

# FROM MURPHY'S TO HOWARD'S LAW

Shared parenting laws are under threat from feminists with no intention of giving fathers a fair go, says **Sue Price**

The primary source of the unpopularity of the family law system is the manner in which parenting arrangements for children have been determined in the course of divorce proceedings. In fact, the *Family Law Act 1975* (the Act) has been described as 'the most unpopular single enactment in Australian history.'<sup>1</sup> For most of the past 35 years, the Family Court of Australia has treated most separated fathers as if an 'access' visit every second weekend and half the school holidays were sufficient to create a real and lasting relationship between child and parent.

This started to change when the Howard government changed the Act in 2006 and compelled the Family Court to recognise that shared parenting arrangements should be the norm for many separating parents. The subsequent amendments to the Act were the result of more than a decade of public inquiry and agitation concerning the operation of the Family Court and how family law could better serve the best interests of children. Unfortunately, only four years after they were introduced, the shared parenting laws are coming under renewed attack from feminist groups and their legal and academic supporters who opposed the new system right from the start and have no intention of allowing it to be judged impartially on its merits.

## Finding fault

The introduction in 1975 of 'no fault' divorce (based on the irretrievable breakdown of the marriage proven by a 12-month separation) created a legal fiction. The politicians failed to consider whether people could accept moving on with their lives without assigning blame or

taking responsibility for their behaviour. The 'no fault' concept therefore struggled to overcome some people's need to blame the other party for real or imagined transgressions that led to the end of their marriage. The result was that fault was reintroduced by the backdoor. Family Court decisions about where the children would live or how the property would be divided became an adversarial war of 'he said, she said' involving family lawyers at 10 paces, with little evidence to prove who was telling the truth.

By 1992, widespread community dissatisfaction and the justifiable perception of bias against fathers in what was then known as custody and access decisions had resonated within the offices of politicians across the country. The result was the creation of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act* (JSC FLA) 1992. Based on the recommendations of the committee, the Keating government amended the Act in 1995 to include 'a rebuttable presumption of shared parenting,' just as the 'father' of the Act, Senator Lionel Murphy, had always intended.<sup>2</sup> However, the amending legislation failed to satisfy a divorced father's demands for a continuing role in his child's life. In practice, the intent of the legislation was ignored by the Family Court, which continued to decide custody and access arrangements based on an assessment of the best interests of children that overwhelmingly favoured mothers.<sup>3</sup>

**Sue Price** is a director and co-founder of the Men's Rights Agency.

In 2003, Prime Minister John Howard read the political mood well when he announced a new inquiry into the family court, and threw his support behind considering 'allowing immediate joint custody to divorced dads and mums.'<sup>4</sup> Despite the usual claims from defenders of the Family Court about the alleged impracticality of shared parenting, commentators from across the political spectrum acknowledged that reopening the issue was overdue.<sup>5</sup> Shared parenting was recognised as a step towards better protecting the interests of children (for whom joint custody is usually beneficial and desired by most children) while ensuring that men have the right to continue to bring up their children post-divorce.<sup>6</sup>

### 2003 federal inquiry into 50/50

A collective sigh of relief, tinged with a significant amount of hope, swept over separated fathers who felt they had been unreasonably denied a meaningful relationship with their children. Finally, the system was to be examined in an open and accountable forum that offered parliamentary protection to those who had previously been prevented from detailing their experiences by the secrecy provisions contained in the Act.

