

FAMILY FUTURES: ISSUES IN RESEARCH AND POLICY.

Session 3d: Co-parenting After Divorce.

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Post-separation Parenting - what's law got to do with it?

Good morning. My name is Anna Byas. I am a doctoral student in Legal Studies at the Flinders University of South Australia.

How do most parents get on with parenting after they have separated and how do most separated parents get on with each other? This paper outlines a qualitative study intended to answer such questions. The study seeks to analyse the diversity of practices, preferences and perceptions of post-separation parenting among separated parents whose ongoing relationship is not characterised by high-level conflict. It is hoped that the study will complement the recent evaluative research on the impact of the new legal guidelines inherent in Part VII of the Family Law *Reform Act 1995* (Cth) ("*Reform Act*") was enacted in June 1996. Further, it is hoped that the study will highlight the diversity of parenting styles and beliefs and to glean insights into parents' idiosyncratic notions of fairness and justice about parenting after separation. Data of this nature will contribute to debates about the new trend in family law that embraces the notion of shared and cooperative parenting after separation - a trend, according to Abella, that has made the law of the family '...the law of the former family' (Abella, 1999: 5) or, as I like to call it the post-family family.

I am assuming that many of you are familiar with the object and principles of Part VII set out in S6013. For those of you who are not, I will put it up here. OVERHEAD

The *Reform Act* exhorts parents to co-operate, share responsibilities and agree (Chisholm 1996). On one level, it provides a blueprint for positive possibilities. On another level its exhortations are simplistic and indeterminate and there is contention about whether this is good or bad. Is there any other way to deal with such complexity? By some accounts, the indeterminacy of the principles set out in S 6013, and the ascendancy of the child's right of contact in particular, have created new legal causes of action and the misappropriation of children's rights by some parents (Dewar and Parker 1999). Other negative impacts are being identified - such as the demonisation of mothers who dare to **obstruct contact and the new** orthodoxy of the right to contact that appears to be overriding issues of violence and abuse (Rhoades, Graycar and Harrison 1999).

Nevertheless, following the completion of a theoretical feminist analysis of Part VII in my Honours thesis, I began to wonder less and less whether the *Reform Act* was inherently good or inherently bad. Instead, I began to wonder whether or not it might actually matter to a significant proportion of separated parents. Many separated parents that I have encountered over the years have not had custody determined by the family court - many in fact have deliberately avoided lawyers and the legal. Others had dabbled with lawyers, counselling or mediation. I hypothesised a majority - a 'mainstream' if you like, for whom the legal was marginally relevant or not relevant at all.

This is what underpins my doctoral thesis. I aim to contextualise the *Reform Act* by evaluating it against the lived realities of a theoretical sample of a mainstream population for whom it was presumably enacted but for whom the statutory constructions of post-separation parenting are largely unknown or simply not consulted. Positing a mainstream population is not an attempt to trivialise the high-conflict stories that wrench at our hearts or make our blood boil. Rather, it is an attempt to give voice to those who are not necessarily captured by researchers in the obvious places - not necessarily found in Family Court records or through legal or mediation or counselling services. And I suspect there are many voices - many stories that tell of the amazing diversity of the practices and perceptions of parents who negotiate this post-separation terrain- It is possible that these

voices were largely absent in the construction and production of legal meanings about post-separation parenting. After all, the passage of the *Reform Act* was largely informed by individuals and groups with political agenda (eg. Submissions to the Joint Select Committee: *Certain Aspects of the Operation of the Family Law Act 1975*, 1992) and in part, by anecdotes from Members of Parliament who had been confronted by extremely distressed individuals who implored them to address the inadequacies of family law (see discussions in Hansard, Representatives, *Family Law Reform Bill 1994*, 8th and 9th November 1994). There is little to suggest that Part VII was premised on acknowledgment or understanding of the complexities of lived experiences of separated parents beyond the arena of legal or political interests.

Broadly speaking, the *Reform Act* is a legal blueprint for co-parenting but this is neither defined nor overtly prescribed. On that account perhaps one could ask - what is coparenting? What does it mean? Does it mean different things to different people? Will any form of co-parenting do? Must there be increased interaction between parents - for better or worse - to facilitate positive and continued involvement with children?

