

Winners and Losers: The Father Factor in Australian Child Custody Law

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I INTRODUCTION

Laws about divorce and its consequences have inspired intense debate since they were “politicised” in common law systems with the passage of the Divorce and Matrimonial Causes Act 1857 (Imp). The debates in the subsequent 150 years have typically been narrow-focussed and have enabled people to ignore the importance of the history of changes to the laws and how they came about. Child custody has always been an important part of what we now call family law, and refers to decisions about which parent has possession of the children post separation. The history of child custody involved reforms over many decades that reflect the history of gender relations which on a larger scale reflects the history of political liberalism. In Australia, men’s group lobbying gained ascendancy in the 1990s, displacing that of a broad feminism which was responsible for the liberal law reforms in the 1970s. More than other areas of family law, child custody was about power.

At all historical moments, to “lose custody” of one’s children was a horrifying prospect for most parents, especially in the atmosphere of anger surrounding a divorce. Court cases typically involve intractable disputes fuelled by emotion. In some cases, parents bargained for custody by foregoing their entitlements in property settlement, and in other cases they fought “all the way” for their custodial rights at court. Threats or domestic violence were involved in many cases, whether or not they were disclosed to the court. Often, whoever “won” the children following an adversarial divorce exercised penultimate power over the other party, short only of killing that person.

This article offers a history of changing legal attitudes towards a father’s responsibility to his children in the twentieth century. It considers significant court cases as well as law reforms, which were often driven by the hardest cases. That law has undergone two historical shifts since 1857. The first involved the change from “father-right” to “maternal preference” that occurred around the middle of the twentieth century. The second change is associated with the Family Law Act 1975 and involved a form of “child-right”, a stricter application of the child’s best interest which did not presume in favour of either parent because of their gender. Since 1995 the series of amendments to the Family Law Act 1975 suggests the beginnings of a third shift, perhaps towards “shared care”, but the outcome is unresolved.

In the nineteenth century laws about child custody in both Australia and England were similar, as the colonial legislators followed English direction and precedent decisions came from English courts. After 1900 Australian influences developed as local experiences changed the significance of family, marriage and divorce, as well as the local political discourses about fatherhood, nationalism, the role of the mother and the importance of the family.

Case reports seldom referred to child custody matters. Even after 1900, Australian texts on the law of husband and wife contained only discrete sections on the

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law of custody and they relied on English authorities.¹ The first journal article on Australian custody law was Marie Byles' 1931 note in *The Australian Law Journal*.² Byles described the complexity of the contemporary law on child custody that "depends upon the common law rights of the father, as modified by the principles of equity and by statutory provisions relating to the rights of the mother and the welfare of the child".³ The ALJ published no further articles on custody aside from tangential matters until Henry Finlay's paper on the child's best interest in 1968.⁴

The law became less intrusive under liberalism during the 20th century and separating parents avoided the courts if they could, deciding informally about where their children should live. Often parents agreed that the mother would retain custody of young children because men were more likely to be employed, or have better earning potential, while women were experienced in parenting skills and usually were willing to meet young children's needs.

Developing liberalism recognised the enormous diversity of people's needs. This led to replacing strict laws with principles to be applied by the courts. Debates over child custody law intensified during the second half of the century as increasingly courts decided cases on their particular facts. Perceptions and rumour sometimes had more impact than law on people's lives and some men did not apply for custody because they believed they would not succeed in the Family Court. Popular assumptions about custody law formed the "shadow of the law" and these had a large but immeasurable effect on parenting decisions after separation.⁵

The discourse on custody intensified in the 1970s following passage of the Family Law Act 1975 (Cth) which primarily facilitated divorce in Australia by abolishing the need to prove matrimonial fault such as adultery or cruelty.⁶ As the divorce rate increased women continued to "win" custody of children in disputed cases at court. Some believed this reflected a bias of the Family Court in favour of women, although many researchers were more concerned with the *effects* of women retaining custody of their children, such as the "feminisation of poverty".⁷

¹ A principle legal text of 1933 used in England, Australia and other English common law countries gave less than four pages to 'Custody, &c. of infants' in the section on 'Separation Agreements': Grant-Bailey, *Lush on the Law of Husband and Wife* (4 ed, 1933) 480-483.

² Byles, "The Custody and Guardianship of Infants" (June 1931) 5 ALJ 53.

³ Ibid at 53. Things became even more complicated if the parents were before the divorce courts because a finding that one or other party was guilty of a matrimonial offence could preclude them from an award of custody.

⁴ Finlay, "First or Paramount? The Interest of the Child in Matrimonial proceedings" (1968) 42 ALJ 96.

⁵ Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950; Family Law Council, *Patterns of Parenting after Separation: A Report to the Minister for Justice and Consumer Affairs prepared by the Family Law Council* (1992) 10; Smart, "Negotiating Parenthood: Bargaining in the Shadow of a New Law", in Barker, Kirk and Sah (eds) *Gender Perceptions and the Law* (1998) 1.

⁶ Finlay, "Family Courts Gimmick or Panacea?" in *Proceedings of the Family Law Interest Group of the Australasian Interest Group of the Australasian Universities Law Schools Association* (1970); "The Battered Wife" in Deveson, *Australians at Risk* (1978); Hartin, *Divorce Dilemma: A Guide to Divorcing People* (1977); Mackinolty and Radi (eds) *In Pursuit of Justice: Australian Women and the Law 1788-1979* (1979); Windschuttle (ed) *Women, Class and History: Feminist Perspectives on Australia 1788-1978* (1980).

⁷ Burbidge, *Poverty in Australia: new data on the incomes of Australian families and individuals*, (1984); Cass, "The Changing Face of Poverty in Australia: 1972-1982" (1981) 1 AFS 67; Henderson, Harcourt, and Harper, *People in Poverty: A Melbourne Survey* (1970); Weston, "Changes in Household Income Circumstances" in McDonald (ed) *Settling Up: Property and Income Distribution Divorce in Australia* (1986) 100; Weston, "Money Isn't Everything", in McDonald (ed) *Settling Up* (1986) 279, 307.

The gender-based realms of public and private obligations in both family and society meant that most children were more bonded to their mothers while their fathers represented an absent authority figure, often loved but frequently feared. Some men who lost custody of their children refused to accept the decision of the court.⁸ Men appeared to have more difficulty than women in accepting the authority of the court and in several cases men took violent and even murderous action against the mother, the children or judges of the court.⁹ In 1995 the Commonwealth passed an Act favouring shared responsibility for children.¹⁰ While it appeared to be a move towards “equality”, it was not clear how it would advance the best interests of children unless it reduced the bitterness and litigation fought on their behalf.

In 1989, Annette Hasche’s analysis of case law suggested that many judges favoured “natural” family settings and gave men custody where they had repartnered and could offer the child a step-mother.¹¹ In 1991 Sandra Berns’ study of custody cases from 1976 to 1990 showed judges used “remarkably different constructions” about the roles of the fathers and mothers in reaching their decisions.¹² Some judges claimed there had been a shift in sex-roles in the family, whereby men contributed more towards home duties and parenting, but social research by Russell (1983) and Bitman (1992) contradicted that view.¹³ Similarly, in 1990 Graycar and Morgan found that some judges assumed shared-parenting was the norm and used it to justify joint-custody decisions, like a “script for equality”.¹⁴

In the 1990s, the cultural attention on men and masculinity produced significantly more sociological and populist publications than legal or historical analyses.¹⁵ Many articles and books sympathised with men for losing the status they

⁸ Arguably there was an increase in domestic violence in the 1980s in Australia evidenced by the steady increase in women’s refuges funded by governments: *Women’s Budget Statement 1990-91* (1990) 110. See also Healy, *After the Refuge: A Study of Battered Wives in Adelaide* (1984). McDonald also found an inverse relationship between the degree of litigation over custody and the regularity of men’s maintenance payments for women: see McDonald (ed) *Settling Up*, supra note 7, 270.

⁹ Abrahams, “Violence Against the Family Court: Its Roots in Domestic Violence” (1986) 1 AJFL 67; Taylor, “Australian Terrorism: Traditions of Violence and the Family Court Bombings”, (1992) 8 AJLS 1.

¹⁰ The Family Law Reform Act 1995 (Cth) inserted s 60B(1) and (2) into the Family Law Act 1975 (Cth).

¹¹ Hasche, “Sex Discrimination in Child Custody Determinations” (1989) 3 AJFL 218.

¹² Berns, “Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions” (1991) 10 U Tas LR 233.

¹³ The strongest statement on the alleged contemporary increase in men’s contributions was the High Court in *Gronow v Gronow* (1979) 144 CLR 513; Russell, *The Changing Role of Fathers* (1983) 187; Bittman, *Juggling Time: How Australian Families Use Time, A Report on the Secondary Analysis of the 1987 Pilot Survey of Time Use, prepared for the Office of the Status of Women, Department of Prime Minister and Cabinet, May 1991* (1992); see infra discussion accompanying notes 119-123; Drakich, “In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood” (1989) 3 CJWL 69.

¹⁴ “Losing Children: Motherhood on Trial” in Graycar and Morgan, *The Hidden Gender of Law* (1990) 243-269; see also Scutt in *Women and the Law: Commentary and Materials* (1990) 277-289. The recognition of joint custody as a ‘script for equality’ comes from Lehmann, “The Case for Joint Custody” (1983) 27:6 Quadrant 60-66.

¹⁵ Many texts on Australian men published during the 1990s included guides for men as fathers in the difficult social and family environments that developed since the 1970s. See, for example, Biddulph, *Manhood: A Book about Setting Men Free* (1994); Biddulph, *Men Talk: Fourteen Australian men talk about their lives, loves and feelings after two decades of feminism* (1996); Morton, *Altered Mates: The Man Question* (1997); Webb, *Junk Male* (1998); Green, *Fathers After Divorce: Building a New Life and Becoming a Successful Separated Parent* (1998); Edgar, *Men, Mateship, Marriage: Exploring Macho Myths and the Way Forward* (1997); Biber, Sear

once enjoyed as “head of the household”. Some claimed men had lost their legal rights to custody because of a feminist bias in the family court and that men were victimised again by subsequent reforms such as the 1987 child support legislation.¹⁶

The historical “backlash” of anti-feminist rhetoric in Australia which began in the 1970s with criticism of “single mothers” for exploiting the welfare system continued through the conservative political environment of the 1980s and 1990s and contributed to a “clawback” reform of the law on custody in 1995. In that Act the Commonwealth acceded to arguments of several men’s groups and facilitated shared parenting for children after parental separation.¹⁷ On the surface this reform was a move towards “equality”, but it ignored the importance of the child’s primary care-giver, and in some cases risked exposing children to continuing threats and violence between the parents.¹⁸

The long-view history shows a continuing fear that liberalism posed for patriarchy by weakening gender roles. The fear was that reforms aimed at diminishing the notional power of the father in the marital hierarchy risked the collapse of society by undermining the marriage-based family. Before examining these fears and their effects on reform on child custody law it will help to first consider the position of men who fathered children “out of wed-lock” because they formed a counterpoint for the mainstream history of ‘legitimate’ custody law.

II ILLEGITIMATE FATHERS

Truth never comes into the world but like a bastard, to the ignominy of him that brought her birth.

