverty of women's households.

Still, what public assistance programmes exist are perceived by many women as offering an alternative pathway for child support and therefore some measure of economic stability. The role of public assistance in the area of child support is therefore critical. However, the research in the region has suggested that public assistance laws and policies make no special allowance for mothers who have exclusive responsibility for the care of their children. The programmes do not address the feminisation of poverty.

The question has been posed "who should be responsible for the care of children?" How should the responsibility be apportioned between parents and between parents and the state? These are questions fundamentally linked to women's empowerment and gender equality. To the extent that public policies take for granted and therefore reinforce this unequal gendered reality, economically marginalised women and their households will continue to experience deprivations and disprivilege and poverty transmitted inter-generationally.

Social welfare provision and child support are inextricably linked. Although the two systems do not necessarily work together as an integrated system for the benefit of economically marginalized families, they converge to ensure that the cost of care-giving remains primarily a private matter. In other words, both judicial proceedings and social welfare services underscore private parental responsibility to support dependent children.

This research project has been premised on the idea that solutions to the poverty of women's households in the Caribbean ought to be informed by an appreciation of the root causes of the economic insecurity of single female headed households. Men's failure to make regular payments or hostility to make child support payments at all is a feature of Caribbean family relations. And there can be no doubt that the intersection of multiple social and economic realities creates a policy challenge. Significant proportions of children do not live in two-parent households. Many persons have children with more than one partner and as a result non-custodial fathers may have children living in more than one household and mothers may have children who do not necessarily share the same father. As Wyss points out 'complicated residential patterns beget complicated income and resource pooling patterns'.<sup>1</sup>

For women and men who have children together, but brief or fragile inter-personal relations, the comity required to meet and treat with sincerity and

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<sup>1</sup> Brenda Wyss: Culture and Gender in Household Economies: The Case of Jamaican Child support Payments. *Feminist Economics* 592, 1999, 1-24

commitment in the best interests of children may not exist. Complex and fluid partnering dynamics also help to explain the contestation around child support. Wyss argues in the Jamaican context that resource transfers from men to women is in part a transfer of resources from 'babyfathers to babymothers' rather than a transfer from fathers to children'. This is an important distinction which can help to explain the cessation of support when the intimate relationship between parents ends. Gender-based ambivalences about roles and expectations of women and men for child care also complicate the efficacy of purely legal solutions.

Fathers of the children of single poor women are also likely to be from a similar social background. High levels of unemployment, casual employment and informal sector employment leave such men with fluctuating incomes which in any event cannot be attached at source – an enforcement mechanism which features strongly in the jurisdictions discussed above.

A Caribbean child support model cannot ignore these overlapping cultural and socio-economic realities and policy reform must be guided not only by considerations for efficiency in economic transfers between parents. Policy reform will have to be informed by a concern for the cultural transformation in which women's time and labour costs of rearing children is made visible and quantified and men share the responsibility of care.

### **Brief description of the project:**

The need to catalyse integrated social and legal policy responses that would better respond to the realities of Caribbean families in which women carry the disproportionate burden of care is the rationale for this research. The research has provided knowledge on i) the manner in which applications for child support are resolved by the courts, (quantum and enforcement of awards); ii) the criteria used and legal principles applied in resolving child support proceedings in the Caribbean; iii) how gender and other ideologies inform the legal resolution of child support claims; iv) women's access to public assistance programmes; and v) alternative dispute resolution processes.

The research also provides some indication on the impact of the outcomes of the court processes on women's resilience or vulnerability to poverty and on societal shifts in gendered responsibilities for childcare. This research probed both state and parental obligations to financially support children; the interplay between these dual responsibilities and the systemic responses to these complex interconnections. The role of the state in supporting poor women's households is explored, as are the ways in which public assistance programmes are related to the court process. The research also sought to assess whether these programmes represent a 'safety net' for poor women and their families.

These policy guidelines are based on the findings of the research. They outline some principles which ought to be considered in fashioning policy reform. The document also sets out the areas for policy reform as identified through a series of consultations on the research in both Barbados and Trinidad and Tobago with

a cross-section of stakeholders. The guidelines also point to areas in which new thinking is required as opposed to perhaps a tweaking of existing frameworks.

## **The Existing Framework and Challenges: Summary of Project Findings**

The research highlights most vividly the extent to which child care is a feminized responsibility in the Caribbean. The great majority of applications made to the courts are made by mothers. This expectation that children are the primary responsibility of mothers even finds expression in the inability of men to apply for child support or even for custody and access at the magisterial level in Barbados.

Despite improvements in the justice sector, including the Family Court Pilot of Trinidad and Tobago, that there is consistent dissatisfaction with:

- Inefficient administration leading to delays (over-burdened courts, service of documents in particular)
- Limited fact finding on means of parties
- High levels of judicial discretion
- Significant involvement of non-judicial officers in dispute resolution
- Low levels of awards
- Significant non-compliance with court orders
- Limited avenues for enforcement (imprisonment still the primary method, attachments little used and unavailable to persons in the informal sector as well as to public servants in Barbados)

In addition, the research elicited how fraught are relations between women and men, characterized by anger, resentment and distrust. In many ways, courts are called upon to manage this discord and this role can overshadow the court's central role of ensuring an equitable sharing of the care responsibilities between parents.

