Shared Parenting:

POSSIBILITIES ... AND REALITIES

Juliet Behrens

Exploring the impact of the recent family law reforms on women.

Recent reforms to the *Family Law Act 1975* (Cth) (FLA) have changed the bases for making orders allocating parental responsibilities. The implicit general goals underlying the new provisions are shared parenting and private agreement. This article is concerned with how these family law reforms will impact on women's equality. The reforms will be examined in light of some of the social and economic realities for many women.

Some realities

The birth of a first child is a life-changing event for most women, not least in that it is the 'highwater mark in the division of paid and unpaid work by gender amongst couples'.[1] A woman's hours of unpaid work increase by an average of 91% on the birth of a first child.[2] On average, new fathers do not increase their unpaid work by a single minute.[3] 'Egalitarian marriage' is often far from reality. We are in the midst of a 'stalled revolution' in that women's paid work contributions have increased, but there has been no significant change in the proportion of unpaid work that men do in the home.[4] Following in part from this gendered division of unpaid labour, women often lack economic independence during a relationship.

The primary care of children continues after separation to be largely done by women. Further, the economic disadvantage of women as compared to men following separation is well documented.[5] Women do not receive adequate compensation after separation for the economic costs to them of the gendered division of labour within a relationship.[6] Approximately 90% of single parents are women, and social security is the main source of income for about two-thirds of these women.[7] Poverty is commonly associated with single parenthood.

In many relationships, physical violence and other behaviours are used by the man to exert power and control over the woman. This behaviour can have a wide range of ongoing consequences for women, including physical injury, damage to self-esteem and isolation from sources of emotional, practical and financial support.

These are realities for many women that we need to work to change. However, they are realities that decision makers need to understand in the development of legal policy. As will be argued in this article, it seems that the recent amendments to the FLA were developed without properly addressing the realities of the social and economic disadvantage of many women.

Changes to the law

Until the recent reforms, the FLA provided that the paramount (in reality, the sole) principle to be applied in decisions about children was the welfare of the child. The legislation now uses the phrase 'the best interests of the child'. This change in terminology is unlikely to bring about substantive change. The list of relevant 'best interests' factors is

Juliet Behrens teaches law at the Australian National University.
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similar to the earlier 'welfare' list except that family violence is included. The change in terminology probably reflects the fact that 'best interests' is the language used in the United Nations Convention on the Rights of the Child, and that the language of 'welfare' is seen as inappropriate in the light of growing recognition that children have rights.

In the FLA amendments, there is an increased emphasis on private agreement. For example, the legislation provides that 'parents should agree about the future parenting of their children' (s.60B(2)(d)) and that 'primary dispute resolution methods' should involve the resolution of disputes out of court. The amendments also encourage private agreement by providing for parenting plans.

The FLA amendments replace the old concepts of custody, guardianship and access with the broad concept of parental responsibility and specific aspects of it, for instance, residence and contact. The Act provides that each of the parents of a child has parental responsibility for the child, despite any changes in the nature of the relationship of the child's parents (s.61C). The extent of this responsibility can be affected by a parenting order or agreement dealing with residence, contact and more specific issues.

The previous law provided that, subject to any order of a court, each of the parents of a child was a guardian of the child, and the parents had joint custody (former s.63F). Guardianship and custody covered all parenting responsibilities, so that an order for custody, for example, carried with it all the rights and responsibilities associated with the daily care and control of the child, except when the child was on an access visit. The new forms of court orders with respect to children have changed so that the most common orders will be residence and contact orders. However, residence orders do not automatically carry with them sole responsibilities for day-to-day decision making. A woman with a residence order will need to obtain a specific issues order to have the exclusive right to make other decisions concerning the children.

While the Act does not introduce a statutory presumption of joint parenting post-separation, the presence of the objects and principles at the beginning of Part 7 are aimed at influencing the way the court, and the parties, approach the resolution of issues. As indicated, the objects of Part 7 focus on shared parenting. Further, the language of continuing joint parental responsibility suggests that parental responsibility will be interpreted to be co-operative rather than independent.[8] This may mean that parents must make decisions co-operatively about parenting matters not covered in any order or agreement, or obtain a specific issues order concerning them.

There is also an end to the 'silence about violence' in the FLA amendments. I have documented these changes in detail elsewhere.[9] They include making family violence relevant to the best interests of the child. Also, the need to ensure safety from family violence is included in the guiding policy principles for the Family Court.