The Family Pathways Group, a committee appointed by the Minister for Family and Community Services and the Attorney General (and dominated by stakeholders with vested interests), had examined the family law system in 2001, but its report was generally regarded as disappointing for failing to address the major issues.<sup>7</sup> This time, the Standing Committee on Family and Community Affairs was handed the job of conducting the inquiry into 'Joint Custody, 50/50.'<sup>8</sup>

The depth of feeling in the community about family law was made apparent by the more than 1,700 submissions to the committee. Public and in-camera interviews were also conducted, which gave many interviewees the opportunity to describe their traumatic encounters with the Family Court. Time and again, the committee heard from parents who had spent thousands of dollars on litigation costs and had not seen their children for years, often for no apparent reason.<sup>9</sup>

Typical was the story told by one man about how his wife had raised 37 different domestic

violence orders. He was found 'guilty' of two—for writing a poem and a love letter. When the woman complained without proof that he had breached the order, he was imprisoned for 42 days. She now lived in his \$400,000 house, which he owned before he met his wife and had possession of his and his grandfather's stamp collection. He was left with a 1992 Honda and \$8,500—and he had not seen his son for two years and his daughter for three.<sup>10</sup>

### 2006 shared parenting amendments

The personal testimony before the committee heightened concerns about the level of contact between non-resident parents and their children. It became clear that many fathers were trapped in an 80/20 split-custody model, which did not provide sufficient time for a father to develop a close relationship with his children. With limited contact opportunities, combined with many residential parents opting to move away to live with new partners or take up different jobs, the bonds between child and parent are easily broken to the detriment of both. More than one million Australian children are not living with both their biological parents and of those, half see one of their parents four times a year or less or not at all.<sup>11</sup>

The committee's final report and recommendations in support of a 'clear presumption, that could be rebutted, in favour of equal shared parental responsibility' set the stage for the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which was passed with the bipartisan support of the Opposition Labor Party and commenced operation on 1 July 2006.<sup>12</sup>

Under the amendments, and providing there is no evidence of violence, child abuse or ongoing acrimony severe enough to prevent the parents reaching agreement about their child's future needs, the court is required to consider equal shared parental responsibility. If granted, the court is then obliged to consider ordering equal parenting time or substantial and significant time for non-resident parents, but with the best interests of the child remaining the overriding and final determinant.

The cornerstone of the new arrangements was the requirement for parents to undergo mandatory

mediation to resolve parenting arrangements in one of the 65 newly created Family Relationship Centres or with private mediators.<sup>13</sup> If mediation fails, then a certificate would be issued allowing parents to make an application to Family Court. In cases of violence or child abuse, or if a parent absconds with the child, the requirement for mediation is suspended.

### Paradigm shift

The debate about separated or divorced fathers' involvement in their children's lives occurs across an ironic cultural and political dichotomy. The self-styled 'progressive' feminists and women's groups who opposed the 2006 changes subscribe to an outdated view of men, women and society. In defence of women's right to be entirely free from the last vestiges of the bonds of marriage, men are portrayed as patriarchal oppressors and abusers of women and unfit to parent children. Many men, and the groups that defend separated fathers' rights, recognise that we have moved on from the 1950s. In the majority of modern families, both parents are expected to work and both parents expect to be fully involved in the care of their children.

For two decades, the Family Court subscribed to the feminist ideology that gave priority to maximising women's freedom post-divorce at the expense of fairly balancing the interests of mothers, fathers and their children. The defenders of the Family Court's longstanding approach, which includes many of the family counselors who write the reports the court uses to make custody decisions, are stuck in the old paradigm. The Howard government's shared parenting laws have attempted to force the 'family law industry'—the lawyers, the judiciary, and associated service providers—to accept the social realities of the twenty-first century and accommodate changed expectations about parenting and family life.

The ideological stakes partly explain the entrenched opposition to shared parenting led by feminist academics determined to preserve mothers' control of children after separation. The inclusion of even the words 'rebuttable presumption of shared parenting' in the 1995 Act triggered an almost immediate response from these quarters, a response that was orchestrated

by the Family Court of Australia. Helen Rhoades of the University of Melbourne, Professor Regina Graycar of the Sydney University, and Margaret Harrison, then a senior associate to that long-term opponent of shared parenting—Alastair Nicholson, the then Chief Justice of the Family Court—produced a report examining the impact of the 1995 amendments. The authors' research was generously subsidised by a \$300,000 grant jointly funded by the Australian Research Council and the Family Court.<sup>14</sup>

