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Child-focused Parenting after Separation: Socio-legal Developments and Challenges

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In this article I utilise developing ideas in family law as a backdrop against which to discuss changing assumptions about parenting. In particular, I examine the gender-neutral assumptions within family law in Australia and elsewhere in the light of seemingly contradictory evidence about the value of post-separation fathering. That men were equally capable of providing effective parenting was by no means clear at the time that the principle of gender-neutrality became common *in family law—the 1960s and 70s. Only recently, has burgeoning research on fathering begun to more clearly affirm its value and to clarify the conditions under which pre and post separation fathering makes a positive difference. Paradoxically, it is at this very time that legally based challenges to the gender-neutral, shared-parenting philosophy of the 1995 Australian Family Law Reform Act have begun to emerge. The often-perplexed interface between law, social science research and therapeutic intervention presents many challenges. I conclude the article by flagging a number of questions relevant to family therapists in this difficult field of work.*

THE CHANGING FACE OF FAMILY LAW

> If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them; for no stronger case for the father can be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes for is her return. It is a matter of simple justice between them that he should have care and control. Whilst the welfare of the children is the first and paramount consideration the claims of justice cannot be overlooked (Lord Denning *Re L (Infants)* [1962] 3 All ER 1, 4).

In this judgement, Lord Denning, perhaps the best known and most highly respected British judge of the twentieth century, constructs his particular solution to the competing claims of gender, childhood and morality. Like all family law judgements, this one is a product of its times, privileging certain aspects of some claims and offering justification for the non-privileging of others. Lord Denning's judgement suggests that amongst the guiding principles to be considered in 1962 were the following:

- children's welfare, though 'paramount' is nonetheless subject to other (presumably higher) principles of justice
- awarding custody of children to an adulterous mother would encourage or at least implicitly endorse such behaviour amongst other women
- reconciliation is very clearly to be preferred to ongoing separation
- the act of forgiveness on the part of a partner (in this case the husband) constitutes sufficient and necessary conditions for reconciliation.

Viewed from an early twenty first century perspective, each of the above propositions might be seen as problematic. For example, we might ask: *Which* justice principles ought to take precedence over the welfare of children? What empirical evidence exists to support the implied proposition that to award custody to the mother would encourage an outbreak of adultery? And is forgiveness by the 'wronged' spouse all that is needed to ensure (or perhaps even require) a reconciliation?

Nineteen sixty two was a time when the divorce rate in western style democracies was still comparatively low, when marriage was more popular than it had ever been and when the common perception of the 'normal' family was that the husband (father) acted as breadwinner and the wife as mother took charge of the children and the domestic domain. In Australia, for example, these norms were reflected in the fact that single parent benefits did not exist and that single mothers continued to be strongly urged to give their babies up to a married couple for adoption.

Negotiations, debate, mediation and therapeutic interventions that seek to respond to family structures and family values necessarily take place within a cultural and time-related context, including within the shadow of the law of the day (Mnookin and Kornhauser, 1979). Family law is one of several bodies of legislation which impact significantly and sometimes quite directly on family structures and values. At any moment in time, family law judgements may anticipate, illuminate, challenge or ignore contemporary expressions of what is appropriate or workable within families. In particular, family law judgements related to children commonly tap into intense feelings because, wittingly or otherwise, they go to the heart of many of core human values.

The Australian Family Law Act was passed in 1975 following a period of heated debate suggestive of deep social

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and political divisions. Historically, the timing of divorce reform has always been controversial. Amongst other things, this particular legislation signalled a belief that the old verities of women's aspirations were changing and were likely to continue to change (that is to say that women's roles should no longer be seen as largely confined to nurturing or low paid service jobs); and that though marriage remained a contract entered into by two parties, it had become a contract which relied for its continuation on the maintenance of feelings of mutual respect, love and even passion. By allowing an application for divorce to be lodged on the sole grounds of separation for twelve months or more, the Australian Family Law Act was formally acknowledging the highly personal choice that marriage had become (it was not, of course always so) and the irrelevance if not impossibility of attempting to determine who might be at fault when one or both partners no longer felt sufficiently positively disposed towards each other.

The Family Court of Australia and courts like it elsewhere have since had the task of reflecting upon, interpreting and even suggesting modifications to the bewildering variety of rapidly changing and frequently competing social values which impact on family life[1]. Once fault was removed from the equation in most divorces, the resolution of questions regarding who should parent, how they should parent and how children benefit from such parenting became especially complex.

STRUCTURE OF THIS ARTICLE

This article invites reflection on issues related to contemporary parenting in general and on the place of fathers as parents in particular. I begin with an assumption that all family therapists hold views about appropriate and inappropriate parenting. Some of those views (around abuse for example) will generally be explicit, whilst other will be less so. I further presume that some of the less explicit views will include assumptions about gender.

Throughout the article, contemporary family law forms a backdrop from which I wish to tease out a number of changing assumptions about parenting and the tensions which exist within them. I begin with a brief historical perspective, showing how we have moved from the concept of paternal ownership, via maternal instinct theories mixed with the notion that child custody should be regarded as a reward for good behaviour, to the 'best interests of the child', which is the principle currently guiding decisions about parenting in Australia.

Next, I draw attention to the existence of recent legislative changes within the Australian Family Law Act (The Family Law Reform Act, 1995) which, consistent with the aspirations of Articles 9 and 18 of the United Nations Convention on the Rights of the Child, emphasise the continuing parental responsibilities of both partners after separation or divorce, and the right of child, in normal circumstances, to an ongoing relationship with each parent.

I then review key research, mainly conducted in North America, the United Kingdom and Australia, on the role of fathering generally and the role of fathering after separation. I suggest that paradoxically, at the very time when legislative reform in Australia (and elsewhere) was promoting the ongoing responsibilities of non-residential parents (usually the fathers), the empirical evidence appeared to be suggesting that ongoing contact between fathers and their children after separation was generally not correlated with positive outcomes for the children. Given that the general research evidence on fathering has increasingly supported the proposition that men are perfectly capable of effective parenting, I search for a contemporary social explanation for the apparent lack of evidence regarding the value of post-separation fathering.