- John Milton

Legitimacy was the legal endorsement bestowed on a child born to married parents. Marriage was the primary tool of social control that regulated families through the religious rules of heterosexuality, monogamy and patriarchy. Illegitimacy was grounds for legal discrimination, a tool to punish unwed parents through the suffering of their offspring. Governments considered high numbers of illegitimate children to jeopardise their regulation of society because they relied on the religious myth of marriage as the basis of the family, and the family as the basis of society. De facto or irregular relationships were perceived as a threat to social order and in Australia, particularly at the time of federation in 1900, to the wellbeing of the infant nation.

and Trudinger (eds) *Playing the Man: New Approaches to Masculinity* (1999). Naomi Rosh White writes: “Despite scant attention in the past, fathering has become an area attracting considerable media attention as well as the interest of social scientists” White, “About Fathers: Masculinity and the Social Construction of Fatherhood” (1994) 30:2 ANZJS 119.

¹⁶ The Child Support (Assessment) Act 1989 (Cth) made it difficult for non-custodial parents (mostly men) to avoid their maintenance obligations and contributed to many men’s opposition to the Family Court system, to the anti-feminist sentiment and to the rise of the “men’s movement” in Australia.

¹⁷ The Family Law Reform Act 1995 (Cth) inserted s 60B(1) and (2) into the Family Law Act 1975 (Cth).

¹⁸ Kathleen Funder’s analysis of community attitudes in 1996 concluded, “the assumption that all parents have continuing responsibility for children is qualified in the minds of Australians”: Funder, “Family Law Reforms and Attitudes to Parental Responsibility: The Question of the Match”, paper presented at *The 3 R’s: Relationships, Rights, Responsibilities; The 7th National Family Law Conference* (1996).

The concept of legitimacy did not only reflect the Judeo-Christian kinship system. It also enabled the law to create a system to protect accumulated property, and facilitate its orderly transmission between generations. Parliaments and jurists were obliged to discourage illegitimacy and encourage discrimination against “fatherless” children. Consequently, in Australia as elsewhere, there is a history of legal sanctions and social stigma attaching to “bastards” that made life difficult for those children born “out of wedlock”.¹⁹ The legal discriminations against illegitimacy helped to promote legitimacy as the proper and “natural” status.

In the common law of inheritance, an illegitimate child was *filius nullius*, “the child of no-one”, who could not inherit from her or his natural parents.²⁰ Blackstone claimed in 1765 that it would be “odious, unjust, and cruel to the last degree” to discriminate against the “innocent offspring of his parents’ crimes”.²¹ However, many courts in the late-eighteenth and early nineteenth centuries took a harsher view, sometimes refusing to award guardianship of an illegitimate child to either parent.²² The courts began to recognise some custody rights for the mother of an illegitimate child in 1891, but these were typically less than the father’s rights to his legitimate children.²³

Language too reflected the prejudice experienced by people whose parents were not married. A “fatherless” child was a bastard, then illegitimate and then ex-nuptial; while the mother was a harlot or strumpet, then a fallen woman, an unmarried mother and later a single mother.²⁴ There appears to be no discriminatory language for the man involved who, until the innovation of DNA testing in the mid-1980s, was only the “putative father” because while motherhood was a matter of fact, fatherhood was a matter of opinion.²⁵ Whatever the origins of discriminatory language there is little doubt that gendered terms developed already loaded with unexamined significance. A common example is the verb “to mother” which implies a duty of care while “to father” involves merely impregnation. This kind of association “influenced” judges and parliaments and likely contributed to presumptions about the natural order of gender difference.

During the nineteenth century, patriarchal principles empowered men to take custody of their illegitimate children. A woman of means could, however, call upon a

¹⁹ Michel Foucault contrasted marriage as the ‘deployment of alliance’ with the illicit ‘deployment of sexuality’, as though the latter marked the boundaries and helped to define the former; Foucault, *The History of Sexuality, Vol 1: An Introduction* (1978, Robert Hurley trans 1981), 106-107.

²⁰ Littleton, *Treatise on Tenures* (1481), Book 2, ch 11, sec 188; Blackstone, *Commentaries on the Laws of England* (18 ed, 1829) 447; Windeyer J claimed that although a bastard ‘was not of heritable blood’, he (or she) could acquire property and leave it to his (or her) heirs; *Attorney-General (Victoria) v Commonwealth* (1962) 107 CLR 529, 584 ((the “Marriage Act Case”).

²¹ Blackstone, *supra* note 20, 447.

²² *R v Soper* (1793) 5 Term Rep 278; 101 ER 156, 156-157; *R v Felton and Wenman* (1758) in Const, *Laws Relating to the Poor* (4 ed, 1800), 494; *Re Lloyd* (1841) 133 ER 1259, 1260 (per Maule J).

²³ *Barnardo and McHugh* [1891] 1 KB 317; *Re Carroll (an infant)* [1931] 1 KB 317, 356.

²⁴ Anthony Dickey claims that the term bastard derives from the French ‘bast’ meaning a pack saddle, often used as a pillow by muleteers, and a bastard was a ‘pack-saddle child’, born from a casual relationship on the road: Dickey, *Family Law* (1997) 280. Swain and Howe note that the changing terminology did not reflect matching changes in social stigma or legal sanction: Swain and Howe, *Single Mothers and their Children: Disposal, Punishment and Survival* (1995) 2.

²⁵ As per the adage expressed by the Latin maxim ‘*mater semper certa est, pater incertus est*’: *G v H* (1993) 113 FLR 440, 441.

court of equity to regain their custody.²⁶ In 1891, English courts began to display a shift from formalist to liberal influences by resisting the legal presumption in favour of men and to recognise mothers as having some rights over fathers in custody disputes when the parties were not married.²⁷ For legislators, however, illegitimate children represented the law's failure to enforce marriage as the basis of family life, and posed a challenge to the preservation of the system of patrilineal inheritance. In addition, the colonial governments were concerned about the *rate* of illegitimate births, and the high morbidity of such children.²⁸ Under liberalism, the law was obliged to protect the rights of all individuals, even children born on the "wrong side of the blanket". However, if prevention was impossible, it was in the interests of all parties to remedy the "error" of an illegitimate birth. Between 1899 and 1909, the Australian colonies and States passed the various Legitimation Acts to enable local courts to bring illegitimate children into their cover for purposes of custody and welfare orders.²⁹

During the twentieth century, Australian legislation reformed most of the formalities that discriminated against ex-nuptial children. Some legislation nonetheless survived to the end of the 1990s, such as the rule that gave an illegitimate child the mother's domicile and a legitimate child the father's domicile.³⁰ While the Commonwealth Constitution restricted the 1975 Act to "children of a marriage", between 1986 and 1990 all the States except Western Australia referred their powers over children to the Commonwealth to enable the Family Law Act to apply uniformly to Australian children.³¹ Western Australia retained discriminatory provisions in its Family Court Act 1975 that decreed ex-nuptial children were in the custody of their mothers until the Court ordered otherwise.³² On the other hand, the law in all States presumed paternity in marriage (a "rebuttable presumption" that a husband was the father of his wife's children) consistent with the common law's function of promoting marriage and legitimacy.³³

²⁶ Equity held that custody of an illegitimate child went first to the mother, then to the father and finally to the mother's relations, *R v Nash* [1845] 10 QBD 454, 456, and *Re Ullee* [1885] 53 LT 711.

²⁷ Lord Watson in *Clarke v Carfin Coal Co* [1891] AC 412, 420; *Barnardo v McHugh* [1891] AC 388, 396-398. This change reflected the move from formalist to liberal philosophy in politics and social values at the time.

²⁸ In Australia from about 1860 to 1900, poverty led to the death rate of illegitimate infants at about three times the rate for legitimate infants: *Report of the New South Wales Royal Commission on the Decline of the Birth-Rate* (1904) Volume 1, paras 131-148; also Hicks, 'This Sin and Scandal' *Australia's Population Debate 1891-1911* (1978) 28, Chapter 2 'Marriage', notes 88-89.

²⁹ Legitimation Act 1889 (SA), 1899 (Qld), 1902 (NSW), 1905 (Tas), 1909 (WA), Registration of Births, Deaths and Marriages 1903 (Vic).

³⁰ Domicile refers to the 'permanent home' of a person and contributes to determining that person's civil status: Sykes and Pryles, *Australian Private International Law* (3 ed, 1991) 353. In matters other than domicile, Tasmania was the first in 1974 and Western Australia the last State in 1997 to recognise the formal equality of ex-nuptial children with nuptial children: Status of Children Act 1974 (Tas); Status of Children Act 1974 (Vic); Family Relationships Act 1975 (SA); Status of Children Act 1978 (Qld); Status of Children Act 1978 (NT); Children (Equality of Status) Act 1976 (NSW); Birth (Equality of Status) Act 1988 (ACT); Family Court Act 1997 (WA) s 66(2)(a).

³¹ Commonwealth Powers (Family Law - Children) Acts 1986 (NSW and Vic), 1990 (Qld), and Commonwealth Powers (Family Law) Acts 1986 (SA), 1987 (Tas).

³² Family Court Act 1975 (WA) s 35.

³³ Filiation (the determination of parentage) was determined by the maxim '*pater est quem nuptiae demonstrant*', which meant that the husband is (deemed to be) the father of the child of his wife: *In the Marriage of J and P* (1985) 80 FLR 126, 130.

III FATHER-RIGHT, GUARDIANSHIP AND CUSTODY

The father is entitled at common law to the custody of the child at its mother's breast.³⁴

Most reported cases on child custody involved children born to married parents, reflecting the success of the ideal of marriage despite the high numbers of ex-nuptial children. Father-right was part of common law and expressed the patriarchal rule that the father would decide all things concerning his legitimate children until the age of 21, including who should have their possession and be responsible for their care and control.³⁵ Case reports show father-right notions surviving at least in the background of Australian judicial decisions on custody for most of the twentieth century despite later amendments that favoured the mother, the rules of equity and the "equality" reforms in the 1970s.

In common law the father had the power, without an order of a court, to take his child from the mother and place it in the care of a female relative or staff. The rule served to protect the family because if a woman left her husband, she left her children. The origins of the rule pre-dated the early English statutes, such as the 1660 Act that gave a father power to appoint a guardian for any of his children who were under age and unmarried at the time of his death.³⁶ Common law assumed that men were the "natural guardians" of their legitimate children and the idea of guardianship developed into several types.³⁷ During the nineteenth century, following the case of *De Manneville* in 1804, the courts gradually liberalised the concept of guardianship to mean the rights and powers that could be exercised by an adult in respect of the welfare and upbringing of a child.³⁸ The cases referred to "custody" as that part of guardianship which involved the right of physical possession and control of a child.³⁹

One challenge to father-right in England was the 1839 statute that gave married women standing to petition for access to their children under the age of seven in cases where the husband was guilty of misconduct, and in extreme circumstances, to petition for custody.⁴⁰ Although the provision was symbolically important, it was rarely used, since it depended on the wife having the resources to petition in equity, often a lengthy and costly procedure.⁴¹ New South Wales adopted a similar Act in 1854, but the nature

³⁴ *Cartledge v Cartledge* (1862) 31 LJ Mat 85.

³⁵ William Blackstone stated the common law position in his *Commentaries*: Blackstone, *supra* note 20, 441.