Social protection systems only partially address the needs for resource support by low income families, particularly those headed by single mothers. One of the very contested issues is the requirement that women use the court system as a pre-condition for qualification for public assistance.

The following describes the key findings of the research which require a policy response.

### **The gendered burden of resolution of child support**

Stereotypical notions of gender ascribe to women the role of the primary caretaker of children, which in many families means physical, emotional and financial care. Women are expected to get on with the job of child caring,

including making the efforts necessary to realise a deeper commitment of fathers to their children. The burden of resolving adequate provision for children rests squarely on women.

The research clearly establishes that mothers initiate most of the applications for child support. This brings the consequential burden of seeking legal representation (particularly in the High Court) and the costs of doing without it where it is unaffordable. Where it is available, legal aid is heavily relied on by applicants for child support, but some applicants find the process of qualifying arduous and complex and never apply for legal aid.

The increased use of DNA testing has reduced the burden on applicants of proving paternity, but applicants bear the burden of delays in proceedings due to non-service of documents on evasive respondents. The burden is two-fold: the unavailability of support while proceedings are being determined, and the direct costs of multiple visits to court in terms of lost earnings, absence from work, and transportation to and from court. In some jurisdictions it is also expected that mothers will partly bear the burden of locating elusive and non-responsive fathers.

During child support proceedings women disclose means in larger numbers than men and therefore carry the burden of proof of need. And, given the emphasis on consensus, in only the rarest of cases will costs be ordered to recompense the applicant for the incurring of unavoidable costs in sorting out issues that are in the best interests of the child.

While the state assumes formal responsibility for enforcement of child support orders in the lower courts, ultimately mothers are put to considerable trouble to realize the child support. In some jurisdictions like Trinidad and Tobago, the High Court must make a separate order in respect of arrears. Notoriously, due to ineffective collection systems, mothers often make many wasted trips to the courts to find out if the sums awarded have been deposited. The evidence is that female family members (mothers and sisters) of fathers also assume the burden of resolving child support matters, often paying outstanding child support at the moment that the threat of imprisonment looms.

Given the dominance of the ethos of parental responsibility to support dependent children, a further burden is placed on mothers to exhaust the thorny legal process before applying for public assistance, which in most places provides small sums of support.

### **Persistent dualities**

Historically there was a dual system of family justice in child support matters with sharp distinctions in the nature of child support proceedings in superior and inferior courts. Access to justice depended to varying degrees in the region on the marital status and class of the parents of children.

Two jurisdictions in relation to child support developed. First, there was the summary court jurisdiction transferring responsibility for the poorest from the state to families. The summary jurisdiction ultimately focused on giving 'single women' access to the courts for child support and was premised on women's assumed primary responsibility to care and support their children. By placing limits on 'single' men's right to apply for child support, custody and access in the courts, the law reinforced rather than challenged existing inequalities in the burden of care. These summary proceedings had a strong quasi-criminal flavor and historically criminal sanctions were imposed on both mothers and fathers who were not in compliance with the law.

In the superior courts, child support was generally secondary relief in adult centred proceedings including divorce, separation and spousal support. This superior court matrimonial jurisdiction was ideologically, though not practically, at the centre of family justice and marital relationships had primacy in the family justice system.

Notwithstanding, this duality has been maintained in most Caribbean countries, even with the passage of status of children legislation. As a result in most Caribbean countries, married persons and their children (and 'unions other than marriage' in Barbados) have simple access to the superior courts for relief, while other families are confined to resolving child support questions in the summary courts.

Dualities in the legal process persist even where formal discrimination in the laws has been removed. Proceedings in the lower courts are generally less forensic, with less documentary evidence of means and needs provided to the courts. Record keeping is generally less well organized in the summary courts, making it difficult to track the progress of individual cases over time.

In Trinidad and Tobago, for example, where formal dualities have been removed, in practice the High Court is dominated by child support applications that are ancillary to divorce proceedings. Very few applications are made to the High Court in respect of families not based on a marriage. Magistrates bear much heavier case loads despite their complex and multidimensional responsibilities in family matters and the relative dearth of lawyers. With more time to devote to each case, superior court judges are generally more responsive to the needs and concerns of litigants.

Even where law reform has eroded some dualities, as in Trinidad and Tobago, many Caribbean countries have retained overlapping and multiple jurisdictions in child support with different criteria applying depending on which statute and which provision is invoked. That lack of coherence in the legal principles undermines the goal of equal protection of the law.

## **Gendered realities and conflict dominate the legal process**

### *Socioeconomic status of applicants*

The applicants for child support are overwhelmingly mothers who, from the data available to the study in the superior courts, earn relatively less than the fathers against whom orders were being sought.

### *The menace of domestic violence*

Domestic violence is a prominent feature of many intimate relationships in Caribbean. Applications for protection orders take up a significant part of magisterial time and the spectre of domestic violence lurks in child support cases. In some instances there were protection order applications pending between parties in child support proceedings. The research on national assistance in Barbados found a significant number of fathers who were reportedly in jail, many for offences of a violent nature, and in direct interviews with women receiving national assistance the theme of domestic violence also featured very highly.

Apart from the violation of personal security, domestic violence in a very stark way undermines the capacity of women to physically and financially take care of their children. Additionally, the threat and/or experience of abuse effectively interferes with the ability and will of mothers to demand timely, reliable and fair monetary contributions for the care of children.

