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Family Law: Old shadows and new directions.

Introduction.

There have been ongoing debates in recent decades about the post-separation family arrangements that engender best outcomes for children. A breathtakingly diverse array of contradictory findings by social science on, for example, the impact of divorce on children, the ideal custody model or the role of fathers following separation has to date failed to come up with any definitive answers. Social science has offered little consensus. Nevertheless, from out of the chaos came the strong belief that inter-parental conflict is damaging for children, regardless of their living arrangements. On that account, there has been an ardent search for legislative frameworks which might best foster constructive post-separation relations and promote non-legal resolutions.¹ In Australia, the *Family Law Reform Act* (Cth) 1995 was enacted in 1996, ushering in new terminology and the principles of children's rights and shared parental responsibilities. The first evaluative studies conducted on the impact of the Australian legislative guidelines for post-separation parenting have not revealed any significant reduction of legal conflict within the ambit of the Family Court.² It would seem that the legislative blueprint for shared and cooperative parenting is not having the desired effects. Other recent studies of post separation arrangements, that more fully explore the complex social, emotional, legal and financial dynamics of post-separation parenting, are giving clues as to why this may be the case.³ The findings and conclusions drawn from my study of separated parents point to several reasons why family law reform is limited in its application to parents living life following separation. Analysis of participants' interactions with the family law system show that the law is of minimal use or importance to the majority of these parents for a variety of reasons, supporting my assertion that separation is not and should not be viewed primarily as a legal event. The irony of using the legal infrastructure to decentralise law is increasingly apparent. If the widespread perception, that separation is a legal and adversarial event, is to be successfully disrupted, in both the broader societal perceptions of separation/divorce and in actual practices of those separating, the family law structure itself needs to be decentred. For this reason, if any system should be in place, it should not be referred to as the 'family law' system, for this implies that the law has the first and last word on the 'good divorce' and appropriate parental behaviour following separation. This paper will outline my research results and give suggestions, prompted by this study, for enlightened directions that may dispel the myth of the 'shadow of the law'.⁴

Background to the study.

While spousal separation *might* have a legal dimension if people so chose, the current socio-legal environment actually favours a non-legal pathway or a pathway with minimal legal interaction. This is evident in the *Family Law Reform Act* (Cth) 1995, with its emphasis on primary dispute resolution⁵ and objects and principles setting out a somewhat ambitious normative guideline for 'proper familial behaviour' following separation.⁶ What seems to be lacking in Australian research is a more holistic picture of how parents adjust to separation, how they make arrangements for their

children and how they negotiate change in their lives. Thus, one of the aims of this research was to compare lived experience with family law reform objects and principles and evaluate the impact of “law” in post-separation lives, from the perspective of parents who had varying degrees of interaction with family law services. My main argument, however, is that separation is not primarily a legal event. If this is true, the law does not have a great deal of influence on the practices and perceptions of post-separation parents. The primary aim of my research then, was to contextualise the various, and sometimes competing, influences that operate on parents as they traverse the post-separation terrain.

This study is a qualitative analysis of semi-structured interviews conducted in 2000 with 32 separated parents. The aim of the study was to obtain a theoretical sample⁷ from the “mainstream”.⁸ The study sample is diverse on a range of demographic variables and interview data was rich and enlightening.

Interaction with the family law system: A Study snapshot.

It is estimated that approximately 80% of people going through the separation process seek legal advice. Twenty-one of the 32 participants sought legal advice in the early months of separation for a variety of reasons. Five of these, having obtained information or reassurance, had no further contact with a lawyer beyond the initial visit. Of the 21 participants who made contact with lawyers, 15 secured formal financial settlements and six register consent orders in regard to arrangements for children. Most participants did not experience initial disagreement over residence and contact as they tended to follow their own pre-existing parenting patterns. However, five participants initially had considerable difficulties establishing residence-contact regimes and three of these became enmeshed in the family court process early in the separation process. This resulted in three court orders for residence-contact arrangement. Four participants, three of whom had not had previous dealings with lawyers or the family court, became involved with lawyers and the family court over children’s matters one to four years following separation.

Seven participants attended mediation services to resolve financial and/or children’s matters. Three participants successfully mediated property settlement and one participant reached an agreement about property and children’s arrangements which was then drawn up by a lawyer as a consent order and registered with the court. In the other three cases, agreements reached in mediation about residence-contact routines collapsed almost immediately.