³⁶ Tenures Abolition Act 1660. The relevant parts of this Act became Australian law upon colonisation, however they were amended variously by the States (following the Custody of Infants Act 1886 (Imp)) to allow a mother, as the surviving parent, to be a guardian and to object to the appointment of a guardian under the father's will, for example: Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW).

³⁷ Blackstone distinguished between guardianship by nature, for nurture, in socage, by statute, by local custom, and guardianship in chivalry: Blackstone, *supra* note 20, Vol 1, 449-450, Vol 2, 67. Blackstone stated that the 'empire of the father continues even after his death', 441; most of these formalities had fallen away or were abolished by the mid-nineteenth century.

³⁸ *R v de Manneville* (1804) 5 East 221, 105 ER 1054; *Re Agar Ellis* (1978) 10 Ch D 49; (1883) 24 Ch D 317. See also the Australian cases *Neale v Colquhoun* [1944] SASR 119, 129 and *Youngman v Lawson* [1981] NSWLR 439, 445-446.

³⁹ *R v de Manneville* (1804) 5 East 221; 105 ER 1054; *Seddon v Seddon & Doyle* (1862) 2 Sw & Tr 640, 164 ER 1146; for Australia see Mayo J in *Wedd v Wedd* [1948] SASR 104, 107.

⁴⁰ The Custody of Infants Act (Talfourd's Act) 1839.

⁴¹ One reported use of Talfourd's Act was *Shillito v Collett* (1860) 8 WR 683, 696; 24 JP 660. The provision was abolished by the Custody of Infants Act 1873 (Imp) (criticised by Lindley LJ as 'essentially a mother's Act' in *Re A v B* [1871] 1 Ch 786, 790) which increased the relevant age

of colonial society at that time meant that even fewer women had the financial capacity, and perhaps the affront, to challenge their husbands' misconduct, even if the evidence was clear.⁴²

The rules of equity worked against father-right by introducing a contrary principle concerning the welfare of the child.⁴³ The Australian States passed legislation between 1876 and 1935 to consolidate case-law references that assumed the welfare of the child was the "paramount principle".⁴⁴ The intrusion of equity into father-right principles enabled many courts to decide that the child's best interest justified awarding custody to the mother. However, under the fault-based system of matrimonial law, if the mother was guilty of adultery, she could lose not only custody but any contact with her children at all.⁴⁵

In the publicised but unreported 1875 Sydney case of Robert Strang, for example, the husband deserted his wife and child for two years without support.⁴⁶ When he returned and found his wife living with another man, he divorced her on the grounds of adultery and the court awarded the father custody of the young child. In a similar case in Sydney in 1876, William Harrison was awarded custody of his five children, even though he was a pauper. The unsuccessful "guilty" wife was able to support the children, but was living with another man in an adulterous relationship.⁴⁷ In such cases, equity failed to overturn father-right principles while the courts still appeared to consider the welfare of the child. The courts joined both principles by explaining that it would not be in a child's interest to be placed in the care of an adulterous woman. The actual reason for this kind of decision, however, was to avoid the Courts being seen to reward adulterous behaviour.⁴⁸ On the other hand, when the father was guilty of adultery, many instances of "convenience and advantage to the children" could serve to prevent them being taken from his care.⁴⁹

of the child from seven to sixteen years; Charles Dickens satirised the tyranny of delay and costs perpetrated by the court of Chancery in *Bleak House* (1880).

⁴² An Act to amend the Law relating to the Custody of Infants 1854 which was repealed by an Act of the same name in 1875. Radi referred to cases that involved the mother seeking custody against a third party after the father's death: Radi, "Whose Child?" in Mackinolty and Radi (eds), *supra* note 6, 119, 122. Golder dispelled the myth that women in late-nineteenth century New South Wales (and possibly other colonies) did not have to pay their own divorce costs; *Divorce in 19th Century New South Wales* (1985) 193.

⁴³ *Chetwynd v Chetwynd* (1865) LR 1 P & D 39; *R v Gyngall* [1893] 2 QB 232; (1894) 2 QB 232.

⁴⁴ Australian legislation included Judicature Act 1876 (Qld) s 5(10); Supreme Court Act 1928 (Vic) s 62; Supreme Court Civil Procedure Act (Tas) 1932 s 11(8); Supreme Court Act (WA) 1935 s 25(11).

⁴⁵ *Seddon v Seddon and Doyle* (1862) 2 Sw & Tr 640, and 164 ER 1146, 1147; *Mozley Stark v Mozley Stark and Hitchins* [1910] P 190, 193-194.

⁴⁶ *Sydney Morning Herald*, Sydney, Australia, 8 June, 26 November, 6 December 1875.

⁴⁷ *Sydney Morning Herald*, Sydney, Australia, 23 May 1876. A man could defeat his wife's petition for divorce or separation on the grounds of desertion, and also defeat her case for custody of the children, by sending her a small sum of money on a regular basis; Radi, *supra* note 42, 125.

⁴⁸ Although it seemed a matter of course that an adulterous wife would not get custody, the courts were careful not to establish the rule so firmly as to fetter their discretion; *Stark v Stark* [1910] P 190; 27 Digest 459; *B v B ante*; *Bolton v Bolton* [1928] NZLR 473; *Roth v Roth* (1929) 46 WN (NSW) 105.

⁴⁹ *Re Goldsworthy* (1878) 2 QBD 75. As late as 1952 Percy Joske informed aspiring Australian jurists that the "natural right of the father is sufficient to cast the onus of proof on those opposing it, even when he is applying to take the child out of its existing custody after a lapse of years, and it raises a presumption, albeit a rebuttable one, in favour of the father": Joske, *The Laws of Marriage and Divorce in Australia and New Zealand* (3 ed, 1952) 443-444.

In many cases equity was not available. In the 1883 English case of *Re Agar-Ellis* the court confirmed the father had the right to the possession of his legitimate children as against the mother or any other person, no matter the age, sex or needs of the child.⁵⁰ According to Brett MR,

To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.⁵¹

The court referred to “nature” as the source of the father-right principle, acknowledging contemporary values instead of older religious notions that were used more often to ground the law in the eighteenth century.⁵² This “natural law”, according to the Master of the Rolls, meant that courts should defer to the father’s authority over his children, and respect this principle as “the most fundamental of all in the history of mankind”.⁵³

In this kind of decision courts sought to devolve their inherent responsibility for children to the fathers. Here the court subjugated the law to a patriarchal notion that men had a “natural” authority to control their children and that this power was the “very foundation of family life”. *Re Agar-Ellis* reinforced father-right as a principle of patrilineal inheritance among the propertied classes in England, where it survived until 1970.⁵⁴

In Australia, where class distinctions were less marked than in England and inherited wealth did not necessarily equate with social power, the courts and parliaments applied more liberal principles concerning children. Even prior to 1900, some colonial legislatures were dissatisfied with father-right principles. As early as 1854 (and again in 1875) the New South Wales Parliament enacted laws to allow mothers to petition for the custody of their legitimate children.⁵⁵ As well, Australian courts began retreating from father right principles under the influence of equity.

Increasingly after 1900 the “welfare of the child” became the dominant stated principle in custody matters, although it was used in different ways. Some courts resisted the change. The Supreme Court of Victoria between 1907 and 1919, for instance, retained father-right considerations as criteria for the welfare of children. In the 1906 case of *R v Goldsmith* a man placed his young child in the care of the maternal grandparents for nine years and then tried to take the child back. The grandparents refused and, although they were successful in obtaining custody at first instance, on appeal the Supreme Court returned the child to the father.⁵⁶ Madden CJ said that in the absence of the father’s misconduct the welfare of a child would always be satisfied by placing the child in the father’s custody.⁵⁷ On further appeal, the High Court of Australia (HCA) disagreed saying that the “natural right” of the father was only one of

⁵⁰ *Re Agar-Ellis* (1883) 24 Ch D 317, 327-328 (Brett MR).

⁵¹ Ibid at 336.

⁵² Relying on religious presumptions would still have favoured the father, however to rely on ‘modern’ ideas of science and naturalism strengthened the father-right principles against calls for liberal reform. References to nature seemed to increase from the late-nineteenth century, suggesting the rise of scientism over religion as a judicial influence, especially following the controversy sparked by publication by Charles Darwin in 1872 with Darwin, *The Origin of Species* (1872, 6 ed 1909).

⁵³ *Re Agar-Ellis* (1883) 24 Ch D 317, 337-338.

⁵⁴ See *Hewer v Bryant* (1970) 1 QB 357, 369, 372.

⁵⁵ An Act to amend the Law relating to the Custody of Infants (1854); An Act to amend the Law as to Custody of Infants (1875).

⁵⁶ *R v Goldsmith* (1906) 29 ALT 40.

⁵⁷ Reasons of Madden CJ in *R v Goldsmith* (1906) 29 ALT 40.

many considerations, and the child was returned to the grandparents.⁵⁸ While Griffith CJ in the HCA referred to the “well settled” legal principle that the right of the father to the custody of his children was “one of the most sacred of rights”, here he agreed with the trial judge in forming an unfavourable opinion of the father and said a resumption of the father’s authority would be “capricious and cruel” towards the child.⁵⁹

In 1919, the Supreme Court of Victoria made another attempt to revive the father-right principle. In *The King v Boyd* a man had handed his baby daughter to his sister when the mother died.⁶⁰ After two years the father agreed to his sister handing the child to her maternal grandmother with whom the child lived for a further seven years. The father applied for custody when the child was thirteen years old, although his contact with her had been limited because he was living overseas. The father lost at the first hearing but won on appeal when three judges in the Supreme Court of Victoria awarded him sole custody. The judges were impressed by the husband’s social identity as a doctor, an ex-service man, “a gentleman of unblemished reputation”, and by the fact that there was no failure in his duty to the child.⁶¹ The Supreme Court rejected the reasoning of the trial judge, Hood J, who had referred to the happiness of the thirteen-year-old child as a forceful argument against the father’s application.⁶² The Supreme Court found there was a “rebuttable presumption” that the child’s welfare consisted of her “right”, regardless of her wishes, to be in the care of her father.

Unfortunately perhaps for the child, *Boyd* was not appealed to the HCA, which might have returned her to her grandparents and established carers. The Supreme Court of Victoria seemed to privilege a man’s identity, evidenced by his social image and personal conduct. On the other hand, in the eyes of the HCA, a man could jeopardise his “natural” rights to the custody of his legitimate children by inappropriate behaviour. Both positions were oriented towards the father but applied different standards of masculinity.

In 1934, New South Wales was the last State to formally remove father-right as a principle in determining matters of child custody.⁶³ As in the other States, the 1934 Act adopted the principle of equity that the welfare of the child was the “first and paramount principle” in determining custody. However, without guidelines on determining the welfare of a child, judges could only use their discretion in the evidence on each case in the light of precedent decisions. In many cases, the welfare of the child tended to be consistent with the mother’s claim for custody because most judges accepted the broadly held view women’s places were in the home and they were more suited to parenting than men. However, women could only succeed in custody if they satisfied a test of moral behaviour that the courts rarely applied to men. Although the 1934 Act and similar provisions by other States were progressive symbolically, they relied on notions of separate gender realms in reproducing the prevailing view that women belonged in the home.