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The report concentrated on the shared parenting provision of the 1995 Act, which was described 'as one of the most contentious aspects of the reforms.' In his comprehensive analysis and rebuttal, Michael Green QC labeled the final report as a waste of time and money. On top of the overt bias towards custodial mothers and the failure to understand the real value of fatherhood for children, Green argued that the limited sample of cases used by the authors did not justify their sweeping conclusion that shared parenting placed women and children at greater risk of serious domestic violence and abuse.<sup>15</sup>

### A nest of inquiries

The election of the Rudd government in November 2007 re-energised the campaign to roll back the shared parenting laws that had been in operation for barely a year. The renewed offensive has covered the same ground and concentrated on the most emotive issue. The Family Court has been accused of forcing children to spend time with violent fathers and placing mothers and children at risk of harm in order to comply with shared parenting requirements. The issue gained national attention when the shared parenting laws were blamed for the death of four-year-old Darcey Freeman, who was allegedly thrown by her father

from the West Gate Bridge in Melbourne in January 2009.

In response to Darcey's death, federal Attorney General Robert McLelland announced his intention to reconsider the 2006 amendments in light of the alleged increased risk of exposure to domestic violence. The Chief Justice of the Family Court Diana Bryant gave credibility to the roll back cause when she called for the provisions of the Act dealing with penalties for false allegations of domestic violence to be repealed 'as the wrong interpretation of the law meant some women in custody hearings were less likely to report violence to the court.'<sup>16</sup>

To fairly judge the impact of the new laws requires separating fact from fiction and not muddling the issues of shared care and domestic violence.

Five new and ongoing inquiries into shared parenting have been announced, the majority of which focus on domestic violence.<sup>17</sup> Retired Family Court Judge Richard Chisholm was appointed by the Attorney General to inquire into family law and domestic violence. Chisholm's appointment was controversial given his well-known opposition to shared parenting and to fathers caring for children under three years old.<sup>18</sup> The suspicion that the Rudd government had rigged the deck to gain a predetermined outcome that would support the ending of shared parenting was increased by the predictable findings of the Chisholm report, which was published in November 2009. Chisholm found that some women had become reluctant to raise allegations of violence without proof for fear of not being believed and being forced to pay the other party's cost for making unproven allegations. He concluded that the presumption of shared parental responsibility had taken the focus off the best interests of the child and had exposed women and children to greater risk of violence.<sup>19</sup>

### Countering the counterattack

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the issues of shared care and domestic violence. Statistical evidence shows mothers and their boyfriends kill more children than biological fathers<sup>20</sup> and that almost equal numbers of children identify witnessing violence against their mother and their father.<sup>21</sup> Men are not the sole perpetrators of domestic violence as one in three victims are actually men.<sup>22</sup>

Twelve months prior to Darcey Freeman's death, Gabriella Garcia strapped her 22-month-old son to her chest and jumped off the same bridge because she feared losing her son due to a non-existent Family Court application. Both tragedies point to the fear and desperation felt by parents facing significant, if not complete, exclusion from their children's lives. But neither tragedy justifies a knee-jerk reaction against shared parenting.

Section 117AB of the Act states a party may be ordered to pay some or all of the costs of the other parent if the court is satisfied that a party 'knowingly' made a false allegation or statement in the proceedings. Deliberate intent to falsely accuse is difficult to prove and when allegations are dismissed by the court, the penalty is rarely, if ever applied. However, it is essential to retain the penalty as a safeguard, which may discourage the use of false allegations as a legal tactic or to unfairly remove a parent from their child's life. Allegations of abuse have an instant and serious affect on a parent's time with their child, delaying court decisions until the truth is determined, creating enormous stress, damaging reputations, destroying relationships with friends, family and children, and incurring large costs to prove innocence. It is unlikely that the threat of a cost order would stop a parent who was convinced their child was being abused from reporting the offence.