I suggest that a solution to the puzzle can be found in the results of the meta-analysis of contemporary studies on fathering (Amato and Gilbreth, 1999). Approaching post-separation fathering data from a more systemic perspective, these authors propose that the issue is not one of correlating outcomes with the *amount* of contact, but with the *way* fathering after separation has been, and continues to be, constructed.

In the light of findings on what, from the child's perspective, enhances post-separation fathering, I briefly examine two research studies on the effects of the 1995 Reform Act, noting that both point to the existence of a sharp discrepancy between the perceptions of lawyers and counsellors with regard to the value of the reforms. I acknowledge the authors' concerns that under the Reform Act, issues relating to the effect of violence and the effect of ongoing unresolved conflict may be competing with the aims of promoting ongoing parental responsibility and an ongoing relationship with both parents. At the same time, I explain why I have difficulty in accepting the view expressed in one of the reports (Rhoades, Greycar and Harrison, 1999), that the legislative reforms may not have been needed in the first place.

I suggest that the competing aims of the Reform Act parallel difficulties and tensions felt by many therapists, noting also that that legal, social and therapeutic discourses which address these problems tend to be expressed differently. I see some of the theorising in Dewar and Parker's (1999) research report on the Reform Act as providing a way in which a more constructive dialogue on post-separation parenting issues may take place between lawyers and therapists. I conclude this article by flagging (for the purpose of expanding upon them in a future article) some of the systemic and therapeutic issues which confront counsellors and family therapists in working with separating families. The question of whether (and if so how) to tie therapy into the sort of legal discourse with which most clients are confronted is also flagged as worthy of attention.

BRIEF HISTORICAL OVERVIEW

It is obvious that attitudes towards children and the parenting of children must always be understood within the context of the times in which those attitudes were formed and sustained. The present legislative emphasis on the child's need for ongoing support and an ongoing

relationship with both parents following separation and divorce has evolved, in one sense, over thousands of years. At the same time, it could be argued that the availability of divorce, which in most western style democracies has existed for the general population for less than a hundred years (Phillips 1988, 1991) has served to accelerate our thinking on questions of what sort of care and parenting children really need.

What follows is a brief historical review of some key socio-legal assumptions which have impacted on children and on the way they have been parented. More detailed reviews can be found in Marafiote (1985), Moloney, Marshall and Waters (1986), Kelly (1994) and Mason (1994).

First, until well into the nineteenth century, many cultures supported a long standing set of assumptions that children were chattels—almost always the chattels of their fathers (Knibiehler, 1995). Fraser (1976) notes that the first record of children being seen as the possessions of their fathers can be found in the Code of Hammurabi, written in 2150 BC According to Radin (1927), the central ideas within this code passed into Roman law in which the concept of *paterfamilias* allowed the father to enjoy absolute power over his family. In English law, derived from Roman law and from which Australian and North American law originate, rights were associated with land ownership that could only be passed on via male succession. If the child was deemed legitimate, questions of custody were inextricably linked with questions of inheritance. Indeed historical writers such as deMause (1974) in the United States and Sayre (1942) in England, cite nineteenth century examples of court judgements requiring children to be removed from mothers who were still breastfeeding because, despite evidence of cruelty and neglect on the part of the father, his exclusive right to custody could not be legally challenged.

With the industrial revolution came a greater division of labour between men and women, a greater need for men to leave the home to find employment, an emphasis on extolling the virtues of motherhood and domesticity and the developing idea that men were the principal breadwinners in the family (Mason, 1994). No longer the primary place of production, the home became the haven to which the man would return each evening. Coincidentally with this massive change emerged more sophisticated understandings of children as being qualitatively different to adults. Psychologically based notions of child development, the critical nature of the first few years of life and the significance of the quality of parenting during this period began to be more generally accepted.

The concept of the best interests of the child as a decision-making criterion also began to be articulated, tentatively at first, as far back as 1881[2]. The child's best interests were increasingly linked by courts to the establishment in the early years of what Bowlby (1987) was eventually to call 'a secure base'. Influenced by psychoanalytic theory which emphasised the mother's role as '... the prototype of all later love relations' (Freud, 1949: 90), it was generally assumed that small children needed their mothers. Along with this, as Mason (1994) notes, came the formal separation of custody issues from issues of property ownership and gradual progress with respect to the legal and social status of women.

A competing and sometimes confusing thread ran through much of the twentieth century socio-legal rhetoric whereby the parent who was judged to be the innocent party in fault-oriented divorce systems (which dominated family law in most countries until the 1970s) was more likely, notwithstanding the relevance of other issues, to be granted the sole or the major parenting role in a post-separation dispute. Clearly, much of the history of divorce is also a history of what is deemed to be acceptable behaviour between men and women inside and outside the family (Phillips, 1991). The threat of losing one's children has always been an important sanction against behaviour considered to be outside the norms of the day. Lord Denning's judgement cited above clearly reflects the sort of thinking which links judgements concerning (usually sexual) morality with outcomes for children.

Contemporary divorce legislation such as the 1975 Australian Family Law Act takes a more systemic view of interactions between spouses and partners. It is not the purpose of the legislation to apportion blame for the breakdown of the marriage. Only where it is shown to have been of a criminal nature (especially abuse of a partner or child) does the behaviour of a spouse formally impact on outcomes—especially outcomes with respect to future parenting arrangements. But outside findings of criminality or criminal-like behaviour, courts like the Family Court of Australia now struggle to articulate clear benchmarks regarding fair outcomes in post-separation parenting disputes. The 'best interests of the child' principle, to which the court is required to adhere, provides broad scope for interpretation and debate.

THE BEST INTERESTS OF THE CHILD: RECENT DEVELOPMENTS IN AUSTRALIA

In 1993, Australia hosted the First World Congress on Children, Law and Rights. The content of that Congress, like the content of books and collections of papers by Australian researchers such as Alston, Parker and Seymour (1992), Alston (1995) and Funder (1996), reflect the breadth and depth of scholarship which 'Children's Rights' now attracts. Hodgson (1992) has detailed the emergence and internationalisation of the children's rights movement which culminated in United Nations Convention on the Rights of the Child (1989), to which 188 countries have now assented (Grant, 1997).

Article 9 of the Convention asserts the ongoing right of the child, separated from one or both parents, to 'maintain *personal relations* (my italics) and direct contact with both parents on a regular basis except if it is contrary to the child's best interest'. The ongoing responsibility of both parents to continue to support and nurture their children is addressed in Article 18.