In Australia the judicial use of the term “father-right” appeared to end in the 1960s. Ironically, Percy Joske’s apparent attempt to revive the principle in his 1952 edition was the last time the father appeared as a distinct category in a text on the law of custody.⁶⁴ Joske cited *Goldsmith v Sands* (1907), as though nothing had changed in the

⁵⁸ *Goldsmith v Sands* (1907) 4 CLR 1648, 1654 (per Griffiths CJ).

⁵⁹ Ibid at 1652 and 1655. Griffiths CJ referred to *In re Newton* (1896) 1 Ch 740, 749.

⁶⁰ *The King v Boyd* (1919) VLR 538.

⁶¹ Ibid at 546 per Mann J.

⁶² Ibid at 543 per Hood J.

⁶³ Section 2(a)(i) Guardianship of Infants Act 1934 (NSW).

⁶⁴ Joske, supra note 49, 443.

interim, for the “strong presumption” of custody in favour of the father “even when he is applying to take the child out of its existing custody after a lapse of years”.⁶⁵ He argued that because the father’s right to the guardianship (including custody) of his children “has been said to be high and sacred, ... the matrimonial causes court should not take it from him unless there is not only gross misconduct on his part, but also danger to the health and morals of his children”.⁶⁶

However, in Australia in the 1950s, the traditional “nuclear” family had a demographic resurgence that confirmed a woman’s proper position as in the home with her children. Around that time the steady increase in divorce rates slowed. When courts had to consider custody disputes they frequently decided in favour of the mother.

IV MATERNAL PREFERENCE

The nineteenth century liberal reforms strengthened the “maternal preference” doctrine, whereby both English and Australian courts favoured mothers in child custody cases, and disrupted the principle of father-right.⁶⁷ Maternal preference was a biologically determinist idea, sometimes referred to as the “tender-years” doctrine which seemed more prevalent after 1950.⁶⁸ The doctrine stated that the welfare of children, especially young children and more particularly young girls, was ensured by placing them in the care of the mother. It assumed that most men were neither capable nor willing to be primary caregivers for young children. Maternal preference was consistent with the theory of “separate realms” because it accepted the sex-role notions that a woman’s place was in the home and a man’s function was to provide and protect.

Maternal preference arose from the early liberal reforms of patriarchal English society, such as Talfourd’s Act in 1839 which gave the English Court of Chancery power to grant a mother custody of her children up to the age of seven.⁶⁹ Around that time middle-class opinion had begun to acknowledge the importance of women’s contribution to society through the family. An example was the publicity surrounding the case of Caroline Norton in 1854 and her subsequent article in which she argued that a mother’s love was vital to the welfare of children.⁷⁰ Courts became more willing to favour women against men in disputes over young children, providing the wife was not guilty of adultery.⁷¹ The maternal preference idea, like many rules of equity, was

⁶⁵ Ibid at 444.

⁶⁶ Ibid at 449.

⁶⁷ Carol Smart described these assumptions in English cases as ‘the ideology of motherhood’: Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984) 124.

⁶⁸ Constance Backhouse found little support for the notion of maternal preference in her analysis of Australian custody cases between 1900 and 1950 in Backhouse, “The Mother Factor in Australian Child Custody Law, 1900 – 1950” (2000) 6 AJLH 51.

⁶⁹ See supra note 42; Custody of Infants (Talfourd’s Act) 1839.

⁷⁰ Norton, *Caroline Norton’s Defence* (1854); see also Norton, *The Natural Claim of a Mother to the Custody of her Children as affected by the Common Law Rights of the Father* (1837); Norton, *A Plain Letter to the Lord Chancellor on the Infant Custody Bill*, by “Pearce Stevenson, Esq” (1839).

⁷¹ After 1857 the Divorce Court found custody in favour of the wife on several occasions; *Clout v Clout* (1861) 2 Sw & Tr 391; *Seddon v Seddon and Doyle* (1862) 2 Sw & Tr 640; 164 ER 1146. A woman’s adultery, but never a man’s, automatically precluded her consideration for custody of her children until the end of the nineteenth century; *Re A and B* [1897] 1 Ch 786; *Mozley Stark v Mozley Stark and Hitchins* [1910] P 190.

“progressive” with popular appeal in both English and Australian society and continued exerting influence in courtrooms for more than a hundred years.

A judicial authority for maternal preference was the 1865 English case of *Austin*.⁷² In that case, Sir John Romilly exclaimed: “No thing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother”.⁷³ In Australia in 1954, Barry J in the Victorian case of *Harnett* approved of Romilly’s dictum as a “rule of prudence and commonsense”.⁷⁴ The final judicial statement of maternal preference in Australia occurred in 1976 when Glass JA pronounced in favour of women applicants for child custody generally in the New South Wales case of *Epperson v Dampney*.⁷⁵ His Honour found that he was “directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers”.⁷⁶ Such patronising chivalry not only infantilised women but denied the underlying influences of father-right, the persistent test of matrimonial guilt and other formalist notions about the welfare of the child.

In most cases the double standard was clear in that a woman’s matrimonial guilt would preclude matrimonial preference while the question rarely arose for men.⁷⁷ Courts agreed that a woman would corrupt a child if she had been convicted of adultery. As well, unsavoury political associations could make a woman unsuitable for custody of her children, as it did in the case of Annie Besant in England in 1879.⁷⁸ The Court of Appeal denied Besant custody of her child because she had advocated contraception and admitted atheism.⁷⁹ On the other hand, as men were expected to be of-the-world, a father who indulged in unusual political activities, or even found guilty of adultery, would be less likely to fail in a custody petition on that grounds.

In Australian law texts, gallant male authors pondered on the circumstances in which a court would look generously upon an unfortunate woman in a custody case. Texts referred frequently to the “guilty wife”, occasionally to the “guilty party”, but never to the “guilty husband”. Mackenzie’s 1935 edition of *The Practice in Divorce (New South Wales)* included a complete section on the law of the “Guilty Wife”.⁸⁰ Clearly a husband’s guilt was less relevant than a wife’s guilt in custody disputes. Men were more likely to be found “guilty” when they displayed a lack of manly responsibility, such as the failure to provide by desertion or failing to pay maintenance, although it rarely affected their chances in a custody case.

⁷² *Austin v Austin* (1865) 55 ER 634.

⁷³ *Ibid* at 636-637.

⁷⁴ *Harnett v Harnett* (1954) VLR 533, 536.

⁷⁵ *Epperson v Dampney* (1976) 10 ALR 227; FLC 90-061; this case was determined under the Matrimonial Causes Act 1959 (Cth) and so was subject to the older considerations that applied before the 1975 reforms.

⁷⁶ Glass JA continued saying that ‘the mother’s attachment is biologically determined by deep genetic forces which can never apply’ to men, *ibid* at 75,302. See notes 108-110, *infra*.

⁷⁷ One exception was *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 30; [1829] ER 236, where after the mother’s death, the father applied for custody against other relatives. The Lord Chancellor refused the father’s application because he was still residing with the adulteress.

⁷⁸ *Re Besant* (1879) 11 Ch D 508

⁷⁹ In Annie Besant’s case, *ibid* at 521, three Law Lords affirmed the earlier decision of the Master of the Rolls, Jessel in the Chancery Division, to remove the infant daughter from the mother and ordered sole custody for the father. The Law Lords were unanimous in finding that because the mother advocated atheism and birth control measures her behaviour was “so abhorrent to the feelings of the great majority of decent Englishmen and Englishwomen, and would be regarded by them with such disgust, not as matters of opinion, but as violations of morality, decency, and womanly propriety, that the future of a girl brought up in association with such propaganda would be incalculably prejudiced”.

⁸⁰ MacKenzie, *The Practice in Divorce (New South Wales)* (5 ed, 1935) 191-192.

The maternal preference favouring women in custody cases supported the principle of separate realms that ultimately advantaged men by keeping women in the home. In the 1924 Sydney case of *Emelie Polini*, Justice Harvey stated that a mother *prima facie* should have custody of a two-year-old girl, but where the mother had assumed the father's role by becoming the breadwinner and providing for the child, she would not retain custody.⁸¹ Eventually, that case led to the 1934 Act in NSW that focussed on the welfare principle and gave women "equal rights" to make a claim for custody.⁸² However, men retained the power to challenge their wives for custody and they could attract the court's support in cases where the women did not display sufficient motherliness or the appropriate level of Christian moral behaviour. The 1934 Act obliged the court specifically to "have regard" to three matters, which were not expressed in the alternative: the welfare of the children, the conduct of the parties and the wishes of the parties.⁸³ The Act gave judges no help in prioritising these matters leaving them to exercise their discretion and to apply the established authorities.

Maternal preference in custody cases remained influential at least until the end of the 1970s. After the Matrimonial Causes Act 1959 (Cth) (MCA), the courts ceased to consider matrimonial offences relevant in custody cases, although men who deserted and failed to provide for their families would incite the courts' disapproval.⁸⁴ The MCA was the first attempt by the Commonwealth Government to guide the State judges on custody matters. It copied the reformed State Acts to the extent that it adopted the welfare of the child as the paramount principle, appearing to give equal entitlements to the father and the mother.⁸⁵ However, the MCA continued the assumption of maternal preference for custody in several provisions, such as those that obliged husbands but not wives to pay maintenance.⁸⁶ In the meantime, Australian law texts appeared to contradict the 1959 Act by stating matrimonial fault prevailed over maternal preference. In 1968 for example Toose et al emphasised that courts would apply "conventional morality" as a "dictate" in custody cases.⁸⁷

The effect of maternal preference in Australia during the 1960s not only reinforced women's position in the home and the principles of separate realms, it denied suitable fathers the opportunity to have closer interactions with their children. The judicial thinking that advantaged women in custody disputes disadvantaged them in the "public" realm such as obtaining employment, equal wages with men and promotion. Maternal preference became emblematic of the separate realms that advantaged men,

⁸¹ Unreported judgment of Mr Justice Harvey 8 April 1924, Department of Attorney-General and Justice, Special Bundles, Guardianship of Infants 1914-46, Archives Authority of New South Wales, Sydney. Emily Polini was supported by Millicent Preston-Stanley, the first woman member of the NSW Legislative Assembly.

⁸² Guardianship of Infants Act 1934 (NSW). Radi, *supra* note 42 at 129. By 1934 most other States had reformed their laws to include the equitable principle of the welfare of the child.

⁸³ Guardianship of Infants Act 1934 (NSW), s 2(a)(i).

⁸⁴ Concerning the rejection of matrimonial guilt as relevant to custody: *P v P* (1964) 5 FLR 452, per Barry J; *Travincek v Travincek* (1966) 7 FLR 440, 444; concerning the 'natural' preference for the mother: *Kades v Kades* (1961) 35 ALJR 251, 254; *Chignola v Chignola* (1974) 9 SASR 479, 487-488. The Matrimonial Causes Act 1959 (Cth) did not become effective until 1 February 1961.

⁸⁵ Matrimonial Causes Act 1959 (Cth) s 85(1)(a).

⁸⁶ *Ibid* at ss 8(3)(i) and (6), and 55(3).

⁸⁷ Toose, Watson and Benjafield, *Australian Divorce Law and Practice* (1968) 494. Earlier texts that exhorted courts to accept the relevance of matrimonial guilt in custody decisions included MacKenzie, *The Practice in Divorce (New South Wales)* (5 ed, 1935) 191-192 and Joske, *supra* note 49.

fettered women, and fed the rise of feminist thinking and the political shift to the left in the early 1970s.