In addition, the adverse judgment that child-support proceedings are a venue for unseemly and irrelevant post-relationship disputes can make domestic violence and a violent father seem irrelevant to the determination of issues of support, custody, and access.

### *Courts as sites of gender conflict*

Strong perceptions about the motives, behaviour, and morality of women who initiate child-support proceedings and men who are respondents to them influence the character of the proceedings. Child-support proceedings are routinely described in ways that suggest gender conflict between women and men with the courts as battleground, negotiating the detritus of failed and fragile intimacies. Furthermore, those involved in the administration of child support claim consistently that children do not come first and that the latter are subordinated to man-woman conflict.

The initiation of stand-alone child support proceedings in summary courts generates strong hostility and resentment on the part of many men. Many complain that it was motivated by the vindictiveness of the mother and was fundamentally unfair where the father had been provided some support, and that the process made them feel like a criminal.

Mothers on the other hand, said that they were often the recipients of the strong reactions of hostility and resentment on the part of fathers who sometimes made the pursuit of the action difficult by making service difficult, denying paternity or failing to appear in court. Mothers described irregular and inadequate support and the changing and growing needs of the child as major motivations for

litigation. Women consistently complained that men who provided adequately during the intimate relationship changed the regularity and quantum of support after.

Once initiated, both men and women describe high levels of dissatisfaction with the court process, but offer very different reasons for their dissatisfaction.

### *Gender ideologies*

The research suggests that the better trained judicial officers and social workers are, the less likely they are to be guided by dominant ideologies that reinforce gender inequalities.

Negative perceptions about the initiation of child support proceedings by mothers can place a burden on mothers who apply for child support to overcome the deeply entrenched presumptions by proving that they are not being unreasonable.

There is also harsh censure amongst some judicial officers and social service personnel of men deemed to be deviant fathers, usually described as men who are young and unemployed with “rasta hairstyles.” Conversely, considerable effort is made to support and accommodate men who are not deemed hopeless “low-lives” and are engaged in activities that are viewed as worthy, progressive ones for “men” and that will improve their “future.” For many decision-makers, the “future” of mothers is little considered in child-support proceedings as theirs is seen as more naturally connected to the raising of children. Men, on the other hand, are assumed to have independent lives that should be facilitated.

In sum, the lives of women are still expected to be centred on their children but the legal system puts little value on those relationships of dependency. Men on the other hand get rewarded for being attentive to their children. The discourse of independence has also now been impressed on women, so that while the caring work of women is both assumed and discounted, the expectation that they are equal economic providers has gained ascendance.

### **Embattled enforcement and poor compliance**

Compliance with child support orders is weak throughout the Caribbean and summary courts spend a significant amount of judicial time dealing with arrears. There is wide acceptance that the collections systems in the summary courts are ineffective and that they unnecessarily burden applicants.

It is evident that coercive enforcement mechanisms like imprisonment do little to produce compliance. There are a number of possible explanations for this. First, imprisonment does not serve as a deterrent when judicial officers and law enforcement officers fail to use it consistently, or treat it as a last resort and give men, particularly men with some means, second chances to comply with the orders. Second, to the extent that the use of imprisonment is viewed by many men and others as unfair and demeaning, especially when they are genuinely

unemployed and without resources, it puts the legitimacy of the entire child support system in question and undermines the likelihood of compliance.

### **Poor collections system**

Child support is marked by dual collection systems. Orders made by the High Court are paid pursuant to arrangements agreed to by the parties. It is otherwise in the Magisterial jurisdiction where payments into court are mandatory. This insertion of the state in the payment in and out of court is a source of significant discontent.

The justification for the payment into court requirement is the connection with court-driven enforcement procedures. Non-compliance automatically triggers the issuance of warrants. The advantage of this is that the costs of enforcement are borne by the state as non-compliance is seen as a contempt of court

However this requirement of court-connected payments undermines privacy, is time consuming and timeliness of pay out is dependent on court administrative processes.

### **Uneven use of attachment**

Timeliness of meeting payment obligations can be enhanced through the use of attachment processes- payment from source of income. However use of this method is uneven for a number of reasons. Firstly, attachment is seen as a possibility only if there is an attachable source of income as in the case of salaried persons. Therefore attachment has not been used for self-employed persons or for casually employed or unemployed persons.

Additionally, it would appear that attachment is not legally possible for certain classes of public officers in the case of Barbados.

Otherwise, attachment is less used than its promise as the procedures are complicated, requiring not a straight forward deduction to meet the court order but rather a computation of protected earnings and deductible earnings.

### **Poor response to female poverty and dependency in social welfare system**

The underlying philosophy of public assistance programming and service delivery is the primacy of familial responsibility for the care and support of its own members. Accordingly, entitlement to cash grants or any other form of assistance is only possible where child support from the father cannot be realized. Applicants are required therefore, to pursue child support before final consideration is given to a request for public assistance.

It is at this intersection of public assistance and the courts that women experience the frustration most acutely of societal expectations that must carry

the burden of care of children. The public assistance grants are not only small but likely to be withdrawn if the woman makes an application to court for child support. The irony however is that court awards, particularly those made in the magistrate's court or those made in relation to economically marginalised fathers, are unlikely to take women and children out of poverty. Yet the making of the award reduces eligibility for a grant, so strong is the ideology of the primary role of parents.