Impacts on women's equality

There may be potential benefits from encouraging shared parental responsibility after separation. Perhaps something can be achieved after separation that, in most relationships, does not happen before, that is, real sharing of the caring. For example, a potential benefit of genuine shared parenting in appropriate cases could include reducing the burden of childcare on single mothers. Other benefits for the mother (and children) of shared parenting after separation may include the possibility of pursuing economic independence, time freed for other pursuits in the 'public' sphere,[10] having someone to share the responsibility for care of children who are sick or on school holidays, and having another source of life experiences and emotional support for children. It seems to me that these are important, but scarcely addressed, potential benefits of the policy change.

We must be wary of thinking, however, that by putting something in a law we make it happen. As Susan Boyd, a Canadian feminist writer in this area, has commented: 'It is ... largely beyond the power of statutory language to make parents behave better or co-operate in child custody disputes'.[11] If we accept this view, then the gains from the language of co-operation and shared parenting are vastly outweighed by the costs of failing to address sufficiently in the legislation inequality and power imbalances.

Feminist commentators have long challenged legal presumptions of joint custody post-separation (increasingly built into legislation in the United States) as failing to promote women's substantive equality. Australian women's groups, including the National Women's Justice Coalition, have expressed concern about the emphasis on shared parenting in the new legislation.[12] Recent empirical work carried out by English feminist Carol Smart supports claims that the UK *Children Act* (on which parts of the Australian legislation are modelled) is having disadvantageous effects on women.[13]

Issues of women's social and economic inequality and power imbalances in domestic relations are not accommodated under the amended provisions of the FLA.[14] As some feminist theorists have pointed out, formal equality does not result in substantive equality because formal equality fails to take account of the subordinated position of women within society. The legislation, in focusing on shared parenting, denies the reality that it is women who are usually the primary caregivers of children. Thus the vast majority of the caring for children before and after separation is done, and is likely to continue to be done, by women. Yet women are denied the legal authority needed to carry out this responsibility.

Further, the emphasis on private dispute resolution and agreement is predicated on the negotiating parties having equal bargaining power. Power imbalances, particularly resulting from the social and economic disadvantage of women and the violent and controlling behaviours used by some men, may well be exacerbated by the legislation.

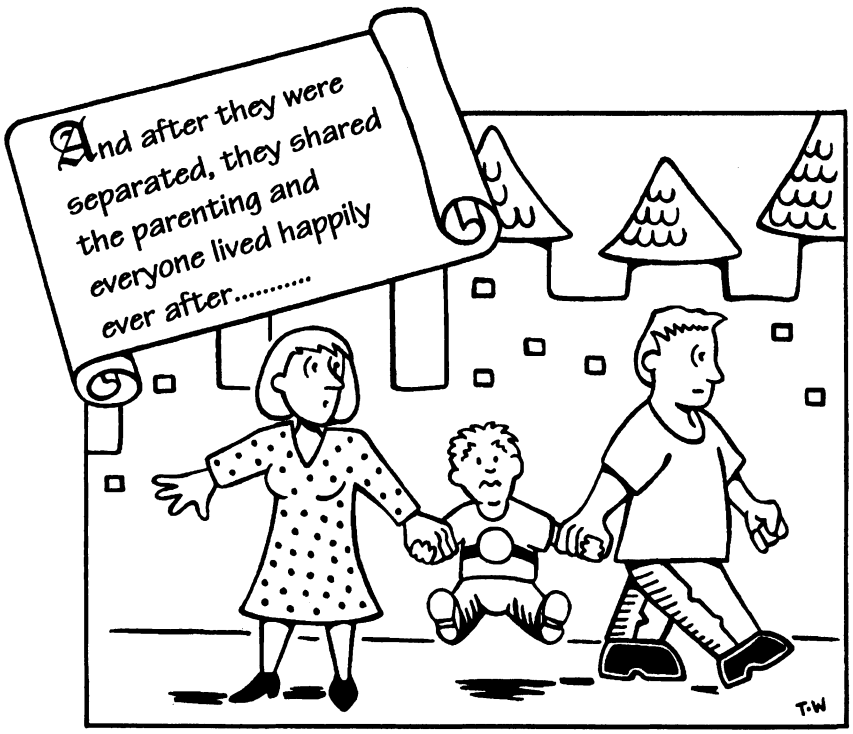
Other specific concerns about the potentially subordinating effects on women of the new FLA legislation relate to the following:

- the interpretation of the best interests of the child;
- the potential for continuing control of women by men;
- the negotiating position of many women;
- the notion of the idealised family; and
- the fairness to women of the new provisions.