Whitlam's Commonwealth Labour government took office in December 1972, and many of its political initiatives were feminist-inspired and contravened the assumptions of separate realms.⁸⁸ In addition, beginning in 1975, the States introduced the so-called "equality Acts" which unsettled judicial rationales for maternal preference in child custody cases.⁸⁹ In the same year, the Federal Parliament passed Lionel Murphy's Family Law Act 1975 (Cth) which formally abolished not only matrimonial fault, but any gendered considerations in custody cases, including the principles of tender years and maternal preference.⁹⁰ The paramount principle in children's cases under the 1975 Act was the welfare of the child. Although this principle was not new, it was eventually applied differently by the new Family Court of Australia and the Family Court of Western Australia and caused a protracted, contentious and sometimes violent debate in the Australian community that would continue to the end of the century.

V THE WELFARE OF THE CHILD

The "paramount principle" of the welfare of the child was a liberal notion with antecedents in the nineteenth century. Until 1975 in Australia, the principle remained subject to the other assumptions about father-right and maternal preference.⁹¹ Most of the reforms during the late-nineteenth century specified that the child's best interest was the paramount principle in custody cases although the statutes followed the English precedents.⁹² Prior to 1975 courts gave a formal acknowledgement to the welfare of the child and sometimes seemed to apply it after the fact, as though to rationalise a decision based on other priorities.⁹³

⁸⁸ The first acts of Gough Whitlam's federal Labour Government included intervening in the Equal Pay Case, abolishing sales tax on the contraceptive pill, allocating substantial funds to preschools and child care, introducing maternity leave for federal public servants and, in April 1973, appointing a women's adviser to the Prime Minister.

⁸⁹ Most of the anti-discrimination Acts were passed by Labor Governments: the Sex Discrimination Act 1975 (SA); Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1977 (Vic); Equal Opportunity Act 1984 (WA); Sex Discrimination Act 1984 (Cth); Discrimination Act 1991 (ACT); Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1992 (NT); Sex Discrimination Act 1994 (Tas). At the Federal level, according to Lionel Bowen, Australia was influential at the 34th session of the United Nations General Assembly in 1979 by enabling the Committee on the Elimination of Discrimination Against Women (CEDAW): Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 March 1984, 676. In October 2000 the conservative Howard Government refused to support the resolution.

⁹⁰ The Family Law Act 1975 (Cth) s 65 states that the best interests of the child are to be the paramount consideration. Although this was similar to s 85 of the MCA the 1975 reform contained no terms that inferred parenting expectations for the mother and maintenance obligations for the father as appeared in sections 8(3)(i) and (6), and 55(3) of the 1959 Act.

⁹¹ In *R v Gyngall* (1894) 2 QB 232, 248, Kay LJ held that the term "welfare" here "must be read in its largest possible sense". That case was applied in Australia by *Goldsmith v Sands* (1907) 4 CLR 1648, 1653. In English law, Nigel Lowe identified different forms of the welfare principle in Lowe, "The Legal Status of Fathers: Past and Present" in McKee and O'Brien (eds) *The Father Figure* (1982).

⁹² Judicature Act 1876 (Qld) s 5(10); Supreme Court Act 1928 (Vic) s 62; Guardianship of Infants Act 1934 (NSW) s 2; Supreme Court Act 1935 (WA) s 25; Supreme Court Civil Procedure Act 1932 (Tas), s 11(8).

⁹³ Jon Elster criticised the welfare principle for being indeterminate, unfair and not cost efficient in Elster, *Solomonic Judgments* (1989) 134-148.

In addition to applying father-right and maternal preference early child custody cases sought to punish the wicked and reward the virtuous. It was not until 1924, for example, that an adulterous wife was allowed access to her children although custody was still unlikely.⁹⁴ As late as 1933, in *Re an Infant*, a New South Wales court held that the welfare of a child should not be used to hamper a court's discretion in determining custody between a guilty and an innocent party.⁹⁵

Clearly the "welfare principle" was a fluid notion that depended on historical factors. Under the States' various Matrimonial Causes Acts, judges exercised unfettered discretion to order custody. However, they risked an appeal if they strayed too far from the contemporary perspective and principles concerning a child's welfare. Gradually courts accepted that it was possible to decide each child custody case on its merits. One example of this development was the increase in the number of considerations treated as exceptions to the rule that prevented "guilty" mothers obtaining custody.⁹⁶ However, conservative judges hindered progress by expressing fears for the effect on marriage and society if "lax" principles crept in and changed the way justice was done in deciding matters of custody.⁹⁷ The judges exercised broad discretion under almost identical provisions in the various State Acts. Except for reducing the significance of matrimonial fault in custody cases little if any change followed the introduction of the Matrimonial Causes Act 1959 (Cth).⁹⁸ The welfare principle remained "paramount", although there continued to be enormous discretion and diversity of opinion in how the principle should operate.⁹⁹

Similarly, the Family Law Act 1975 (Cth) did not make a significant change to the law of custody, since the Senate Standing Committee advising Parliament on the reform had recommended only minor alterations.¹⁰⁰ However, the Act did bring matters concerning "legitimate" children under a new Family Court of Australia (except in Western Australia which had its own new court) and careful drafting avoided the gendered presumptions that had persisted under the 1959 Act.¹⁰¹ In addition, the starting

⁹⁴ *B v B* [1924] P 176, 182 (CA).

⁹⁵ *Re an Infant* (1933) 50 WN (NSW) 85. This case was prior to the 1934 Act in that State, and together with the Polini case, it may have contributed to the reform. See the analysis of *Polini* by Radi, supra note 49, 126-129 (and see Judgment of Mr Justice Harvey 8 April 1924, Attorney General and Justice Special Bundles, Guardianship of Infants 1914-46, NA 7/7167). The precedent case for the Australian States was the English case *W v W* [1926] P 111, 114 which held that custody is not usually given to a guilty spouse, unless for good reasons shown in evidence.

⁹⁶ New considerations included the happiness of the child (*Wilkinson v Wilkinson* [1944] SASR 239), the status quo (*Storie v Storie* [1950] ALR 470); proper discipline and parental control (*Rogers v Rogers* (1947) 64 WN (NSW) 207); adequate provisions for the child's maintenance (*Flood v Flood* [1948] 2 All ER 712; Digest Supp); the child's parentage, which may have required blood tests (*R v Jenkins: Ex parte Morrison*, [1949] VLR 277); the wishes of a child aged 16 or more (*Ex parte Dubal* [1920] 37 WN (NSW) 233; 1 Austn Digest 48).

⁹⁷ Some cases emphasised the parental rights of the 'unimpeachable parent'; *Hedges v Hedges* [1944] SASR 266; *McKinley v McKinley* [1947] VLR 149.

⁹⁸ *Matrimonial Causes Act* 1959 (Cth) s 85

⁹⁹ Finlay, supra note 4, 96. In *Clarkson v Clarkson* (1972) 19 FLR 112, 116, for example, the court asserted the best interests of child came before a solicitor's duty to the client.

¹⁰⁰ Section 64(1) Family Law Act 1975 (Cth). Note that in WA until the Family Court Act 1975 (WA) s 39A was repealed by the Family Court Act 1997 (WA) ex-nuptial children were in the sole custody and guardianship of the mother until a court ordered otherwise.

¹⁰¹ The 1975 Act reflected gender neutral drafting in the sections to do with children with minimal references to gendered terms such as mother, father, husband or wife, although it left open the power of the court to consider "any other fact or circumstance" which the court felt might affect the welfare of the child: Family Law Act 1975 (Cth), s 64(1)(bb)(vi); also Family Court Act 1975 (WA), s 39A (1)(vi).

point under the 1975 Act was that each parent was a guardian of the children and that both had joint custody.¹⁰² Upon an application to vary those rights, the Act expressly directed the court to regard the welfare of the child as the paramount consideration, and then listed a number of other considerations that the court should take.¹⁰³ These included “the nature of the relationship of the child with each of the parents ...[and] the effect on the child of any separation from either parent”.¹⁰⁴ As a result of those sections, many children remained with the “primary care giver” after the parents separated, and in most cases in the 1970s and 1980s this was the mother. While the *reasoning* shifted as a result of the compulsory considerations imposed by the 1975 Act, there was no significant change in *outcomes* of custody trials and negotiated agreements based on legal principles.

In the 1976 case of *Epperson v Dampney*, heard under the 1959 MCA, the Supreme Court of New South Wales made a fruitless attempt to reinstate the maternal preference. The Court ordered a father to hand over to the mother two young children who had lived with him for two years.¹⁰⁵ According to Glass JA, with whom Street CJ agreed,

I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers. ... That knowledge includes an understanding of the strong natural bond which exists between mother and child. ...the mother's attachment is biologically determined by deep genetic forces ...¹⁰⁶

Street CJ agreed with the “common knowledge” about the respective role of parents and the welfare of children, rather than the opinion of experts such as psychiatrists and psychologists.¹⁰⁷ In the politicised environment of the 1970s, the State Supreme Courts were about to lose their matrimonial jurisdiction to the Family Court of Australia and the Family Court of Western Australia. The NSW judges seized the opportunity to express disapproval of the 1975 Act and the values it espoused, at the expense of the husband's case and possibly the welfare of the children in that case.

In a subsequent case and by apparent response, the Family Court of Australia directly contradicted the Supreme Court of New South Wales and issued a clear rebuke. In *Raby* (1976) the Full Court said: “We are of the opinion that the suggested ‘preferred’ role of the mother is not a principle, a presumption, a preference, or even a norm. It is a factor to be taken into consideration where relevant”.¹⁰⁸

Subsequently, the HCA agreed with the Family Court in the 1979 case of *Grofenow* where Mason, Wilson and Aickin JJ confirmed that an historical shift had occurred in the family structure in Australia.¹⁰⁹ The judges identified a “radical change in the division of responsibilities between parents”, whereby “the father gives more of his time to the household and the family [which] reduces the strength of the factual

¹⁰² Family Law Act 1975 (Cth) s 6(1).

¹⁰³ Ibid at s 64(1)(a).

¹⁰⁴ Ibid at s 64(1)(bb)(i) and (ii); Family Court Act 1975 (WA), s 39A(1)(b)(i) and (ii).

¹⁰⁵ *Epperson v Dampney* (1976) 10 ALR 227.

¹⁰⁶ Ibid at 241 per Glass JA; also at 231 per Street CJ. Glass JA referred to *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111, 119 where the HCA gave *obiter dicta* to the effect of rejecting expert evidence of “ordinary human nature”.

¹⁰⁷ Street CJ agreed with Glass JA by saying that the views of child psychiatrists and child psychologists “will fall short of elucidating all of the matters that a judge must take into account in deciding a custody dispute” in *Epperson v Dampney* (1976) 10 ALR 227, 229.

¹⁰⁸ *In the Marriage of Raby* (1976) 27 FLR 412, 427. It was also “an important factor” in *In the Marriage of Hobbs and Ludlow (formerly Hobbs)* (1976) 29 FLR 101, 106.