There is reluctance in the provision of social welfare to acknowledge that the assumption of child care responsibilities by women generates economic dependency and vulnerability. The research clearly uncovered sex discrimination in social welfare programming. This discrimination manifested itself not only in terms of unequal access to available benefits, but was also reflected in the very language of the legislation and the application of its provisions.

One of the most disturbing indicators of deeply entrenched discrimination was the head of the household philosophy seen in Trinidad that evidently translated into a presumption of male household leadership. This triggered a number of programmatic features that were blatantly sexist and inequitable, requiring urgent redress both in terms of policy changes and legal reform.

In Trinidad, the "deserting father" category of public assistance applicants is riddled with difficulties, and by the very nature of the category has a disproportionately negative impact on women. However, it is important to note that the creation of this category of applicants has also excluded fathers who have custody of their children from applying for public assistance in circumstances where the non-custodial mother has "deserted" and makes no financial contributions to the support of the children. This is undeniably another manifestation of gender inequity deserving of urgent attention.

The exclusion of unemployment as a ground for public assistance in Trinidad seriously prejudices women who are not working because of the burden of caring for families. Barbados does not exclude unemployment, thereby recognizing that this is generally a significant factor contributing to poverty, especially the peculiar vulnerabilities of women with childcare responsibilities. Trinidad will need to reflect on the justification for this existing limitation placed on welfare accessibility, especially in relation to its gender equity implications.

The research highlighted the perceived inadequacy of public assistance grants by not only the recipients, but also by social welfare officers who readily conceded that welfare on its own was not a viable option for women with children to support. This assessment of insufficiency also extended to child support payments.

Despite the acknowledged inadequacy of both potential sources of support, the research findings revealed that the possibility of combining both income sources was rarely offered as a solution to easing the many financial stresses experienced by impoverished women and their families. The Trinidad study demonstrated that most welfare officers viewed receipt of child support, regardless of its quantum, as an automatic barrier to qualifying for public

assistance. The treatment of child support and public assistance as mutually exclusive is evidently a serious impediment to realizing effective responses to female poverty, and deviates from the main consideration of “need”, which is supposed to be the overriding criterion in determining welfare eligibility.

Realistically, the granting of a child support award through the court often does little to remove that element of “need”, but yet it could potentially serve as a useful source of supplemental income. The feature of “topping up” inadequate child support payments with public assistance grants would therefore be a positive step in the right direction towards improving the economic conditions of female caregivers and their families.

### **Consensus-driven pragmatic resolution of child support disputes**

Child support determination is very much shaped by a desire for arriving at a consensus between the parties. In many cases the court takes the parties into a mediation mode in which applicant states what she want and the respondent says what he is willing to pay. Many judicial officers work around these figures, adjusting ‘based on all the circumstances of the case’ or more crudely splitting the difference between what is asked and what is offered.

There is a strong sense in which women are expected to be reasonable, though factors for assessing the reasonableness of responses or of demands have less to do with evidence of children’s needs and parties’ abilities than the imperative of quickly reaching resolution. The need to reach resolution is one that seems to be driven by concerns over delay, by concerns that consensus will result in higher rates of compliance, realism on the means of parties, as well as by the need to get through long court lists.

Although the means of the parties is a fundamental ingredient of judicial decision making in child support cases, in all the courts, less formal evidence of means is available than might be expected. Related to this, there is less forensic evaluation, such as evidence given under oath or evidence of proof of income, than one might expect in a legal process. Given the large caseload of magistrates, there is little time for careful fact finding. In the High Court, this might be explained by large numbers of consent orders on child support in divorce applications.

The users of the court system directly and indirectly criticize these methods which from the applicants’ side do not adequately respond to children’s needs and from the respondents’ side fails to properly establish the means of the parties.

### **The difference made by the Trinidad and Tobago Family Court**

The Trinidad and Tobago Family court makes a difference to both process and outcome. In general cases are being decided more quickly, being heard for the most part by one judge, thus facilitating consistency. Judicial officers in the

Family Court appear to have the time, temperament, talent and specialized training to properly carry out judicial decision making.

However the improvements are much more evident in the High Court jurisdiction. Both the Family and ordinary magistrate's courts are plagued by long lists, delayed service of documents and high number of dismissal of matters and little legal representation. Absence of dedicated process servers and reliance on the over-burdened police process branch.

This component of the research suggests that physical improvements in the surroundings of the court and even the presence of social services within the building are not in and of themselves dispositive of the problems experienced by users of the magisterial court system. Rather, what is needed are systemic changes including those which would allow for a similar reduction in case load of magistrates and greater efficiency in the service of court documents.

## **Guiding Principles for Reform**

### **1. Honouring national, regional and global commitments to human rights**

Ordinary legislation, for example that which deals with status of children, the Constitutions of the Commonwealth Caribbean and international human rights instruments provide benchmarks for regional legal and policy reform on child support. They identify equal protection, non-discrimination, gender equality, respect for children's rights and inherent human dignity as imperatives in a reformed child support regime.

#### **Non-discrimination and equality**

Both CEDAW and the CRC demand that legal and policy reform integrate the principle of non-discrimination and give parents and children equal rights regardless of gender, marital status and birth status. Some national constitutions, such as the Guyana Constitution clearly recognize the equality of all persons, whether born in or out of wedlock and their entitlement to equal rights and status. Status of children statutes represent one attempt to make this principle meaningful.