In Australia, The United Nations Convention on the Rights of the Child acted as a major catalyst for the production of a series of discussion papers and Family Law

Council reports which in turn led to the Family Law Reform Act (1995) noted above. The Reform Act has been described by Nygh (1996) as 'the most significant development in Australian Family Law since 1975'. A central focus of this reform is its emphasis on parental responsibility, which is deemed to be shared by parents irrespective of their separation (Family Law Act s 61C(2)). How parental responsibility can be exercised following separation can be subject to a range of Family Court parenting orders (s 61D) but otherwise, both parents are assumed to retain their full parental status. In addition, the legislative statement of object and principles which supports the reform states categorically (within s 60B(2)(b)) that 'children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development'.

Consistent with its aims, the Reform Act abolished the terms 'custody' and 'access'. Abolition of 'custody' represented an attempt to break any remaining perception that there might be a link between caring for children and owning them as one would own property. In abolishing the term 'access' the intention was to elevate and/or restore the status of the 'other' spouse to that of a fully functioning parent rather than a visitor to his or her children. The terms 'residence' and 'contact' which replaced custody and access probably represent the sort of uninspired compromise solution which frequently emanates from committee procedures. Nonetheless the Reform Act marks a radical departure from the previous legislation, under which it was assumed that the custodial parent retained all or most of the legal authority over the child.

Some question the 'best interests of the child' as an appropriate guide to assist in post-separation decision making. For example, Kelly (1997) whilst having some sympathy for the concept, expresses concern about the fact that every disputed parenting case might potentially be brought to a court and about the wide judicial discretion and the wide range of possible outcomes the concept allows.

Some researchers (e.g. Berns, 1991) have suggested that the Family Court of Australia has dealt with these sorts of difficulties by effectively restating the 'tender years' doctrine[3] as that which is in the child's best interests unless there is strong evidence to the contrary. Other writers oppose the best interest of the child principle altogether. Fineman (1994), for example, is an advocate of a primary care principle or a status quo assumption, both of which effectively declare that children should continue with the arrangements which existed prior to separation. Fineman is a strong critic of what she sees as a social science takeover of an area which, in her view 'belongs' to the law. According to Fineman, one practical advantage of the status quo or primary care approach is that disputes can be translated into disputes over 'facts' with which the legal system is better equipped to deal. Boyd, Rhoades and Burns (1999) have reviewed what they refer to as the politics of the primary care (and to some extent the status quo) presumption via an engaging three way 'conversation' on many of the issues raised by this approach. As the title of their article perhaps suggests, the review is not primarily child-focused. Much of it (e.g. p. 244, p. 250) considers primary care and related principles in the light of the extent to which they might serve as strategies for empowering women.

Boyd et al. express the wish that others will engage with them in a continuing conversation on this issue. It is to be hoped that other writers and researchers will take up the challenge because the issue is indeed multi-faceted. For example, the logic of the status quo and primary care arguments is that pre-separation arrangements and relationships between parents should continue. In my view, such arguments take inadequate account of the usually dramatic changes in circumstances for both parents and children that pertain after separation. Post-separation relationships between children and their parents are inevitably different and the parenting challenge after separation is how to adjust to such changes. From the child's perspective, the important question is how the management of the changes leading up to and accompanying their parent's separation impacts on their well-being.

My focus in this article is on the place in the children's lives of the father because I believe there is ample evidence that the father's *personal relationship* with his children has been less privileged in contemporary culture and in the family-related laws which strive to reflect that culture. How has this come about? And more importantly from the child's perspective, does it matter?

In the next section, I review some key contemporary research on fathering. My purpose is not to promote fathering as if it were in competition with mothering. Rather, my purpose is to suggest that in view of research findings on fathering, we are justified in beginning with a 'both/and' set of assumptions regarding the parenting of children from heterosexual families, whether the parents in those families remain together or not.

Following this general review, I focus on some puzzling findings with regard to fathering after separation which, without further analysis, could lead policy makers and decision makers to revert to a promotion of more traditional post-separation parenting structures—'custody' (usually) to the mother and 'access' or 'visiting rights' to the father. I draw attention to Amato and Gilbreth's (1999) analysis of those findings and to the fact that their analysis appears to provide a solution to the puzzle presented by previous researchers. In the light of this, I suggest that our emerging understanding of the importance of fathering both generally and after separation does indeed reinforce both the aspirations of Articles 9 and 18 of the United Nations Convention on the Rights of the Child and the wisdom of the principles underlying the Family Law Reform Act.

SHIFTING IMAGES OF THE FATHER

We have seen that from both a structural and legal perspective, fathers had great power over their children and their wives until well into the nineteenth century. Unbridled power in which a father could 'chastise', maim or murder his children and his wife (who in law had no more

rights than her children) without fear of legal recrimination, invited cruelty and excess. There is no shortage of historical examples of such excesses both literal and mythological (Abramovitch, 1997). Indeed Shapiro's (1984) analysis of manhood goes so far as to conclude that historically, the child's first task was to survive the envy of his or her father.

At the same time, detailed historical examples of how fathers related to their children on a day to day basis, what nurturing qualities they displayed (or were permitted to display), and what they did on behalf of, or for, their children, are practically non-existent. We know of men's power and cruelty. But we also know from historians of childhood such as Aries (1965), from novelists such as Dickens and from psychosocial overviews provided by researchers such as Edgar and Ochiltree (1981), that cruelty towards children was almost universal. Whilst social historians such as deMause (1974), Shorter (1975) and Stone (1977) often see fathers as brutal and indifferent, others such as Pollack (1983) and Demos (1986), following painstaking analyses of court records, refute these views.

In truth, we have little direct systematic knowledge of the interior of family life prior to the twentieth century because the topic was scarcely considered worthy of recording. Impressive as the works by writers such as Aries and Shorter might be, they are based on mere fragments of information gleaned mainly from scattered parish records and recorded anecdotes. In addition, until well into the nineteenth century, most children were born into a precarious world which had few resources to focus on their needs. For most people, life was difficult and comparatively short. Death of mothers during childbirth was common, causing frequent social and family disruption (Edgar and Ochiltree, 1981) and roughly half of all infants born were not expected to survive beyond the age of two.