¹⁰⁹ *Gronow v Gronow* (1979) 144 CLR 513.

presumption” in favour of mothers as custodial parents.¹¹⁰ In a separate judgment, Murphy J referred to “the movement of women into the industrial workforce” and the change in property rights towards equality between spouses as having the consequence of “greatly weakening” the principle of maternal preference.¹¹¹

The assumed economic equality in marriage allowed judges to ignore other differences between fathers and mothers in deciding custody cases. *Raby* and *Gronow* were consistent with the “gender-neutral” philosophy principles of the 1975 Act, and the anti-discrimination Acts passed by the States at that time.¹¹² These and other judgments in the 1970s assumed that a “level playing field” had developed between women and men in Australian families and society generally.¹¹³ However, despite the rhetoric of equality, as Graycar observed in 1994, seldom if ever would judges reward women for assuming the male role in obtaining paid work.¹¹⁴ On the other hand judges would appreciate the efforts of a man who had “tailored his life so as to act as mother and father”.¹¹⁵

In the 1980s, Australian research on sex roles found no change had occurred in men’s behaviour or contribution in families, which contradicted the contemporary judicial assumption of gender equality. There was almost no increase in men’s contribution to home duties or parenting duties although married women had increased their involvement in the workforce.¹¹⁶ Publicly-funded childcare and anti-discrimination laws enabled more women to undertake paid employment, but had no effect on men’s contributions to home duties.¹¹⁷ In the few cases where men did take more responsibility for home duties, the arrangements were often unstable and many reverted to “traditional” patterns over time.¹¹⁸ Another factor was that men continued to earn

¹¹⁰ Ibid at 527 (per Mason and Wilson JJ).

¹¹¹ Ibid per Murphy J at 531. Murphy J considered the entry of women into the industrial workforce to be possibly “the greatest phenomenon of the mid-twentieth century in Australia and similar countries”.

¹¹² Sex Discrimination Act of 1975; Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1977 (Vic), the Equal Opportunity Act 1984 (WA); Sex Discrimination Act 1984 (Cth); subsequent legislation included Anti-Discrimination Act 1991 (Qld); Discrimination Act 1991 (ACT); Anti-Discrimination Act 1992 (NT); Sex Discrimination Act 1994 (Tas).

¹¹³ In *Mathieson v Mathieson* (1977) FLC 90-230, for example, Fogarty J said at 76,218 that the evidence showed “an illustration of role reversals in our community. Here the mother does in fact work full-time ... The husband on the other hand has tailored his life so as to act as mother and father to the three older children ...”; Richard Collier ““Waiting Till Father Gets Home”: The Reconstruction of Fatherhood in Family Law”, in (1995) 4 Social & Legal Studies 5, 20.

¹¹⁴ Graycar, “Gendered Assumptions in Family Law Decision Making” (1994) FL Rev 278. Graycar and Morgan observed how the judicial assumptions failed in the special cases of “minority women”, such as lesbians and Aboriginal women in “Losing Children: Motherhood on Trial” in Graycar and Morgan, *The Hidden Gender of Law* (1990) 243.

¹¹⁵ *Mathieson* [1977] FLC 90-230.

¹¹⁶ In 1983 few genuine “shared care-giving” families existed in Australia and where men did provide assistance in parenting often it was not sustained over time. In fact, men were “highly participant” in only one or two per cent of families according to Russell, *The Changing Role of Fathers* (1983) 78 and 187. See also Kelley, Bean and Evans, *National Social Science Survey, 1989-90: Family and Changing Sex Roles* (1993) 9.

¹¹⁷ According to Hargreaves, the Commonwealth Government funded 2,171 childcare places in 1970 rising (under the Labour Government) to 20,000 in 1977: Hargreaves, *Women at Work* (1980) 77.

¹¹⁸ Baxter, Gibson and Lynch-Bliss, *Double Take: The Links Between Paid and Unpaid Work* (1990) 20-24. Similarly in Canada, Janice Drakich found that men had not increased their contribution to home duties or parenting tasks; Drakich, “In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood” (1989) 2 CJWL 69.

considerably more than women in the workforce, despite equal pay legislation.¹¹⁹ Community attitudes also reflected sympathy for the maternal preference doctrine that had been rejected by the 1975 Act.¹²⁰ Overall, research in the 1990s confirmed that there had been little change from the 1950s in men's contributions to home duties and parenting.¹²¹

Despite the 1975 reforms, many court decisions were based on gendered assumptions and idealised concepts of the nuclear family. A study in 1985 of 195 cases in the Melbourne registry found that in 72 per cent of cases the mothers were the sole applicants for custody, a finding that prompted Justice Nygh to claim extra-judicially that "the mother preference is alive and well in the general community".¹²² Some family court judges may have felt justified in applying a maternal preference in custody decisions in the belief that it was consistent with community views. However, since the 1975 Act rejected all assumptions except for the welfare principle, and because the Full Court in *Raby* and the HCA in *Gronow* had confirmed that custody considerations were to be "gender neutral", judges had to be careful how they articulated a decision influenced by the maternal preference.

As discussed above, maternal preference was a deeply gendered notion that did not necessarily benefit women, but relied on broad assumptions and practices that worked to advantage men. Separate research by Annette Hasche and Sandra Berns considered the welfare principle in case law up to 1991 and they concluded that some judges applied a double standard to disqualify working mothers but reward working men.¹²³ Hasche examined several decisions during the 1980s, and found that men who had re-partnered and were able to offer the children a step-mother often succeeded in custody trials against mothers who had obtained paid employment.¹²⁴ In 1991, Berns published similar findings of custody cases between 1976 and 1990 and found that despite the gender-neutral law judges made "remarkably different constructions" about the roles of the fathers and mothers in reaching their decisions.¹²⁵

¹¹⁹ Australian Bureau of Statistics, *Average Weekly Earnings*, Cat No 6302 (1986).

¹²⁰ McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) 269.

¹²¹ Michael Bittman found that men had increased their involvement in pleasurable activities in the home, such as playing with children, but not the more irksome tasks which they continued to leave for their women partners: Bittman, *Juggling time: How Australian Families Use Time, A Report on the Secondary Analysis of the 1987 Pilot Survey of Time Use, prepared for the Office of the Status of Women, Department of Prime Minister and Cabinet, May 1991* (1992) 6-7; Morehead, Steele, Alexander, Stephen and Duffin, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997); "Daddy Time", *The Weekend Australian*, 19-20 June 1999; Lindsay, "Diversity but not Equality: Domestic Labour in Cohabiting Relationships" (1999) 34 *AJ of Social Issues* 267, 281.

¹²² Nygh, "Sexual Discrimination and the Family Court" (1985) 8 *UNSWLJ* 62, 67-68.

¹²³ Hasche, "Sex Discrimination in Child Custody Determinations" (1989) 3 *AJFL* 218; Berns, *supra* note 12.

¹²⁴ *Mathieson* (1977) FLC 90-230 76,219 and 76,221 (per Fogarty J); *Ward*, Family Court of Australia, 6 August 1987 (unreported, overturned on appeal); *Schenck* (1981) FLC 91-023; *Archibald*, Family Court of Australia, 8 November 1983 (unreported) per Renaud J; *Goudge* (1984) FLC 91-534; *Williams*, Family Court of Australia, 15 January 1988 (unreported, confirmed on appeal in *Williams* (1988) FLC 91-980, 77,082).

¹²⁵ *Ryan* (1976) FLC 90-144, 75,703; *Issom* (1977) FLC 90-238, 76,287; *Cartwright* (1977) FLC 90-267, 76,428-76,429 and 76,432, per obiter dictum by Asche SJ; *DKI v OBI* (1979) FLC 90-661, 78,529 and 78,538. Berns, *supra* note 12, identified judicial allusions in these cases to gender differences that were emphasised by Jean Jacques Rousseau in *Emile* (Foxley trans, 1911) 5-6; also *The Emile of Jean Jacques Rousseau* (Boyd trans and ed, 1956). In *N v H*, the Full Court claimed the welfare of the child made it necessary to deny a male-to-female

As the masculinist discourse developed in the early 1990s, some trial judges attempted to revive the principle of separate realms by suggesting that a man should be a worker in the public domain. In 1994, the trial judge in *Sheridan* refused a father's application for custody of two pre-school children, saying the father would present a better role model for them if he obtained employment instead of engaging in their full-time care.¹²⁶ Although the Full Court disagreed on appeal, a year later a similar decision arose with the case of *McMillan v Jackson*.¹²⁷ In that case, the trial judge rejected a man's application for the sole custody of his young son for several reasons including that the father proposed to remain on welfare during the child's formative years instead of taking the employment available to him.

Although both decisions were overturned, the appeal courts displayed sympathy for the trial judges' efforts to apply the law based on the welfare of the child while remaining consistent with community attitudes. In *McMillan v Jackson* the Full Court attempted to achieve a difficult balance: "To the extent that the trial Judge may have assumed ... that a father in full-time paid employment presents a better role-model to his children than one engaged in their full-time care we would disagree". The Full Court asserted that a trial judge "*must* leave outside the court any pre-conceived notions which he or she may entertain, as a private individual, about the roles which males and females ought to adopt in society."¹²⁸ However, the judges continued, the Family Court "above all other Courts, has the obligation and responsibility to reflect community standards and opinions subject only to the Family Law Act 1975 (Cth) itself".¹²⁹ The Full Court did not explain how it arrived at one set of community standards and opinions or how it measured the need to reflect contemporary values against its duty to set standards for the community to follow.¹³⁰

After 1975 judges of the Family Court of Australia exercised the most unstructured discretion of any system in the Western world, even though the Family Law Act imposed guidelines for applying the welfare principle in custody matters.¹³¹ That helps to explain why, during the 1990s, judges showed considerable diversity of opinion on the importance of gender roles in parenting decisions. Although Australian research had linked egalitarian beliefs with higher educational attainment, Family Court decisions showed that judges were as capable of gender bias as other community members.¹³² The Full Court's statement in *McMillan v Jackson* confirmed that the Family Court had an obligation to follow "general community opinion". However, other cases confirmed that the welfare principle was "paramount" and so should override

transsexual access to her three-year old child, even though none of the various experts on either side had supported that decision: *In the Marriage of N v H* (1982) FLC 91-267.

¹²⁶ *Sheridan v Sheridan* (1994) FLC 92-517.

¹²⁷ *McMillan RS v Jackson SM* (1995) FLC 92-610.

¹²⁸ *Ibid* at 82,084 (original emphasis).

¹²⁹ *Ibid*.

¹³⁰ According to Michael Kirby, Justice of the High Court of Australia, judges who are sometimes called "judicial activists" must "accept that appellation with fortitude": "Judicial Activism" (1997) 27 Western Australian Law Review 1, 19. See also Berns, *To Speak as a Judge: Difference, Voice and Power* (1999).

¹³¹ Family Law Act 1975 (Cth) s 68F. According to Parker et al, the FLA by itself conferred more discretion on courts than has been experienced by any other family law system: Parker, *Australian Family Law in Context: Commentary and Materials* (1994) 3. See also Graycar, "Gendered Assumptions in Family Law Decision Making" in (1994) FL Rev 278.

¹³² Bittman and Lovejoy found the connections between education and egalitarian beliefs in Bittman and Lovejoy, "Domestic Power: Negotiating an Unequal Division of Labour Within a Framework of Equality" (1993) 29 ANZJS 302. See also Devins, "The Judicial Role in Equality Decisionmaking", in Devins and Douglas (eds) *Redefining Equality* (1998) 218-232.

community opinion. Given the discretion available to judges, the Family Court could have interpreted the 1975 Act broadly enough to overrule any community opinion that might have prejudiced a child's best interest in the long term. In the early 1990s other interpretations of "community opinion" impacted politically, and led to amendments of the Act that reduced judicial discretion and for the last time in the twentieth century changed the meaning of the welfare principle.