In ten cases participants were, at one time or another, required to attend Family Court conciliation counselling.⁹ Four of these cases occurred some years after separation. Six cases were resolved prior to final hearings and four cases continued on to final judicial determination.

Eight participants made no contact with legal services at all.

Participants' Perceptions of interaction with the 'family law system'.

Participants sought legal counsel for four main reasons. The first was just 'to check' on entitlements or procedures and satisfy themselves that they had no further use for the law. The second was to have mutual agreements about finances and/or children's arrangements drawn up and registered as consent orders with the family court. The third was to pursue lawyer negotiated property settlement and the fourth was to make an application to the court. The primary cause for complaint about lawyers was the delay experienced in the process of lawyer to lawyer negotiations and the costs involved. Generally, those who arrived at mutual agreements and sought legal counsel primarily for administrative purposes had no complaints. The most salient perceptions of interactions with family law were of mediation and conciliation counselling. These were all negative. In general, the participants who attended these services found them neither educative nor beneficial to the ongoing co-parenting relationship. Indeed, several criticisms were made of the family court conciliation process because participants felt constrained. They felt that they were not encouraged or given space to release their anguish. Several participants who attended mediation felt that it was a waste of time because emotions were running too high at that time.

In spite of the high number of participants who had some interaction with the family law system, there was a demonstrable lack of knowledge about family law. For example, when participants were recounting their experiences of the court process, most were unable to distinguish the sequence of hearings and conferences or the particular court services they accessed.¹⁰ Added to this is the difficulty many participants had in recalling details, due to the highly emotional circumstances that they had found themselves in at the time. Most of the participants in the study had little, or no knowledge of family law legislation or the Family Law Reform Act's new terminology, much less its principles and objectives. Many of the participants laughed when they said they had no idea what the law was in relation to family law matters. Several commented that they did not want to know. Only a few participants offered their understandings of contemporary family law.

Summary

People with significant assets to divide are more likely to seek legal counsel and are more likely to formalise arrangements for children than people without significant assets. There is very little disagreement about residence and contact in the early stage of separation for the majority of parents and therefore, few people contact legal services for children's matters alone, or beyond just 'checking' where they stand as parents and seeking reassurance.

The majority of those in the study who attended mediation or conciliation counselling expressed disappointment or frustration that their emotional needs were sidelined. Agreements arrived at through these processes may have diverted ongoing legal dispute but the process did little to diffuse ongoing, low to medium conflict experienced by the majority of participants. Low to medium conflict between separated parents hinders co-parenting but if conflict does not erupt into a definable dispute or crisis, the family law system has little to offer.

Lawyers, legal services and legislated family law principles have a negligible or short-term impact on the way that parents view or approach parenting after separation. Some degree of conflict between parents is inevitable and normative in the circumstances.¹¹ However, the study makes it clear that the nature of this conflict stems largely from the emotional positioning of men and women, not just in relation to each other as parents but in relation to each other as disengaging spouses. The study suggests that ideological principles that exhort parents to ‘put hurt and blame aside’¹² are a prescription for failure or very limited success. Current dispute resolution services that advocate this, frequently do a disservice to people who are ‘bursting with all that pain’.¹³

The Emotional Dimension

This study looked at the multitude of aspects of emotional and situational adjustment to separation that influence parents’ stories. While there is a strong code in society and in family law that children’s interests and well-being come first, it must be recognised that parents struggle within themselves and with each other to consistently maintain this code in the face of emotional and social upheaval. The belief and intention to do so may be strong but as research generally shows, the outcomes suggest that much more complex social and relational dynamics are at play. I found that the dynamics of spousal disentanglement is the source of much inter-personal and parental conflict, and that these parents are complex people navigating an emotionally fraught journey.

Indeed as Smart and Neale propose in their study of parents and children following separation, the ‘best interests of the child’ principle as it is currently applied in family law needs to be reassessed and perhaps replaced with a ‘principle of care’ that takes account of the well-being of all family members. The focus, they suggest, should be on relationships rather than interests.¹⁴ My study supports their proposition.