Thankfully, a report by the Australian Institute of Family Studies (AIFS) released at the same time as the Chisholm report found that in most cases, the shared parenting laws were working well. Shared time with both parents was found not to have a negative impact on the wellbeing of children, except as one might expect, in extremely acrimonious situations where parents struggle to reach and keep shared care arrangements, and where the mother has safety concerns.<sup>23</sup> In some cases the concerns are real. In others, they

are perhaps concocted or even imaginary. Most importantly, as the Garcia tragedy illustrates, cases of family breakdown leading to violence and harm do not necessarily conform to the feminist stereotype.<sup>24</sup>

### Fair go for fathers

Anecdotal evidence suggests that shared parenting laws have increased the level of the fathers' involvement with their children. The AIFS report drew on three sets of statistics to gauge the impact of the changes. However, none of the data is conclusive because of the short time period involved.

A Longitudinal Study of Separated Families conducted in 2008, barely 18 months after introduction of shared parenting, found 16.1% of all children were in shared care and 5.2% spent most or all nights with their father. At the other end of the spectrum, 33.5% of children never stay overnight with their father and 11.1% spend no time at all.<sup>25</sup>

The Family Characteristics Surveys of 1997 showed relatively low levels of shared care in just 3% of divorced families. The Family Characteristics and Transitions Survey 2006–07 conducted 12 months after the legislative changes found that the level of shared parenting had risen to 8%.<sup>26</sup>

The Child Support Agency (CSA) statistics show an increase in shared care from 7% in 2003 to 12% in 2008 and 17% in 2009. However, doubt is cast on the accuracy of these figures because 40,000 cases have been overstated as being in shared care, due to the CSA counting each parent as a separate case number.<sup>27</sup> The number is equivalent to a 5% reduction in shared care statistics.

The Family Court has conducted its own survey, and the results of litigated cases decided since the change to the legislation are more encouraging. Fathers have been granted primary care in 17% of decided cases; equal parenting time has been granted in 15% of these cases; and shared parenting (around five days per fortnight) in 14%. In consent cases, fathers have been granted primary care in 8% of cases; equal parenting in 19% of cases; and shared parenting in 14% of cases. Overall, 46% and 41% of fathers

have a considerable level of involvement in their children's lives in decided and consent cases respectively.<sup>28</sup>

### Conclusion

It is timely to remember that 95% of couples manage to resolve their separation issues by themselves, and the vast majority of divorcing couples are not abusive to each other or their children.<sup>29</sup> However, much avoidable misery will be caused if we do not get the policies right for the 5% of cases where the Family Court intervenes and sets the ground rules for parenting after divorce. There is clear evidence that children fare much better when both parents remain fully involved in their lives: they have greater self esteem and confidence, do better at school, and are less likely to use drugs and be in trouble with the police.<sup>30</sup>

The truth is that it is too early to accurately gauge the impact of the shared parenting changes, let alone establish whether they have succeeded and ensured that competent parents have meaningful relationships with their children in separated families. But we will never know the truth, or establish what more needs to be done, if the federal government preemptively caves into the pressure groups based on exaggerated claims about the dangers to women and children. Rumour has it that the Prime Minister has told the Attorney General to 'back-off' on rolling back shared parenting. The seeming rush not to judge could be a political dodge and may only last until after the next federal poll. The Rudd government is understandably reluctant to reopen an issue in an election year that pits the interests of families against feminist ideologues who have the ear of policymakers.

### Endnotes

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- 2 Peter Duncan, Parliamentary Secretary to the Attorney General, HANSARD (21 November 1995), 3303.
- 3 See John Hirst, "'Kangaroo Court': Family Law in Australia,' *Quarterly Essay* 17 (2005).
- 4 Dads on the Air, *Chaos at the Crossroads*, an account of the Joint Custody 50/50 submissions and hearings (2004), 5.