Whatever the division of child-rearing tasks between men and women and whatever the nature of the relationship between fathers (or father figures) and their children in earlier times, the industrial revolution, as noted, brought with it significant pressures on men to define their primary role as that of breadwinners who worked away from the family; and on women to see themselves primarily as mothers who attended to domestic duties. Throughout the twentieth century, theories of child development have focused largely on the success or otherwise of the development of a primary relationship between a *single* parent or parental figure (usually assumed to be the mother) and the child.

Perhaps the critical importance of this relationship has never been more clearly and more strongly articulated than it was by Goldstein, Freud and Solnit (1972). In specifically addressing the issue of post-separation parenting, these authors advocated a rapid legal decision regarding who was the primary parent and the immediate granting of total power and control to that person. According to Anna Freud's biographer (Young-Bruehl, 1991) this book has remained the most commonly read psychological text in family law.

A 'primary parent' focus on child development does not theoretically exclude fathers but in practice it relegates the majority of them to the sidelines. In practice, the theory puts a psychological spin on Rousseau's earlier idealisation of the mother and privileging of the mother–child relationship.

> Tender, anxious mother, I appeal to you. You can remove this young tree from the highway and shield it from the crushing force of social conventions. Tend and water it ere it dies. One day the fruit will reward your care. From the outset, raise a wall around your child's soul; another may sketch the plan; you alone should carry it into execution (*Emile,* Everyman's Library, 1911: 5–6).

Rousseau's language may appear quaint to the modern ear but in the popular twentieth century mind and in much of the psychological literature, it is probably fair to say that it is the mother who is still praised when children turn out well and blamed when their behaviour is problematic.

Serious and systematic research on fathering is scarcely thirty years old. In the preface to Lamb's (1997) edited review of contemporary research findings on fathers and child development, however, he notes a burgeoning interest in the area. He also points out that since publishing his first review (Lamb, 1976) there has been a shift in research interest away from the almost exclusive focus on father–child dyads, to studies which 'place fathers in the context of family systems and sub-systems'. Research into fathering since the late 1970s has expanded to examine fathers as companions, carers, spouses, protectors, models, moral guides, teachers and breadwinners.

Lamb (1997a: 3) now speaks of the 'cultural ecology' of fathering, suggesting that contemporary research points to the fact that fathers play differing roles in differing subcultural contexts. In the section on cultural ecology, Lamb offers examples (as when a child is conceived outside an enduring relationship) of when breadwinning and the indirect effects of financial security may be of paramount importance. For other families and communities, however, 'financial support may be unimportant, direct care and supervision crucial and emotional support invaluable'.

In an overview of research findings on fathers and children, Lamb (1997a) concludes that children with highly involved fathers in 'intact' families are characterised (compared with low involvement fathers in intact families) by increased cognitive competence, increased empathy, less sex-stereotyped beliefs and a greater internal locus of control. He notes, furthermore, that the positive effects of increased paternal involvement have proved to be consistent across several major studies. A more detailed analysis of these studies can be found in the chapter by Pleck (1997). Edgar (1992) has summarised supporting data arising from the family formation project conducted by the Australian Institute of Family Studies.

Lamb's overview also suggests that the amount of time that fathers and children spend together is probably less important than what they do with that time and less important than *how fathers, mothers, children and other important*

people in their lives perceive and evaluate the father–child relationship (my italics). Lamb's analysis of the evidence further suggests that fathers and mothers seem to influence their children in similar rather than dissimilar ways. He notes (3), 'Contrary to the expectations of many psychologists, including myself, who have studied paternal influence on children, the differences between mothers and fathers appear much less important than the similarities ... [and that] ... students of socialisation have consistently found that parental warmth, nurturance and closeness are associated with positive outcomes, whether the parent or adult involved is a mother or a father'. As far as influences on children is concerned, Lamb's analysis of the research suggests (10) that 'very little about the gender of the parent seems to be important'.

Lamb's expectation that he would find more gender differences than similarities with regard to parental influence is perhaps consistent with deep seated assumptions (clearly present in Rousseau's thinking) that mothers are biologically equipped to be better parents. Though it is not possible to do justice to this complex area, it is worth noting the conclusion to a further chapter contributed by Lamb (1997b) on the development of father–infant relationships.

> We do know ... that both mothers and fathers are capable of behaving sensitively and responsively in interaction with their infants. With the exception of lactation, there is no evidence that women are biologically predisposed to be better parents than men are. Social conventions, not biological imperatives, underlie the traditional division of parental responsibilities (120).

At the same time, Lamb (1997a) suggests that perceptions of mothers as self-sacrificing nurturers and fathers as breadwinners are changing only slowly. He speculates that many women may still be reluctant to relinquish the near exclusive role of mother as primary parent and manager of the household. He notes that even though the majority of mothers are now in the workforce, too many continue to occupy low paying, low prestige jobs with little prospect of advancement. The trade-off, therefore, of 'allowing' men to play a more active parenting role, may be, for them, of dubious value. According to Lamb, resistance by women may continue until fundamental societal changes alter the basic distribution of economic power.

FATHERING AFTER SEPARATION AND DIVORCE: TIME FOR A REAPPRAISAL?

Appropriate allocation of economic resources is one of the other ongoing gender-related debates occupying much time in the theory and practice of family law. Lamb's comments remind us that the question of parenting practices cannot be separated from questions of economic power generally and economic power differentials between partners. Too little emphasis on equality of opportunity in the market place, and on the financial responsibilities of parents towards their children and towards each other, means that the analysis risks becoming simplistic. On the other hand, a focus on these issues at the expense of devaluing the father–child relationship can, perhaps inadvertently, risk a further commodification of children. This is something which the Australian Family Law Act, however imperfectly, has striven to avoid. There is merit, I would argue, in keeping our focus here on the relational aspects of parenting.

Are laws and processes which promote ongoing paternal involvement after separation just a nice idea—or as some (e.g. Kay and Tolmie, 1998) would claim, an idea which mainly panders to 'fathers' rightists'? Can the benefits for children of ongoing contact with fathers after separation be demonstrated?