Interpretation of best interests

The FLA amendments provide new opportunities for the 'best interests of the child' to be interpreted in ways which are adverse to women's interests and which fail to reflect women's realities. For example, the new legislation implies that it could be in a child's best interests for that child's custodial parent to be exposed to a risk of family violence (s.68K(l)). To take another example, recent decisions of the

Family Court under the old legislation recognise the importance of mobility for women (see *I and I* (1995) FLC 92-604). The new emphasis in the legislation on joint parental responsibility and contact could mean that judges become more reluctant to grant orders allowing a parent with a residence order to move out of the jurisdiction (even if this is necessary, for example, to find work or family support, or to escape from violence). In a recent Canadian test case on the relationship between the best interests test and rights of equality under the Canadian Charter, it was argued that lack of mobility for the custodial parent is an equality issue (see *Goertz and Gordon;* Factum of Women's Legal Education and Action Fund, lodged in the Supreme Court of Canada, November 1995).



The Family Law Act Fairytale

Potential for continuing control

Violent and controlling men are likely to use the language of the legislation in ways which continue to oppress and manipulate women. For example, the legislation provides that 'children have a right of contact, on a regular basis, with both their parents ...' (s.60B(2)(b)). It is easy to see how this language could be used to claim a father's right to contact. The legislation is also likely to result in a need for more detailed orders than was the case before the amendments. The amendments will put more power into the hands of those fathers who do not assume real responsibility, but who take advantage of the notion of joint parental responsibility post-separation to exercise continuing control over the mother and children. Yet fathers cannot be required under the legislation to co-operate and provide the child with the 'right to contact' that the legislation so lauds. Thus, assuming that women will continue to be the primary caregivers of children after separation, the language of co-operation has gendered impacts. Mothers can be required to 'co-operate' with fathers, but the obligation is not reciprocal.

Women's negotiating position

Because women are usually the primary caregivers of children they will often have a greater stake in the outcome of decisions about children. If both parties want the mother to continue primary caregiving, legislation granting men increased 'responsibilities' (entitlements?) for children can be used by men to bargain for financial outcomes which advantage them and disadvantage women and children.

Further, the potential for unfair outcomes is increased with the greater emphasis on private dispute resolution in the legislation and the very limited availability of legal aid funds to litigate disputes.

Confronting the idealised family

The new reforms are immersed in an ideology of the idealised family in which, with a bit of encouragement, the adults will put the best interests of children first and rationally negotiate how those and their own interests will be met. Confronting this ideology will be enormously difficult. There is no explicit preference for 'no order' as there is in the UK *Children Act.* However, the language of agreement in the FLA, accompanied by new moves toward private forms of dispute resolution, will undoubtedly make it more difficult to bring cases to court. The exhortation that 'parents should agree about the future parenting of their children' (s.60B(2)(d)) is on one level laudable, encouraging, and supportive of healthy parent/child and ongoing family relationships. However, when this language is applied to a relationship involving a power imbalance, such as the many relationships involving domestic violence, it may be used in subtle and not so subtle ways to pressure the vulnerable parent into accepting outcomes that advantage the father more than the mother and children.[15]

The idealised view of family and shared parenting which underlies the legislation can be used to paint women whose family experience does not reflect the ideal as deviant. Combined with increased moves towards mediation, mothers may be painted as difficult and unco-operative for refusing to agree to fathers having control in an area in which the father has never been significantly involved. Add to this the likely financial disadvantage of many women compared to men, and the very limited availability of legal aid funds for litigation, and the likely subordinating effects of the legislation for women become clear.

Fairness to women

The absence of reference to fairness to women in the debate about family law reform is one of the points Carol Smart makes in her work. Carol Smart interviewed mothers as part of a pilot study into the outcomes from the UK *Children Act* in relation to decisions about the care of children after divorce. In her interviews with mothers, she found that:

> ... they felt that they were losing the most important role they had in their lives, that of being mothers. They felt especially cheated in that they had assumed that they had entered into a socially recognised contract in which they would give up careers and pensions in return for this role. The response of the new family law to their expressions of unfairness has, however, been

to accuse such women of selfishness for putting themselves before the future interests of their children. Little or no weight has been given to the gender contract they entered into in good faith. These mothers did not wish to deny their husbands contact with the children, nor did they expect to receive large amounts of maintenance. But they were astonished to discover that, having done what social policy and political rhetoric required of them, at the point of divorce it counted for nothing and indeed began to appear to have been socially, financially and emotionally imprudent.[16]

What about the children?