- 5 The Hon. Alastair Nicholson J, 'Family law under review,' ABC Radio (18 June 2003).
- 6 Bettina Arndt, 'Fathers may get justice at last,' *The Age* (20 June 2003), cited in *Chaos at the Crossroads*, as above, 4; Paula Totaro, 'Why both parents count,' *The Sydney Morning Herald* (9 December 2005).
- 7 Family Law Pathways Group, *Out of the Maze* (Canberra: 2001).
- 8 Standing Committee on Family and Community Affairs, Joint Custody 50/50 and Child Support Inquiry (2003).
- 9 *Chaos at the Crossroads*, as above, 67, 70.
- 10 As above, 64.
- 11 ABS Family Characteristics & Transitions, Cat. No. 4442.0, Table 13, Children aged 0–17 years with a natural parent living elsewhere, Contact arrangements by age of child (2006–07).
- 12 Standing Committee on Family and Community Affairs, *Every Picture Tells a Story*, Recommendation 1.
- 13 Arti Sharma, *Family Relationship Centres: Why We Don't Need Them*, CIS Issue Analysis No. 70 (Sydney: The Centre for Independent Studies, 12 April 2006).
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- 17 Family Courts Violence Review, Professor Richard Chisholm; AIFS Evaluation of the Family Law Reforms; Australian Law Reform Commission, Family Violence Inquiry; Family Violence Research Project, Professor Thea Brown, University of South Australia, James Cook University and Monash University; and the Shared Parental Responsibility Research Project, conducted by the Social Policy Research Centre at the University of New South Wales (SPRC) in consortium with the Australian Institute of Family Studies and the University of Sydney.
- 18 Richard Chisholm and Jennifer McIntosh, 'Cautionary notes on the shared care of children in conflicted parental separations,' *Family Relationships Quarterly* 3 (Australian Institute of Family Studies, 2009).
- 19 Richard Chisholm, *Family Courts' Violence Review* (Attorney General's Department, 2009).
- 20 Men's Health Australia, *Latest Child Homicide Statistics: Only 24% of Perpetrators are Fathers* (Men's Health Information & Resource Centre (MHIRC), University of Western Sydney, and the Australasian Men's Health Forum (AMHF), 2009).
- 21 David Inermaur, Lynn Atkinson, and Harry Blagg, *Working with Adolescents to Prevent Domestic Violence*, (Crime Research Centre, University of Western Australia, July 1998), 97.
- 22 'Overview of recent family violence research findings,' [www.oneinthree.com.au/overview/](http://www.oneinthree.com.au/overview/) (2010).
- 23 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2010).
- 24 In one case in the late 1990s, the mother would strip off her three-year-old son and photograph him from all angles before sending him for contact with his father. On his return, she inspected him from head to toe looking for signs of injury, took more photos, and questioned him intensely about the time with his father until he fell asleep exhausted. After extensive inquiry and testing of evidence, the father was vindicated, and the Family Court awarded him full-time care of his son. But on the day before he was due to be handed over, the mother killed the boy and took her own life. Sean Parnell, 'Mum, tot found dead,' *Courier Mail* (Brisbane: 14 September 1998).
- 25 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2010), 112–135.
- 26 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms*, 130–131 citing ABS Family Characteristics Surveys 1997 and 2003 and the ABS Family Characteristics and Transitions Survey 2006–07.
- 27 Child Support Agency, *2009 Facts & Figures* (2008–09), 28.
- 28 Jim Carter, *Shared Parenting Trends* citing statistics provided by Richard Foster, Family Court of Australia to the Senate Estimates hearing on 23 February 2009 in his answer to a question asked by Senator Stephen Fielding, [www.familylawwebguide.com.au/news/pg/news/view/605/index.php&filter=21](http://www.familylawwebguide.com.au/news/pg/news/view/605/index.php&filter=21) (2009).
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- 30 UNICEF, *Report on Childhood in Industrialized Centres*, Report Card 7 (2007), '[G]rowing up in single-parent families and stepfamilies [is associated] with greater risk to well-being – including a greater risk of dropping out of school, of leaving home early, of poorer health, of low skills, and of low pay'; 'The Best Parent is Both Parents,' *Parental Equality* (2001).