Amato (1993) summarised 32 studies of divorce that reported data on the relationship between contact with 'non-custodial' fathers and children's wellbeing. Fifteen of the studies concluded that contact was associated significantly and positively with children's wellbeing, seven concluded that contact was associated significantly but negatively, whilst ten found no significant association. Of concern also is the fact that the majority of studies that linked involvement of fathers with improved outcome for children after separation and divorce were conducted by clinicians on small samples. In other words, the positive findings tended to come from studies less able to extrapolate findings to a general population.

Seltzer (1994) concluded that 'large national surveys consistently show an absence of association between non-resident fathers' visits and children's well-being'. In the same year, McLanahan and Sandefur also observed, 'studies based on large nationally representative surveys indicate that frequent father contact has no detectable benefit for children' (256). Both Seltzer and McLanahan and Sandefur note, however, the significantly positive effects of fathers' child-support payments following separation.

What do these data mean? Do fathers continue to be seen (by themselves as well as others) as good for the purposes of breadwinning and not much else? Some evidence suggests that this could indeed be the case. For example, O'Hare (1995) found that the women surveyed in her study overwhelmingly viewed breadwinning as the crucial role for husbands and fathers. Such attitudes tend to reinforce the results of earlier surveys conducted by Quinn and Staines (1979) and Pleck (1982), which found that while the majority of men wanted to be more involved with their children, the majority of women did not want their husbands to be more involved than they currently were.

Aware that 'there is a substantial body of research showing that positive father involvement in two parent households contributes to children's development, wellbeing and attainment', Amato and Gilbreth (1999: 558) looked again at the evidence on post-separation fathering. They decided to conduct a further meta-analysis of the studies (now increased in number) done on post-separation parenting up until that time.

The authors initially speculated that if positive father involvement in two-parent households has been shown to contribute positively to children's development, wellbeing and attainment, then the negative survey results

on post-separation fathering may simply indicate that non-resident fathers are less salient in their children's lives. But salience did not appear to be the key. For example, several studies on the subject (Amato, 1987; Funder, 1996; Gibson, 1992; MacDonald, 1990; Wallerstein and Kelly, 1980) have reached the conclusion that many children in single-mother households think highly of their fathers and wish to have more contact with them.

Amato and Gilbreth therefore decided to approach the question of post-separation paternal contact from the perspective of *assuming* that non-resident fathers have the potential to benefit their children and then to ask why existing studies have frequently failed to provide supporting evidence. They speculated that in focusing on *frequency* of contact and attempting to correlate this with outcome, many researchers were perhaps focusing on the wrong dimension. They recalled, for example, that a study of adolescents' feelings of closeness to their non-resident fathers, which were positively associated with psychological and behavioural adjustment (Buchanan, Maccoby and Dornbusch, 1996), were only modestly correlated with frequency of contact.

Amato and Gilbreth provide a detailed description of their methodology for conducting a meta-analysis of 63 studies dealing with non-resident fathers and children's wellbeing. Their carefully constructed study found positive correlations between outcome and the dimensions of closeness and authoritative parenting. They note that both these dimensions are extensively described in the general family research literature and both have been shown to impact positively on outcomes for children. Payment of child support was also (again) positively correlated with outcome but frequency of contact was not.

The authors concluded that the dimension of authoritative parenting is an especially critical one for understanding the difference between the sort of contact which contributes to the wellbeing of the child and that which leaves both child and parent frustrated and dissatisfied. Rather than focusing on frequency or length of time spent between father and child, authoritative parenting is a *relationship* dimension which reflects parental support and control, seen as key resources for children (Baumrind, 1968; Maccoby and Martin, 1983; Rollins and Thomas, 1979).

According to Amato and Gilbreth, authoritative parents provide a high level of support for their children, as reflected in

> ... behaviours such as responsiveness, encouragement, instruction and everyday assistance. These behaviours facilitate children's positive development by conveying a basic sense of trust, reinforcing self-concepts of worth and competence, and promoting academic success. Control is reflected in rule formation, monitoring and discipline. Through these processes, children learn that their attempts to affect the environment must operate within a set of socially constructed boundaries ... The combination of a high level of support with a moderately high level of non-coercive control reflects authoritative parenting—the parenting style most consistently associated with children's positive development (559).

The non-coercive nature of the control is important. It is control which does not generally rely on physical punishment, deprivations or threats of either because it grows out of the established and continuing relationship between parent and child.

The idea of authoritative parenting stands in contrast to the sort of recreational parenting opportunities available to and frequently associated with the 'weekend father'. It is not difficult to understand how the weekend recreational model of post-separation parenting has developed and has been reinforced. Non-fault oriented proceedings relating to children developed at a time when 'maternal instinct' ideas were still deeply embedded in our culture. Indeed, as noted above, Berns' (1991) qualitative analysis of selected Family Court judgements concluded that, notwithstanding a formal policy of gender neutrality, Rousseau's concept of the self-sacrificing mother has remained alive and well in the Family Court. Berns cites several judgements in which the granting of 'custody' appears to be conditional on the mother's willingness to suspend her own needs on behalf of her children. She cites contrasting judgments in which, even for the man granted 'custody', such a requirement was seen as necessary but irksome. Men, it is assumed, have more legitimate business 'in the world'.[4]

It is true that the 'access every second weekend' regime is also a pragmatic response to a real problem. Children (and their parents) need a certain amount of order in their lives and they cannot be in two places at once. The important questions, however, relate to the purpose of the contact and the demonstrated beneficial effects of that contact for the children. Whilst the *amounts* of time spent between child and parent is not the critical dimension, it is easy for both parents and children to read into the every second weekend formula the message that this is *not* about the development and sustaining of a serious parental relationship.

THE FAMILY LAW REFORM ACT: WHERE TO FROM HERE?

The practical consequences are complex when we promote ongoing parental responsibility after separation, and the right of the child to an ongoing relationship with his or her separated parents. In dealing with disputes arising from this complexity, the legal system is a blunt instrument, generally able to confine itself to questions of how much time a child may spend with each parent and to a lesser extent, how that time will be structured. (The other related and especially contentious issue which courts must deal with from time to time is that of freedom of movement of one of the parents. This problem usually comes about when the parent with the major residential parenting commitment wishes to move such a distance as to make regular contact between the child(ren) and the other parent difficult or impossible.)