I have argued that the new amendments to the FLA may adversely impact on women. A possible challenge to my argument is that the new amendments should be applauded as they require post-separation disputes about the parenting of children to be resolved in the best interests of the child, having regard to children's rights. Children's best interests and children's rights of course are important. However, this language can easily be co-opted by some men to silence women.

The rhetoric of children's rights has the potential to disguise value-laden decision making. Many commentators have pointed to the indeterminacy and subjectivity of the best interests of the child test. There is potential for the best interests of the child test to reflect gender biases and presumptions based on particular perspectives, rather than evidence about what actually does promote best interests (even if this was 'objectively measurable' within the discipline of psychology, for example).

The recognition that children have rights does not import 'objectivity' into decision making. Children's rights may be subject to selective use and interpretation. The amended FLA, for example, is very selective in its use of parts of the United Nations Convention on the Rights of the Child. Initially the 'objects' section of the Act (s.60B) was drafted in such a way that the child's right of contact was not explicitly expressed to be subject to the best interests of the child, which it is in the United Nations Convention. This was a concern as this right of contact could easily have been co-opted by non-custodial fathers. Effective lobbying by women's groups had this changed. Even so, s.60B makes no mention of the child's right to protection from physical and mental violence.

There is a great deal of work to be done to the legislation if the rhetoric of commitment to children's rights in family law is to become a reality. The limited reference to provisions in the Convention on the Rights of the Child does almost no part of this work.

The subjectivity and indeterminacy of both the 'best interests' and 'children's rights' tests, combined with the inextricable link between children's best interests and those of their primary caregiver, demonstrate the need to bring the discourse of women's equality into Australian family law.

Promoting women's equality: making appropriate shared parenting a reality

We need to look at ways to better promote women's equality in the new legislative context of shared parenting responsibilities after separation.

I suggest four ways to bring women's equality into this area of family law. First, there need to be sufficient and readily available legal aid and case management processes to ensure that women who need to litigate to have their own and their children's interests protected can do so, and without being forced into endless private dispute resolution. Second, test cases raising issues of women's equality must be brought as early cases on the interpretation of the new Act will be crucial in establishing the parameters within which cases will be settled and litigated. Third, gender awareness programs for the judiciary and legal community need to accompany the reforms particularly to promote a fuller understanding of violence and its effect on women and children.

Finally, if the *Family Law Act* is to present an ideal model of shared parenthood post-separation the legislation should be accompanied by policies to make genuine shared parenthood both post and pre-separation more of a reality. We need to restart the stalled revolution by further politicising the 'private' world of 'intact' families. It is also vital that the legal system recognises and protects women for whom shared parenthood is not a possibility.

References

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3. Bittman, Michael, above, p.46. In 'Changes at the Heart of Family Households', (1995) 40 *Family Matters* 10 Michael Bittman reports on results of a 1992 Australian Bureau of Statistics national Survey of *Time Use* which indicates that between 1987 and 1992 the only area where men have increased their activity has been in relation to childcare. This was matched, however, by similar increases in the time women spent in relation to childcare.
4. The phrase 'the stalled revolution' was coined by American sociologist Arlie Hothschild in *The Second Shift,* Avon Books, New York, 1989.
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6. Harrison, M., Funder, K. and McDonald, P., 'Principles, Practice and Problems in Property and Income Transfers' in Funder, K., Harrison, M. and Weston (eds), above, pp.196-8.
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12. Critical pieces on the amendments to the *Family Law Act* include: Troup, Maggie 'The Family Law Reform Bill No 2 and its Ramifications for Women and Children', (1995) 5 *The Australian Feminist Law Journal* 111; and Staniforth, Chris, 'The Evolution of the Family Law Reform Bill 1994: Some Unresolved Issues', (1995) 2 *Canberra Law Review,* 145.
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14. Harrison, J. and Behrens, J., 'Inequality, Power and Control: Relevance to Domestic Violence Responses in the ACT and to the Family Law Reform Bill', paper presented to the First Annual Forum on Justice For Women, organised by the National Women's Justice Coalition, Canberra, March 1993, p.12.
15. Harrison, J. and Behrens, J., above, p.14.
16. Smart, Carol, above, p.193.