VI THE BACKLASH

Several reactionary men's groups formed in the 1970s and began lobbying against the Family Law Act before it passed into legislation.¹³³ Once the Family Court was established the opposition to it continued. Opponents were fuelled a conservative print media where both tabloid and broadsheet press alleged that the Family Court was biased against men.¹³⁴ Part of the complaints involved accusations that men succeeded in only two per cent of custody disputes.¹³⁵ In 1979, the Court commissioned research to test the allegations of bias and in the main study, Horwill looked at a sample of 430 cases.¹³⁶ In that sample, wives retained custody in 78 per cent of cases, but mostly as a result of agreements between the parents; defended cases produced equal or closer to equal outcomes.¹³⁷ Until the mid-1980s most studies in Australia confirmed those from overseas and found that the intervention of a judge in a custody dispute significantly *increased* the chances of the father retaining custody.¹³⁸ However, vocal men's groups

¹³³ Men's groups formed in the 1970s included The Australian Family Law Action Group, Lone Fathers Association of Australia, Men's Confraternity (WA), Army of Men, "Abolish Child Support/Family Court Party", and DADS (Dads Against Discrimination). In the Parliamentary debates Mr Peter Fisher (Mallee, Victoria) noted that all members of Parliament had been inundated with "volumes of letters from individuals and groups expressing their concern either for or against this Bill" Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1369 (Peter Fisher).

¹³⁴ In her history of the Family Court of Australia. Leonie Star claimed "There can be no doubt that the media fed a selected build-up of resentment against the court. Much publicity was given to 'men's' movements that were formed in this period. Made up mainly of disaffected men": Star, *Counsel of Perfection: The Family Court of Australia* (1996) 139. See also Hickie, "Violence over Children: Family Court Crisis", *National Times*, November 29 - December 5, 1981, 1 and 22-23. Articles in major city newspapers included "Divorce is still a long, painful operation", *Sydney Morning Herald*, Sydney, Australia, 20 December 1977; "Family Court not to blame: Attorney General", *Sydney Morning Herald*, 4 April 1978, 11. Victoria Green and Robin Gurr examined the role of the media in facilitating the complaints of the men's groups in Green and Gurr, "The Media and the Family Court of Australia: A Marriage of Convenience" (1987) 12 Legal Service Bulletin 243.

¹³⁵ Australian Law Reform Commission, Transcript of Proceedings, Public Hearings on the Law of Contempt, 1986, Mr Ward, Men's Confraternity, 378; Family Law Reform Party and Equality for Fathers, 'Submission to Australian Law Reform Commission Reference on Matrimonial Property', Report No 39 (1987); The Australian Family Law Action Group, *Submission to the Joint Select Committee into the Family Law Act 1975: Aspects of its Operation and Interpretation* (1992), Mr Williams, Lone Fathers Association of Australia, 10.

¹³⁶ Horwill, "The Outcome of Custody Cases in the Family Court of Australia" (1979) 17:2 Conciliation Courts Review, 31.

¹³⁷ Ibid. In a subsequent study Edgar et al found similar results but also found that only 2% of contested hearings in the Melbourne registry in 1981 involved custody: Edgar, Good, Harrison, Prolisko and Freidin, "Information Collection under the Family Law Act: Melbourne Family Court Hearings, 1981", Institute of Family Studies, Occasional Paper No 5 (1983).

¹³⁸ In Australia, following Horwill's 1979 paper, supra note 136. Horwill and Bordow, "The Outcome of Defended Custody Cases in the Family Court of Australia, Sydney" Family Court of

continued to complain with the support of the press that in family law “women always win”.

The most significant male reaction to the 1975 reforms was the increase in domestic violence. Disputes over child custody aggravated the risk to women from violence by their male partners who in many cases exploited access arrangements to further threaten or assault the mother. Women’s refuges first appeared in the early 1970s and by 1979 there were 100 government funded refuges and 265 by 1990.¹³⁹ Male violence extended to judges the Family Court itself. In 1980, Justice David Opas was shot dead, and in 1984 a bomb killed Pearl Watson, wife of Justice Ray Watson. Also in 1984, Justice Richard Gee was seriously injured by a bomb placed at his home in a Sydney suburb and other bombs exploded in Family Court’s buildings.¹⁴⁰ These bombings and shootings appeared to be sophisticated acts of terrorism and most of the crimes were never resolved.

Despite the intensity of opposition by some groups the government proceeded with reforms and passed the Child Support (Assessment) Act 1989 (Cth), which made it more difficult for men to avoid their financial obligations towards their children in the custody of the mother. Rates of domestic violence by men towards their wives increased and research confirmed that the most dangerous times were when women attempted to leave their male partners, sought legal advice about divorce or commenced legal proceedings.

No one in government or the judiciary anticipated such a violent reaction by some men to the reforms. Soon after the Family Court Act came into effect in 1976 the Family Court refused to consider a man’s violence towards his wife relevant in custody cases unless it *directly* affected the children.¹⁴¹ By the 1990s and after research by the Australian Institute of Criminology and an inquiry by a Joint Select Committee there was a significant shift in how judges interpreted the indirect effects of domestic violence on children.¹⁴² In the 1994 case of *JG and BG* involving the custody of two small children the husband’s counsel argued that the allegations against his client of domestic violence towards the wife were inadmissible and irrelevant.¹⁴³ Chisholm J seized the opportunity to acknowledge research on domestic violence, the Australian Law Reform Commission’s report “Equality Before the Law” (1994) and earlier cases in Australia and other jurisdictions. He concluded that violence was relevant to the

Australia, Research Report No 4, Sydney (1983). In the United States: Doyle and Caron, “Contested Custody Intervention: An Empirical Assessment” in Olson et al (eds) *Child Custody: Literature Review and Alternative Approaches* (1979); Weitzman and Dixon, “Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation after Divorce” (1979) 12 UC Davis L Rev 473; in Britain: Eekelaar and Clive, with Clarke and Raikes, *Custody after Divorce: The Disposition of Custody in Divorce Cases in Great Britain* (1977); Maidment, *Child Custody: What Chance for Fathers?* (1981).

¹³⁹ *Women’s Budget Statement 1990-91* (1990) 110. See also Healy, *After the Refuge: A Study of Battered Wives in Adelaide* (1984).

¹⁴⁰ Taylor, “Australian Terrorism: Traditions of Violence and the Family Court Bombings” (1992) 8 AJLS 1; Abrahams, *supra* note 9.

¹⁴¹ *Heidt* (1976) FLC 90-077; *Wood* (1976) FLC 90-098; *Chandler* (1981) FLC 91-008, 76,107.

¹⁴² Scutt, *Violence in the Family: A Collection of Conference Papers* (1980); Australian Parliament, *Report*, Joint Select Committee on Family Law, Parliamentary Paper No 150/80, tabled 28 August 1980; Hatty (ed) *National Conference on Domestic Violence* (1985); Lovejoy and Steel, “Staying Together for the Sake of the Children: Spouse Beating and its Effect on Children” in Scutt, *Violence in the Family* (1980).

¹⁴³ *In the Marriage of JG and BG* (1994) FLC 92-515.

welfare of children whether or not it was directed at them, it was committed in their presence or in some other way affected the parenting of the custodial parent.¹⁴⁴

It was the legislators however that most fully acquiesced to the demands of the reactionary men's groups in the 1990s.¹⁴⁵ The Family Law Amendment Act 1995 (Cth) was a response to men's complaints that had intensified following introduction of the Child Support Scheme in the late 1980s.¹⁴⁶ The 1995 Act followed several of the initiatives contained in the English Children Act (1989) although there had been no review of the effects of that Act or analysis of the cultural and political implications of Australia replicating untested English statutes in the 1990s.¹⁴⁷ Packaged to sell, the reform contained some valuable amendments such as changes to the language that treated children like property (custody to "residence" and access to "contact") and imposed "responsibilities" on parents instead of legal rights. However, the 1995 Act also imposed shared parenting after separation, against the findings and the recommendations of the Joint Select Committee in 1992, instead of keeping the children with the primary caregiver.¹⁴⁸

The rhetoric surrounding the 1995 Act concentrated on the notion of parental responsibility instead of rights. It was the child who had rights, and children were to be cared for by both parents, regardless of who had cared for them prior to separation.¹⁴⁹ The Act sought to revitalise the appearance of equality between the natural parents in addressing the complaints of the men's groups. The legislators seemed unconcerned about the evidence that parents had different capacities, experience and willingness to care for their children. Legal scholar Helen Rhoades noted the irony that the reform imposed "equality with a vengeance" and while women continued to perform the larger share of care-giving work in families, father's groups had not demanded reforms that

¹⁴⁴ Ibid at 81,316.

¹⁴⁵ One troubling incident of government acquiescence to men's violence and threats was the alleged response of the then Attorney-General Gareth Evans to the 1984 bombing of the Family Court of Australia who apparently wrote to the Lone Father's Association and invited their suggestions for changes in the law: Taylor, *supra* note 40, 1; Graycar, "Equal Rights versus Fathers' Rights: The Custody Debate in Australia" in Smart and Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (1989); Miranda and Tolmie, "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law" (1998) 12 AJFL 19.

¹⁴⁶ The most persuasive factors in the Commonwealth government's decision to pass the 1995 Act appeared to be responses of men on commercial 'talk-back' radio, letters to the editor in tabloid newspapers and thirdly, the submissions from individual men and men's groups to the Joint Select Committee, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992) 105. In addition, the 1992 Joint Select Committee received 285 complaints about the Child Support Scheme even though child support was not part of its terms of reference; *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992) 363, 365. Staniforth claimed that the 1995 Reform Act was largely a response to criticism from non-custodial fathers about the effects of family court decisions: Staniforth, "The Evolution of the Family Law Reform Bill: Some Unresolved Issues" (1995) 2 Canb LR 145.

¹⁴⁷ Hoggett, "The Children Bill: The Aim" (1989) 19 Fam Law 217; Hoggett "Joint Parenting Schemes: The English Experiment" (1994) 6 J Ch L 8.

¹⁴⁸ Joint Select Committee, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992) 111. At page 106, the Joint Select Committee specifically cautioned against 'the potential damage to children' that might result in cases where shared parenting was imposed on unwilling parents.

¹⁴⁹ The 1995 Act replaced references to the parents' "rights" in the former Family Law Act (Cth) 1975 s 63 concerning custody and guardianship of children, with the new section 60B which concentrated on the parents' duties and responsibilities. Section 60B(2) states the principle underlying the objects of the Act concerning children that "children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together".

would give them greater responsibilities for child care *before* separation.¹⁵⁰ However, it was possible as the Full Court observed in *B v B* (1995) that the Commonwealth proposed the 1995 Act to be “long term, educative and normative”, in other words, to directly and permanently change “the attitudes of society generally”.¹⁵¹ In this, it was successful, but not in the way intended.