The narrow focus of family law services on parenting issues sidelines their confusion and anguish over the dissolution of an intimate relationship and the frustration and anger that may result from this institutional myopia can seriously impede personal recovery or co-operative parenting. This is why legal action so often seems emotionally reactive

People principally negotiate the separation terrain emotionally and socially. The accounts given by the participants in this study give ample evidence that the construction of their emotional pathways depends on who declares the end of the relationship, how successfully they psychologically process the separation and how much support and assistance they have to do so, how persistent strong emotions are, how well new emotional boundaries are negotiated, whether new situational factors are predominantly negative or positive, whether feelings of spousal or parental jealousy are emotionally contained and to what extent inconsistent messages about parenting after separation confuse people or complicate the way forward.¹⁵

Conclusion

There has been little evidence to date that the child focussed legislative guidelines have had a noticeable effect either within the ambit of the court or beyond it. This disappointment, I suggest, is

due to the overwhelming complexity of the characteristics of conflict between ex-spouses. A more comprehensive understanding may provide insight into why current ideological guidelines and principles are not having the desired impact. This may also lend itself to the development of a system more inclusive of therapeutic services than is the current family law system. Much of the emphasis of primary dispute resolution is on resolving conflict engendered by the perception of competing interests or rights, and yet relationship conflict and the struggle for emotional resolution lies at the heart of most inter-parental conflict. Although the majority of practitioners within the family law system are alerted to this fact, their brief is primarily to try and make highly emotional people see reason. It may be of considerable benefit to promote a range of services or programs that look beyond conflict as dispute and engage with a more complex emotional matrix that may be impeding co-operative post-separation parenting.

It is suggested that if the focus of new directions should be turned more towards the resolution of separation distress and spousal disengagement, parents may be better equipped emotionally to move towards an effective, if not an affable co-parenting relationship. Just because conflicted parents do not surface in the family law system, it does not mean that they are separating well or that practices borne of unresolved angst or hostility are not affecting their children. If services were more readily promoted and available to help parents deal with the adjustment to separation, there may be less angst, hostility and conflict when parenting is being renegotiated and family life is being reconstructed. Although there are several organisations that offer separation counselling or workshops, they may need to be more fully integrated into the system and there should be more recognition that separation issues are not always in the form of a dispute. Currently, the Family Court Counselling and Mediation service, whilst offering 'tremendous expertise' and provision of strict security measures for both staff and clients, is set up to 'concentrate its efforts on crisis counselling'¹⁶. This implies a facilitative model of counselling with the primary purpose of diverting clients from litigation. The emphasis on primary dispute resolution in the reformed Part III of the FLA further demonstrates the concentration of resources on a facilitative model of dealing with separated parents. My criticism lies not with family court services as such, but with the lack of integration of more therapeutic services and the apparent confusion indicated by several participants in the study about the objectives of family court conciliation counselling and mediation. It seems to me that emotional resolution is just as important, if not more so, than dispute resolution, for it is unresolved emotions that can seethe and fester and impact negatively on adults and children alike, sometimes for many years.¹⁷

Whilst the current family law system does its best to diffuse antagonism in order to facilitate agreements about children and property, it lacks sufficient resources to help, as one of the participants put it, 'people understand their emotional positioning and to be able to work through it without actually doing it all over the other partner and their children'. There are in fact many services offering programs to separated people in Australia that deal with a diverse range of issues, including parenting. However, a more cohesively organised system might decentralise law further by promoting these programs as a primary source of assistance rather than leaving them to the individual to discover, as is often the case. In that regard, the trend in some family law jurisdictions in the United States towards mandated divorce education seminars may be worth investigating for applicability in Australia. One qualitative study of a mandated divorce education program in Ohio found that most participants, even those who were initially reticent, gained understanding and skills for improved post-separation parenting.¹⁸ I am not suggesting we leap unformed into this approach

nor be propelled by anecdotal ‘evidence’, but merely that it be considered as an option within a diversified system.

Finally, few would argue that legal conflict over residence and contact, best serves children, their parents or society more generally. The legal forum is not widely perceived as desirable, appropriate nor effective in the broader social contexts of separation. Yet the legal forum is still widely perceived as the usual way to resolve separation/divorce disputes. If non-legal remedies are to be encouraged, we need to more forcefully depose the law as the principal structure for the playing out of hostility and anguish and offer a system that is much less contingent on legal appraisal of post-separation parenting issues.

Endnotes

¹ For example, there is the UK *Children Act 1989* which encourages private ordering and shared parental responsibilities, although parents may discharge their responsibilities independently of each other. Florida has the *Shared Parental Responsibility Act 1982*, which contains a ‘friendly parent’ provision that allows the courts to award custody to the parent most likely to allow the other parent reasonable contact with their children. Washington has *The 1987 Parenting Act* which has provision for parenting plans in four areas. Maine has the *Domestic Relations Statute* which accommodates three options for post-divorce parenting, with **no** preference or presumption in the legislation.