Equality between men and women means that legal impediments to applications by fathers for access, custody and child support should be removed. That conclusion is not premised simply on similar treatment for men and women, but recognition that the discriminatory rules reinforce the gendered burden of care of children on women.

The antidiscrimination goal should be viewed as demanding substantive equality and not a formal one in which men and women are without more treated exactly alike. It must recognize the social and economic implications of the sexual division of labour and the pervasiveness of gender-based violence. Addressing gender inequality demands responsiveness to domestic violence which is often

an unarticulated subtext to some child support cases. In addition, parents should not be treated as equally situated in relation to meeting children's needs where their incomes are different and one disproportionately bears the burden of care. Splitting support for children 50/50 often disadvantages women who often make less than do the fathers of their children, have less disposable income because of their role as custodial parents, and have the burden of the daily physical and emotional care of children.

### **Promote the welfare of children**

Ordinary legislation and the CRC underscore the promotion of the welfare of children as a paramount consideration in child support. This includes recognizing their right to a relationship with their parents as articulated in the CRC. It also demands recognition that parents have a duty to ensure that their children have an adequate standard of living (CRC).

A legal system that increases hostility and acrimony between parents is likely to exacerbate contact between a non-resident parent and a child and undermines the welfare of children. The indepth interviews in Trinidad suggest that after the legal proceedings there was decreased contact between some fathers with their children.

Greater clarity on the relevant principles and more forensic processes that expose the means of the parties and needs of children should inure to the benefit of children.

Promoting the welfare of children is part of the state's duty, outlined in the CARICOM Charter of Civil Society, to ensure the full development and protection of the family. This goes beyond the responsibility to create an effective and fair system for recovering maintenance (CRC); in low income families, it demands more active economic assistance from the state.

### **Encourage shared care**

CEDAW and the CRC place an obligation on ratifying states to encourage and facilitate shared responsibility of parents for the care, development and upbringing of their children. To facilitate this, legal restrictions on fathers' rights to apply for custody, access and child support should be removed. However, shared care should not be at the expense of mothers' safety and their desire to conclude intimate relationships with the fathers of their children.

### **Respect for the dignity of family members**

Respect for human dignity is the starting point for the protection of fundamental rights and freedoms in all Caribbean Constitutions and international human rights instruments. This principle is clearly expressed in the CARICOM Charter of Civil Society which indicates that states in the discharge of their legislative, executive, administrative and judicial functions, should ensure respect for and protection of the human dignity of every person.

The following are critical dimensions of respect for human dignity:

- Reducing hostility in child support proceedings

- Removing distinctions in the child support system based on the birth status of a child
- Ensuring greater privacy and confidentiality for family law proceedings
- Rethinking the existing collections systems and the role of imprisonment for non-compliance

## **2. An accessible and fair system for resolving child support**

Respect for the rule of law requires the legal system to be fair, accessible to all and that legal principles be certain. The child support regime should be accessible to all members of the society regardless of the applicants' and respondents' economic status, marital status or sex. A fair child support system is one that meets the goals of protecting the welfare of children and treating parents fairly in allocating the support burden between them.

## **3. Uniform and coherent laws**

Equal access to family justice and respect for human dignity will be enhanced by the adoption of a single legal standard for child support that applies to all families and children that:

- Identifies the goals of the child support regime and awards
- Broadly defines child support
- Provides an affirmative duty on parents to support children
- Outlines the basis of child support awards and the relevant considerations in determining an award
- Provides guidelines or guidance on the award of child support, particularly in proportioning the support between parties of differential incomes
- Provides a unified and more efficient system for enforcement of child support awards.

The laws dealing with public assistance must also be rationalized with dealing with child support and must also be consistent with the human rights commitments outlined earlier.

## **4. Integration of public support and private law obligations**

Even where the legal frameworks are reformed and enforcement systems buttressed by responsive and effective policy making and programming, this would still not answer the situations of the low income or insecure income fathers. In those cases, policy reform should be considered to augment child support awards with public assistance. It should not be either or but rather both sources of support in the appropriate cases. In other words, a policy framework needs to be devised which puts child care squarely as a responsibility of both men and women, with an emphasis on transforming the way men view child care as a discretionary activity to be done with residual income, their needs and

wants having first been met. However where genuine cases exist of fathers and/or mothers who cannot meet their responsibilities over a period of time, a child friendly and gender-sensitive policy would focus on the best interest of the child rather than respond to a hypothetical possibility of welfare dependency of mothers. Such an approach would also acknowledge and affirm women's labours in the care of children.

## **5. Reforms should be the product of full consultations and build in monitoring and evaluation**

Reforms to the public and private child support system should be the product of extensive consultation on the principles underpinning the scheme. The reforms should also require and facilitate post implementation monitoring and evaluation, which will often demand more effective record keeping.

## **Policy considerations**

### **6. Allocating child support obligations**

#### **The principles**

Perhaps the most important question for policy makers to decide is what principles should guide the allocation of child support obligations. There is general acceptance that protecting children's welfare and treating parents fairly are the primary goals. However the question is what each of these means and how do you balance the two goals and what is the proper tradeoff between them. Ira Mark Ellman cautions that

In the usual case, there is no child support order that can satisfy the maximum reasonable claims that can be made on behalf of the obligor, the obligee, and the child. The question, therefore, is necessarily to balance the shortfall in the expectation that each of these parties is likely to experience, in a way that is fair and which implements appropriate public policy.<sup>2</sup>

Policymakers will have to decide whether they are dividing up children's needs or the parents' income. Put another way, should the focus be on children's basic needs or a child's legitimate expectation to share in the parents income or benefit from parents prosperity. In some public debates about child support there is attraction to the idea that judicial officers could be guided by what it costs to raise a child. This question can be deceptively simple because it can encourage a focus on minimum standards and can ignore the range of answers that are possible given the standard of living of the parents.