The 1995 Act diminished the significance of men’s domestic violence by renaming it as “family violence”, a relatively genderless concept that allowed violence by women against their husbands.¹⁵² The reform specifically empowered child contact (access) orders to override any inconsistent “family violence order” between the parents so that a man who was restrained from contacting or attending the address of his former partner because of his domestic violence was allowed to do so if there was a Family Court order for child contact.¹⁵³ Secondly, the 1995 Act emphasized “private ordering” instead of judicial determination of disputes, making mediation a “primary dispute resolution” rather than “alternative”, and setting the ground for reducing legal aid funding.¹⁵⁴ Analysts and lawyers had acknowledged mediation as a valuable method of dispute resolution in some cases, providing there was little power imbalance or history of abuse. However, there were substantial criticisms of the reform, especially from within the legal profession, for imposing mediation in an environment of reducing legal aid assistance, since it disregarded the prevalence of domestic violence and gave men a potential advantage in family law disputes.¹⁵⁵

A third effect of the 1995 Act was to increase the nominal importance of fatherhood and create a perception of justice by imposing formal equality between the parents through the notion of “shared responsibility”. Just as the 1975 Act was a victory for feminist inspired reform, the 1995 Act was a minor clawback and acquiesced to conservative men’s groups in Australia.¹⁵⁶ It seemed that many disaffected men saw shared responsibility for children as the next best thing to “full” custody although no one, perhaps not even the legislators, comprehended how both parents were to remain responsible for their children *after* separation.¹⁵⁷ There was popular support for the

¹⁵⁰ Rhoades, “Posing as Reform: The Case of the Family Law Reform Act” (2000) 14 AJFL 142, 156.

¹⁵¹ *B v B: Family Law Reform Act 1995* (1997) FLC 92-755, para 9.2.

¹⁵² Most studies showed women’s violence to be less than 10% that of male violence, and it usually followed a history of violence by the man: James, “Truth or Fiction: Men as Victims of Domestic Violence” (1996) 17:3 ANZJFT 121, 122; Flood, “Claims about Husband Battering” (Summer 1999) Domestic Violence & Incest Resource Centre Newsletter 3.

¹⁵³ Family Law Act 1975 (Cth) s 68S.

¹⁵⁴ Regarding “private” dispute resolution see Harrison, “Resolution of disputes in Family Law - Should Courts be Confined to Litigation?” (1997) 46 Family Matters 43.

¹⁵⁵ Kirby, “Family Law Reform: Words of Caution” (September 1996) 11:3 Australian Family Lawyer 4; Alexander, “New Mantras in Family Law” (December 1996) Alt LJ; “Mediation is not always the answer”, *The Age*, Melbourne, Australia, 16 April 1998; Thackray, “Impact of the Family Law Reform Act 1995” (1997) *NAPCAN Seminar in Child Protection Week*.

¹⁵⁶ According to men’s solicitors surveyed in 1997, their clients considered that after the 1995 Act men’s rights concerning children had improved due simply to a belief that “shared custody” was more likely; Harrison and Graycar, “The Family Law Reform Act: Metamorphosis or more of the same?” (1997) 11 AJFL 327, 337.

¹⁵⁷ Shared residence (joint custody) was an objective of several men’s groups: ALRC, Transcript of Proceedings, Public Hearings on the Law of Contempt, 1986, Mr Williams, 11. According to Lisa Young, “a driving force in effecting these reforms has been the recent and persistent voice of fathers’ rights groups”: “Parenting Disputes under the Family Law Act 1975: the New Regime” (1996) 1 Sister in Law 93, 101. Another study found significant diversity in the policies and approaches of the different men’s groups: Miranda and Tolmie, *supra* note 145. Arendt acknowledged that men’s groups had influenced new family law policies in “When School’s Out for Fathers”, *Sydney Morning Herald*, Sydney, Australia, 4 May 1996.

focus on the child in custody (residence) disputes, rather than either parent, and AIFS research showed “solid assent” in the community for emphasising the “core responsibilities” of parents.¹⁵⁸ However, Kathleen Funder’s research showed that there was less public support for the notion of sharing responsibilities for children after divorce or separation, although “somewhat stronger” assent to this came from divorced men.¹⁵⁹

After 1995, there was a significant increase in the orders for interim contact (access) by non-resident fathers, and a decline in the courts’ refusal rate of interim contact applications.¹⁶⁰ Similarly, the number of “shared residence” (joint custody) decisions increased after the 1995 Act, reflecting the newly perceived right of children to be cared for by both parents after separation, and the philosophy of “equality” between the parents.¹⁶¹ In the 1995 case of *B v B*, the Full Court described the 1995 Act as representing “a major re-statement of the law relating to children who come within the ambit of the Family Law Act and over time it may have a significant impact upon the approach to those matters”.¹⁶² However, from an historical perspective, the reform was not only contrary to earlier legal authorities but contemporary social and psychological research, which held that a child’s welfare was best served by family courts providing stability and not ordering a change in the status quo or shared residence in intractable cases until all matters affecting the child’s welfare could be tested at trial.¹⁶³

Ironically, the Commonwealth’s reduction of legal aid funding that began in 1997 also assisted fathers in residence disputes over children. In family law, legal aid

¹⁵⁸ “Core responsibilities” included teaching right from wrong, education, love, and protection from “exposure to violence”: Funder, “The Australian Family Law Reform Act 1995 and Public Attitudes to Parental Responsibility” (1998) 12 IJLPF 47, 51.

¹⁵⁹ Ibid at 58. The Joint Select Committee specifically recommended against introducing a regime of shared custody.

¹⁶⁰ The results of *final* trials for contact did not change compared with prior to the 1995 reform, (Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and expectations?* (1999)) as only 10% (or less) of applications went to a final trial, and it was likely that many women acquiesced and agreed to ‘consent orders’ to continue the contact (access) regime established by the interim orders instead of proceeding to trial for residence (custody).

¹⁶¹ After 1995, magistrates and judges considering child-related matters became less willing to take seriously or to act upon women’s allegations of domestic violence or violence towards or abuse of the children. According to Helen Rhoades, one judge commented “No one is prepared to say ‘no contact’ any more”: “Posing as Reform: The Case of the Family Law Reform Act” (2000) 14:2 AJFL 142, 145. Rhoades, Graycar and Harrison found that several judges explained the new understandings under the 1995 Act as ‘equality’: Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: The first three years*, Final Report (2000), online: <http://www.familycourt.gov.au/papers/html/fla1summary.html>

¹⁶² *B v B: Family Law Reform Act 1995* (1997) FLC 92-755, 84,213.

¹⁶³ “Child experts” considered shared residence to be contrary to the welfare of the child in *In the Marriage of Cilento* (1980) 6 Fam LR 35, 37. Other Australian decisions confirmed earlier psychological research that joint custody of children was only appropriate if the parties’ approaches to parenting were compatible and there was a relationship of “mutual trust, co-operation and good communications” between the parents, *Hafliger and Hafliger-Knoll* (1990) 13 Fam LR 786 (*H and H-K* [1990] FLC 92-128); *Forck and Thomas* (1993) 16 Fam LR 516; and *Padgen* (1991) 14 Fam LR 743; in *Padgen* the judge noted that the Family Court had ‘not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties’, [1991] FLC 92-231, 78,596; see also *In the Marriage of Cowling* (1998) FLC 92-801, 85,006. Berns, *supra* note 12, 249-254, criticised the reasoning of joint custody decisions.

usually helped women more than men due to the effects of means testing.¹⁶⁴ Legal aid reductions denied many women a court hearing and forced them into mediation (conferencing) which disadvantaged women coming from a relationship that involved controlling behaviour such as intimidation or abuse. Further, without legal aid most women could not appeal the increasing number of interim contact or shared residence decisions after 1995, and those arrangements often continued in the long term “by consent” since few women had the financial resources for a trial.

It was incongruous that the concluding reform in the century of family law returned to men some of the privileges they had enjoyed in the nineteenth century under father-right prior to the liberal reforms. There was much controversy during the 1990s over men’s and women’s roles in families as fathers and mothers. It was perhaps unavoidable that a political solution would respond to the loudest complaints, rather than child research or professional experience. The welfare principle in child custody was reinvented once more, but without considering the child’s interests and despite the rhetoric of equality and justice.

VII CONCLUSION

At the beginning of the century, fathers could exercise patriarchal authority over their legitimate children before and after divorce. Although the principle of father-right influenced a court’s decision, many men did not seek custody because they lacked the time, interest or the skills to provide daily care, especially if the children were young. The courts had for some time recognised the value of mothers keeping children after divorce and this “maternal preference” gradually replaced father-right as the courts orienting principle in custody matters. Maternal preference also supported the notion of separate realms which had been a feature of patriarchy and, although it appeared to favour women in custody cases, it helped to preserve men’s advantages and relative power in the public domain. However, the notion of fault complicated the effects of both principles of father-right and maternal preference, because conviction of a matrimonial offence could have precluded either parent obtaining custody of a child until the divorce reforms in 1975.

Under the Family Law Act 1975 (Cth), most divorcing couples decided between themselves that the children would remain with the mother. When there was a dispute over custody, the courts applied the welfare principle by attempting to shield the children from the effects of divorce and allowed them to remain with their primary caregiver who was typically the mother at the interim stage. If the dispute over custody continued to a trial for final orders, the results were close to equally favouring the father or the mother. Despite this, some men perceived a bias towards women in the family court.

In the 1980s, several disaffected fathers’ groups lobbied directly and through the press, managing to persuade the government either they represented the “silent majority” of Australian men, or they offered the best chance of slowing the apparent demise of the marriage-based family. Although the Commonwealth persisted with some

¹⁶⁴ John Dewar, Jeff Giddings and Stephen Parker concluded the changes to legal aid funding, especially the reduced funding by the Commonwealth since June 1997, produced “the disintegration of a legal aid system traditionally conceived as the guarantor of level-playing fields”: Dewar, Giddings and Parker, “The Impact of Legal Aid Changes on Family Law Practice” (1999) 13 AJFL 33, 50.

progressive reforms such as the Child Support (Assessment) Act 1989 (Cth), it eventually responded to the conservative men's groups and passed the Family Law Reform Act 1995 (Cth).

The 1995 Act emphasised "equal" responsibility of the biological parents, regardless of the actual situation of the child. The idea of shared parenting sought to recreate an ideal situation that forced separated parents together, ignoring the prevalence of domestic violence and the bulk of Australian research against imposing joint-parenting arrangements. The law always presented the child's welfare as the paramount principle, and although there were historical shifts in how family law applied the welfare principle, the changes in the 1990s demonstrate the sensitivity, if not subservience of law to perceptions of popular demand and community opinion.

The law consistently promoted responsibility in fathers, although preferably as providers rather than custodial parents. Some legislation and judicial comments tended to insulate men from domesticity and encouraged them to appreciate the benefits of the public realm. On the other hand, Australian men were subjected to cultural influences that emphasised *not* conforming to the wishes of authority, finding heroism in rebelling, larrikinism, irresponsible mateship and a cult of bachelorhood. Consequently in Australia unlike elsewhere fatherhood to most men was not as important as motherhood to most women. While for governments the overriding principle in family law was to preserve the marriage-based family as the cornerstone of society, individuals had their own ideas about parenting. The liberal inspired equality reforms obscured the gendered distinctions in parenting but failed to delete them. Men continued to be men in countless ways, but legislative support of their parenting privileges was never stable and always subject to the interests of economy and state.