² Dewar, John and Parker, Stephen (1999) *Parenting, Planning and Partnership: The Impact of the new Part VII of the Family Law Reform Act 1995*, Family Law Research Unit, Griffith University, Queensland; Rhoades, Helen, Graycar, Reg, and Harrison, Margaret (2000) *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and the Family Court of Australia.

³ Maccoby, Eleanor E. and Mnookin, Robert H. (1992) *Dividing the Child: Social and Legal Dilemmas of Custody*, Massachusetts, Harvard University Press.; Piper, Christine (1993) *The Responsible Parent: A Study of Divorce Mediation*, London, Harvester Wheatsheaf. ; Smart, Carol and Neale, Bren (1999) *Family Fragments?*, Cambridge, Polity Press.

⁴ ‘Shadow of the law’ is a commonly used metaphor derived from the article by Mnookin, Robert H. and Kornhauser, Lewis (1979) ‘Bargaining in the Shadow of the Law: The Case of Divorce’, *The Yale Law Journal*, Vol. 88, 950-997.

⁵ Part III

⁶ Part VII. The term ‘proper familial behaviour is a phrase coined by Dewar, John (1997) ‘Reducing Discretion in Family Law’, *Australian Journal of Family Law*, Vol. 11, 297-326. p. 311.

⁷ Theoretical sampling is the process by which theory and knowledge emerge from initial data and further data collection and analysis builds on the themes and understandings that become apparent with each additional case studied. Glaser, B. G. and Strauss, A. L (1970) *The Discovery of Grounded Theory*, New York, Aldine.

⁸ By “mainstream” I mean parents whose stories are not characterised by high-level, unrelenting conflict or parents whose stories are not dominated by issues of child abuse, family violence, substance abuse or severe psychological disturbance.

⁹ One participant was taken to court on different occasions by two ex-partners and thus represents two of the cases.

¹⁰ This lack of knowledge and understanding was found in research by Hunter, R. (2002) 'Through the looking glass: clients' perceptions and experiences of family law litigation', *Australian Journal of Family Law*, Vol. 16, No. 1, 7-25.

¹¹ King and Heard even suggest that in one sense, 'some conflict may be "good," in so far as it indicates a father's continued engagement as a parent'. King, Valarie and Heard, Holly E. (1999) 'Nonresident Father Visitation, Parental Conflict, and Mother Satisfaction: What's Best for Child Well-Being?', *Journal of Marriage and the Family*, Vol. 61, No. 2, 385-396. p. 387.

¹² Mark, P (1987) 'In Praise of Parents - A View of Separation Pathways and Positive Outcomes', *Australian Journal of Family Law*, Vol. 2, 51-62.

¹³ Female participant in interview, commenting on her experience in Family Court Counselling.

¹⁴ *Op cit.* pp. 193-5

¹⁵ The issue of gendered perceptions of parenting and the contradictory socio-cultural prescriptions of mothering and fathering is outside the scope of this paper. However, the issue is addressed at length in the doctoral thesis upon which the study is based.

¹⁶ Standing Committee on Legal and Constitutional Affairs (1998) *To Have and to Hold: Strategies to Strengthen Marriage and Relationships*, AGPS. pp.252-6.

¹⁷ See for example Dreman, Solly, Spielberger, Charles, and Darzi, Orly (1997) 'The Relationship of State-Anger to Self-Esteem, Perceptions of Family Structure and Attributions of Responsibility for Divorce of Custodial Mothers in the Stabilization Phase of Divorce', *Journal of Divorce and Remarriage*, Vol. 28, No. 1/2, 157-170.. Their study about perceptions of separation culpability and ongoing situationally-related stressors in custodial mothers indicates that unresolved anger is related to poorer parenting and therefore poorer adjustment in children and can persist for many years. Similarly, Jordan's study of separated/divorced men indicate that unresolved or suppressed emotions lead to poorer adjustment outcomes and long-term effects. Jordan, Peter (1996) *The effects of marital separation on men - 10 years on*, Family Court of Australia.

¹⁸ Stone, Glenn, McKenry, Patrick, and Clark, Kathleen (1999) 'Fathers' Participation in a Divorce Education Program: A Qualitative Evaluation', *Journal of Divorce and Remarriage*, Vol. 30, No. 1/2, 99-113.