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<sup>2</sup> Ira Mark Ellman, "Fudging Failure: The Economic Analysis used to construct Child Support Guidelines" 2004 U Chi Legal F 167, 215.

Parental expenditure varies with parental income, and there is wide consensus that the support obligations should increase with the non-custodial parent's income. The question then is how parents' incomes should guide the allocation of the support obligation. Jurisdictions that use a percentage of the parents' income often premise this on contributions that would have been made had the relationship subsisted. This assumes the very long term nuclear residential intimate partnerships that often do not exist in the Caribbean. Moreover, earned income is not always a useful guide where parents give to or receive support from other family members or new partners.

### **Defining child support**

It has been pointed out that the language of child support as opposed to maintenance signifies not just the obligation to contribute financially to **subsistence**, but a broader concept of **care**, allowing for a more complete consideration of children's needs.

Even where not formally defined as such, child support in practice is viewed as financial contributions. The question is whether the court can practically have a larger notion of support, including 'in kind' contributions or care, (though neither as a substitute for financial contributions). It should be recognized that these broader definitions can be difficult to 'police' or regulate and often demand good relations between parents. One question that arises is whether these non-economic forms of support would have to be agreed on, or whether they could be imposed on unwilling parties.

One component of child support, using a more expansive notion beyond the financial, is time spent care taking. There is great unease with perceived denials of access to children by mothers angry over non-payment of child support; an unease generally with the use of children as weapons in emotional wars between parents. New initiatives seek to make clear statements on the inviolability of access, particularly father access to children. The corollary question which ought to be addressed is whether the court should seek to enforce access orders, not only when access is denied unjustifiably, but, as is more common, when children are ignored by non-custodial fathers.

Does the State have an active interest in ensuring parental involvement in the care of children? Obviously so, as this is connected to child development as well as to gender equality. But is there a role for the court, particularly one which has the social service component? Might enforcement measures include orders for parenting counseling?

This issue is further complicated where domestic violence is involved or issues of power and control dominate men's relationship with the mothers of their children. In such cases, access orders need to be able to secure safety of both mothers as well as children. Mechanisms which could be explored would include supervised access centres as well as parental counselling.

## **Who should be required to provide**

In the region, particularly with the phenomena of extended households, multiple partnering and migration, a host of persons assume responsibility for the care of children. The focus here is the power of the State to define a private obligation.

The first principle is that both parents have an equal duty to support their children. However are other persons to be fixed with legal obligations? In the cases of Trinidad and Tobago and Jamaica, the laws make provisions for legal obligations on the part of those who have assumed (in demonstrable ways) the responsibility, so that such a child is understood as ‘a child of the family’ whether or not there are biological ties.

## **Mechanism: Guidelines?**

The current system is a fully discretionary one in which judicial officers decide awards, often, but not always, with reference to a statutory list of considerations which include the child’s need and the parents’ income. Where a list exists, it is not prioritized and gives no indication of how competing factors should be resolved.

The question policymakers will have to decide is which rules will determine how the pie is divided, and as important, what mechanism. Should we have a rules regime, for example guidelines, or continue the fully discretionary regime?

Guidelines are thought to promote certainty and consistency, and simplify the process. The usual criticism of case by case evaluations is that they are time consuming and awards made by different judicial officers and in different courts are inconsistent and arbitrary.

Guidelines are generally based on either the percentage of the obligor’s income, or a percentage of the parental income, which is the same that would be spent on the child if the parents were still together. The guidelines become more complex as they consider living expenses, multiple household responsibilities, the number of other children, shared care, and additional expenses or income.

Guidelines are not a panacea. The more responsive they are, the more complex they become, undermining the goals of simplicity and ease of use. In addition, research on their use in the US has shown modest gains, especially where the obligor has limited means.

Ultimately, guidelines must be premised on clear principles. Setting guidelines is often treated as “an exercise in economic analysis requiring primarily technical economic expertise, rather than an exercise in policymaking requiring interest balancing.”<sup>3</sup>

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<sup>3</sup> Ibid., 178.

As important, guidelines must factor in the indirect costs of child rearing which generally fall on women, they must consider the burden on low income non-resident parents, recognize informal child support and decide what accommodation they make for shared care and contact.

If there are guidelines, one question to be resolved is will the system continue to allow private ordering or private agreements between parents, especially those going through a divorce.

## **7. Treatment of low income families**

The research findings for both Barbados and Trinidad were extensive and provided significant scope for a probing analysis of the current challenges faced by impoverished women and their children who turn to the state for assistance in meeting their families' basic needs. Those findings, which are clearly outlined in both reports, raise a number of questions that must be grappled with both at the level of policy and law reform.

Questions such as, who has the primary responsibility for promoting the safety and security, including economic security of our region's vulnerable children? If that responsibility is to be distributed, how should it be allocated? What are some of the key considerations to be applied in achieving social welfare systems that reflect true gender equality? How can the collaboration between current child support processes and social welfare systems work more effectively to ensure meaningful responses to poverty reduction? All of these questions and more surfaced as a result of the research and create valid entry points for a much needed discourse amongst our regions' policy makers in their effort to combat poverty.