These questions are important to ask for as Smart and Neale assert (1999) the seemingly benign guiding principles in recent family law reform, when applied in the court, tend to solidify into rules which are applied too indiscriminately and do not take account of 'the complexities of real family relationships' (1999: 190). I would add that many legal practitioners also pervert these benign guiding principles by turning them into hard legal strategies that decontextualise clients' understandings of and feelings about their particular circumstances. Thus, it is hardly surprising that many parents steer clear of the legal - there is a real danger of having one's specificity ignored in favour of abstract principles. Before we allow legal and socio-legal practitioners to continue to administer opportunistic constructions of co-parenting with, as Smart and Neale put it, 'all the sensitivity of a sledgehammer' (1999: 190) we need to broaden our understandings of how the co-parenting projects of a wide range of people actually evolve - with or without interaction with the law.

Smart and Neale have recently published their findings on a qualitative analysis of postseparation parenting in the wake of the *Children Act 1989* (UK) (1999). It is, I think, timely for similar bottom-up research in Australia and it turns out to be more timely than I might have predicted - because the socio-political regulation of the post-separation family has only very recently attempted to catch up with the legal co-parenting preference. Neale and Smart propound that there is clearly a lack of 'emotional and material resources for sustaining co-parenting' and that there is 'no real infrastructure available properly to support co-parenting during marriage let alone after divorce' (1997: 214). In Australia, the infrastructure is hastily being devised to accommodate shared parental responsibility. New family policy has belatedly but ineptly divvied up the Commonwealth family payment and put it up for grabs. I suggest that this "I impact negatively on co-parenting, with parents having a real tug of war over percentages of contact time. One night more or one night less can make a lot of difference to a household income - particularly in low-income households. I hope to tap into this aspect with my second round of interviews which will begin next month

In the tradition of grounded theory methodology, I have begun to derive categories and analytical concepts from the data. Data in this case has been generated from semistructured in-depth interviews. Participants are separated parents who have responded to small articles about this research in local Adelaide newspapers or to my discussion of this research on the local ABC radio station (SAD) and have been separated for at least one year. Initially I had decided to screen out stories that included litigation but initial telephone conversations with prospective participants made me realise that litigation could represent just part of a story rich with many other factors that influence the development of a co-parenting relationship. To date, I have conducted 18 interviews. Already, the diversity is breathtaking. To organise this diversity into categories is a real challenge.

Preliminary categorisation encompasses two key dimensions. The first is the division of parenting time over a weekly or fortnightly period. The second is an evaluation of rapport between parents. There is no obvious correlation between these two dimensions. So far,

there is nothing astounding about my observation that the type of arrangement is not related to agreement or co-operation between parents. This is consistent with the findings of Maccoby and Mnookin in the United States (1992) and those of Smart and Neale in the UK (1999)- Australian parents are not proving to be any different. Also consistent with these studies is the perception that arrangements of care over time are far more variable for most parents than they are fixed. Co-parenting it seems - is whatever these families can manage at any particular time. For some this is an amicable division of parental responsibilities - that need not be equal but that reflects the genuine preferences of each of the parents. More often perhaps, co-parenting is making the best of an undesirable situation - making the best of having to stay connected to a person through obligation rather than any desire. So, on the ground, it seems that any coparenting will do - most parents struggle to do the best they can for themselves and their children in a project that requires ongoing negotiation and initiative to be able to parent apart. At this stage of my study, I am doubtful that continuing on as a family in a comprehensive, ongoing relationship is actually desired by many separated parents.

There is a complex interaction of factors that shape people's options and the choices that they make about parenting apart. I hope that my study will reveal some of them and enlighten us a little about how well the Reform Act reflects or accommodates these complex social realities. However, time does not permit me to elaborate so I will focus on one aspect of the study - what's law got to do with it?

The following is just a few responses to various questions about lawyers, legal advice or formal agreements that illustrate the law as unnecessary or undesirable.

I asked one mother if their agreement was ever put in writing - a consent order for example?

Belinda: I think its just that when the divorce was put forward, it was just written down - what are the arrangements and that's all ... I think whatever was presented in court [divorce application] - I mean the 20 minute thing and he [the judge] just said 'Oh so you have them these days'. **So that I'm sure that if we wanted to change things I'm sure it's up to us.**

The next excerpt is from an interview with a mother who has a co-operative shared care arrangement- She relates an incident that occurred early on when she and her daughter had been out and had arrived home later than the father expected.

Emily: There was a nasty message saying - right, I'm going to take action and put in an application to the court. We had a fight in front of her, verbal, and it was distressing, to her, to see us fighting, and it impressed upon him, I think [pause] ... It's really just going to distress your child ... We have no formal family court orders. We've never been to court.

Here's a very different kind of example:

I asked a mother if she had sought legal advice of any sort.