The quantum and the structuring of time spent between a parent and a child is not unimportant. Relationships of any sort will struggle if the amount of time spent together becomes too small or too irregular. Beyond that,

however, the research summarised in Lamb (1997) on fathering generally and the work of Amato and Gilbreth on fathering after separation are strongly suggestive of an hypothesis that it is *how* the fathering takes place which is critical. Put simply, the research suggests that if fathers assume the role and are reinforced in the role of visitors and occasional entertainers rather than parents, the time they spend with their children will have little in the way of positive impact.

As noted, two research reports have been published to date on the effectiveness of the Reform Act. Dewar and Parker's (1999) research is based on interviews in 1997 and re-interviews in 1998 with a small sample, 'restricted to about four Brisbane-based members of each group', of Family Court judges, registrars and counsellors, family law solicitors and barristers, legal aid personnel (including child representatives, social workers and domestic violence specialists) and workers in community legal centres. The exact sample size is not stated and the authors acknowledge that the small number of interviewees and geographical homogeneity of the sample allows for preliminary comments only to be made.

Dewar and Parker (102) believe, nonetheless, that the legislation has had a 'big effect in altering the "mind set" of respondent family law professionals in relation to contact'. On the same page, they note that the principle espoused in s 60B(2)(b), that children have a right of contact on a regular basis with both their parents and with other people significant to their care, welfare and development, 'has had a particularly profound impact and was referred to more than any other provision in justifying a new approach'.

In the following paragraph, the authors claim that

> as a consequence, there is now a greater willingness to challenge the standard 'package' of alternate weekends and half the school holidays and to seek (and be granted) orders for longer weekend contact than previously ... and for contact with children at an earlier age than previously.

They found the trend emerged even more clearly during follow up interviews 'with most respondents ... [also pointing out] ... that the desire by non-resident parents for a greater role in post-separation parenting was linked to wider social changes in parenting' (102).

But attitudinal studies can be difficult to interpret. With respect to the principle of ongoing parental responsibility, the authors believe that despite the above findings, there is evidence that 'Solicitors regarded it rather cynically, as merely a change of words and expressive of "social workers' philosophy"; while counsellors saw it as a useful rhetorical device in counselling sessions, either to "empower" or reassure the contact parents or to focus attention on the child' (106). I return to this issue below.

Dewar and Parker claim that although the Reform Act also introduced provisions which strengthened the visibility of family violence as an issue in children's matters, 'the provisions appeared to have had only limited practical effect'. At the same time, they acknowledge that 'registrars and judges said they took family violence very seriously' (102). Apart from citing the views of two respondents on this matter, it is not clear how the research itself leads to the 'limited effect' conclusion. The authors believe (though the source of the belief is unstated) that delays are causing clients who are the victims of violence to settle for arrangements which would not be sanctioned in a final hearing. They note a substantial increase in applications for contact in the first year of the Reform Act's operations and cite evidence from the report by Rhoades et al. (1999) that judges are reluctant to deal with allegations of violence at interim hearings. I return to this issue also below.

Rhoades et al.'s (1999) more extensive research on the subject of the Reform Act asks the question, 'Can changing legislation change legal culture, legal practice and community expectations?'[5] The Report aims (14) to 'assess the immediate and longer term effects of the children's provisions of the Family Law Act over a three year period'. Key findings in this interim report are as follows.

With respect to the question of how advice given to separated parents differs from the advice given before the passing of the Reform Act, the authors found a clear distinction between advice offered by lawyers and the advice of counsellors. It was found that many lawyers continue to treat the new legislation as a reform in name only, some expressing a weariness with family law reforms which in the words of one respondent, 'promise much, create a lot of confusion and deliver very little' (8). Counsellors and mediators, on the other hand, generally reported that in emphasising a child's right to ongoing contact with both parents and ongoing parental responsibility for children after separation, the Reform Act has done no more than bring itself into line with good social practice.

The Report also looked at whether or not the Reform Act opened up opportunities to non-residence parents (usually fathers) to enjoy more contact with their children. The preliminary results suggest a shift in the focus of disputes from residence (custody in the pre-reform legislative language) to contact (known previously as access). In particular, more men are applying for greater amounts of contact. There is a suggestion that disputes about parenting time have become more numerous and more complex. Despite this, there is little evidence at this stage that non-residence parents are enjoying greater *amounts* of contact time with their children. Once again, counsellors were found to be more supportive of changes in the direction of greater flexibility (and greater complexity) in parenting arrangements than were lawyers.

Rhoades et al. believe that the results of the study suggest that there continues to be a divergence between the theory and the practical reality of shared parental responsibility following separation and further speculate on why this may be so. 'A more solid finding is that of a marked increase in numbers of applications for contact orders, residence specific issues, and findings of breaches of parenting orders. In this respect, the report notes that

> some judges and solicitors ... suggest ... that many applications ... are brought by unrepresented contact fathers, that many of these applications are unmeritorious ... and that much Court time is wasted in dealing with them (12).

Like the Dewar and Parker research, this Report also suggests that there has been a shift towards emphasising the 'right to contact' principle (s 60B(2)) at the expense of the Court's requirement to ensure that a parenting order does not expose a person to 'an unacceptable risk of family violence' (s 68K). The suggestion here is that (mainly) men who may have previously been denied contact with their children because of allegations or evidence of violent behaviour are now more likely to be granted contact, at least at the interim hearing stages.

Rhoades et al. include in their report an historical overview of how the Reform Act came about. Amongst other things, they cite the 1992 Family Law Council Report, *Patterns of Parenting after Separation,* as one of the documents contributing to legislating for the Reform Act. This Report's recommendations concerning the use of parenting plans and the abandonment of proprietorial language grew in part out of a recognition that almost half the children of separation and divorce were losing significant contact with their fathers and that many children were distressed by this.[7] Nonetheless, Rhoades et al. suggest that 'there was no real "mischief" to which the Reform Act's co-parenting reforms was responding' (19).

The question of whether or not the earlier legislation contained a 'mischief' depends to some extent on where one stands. Was the proprietorial language of the former legislation really so bad with respect to children? Were the findings that parenting arrangements between children and their fathers had not generally altered in length or form over twenty years reflecting no more than what was happening in non-separated families? Were not aspirations for greater participation by non-custody and/or non-residence parents at best unrealistic and at worst an indication of vindictiveness towards a former partner?