The challenge is not simply that of poor enforcement and low awards, many fathers and mothers cannot afford to support their families. The regime that integrates private support and public assistance should reduce poverty while at the same time not be a disincentive to private support.

Internationally, there has been an ongoing debate about whether the care of vulnerable households is primarily the public responsibility of the state or the private responsibility of the family to care for its own members. Feminists in the United States, for example, have argued that the many legal and public policy efforts in that country to privatize the costs of caring for children has been done at the expense of mothers, who are often unable to rely on a male breadwinner or their own income to raise their children, and must pay a high price for state support.

The research for this project clearly revealed that in both Barbados and Trinidad, the presumption is that the burdensome responsibility of meeting the needs of vulnerable members of impoverished households is first and foremost a private issue, deserving of private remedies. It is for this reason that the policies of the Barbados Welfare Department and the actual laws governing public assistance in Trinidad, require that poor women with children vigorously pursue

delinquent fathers for child support before applying for welfare assistance. Although the extent to which this was enforced differed in the two islands, the underlying principle was the same. That principle, simply put, is that parents are financially responsible for their children, and even in conditions of poverty that responsibility is paramount and should supersede any obligations on the part of the State to offer assistance. State funded support for vulnerable families is therefore viewed as an option of last resort, after the state has satisfied itself that family members, especially absent fathers, have been vigorously pursued and are either unable or unwilling to contribute financially.

Is this necessarily the correct starting point for ensuring the safety, security and overall integrity of poor and vulnerable households? Is there merit to the view that in circumstances of poverty, the state should have the primary responsibility for guaranteeing that at least the basic needs of families are satisfied, regardless of any other sources from which assistance could potentially be available?

It is the latter view, that internationally has prompted some countries to adopt a system of assigning any rights to subsequently collected child support payments to the state, whereby the state will offer immediate assistance to “single mothers” with children, whilst still ensuring that the parental obligation to support children remains in tact. The major difference with this approach is that women and their families are given immediate assistance and the state carries the burden of subsequently collecting from delinquent fathers.

There are several variations on this approach. Some reimburse the state the full amount paid out in welfare benefits, whereas other systems permit the state to only recover a percentage of the collected child support payments, with the welfare recipient benefiting from a portion of the child support collected by the state.

Assignment of child support entitlement to the state is one alternative that shifts the focus from the private to the public, and relieves some of the many hardships experienced by impoverished mothers who are required to commence child support proceedings as a precondition to receiving public assistance.

## **8. Mechanism for resolving child support**

A number of our common law neighbours have moved to resolving child support as an administrative rather than a legal process. Given the challenges faced by summary courts in the region in handling the administrative dimensions of child support (service of process, record keeping, collections), it has to be asked whether a purely administrative agency might not be a better solution.

The Australia’s Child Support Agency began in the tax department but ultimately became a part of the Department of Family and Community Services. If the Agency has jurisdiction to make an order the court is barred from making an order. This system uses a modified percentage of income scheme with special rules for high and low earners. The assessment creates a debt and carers can

elect private payment or payment through agency. There is preference for voluntary and negotiated arrangements. The Registrar can enforce debts in courts. There is no imprisonment or driving disqualification for non-compliance.

Child support can be attached from source and where persons are self-employed, income tax returns can be a source of credible information both for assessing capacity as well as for enforcement.<sup>4</sup> This is not the case for a significant number of persons in the Caribbean who are in the informal economy. Yet, policy makers may wish to consider a hybrid service, retaining the court process for the difficult cases where there is little credible evidence of means and a history of contestation and non-compliance.

The basis for this shift already exists as the Family Services Division operates a mediation service and facilitates agreements between parties. Consideration for a closer relationship between this service and the court system ought to be considered.

The most obvious concern about a specialized agency dealing with child support administratively is that many parents present a complex range of problems to the courts which include family violence and custody and contact with the child; sometimes also juvenile delinquency.

The other question for policymakers is whether specialized family courts, including ones with a unified jurisdiction, might not better address support and related issues. This would be one step further than the Trinidad Family Court which suggests that good administration, training of all officers, appropriate physical environment dramatically strengthen the administration of family justice. The less dramatic improvements in the magistrate's division of that court suggest that more is required, and the question is whether a unified jurisdiction dealing with all support issues would assist.

## **9. Strengthening administration**

Efforts at improving administration of justice will need to focus on the impediments to timely hearing as well as more effective systems for the payment of child support. The main impediment to timeliness is that of non-service of documents. In this case, most child support court process is served by the police or by other state officials such as Marshals. Widening options for service to include private service is suggested.

Consideration should also be given to a wider range of payment options, including the use of private services such as centralized collection systems or use of banking services.

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<sup>4</sup> As in the cases of Australia and New Zealand where the Child Support institutions are situated within tax departments.

## **10. Strengthening enforcement and compliance**

There is wide support for attachment where the non resident parent is regularly employed. The concern is how to encourage compliance where attachment orders are not possible.

The key is that the collections mechanism must be effective and convenient. Some jurisdictions have adopted using private sector mechanisms for compliance, for example providing incentives for early payment and direct debit. Rather than allowing arrears to build up, in some places non payment prompts a demand or a phone call. This mechanism will have little effect where there are high levels of evasive payors.