She said no, that she was too scared. When I asked why, she replied:

Sharon: My husband has threatened to take my daughter away if I do anything [re- Child Support Agency]... He says that if I do he's going to either not see Kirsty, go on the dole or go for custody and so that I'll pay him I go - you can't go get custody. He said he'd write everything I do that my daughter says and he said that he'll get her because he's in a stable relationship and all this stuff. It wasn't that she seemed afraid of a legal outcome in his favour, rather, she just preferred not to incite his anger.

The following is an example from a share care father in a somewhat conflicted coparental relationship.

I asked if either parent had been to see a lawyer? His reply was a sharp no. I asked, 'That's not necessary?'

Phillip: Not necessary. I would not - even when it got to it's ugliest ... if it ever got to the stage where the lawyers start getting mentioned, I'm out. You will get no satisfaction from me. You will not see me. I'm no longer part of this conversation ... I know how the legal system works and I'm not going to feed my resources, my energy and my children to **the mores of the system. I will not do it.** If I can't negotiate with you [her] then I can negotiate with no-one. End of story and that's absolute ... and she knows that. Anna: You're not playing? Phillip: I'm just not going to play the game.

Finally, I want to give an example of a story in which the consequences of litigation - court judgments - can have a relatively limited impact on post-separation lives, which do not begin and end with legal orders.

One father I interviewed was dragged through the family court twice by each of the mothers of his two sons. In the first instance, he had 50/50 shared care of his son for three years after separation. He entered into a new relationship and the mother of his son went to court to have his contact reduced. Through the most insidious of legal strategies employed by her lawyer, she succeeded. Nevertheless, the mother reconsidered in light of the child's wishes and a shared care arrangement has been re-established. In the second instance, the mother of his younger son had his contact reduced from 3 nights per week to three nights per fortnight by the court, by arguing for the child's need for stability. He thinks it is because her new partner found him threatening and wanted him out of the picture- At one point this new partner had even tried to forcibly remove the son from his arms after the child had spotted him at the shopping centre and spontaneously run to his Dad for a cuddle. This father told me that he has an inkling that his ex-partner's relationship is floundering and he says he glimpsed a positive change in the mother's attitude towards him. He tells me he is grasping at this thread of hope that he will be able to have his son more often. For him, this is a continuing story.

The next story is told to me by a mother of four. Sally, is in her third marriage, has two young children with her third husband, and is very happy. She had a son to her first husband - who she left because he was violent. She has a daughter to her second husband - who she left because he was selfish and made decisions without consulting her. Each ex husband has the standard contact arrangement of every second weekend. Last year, her current husband got a posting in Canberra - it was only a seven month contract- The other fathers were informed and it was open to discussion. Sally and her current husband promised to accommodate as much access time as possible. No major objections were raised.

The family was all packed up and ready to go to Canberra when Sally was informed that there was an interim court injunction preventing her from leaving Adelaide with the children. The second husband had contacted the first husband and encouraged him to accompany him to a lawyer. Neither wanted custody - or residence as it is now called. They wanted Sally to remain as the resident parent and stay in Adelaide. This meant that for seven months she would have to be separated from her husband. It is ironic then that the ex husbands had invoked the child's right of contact. Sally's husband would be separated from his children, whose right of contact had apparently not been considered.

Initially, Sally and her husband spent several thousand dollars to in legal fees but as it was likely that a final hearing would be months away and the interim order had already served the interests of the ex-husbands. Sally decided to resolve it another way- She wanted to be with her husband and for him to be with their young children. Through family court counselling she negotiated for the older children to take up residence with their fathers in her absence and that she would pay for them to visit in Canberra whenever possible and that she would come to Adelaide to visit whenever possible.

On their return, the son, it would seem, had been coerced into keeping residence at his father's house and the father has set rigid terms for contact times with his mother and siblings. Sally tells me that she and her son manage to maintain a close relationship between contact times, through daily email. The daughter has opted for half time in each household. She has a lot of freedom at her father's place and seems happy for now. Contact time is fairly flexible, although Sally claims that the daughter frequently pops in for forgotten items

- with her father in tow. Sally finds this intrusive.

In conclusion, it seems fitting to reiterate some questions I raised earlier. What is coparenting? Well, it seems to be an ongoing project with no end point, no definitive **goal or arrangement and a project in which people negotiate with intensely individual and** personal conceptions of their own post-family family. Will any form of co-parenting do? It would seem so. For many ex-partners, a co-parental relationship is a necessary evil - something that must be endured or tolerated because current perceptions are that it serves the best interest of the child. What's law got to do with it? To be guided by law you have to know or care what it is. I suggest that the majority of these parents manage to parent on their own terms without much regard for family law ideals.

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