Where one stands on such questions depends, in turn, on many factors each of which requires teasing out via very careful research. But as Kelly has noted,

> The current practice of feminist writers and fathers' rights groups to use a particular research finding to bolster a political or gender-linked point of view while ignoring other data makes it difficult for legislators, judges, attorneys, or parents to obtain a balanced, informed view (1994: 128).

Dewar and Parker have framed the Reform Act as something which, however imperfectly, acknowledges the complexity and changing nature of post-separation parenting issues. Rhoades et al. are more inclined to focus on the potential for the legislation to claw back gains made by women. They express concern (as do Dewar and Parker) that violence might again become under-recognised. They see potential for men to gain power without real responsibility and to use this power to harass their former partners. They point to the increased possibility of ongoing conflict under these reforms and the well documented negative effects (e.g. Rutter, 1989) that ongoing conflict has on children. And they question the purpose of the reforms in the first place.

The suggestion from both reports—that the emphasis on the child's right to ongoing contact appears to have taken precedence over the obligation of the Court and of practitioners to assess formally the value of contact when violence towards a child or partner has occurred—is indeed worrying. As Rhoades et al. point out, it took the Family Court some years to articulate clearly a position on the negative impact of ongoing contact between children and the non-resident parent where there had been a history of violence between that parent and (usually his) partner. Any formal or informal retreat from this position would be of concern. What appears to be happening, from figures supplied in both pieces of research, is that in the light of an increased number of applications for contact which the Reform Act may have brought about, courts have become even more overloaded and may have dealt with the large number of interim hearings by placing allegations of violence on hold until a later date. This later date might be twelve months away. This clearly reflects an administrative or resource problem or both which, from the perspective of both the child and the target of the violence, is unacceptable.

The tension between the principle of encouraging ongoing contact between children and both parents following separation, and the protection of former partners and children from the well documented negative effects of violence must clearly be resolved in favour of the need to protect. At the same time, justice demands that the allegations of violence be substantiated at least to a 'balance of probabilities' level of proof. Violence is a serious issue and requires a serious response. Failure to deal with allegations of violence at an early stage of court proceedings, if this indeed is occurring, suggests that the seriousness of the issue is not being adequately recognised. If the problem reflects an attitudinal stance amongst some legal practitioners (at which Dewar and Parker appear to hint), then it needs to be addressed at that level. If it is a question of more dispute resolution resources being required to deal with emerging complexities, there can be no serious excuse for not supplying them.

It remains to be seen what final recommendations will be made by Rhoades et al. and what impact those recommendations might have. The tenor of the interim report would suggest that at this stage, the researchers are at best highly ambivalent about the value of the Reform Act. Space does not permit further detailed analysis of the serious issues they raise. It is important to tease out further the difficult questions relating to the ways in which the intentions of such legislation can be thwarted by some men (and some women), in a bid to exercise inappropriate power and control. It is also important to clarify better the circumstances in which the Reform Act is capable of ameliorating or exacerbating the effect of ongoing unresolved conflict on children. Hopefully, there will be an opportunity for formal commentary on the final report.

LEGAL, RESEARCH AND THERAPEUTIC INTERFACES

What is clear, in my view, is that as the percentage of dual income and aspiring dual income families continues to increase and as the number of jobs deemed exclusively male or female become fewer, 'alternative' patterns of

parenting by heterosexual partners and former partners will continue to evolve and be debated. Prior to the 1970s, an analysis of fathers' nurturing and/or relationship roles was almost entirely absent from the literature. It is not coincidental that serious research on fathering commenced at a time when family structures again began to change.

Current research on fathering indicates that men are perfectly capable of being in a fully caring, responsible and nurturing relationship with their children. Nonetheless the challenges are numerous around how to share parenting responsibilities between partners, whether separately or together, in ways which reduce rather than exacerbate conflict, and in ways which are beneficial to children. It is a major task of family law to continue to be sensitive to these challenges and to provide a forum which, first, encourages constructive debate on the principles of post-separation parenting (and by extrapolation, of parenting generally) and second, tackles questions relating to practical realities arising from those principles.

The authors of both research reports investigating the Reform Act cite examples of respondents who are tired of family law reforms and frustrated with how little they seem to deliver. Perhaps they are the respondents who continue to hold to what Dewar and Parker describe as a linear, hierarchically inspired top-down view of legal processes. I agree with Dewar and Parker's comments that family law can no longer be (if it ever could be) like that. In terms of a more appropriate legal sociology suggested by these authors,

> power and authority is understood to be dispersed throughout different parts of the legal system. In this context, a horizontal view of law suggests that there is no predictable causal relationship between legislative change on the one hand and legal outcomes on the other (114).

Perhaps it is in the nature of the work that contemporary family law will continue to find itself in the paradoxical position of being expected to provide some level of predictability simultaneously with evincing the capacity to respond to the evolving and multiple realities of family life. Perhaps Rhoades et al.'s research question: 'Can changing legislation change legal culture, legal practice and community expectations?' is necessarily rhetorical. From a systemic perspective, legislation responds to, comments on *and* influences changing family practices. But from a more practical perspective, each family court judgement must present a unified, internally consistent (even if complex) story of events in which the conclusions reached can be justified, be difficult to appeal against and, to some extent, act as a precedent for further cases.

Though the range of 'acceptable' family forms reflected in Family Court judgements has expanded over time (custody or residence orders to parents in homosexual relationships for example), I would argue that, from a systemic perspective, judgments operate within a restricted code which necessarily privileges only certain aspects of family life. When working as a therapist, I frequently sense that I am working with the fallout which occurs when individual members of a family, or individual families, find difficulty in conforming to deep rooted expectations about how they and their families *should* be. At such times, I find that narrative approaches, through which I can assist in illuminating those concepts, feelings and relationships which *are* privileged and support those which are struggling for air, can be particularly helpful. But I remain aware in many cases, of the strength of the socio-legal pressures which beckon individuals back to more conventional and more 'acceptable' solutions.