The experience in other jurisdictions suggests that it is critical to develop policies to avoid accumulation of large arrears. Other jurisdictions have incorporated 'carefully designed amnesties' which encourage future compliance.

A better understanding of why fathers do not comply with child support order is needed to assist efforts to strengthen compliance. Research elsewhere and in the study suggests that the reasons for non-compliance include:

- Inability to pay
- Perceptions of unfairness of the judicial process
- Nature of the relationship with other parent: whether it was a long-term committed relationship or casual, the quality of the post-separation relationship between the parents, and whether the parents are in new relationships
- Perceptions of child support as transfers from babyfathers to baby mothers and not from fathers to children, and that such payments are discretionary after the intimacy has ended, and that mothers are spending the sums on themselves
- Poor quality of contact and access between non resident parent and child

Since social attitudes are a strong factor influencing compliance, reform has to target cultural norms and values around intimacy and parenting. Strong deterrence strategies have not been very effective in ensuring compliance, which may be related to reluctance of judicial officers to utilize it.

The question is also whether some of the mechanisms of enforcement used elsewhere would be effective in the Caribbean, these include:

- Suspending drivers licences
- Withdrawal of passport
- Departure prohibition order
- Withholding tax refunds
- Recoup from unemployment benefits
- Collection from third parties (savings accounts)

These enforcement polices linked to formal employment and an integrated government tax collection system do not assist in enforcement with those not in formal employment

## **10. Social Service Support and the Family Court**

The main advantage of a family court is the deliberate weaving in of a social service intervention and support to the court process. For this social service support to be effective, it must be driven by defined principles and practices. How are social workers to intervene? What are the messages which are to be telegraphed by the intervention?

That the interactions between biological parents are highly fraught is a finding which must be matched by a deeper understanding of gender and socio-economic dynamics as determinants of social behaviour and acceptance/rejection of familial responsibility. Breaking the cycle of male avoidance for children and therefore for the likelihood of inter-generational poverty, requires an understanding on culture, gender and ideology. Social workers should be able to lead mothers and fathers in a reflection on the meaning of their conduct, taking them to self-understanding and to a clearer focus not on the parental conflicts, but on the needs of children. For this gender training must be a necessary input into social worker training.

Social workers including probation officers, also need clear guidelines on the negotiation of child support between parents, which ensure adequate enquiry into means, and encourages disclosure of income as a basis for settlement which is fair and to which the parties can adhere. Social service intervention should also allow for an identification of cases where there is hostility and the likelihood of violence so that referrals may be made for psychological counselling and other types of remedial interventions.

### **Alternative Dispute Resolution: Mediation**

Mediation, as an alternative strategy for the resolution of disputes, has been generally accepted as an effective intervention in family law matters. At its essence, mediation is a process in which a neutral person facilitates communication and negotiation between disputants to assist them in reaching a mutually acceptable agreement, or a better understanding of each participant's interests, needs, values and options.<sup>5</sup> Under the present systems, there are both formal (as in Trinidad through the Family Court) as well as informal mechanisms of mediation. Much of the work of probation officers is guiding parties in reaching consensus on payments.

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<sup>5</sup> Stephen Goldberg, Frank Sander and Wang Rogers "Dispute Resolution: Negotiation, Mediation and Other Processes (3<sup>rd</sup> ed. 1999).

Despite some acknowledged advantages of mediation, there are many who are wary of the use of mediation in some contexts, and have strongly urged the pursuit of practical and ethical guidelines in the use of mediation within these particular circumstances.

One such context is the area of family law, where it is argued that power imbalances can seriously compromise the overall value or effectiveness of the mediation. In this respect, it has been argued that the ethical obligations of family mediators is more onerous and that codes of conduct should be more detailed and have specific guidelines for procedural fairness. A good example of where this has occurred is Canada's Family Mediation Code of Professional Conduct for Mediators, which is considered more interventionist in terms of procedural and outcome fairness than the Model Code of Conduct for Mediators of the Ontario Bar Association, which is intended to apply to civil non-family mediations.

Comprehensive family mediation is a high risk area of practice. The mediation process is occurring in the context of a very complex and difficult body of substantive law. Mediators should therefore be adequately trained in family law or parties should have access to legal advice before execution of agreements.

The role of the comprehensive and effective family mediator has been described as not strictly evaluative, facilitative nor transformative but as a hybrid of all three approaches which would allow the mediator to not only elicit, conciliate and facilitate, but also, when appropriate, to evaluate and direct parties in seeking resolution or transformation. This should be done with a view to facilitating substantive fairness in settlements, which is mindful of gender equity.

## **11. Integrated understanding of cultural dynamics and legal systems**

The extent to which legal frameworks have credibility depends of how closely they match cultural norms or make strong statements about the need to transform dominant and harmful cultural norms. The legal system can be understood as having three core components- the substantive (content of the law); administrative (access to justice components); and cultural ( the way people feel about the law).

This research has uncovered the need for reform in all three dimensions. In relation to the cultural, parental responsibility for children is a highly contested area in the Caribbean, with very apparent schisms between women and men over the nature of the obligation. The extent of non-compliance or uneven contributions to children suggests that legal reform will have to be accompanied by sustained and impressive social communications strategies that can transform the notion that child care is the female realm of responsibility and that father contributions are discretionary, to be accomplished with residual income.