In therapy, good will and courage, combined with some level of commitment to each other and to the process, can facilitate the emergence and tolerance not only of an alternative story, but of more than one story. But the multiple stories solution can be considerably more difficult to tolerate (for both family members and therapists) in the case of separating families. At these times, it seems to me that the therapeutic task places additional challenges upon everybody. How does one arrive at a place in which, for example, former partners can simultaneously acknowledge negative feelings towards each other *and* the value of each of them as parents to their children? For me, the co-creation of a space something akin to the mythical Irish Fifth Province is required (McCarthy and Byrne, 1995). The essence of the Fifth Province, as I understand it, is that it is a place which does not exist *and* a place in which ambiguities can be tolerated. In such a place solutions are more likely because everything is theoretically possible.

Can both parents really remain fully engaged with their children after separation and can children positively gain from a sustained ongoing relationship with each parent? Or is this, as some of Dewar and Parker's respondents suggest, mere 'social worker philosophy'? In this article, I have briefly summarised recent critical research evidence on fathering generally and on post-separation fathering outcomes. Results in both cases support the aspirations which inform the Reform Act—that ongoing parental responsibility and an ongoing (authoritative) relationship between children and both parents is worth striving for.

I have also noted that the legislation contains tensions around competing child welfare principles and that these tensions require ongoing debate and discussion. A striking feature of the research to date is the differing perceptions of lawyers and counsellors regarding the value of the family law legislative reforms. Though each profession has an important contribution to make to this discussion, the public voice of therapists who work with separating families has not generally been a strong one. Even within family therapy journals, the number of articles which address issues related to family re-formation following separation and divorce does not remotely reflect the proportion of families (more than a third in Australia) which find themselves in this situation.

In a proposed follow-up article, I wish to raise more specific questions of therapeutic practice in this difficult area. What does 'family' mean to a therapist working with separating couples and their children? How relevant is an understanding of the research literature on parenting and child development? To what extent should therapists declare (at least to themselves) any gender specific views

they may hold on parenting? Who is the client in separation and divorce cases? Under what circumstances might one allow oneself to become an advocate for one partner and what are the dangers in taking up such a position? How are children to be represented or involved? In what ways might therapists work with other professionals such as family law mediators? Under what circumstances, if any, should the therapist work directly with lawyers?

The final question connects with a broader one which I have begun to address elsewhere (Moloney 1999). Is some (even rudimentary) knowledge of the origins and current practice of family law a help or a hindrance for family therapists? As the author of this article, I would come down on the side of its being useful. But the question is not perhaps as straightforward as it might seem. When a family law case is referred, many family therapists in my experience either keep their heads down (at least in the sense of avoiding engagement with other professionals, especially legal professionals); or else adopt a stance which betrays a meta-message that only therapeutic interventions are capable of truly dealing with the issues. In the follow-up article, my invitation to family therapists will include an invitation to reflect formally on the advantages and dangers of getting close to legal and associated processes in family law cases. A thought-through position on this and related questions, whatever the individual therapist's conclusion, is likely to be of benefit to separating couples and their children.

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Notes

1. Indeed it is probably no accident that this Act has been subject to more amendments and more 'reform' than any other piece of legislation in our history.
2. In *Chapsky v Wood* 26 Kan 650 (1881), the child had been cared for by non-family members following the death of the mother. Having subsequently acquired means to support the child, the father applied for custody. In refusing the application, the Judge observed that '... the right of one who has fulfilled the parental place for years should also be considered. ... Above all things, the paramount consideration is, what will promote the welfare of the child?'
3. The so called 'tender years' doctrine assumed that the mother was the appropriate custodian for a young child unless disqualified by marital fault. The doctrine was rejected in the early days of the Family Court—see *Raby and Raby* (1976) FLC 90–104 and the High Court judgement in *Gronow v Gronow* (1979) FLC 90–716. According to Berns (1991), however, 'it continues to surface, albeit in altered form, in judicial discourse'.
4. A frequently quoted judicial statement on this issue is that of Glass J. A. of the New South Wales Court of Appeal ((1976) 10 ALR 227, 241) 'The bond between a child and a good mother ... expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them'. Though, as noted, the Family Court has rejected this view, section 75(2)(1) of the original 1975 Act did direct the Court to consider 'the need to protect the position of a woman who wishes only to continue her role as a wife and mother'. The wording was altered to reflect gender neutral language in 1983.
5. The research into these questions was undertaken by way of personal interviews with Family Court judges and judicial registrars, and family law solicitors (including private and community legal centre practitioners) and barristers in various locations. In addition, family law solicitors, Family Court counsellors and private and community based family counsellors and mediators throughout Australia were surveyed by way of questionnaires and semi-structured personal interviews. The researchers received 166 completed questionnaires from solicitors, 55 completed questionnaires from Family Court counsellors, 113 completed questionnaires from private and community counsellors and 46 completed questionnaires from private and community mediators. Thirty (30) Family Court judges (including Judicial Registrars), 45 family law solicitors and 13 Family Court counsellors were interviewed. Of the 166 solicitors who completed questionnaires, 71 were accredited specialists in family law, and 125 had practised family law for 10 years or more. Several domestic violence services were also surveyed. In addition, the researchers observed hearings of interim children's matters in eight registries of the Family Court, as well as a circuit court. Finally, a selection of 209 pre- and post-Reform Act interim and final judgments and orders were analysed and compared.
6. Rhoades et al. suggest the following reasons:
   - the unwillingness of contact parents to exercise responsibilities, leaving the parent with whom the child lives to do the bulk of the work
   - the unwillingness of a 'hostile' resident parents to share the care of children or parent co-operatively
   - the persistence of the proprietorial 'custody' and 'access' concepts in the community
   - the tendency to replicate pre-separation caregiving roles in which it is usual for one parent (usually the mother) to be responsible for the bulk of the caring work
   - the reality of the separation process which is not conducive to co-operation between the separating partners
   - the logistical difficulties of co-parenting across two households.
7. All but two of the major Australian and overseas research studies cited in this report (13) noted that over time, roughly half the children from separated families lost regular contact with their non-custodial parents. A number of studies cited in the same report (13–14) also found that children generally wished for more contact with their non-custodial parents. One of the briefs given to the authors of this report was 'To indicate the legislative and as far as possible other changes necessary to ensure that pre-existing patterns of parenting prior to separation are either respected or improved upon after the separation of parents'. Though the report's recommendations were rejected by Parliament, its findings and arguments contributed to a climate for the next step, a detailed exploration of the (UK) Children Act 1989, which in turn led to the Reform Act in Australia.