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# Equality Based Provisions Of The Family Law Act And The Invisibility Of Women

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Rachael Field

## Introduction

Australia's current family law provisions about child-related disputes bear little relationship to the lives and material circumstances of the women they so deeply affect.<sup>1</sup> It is a profound paradox that this is largely a result of the fact that the development of the most recent reforms to the children's provisions of the *Family Law Act 1975* (Cth) was significantly influenced by the concepts of equality and shared parenting.

It is fair to say that those involved with developing the current laws would consider them to be equality-based reforms which are not only proper and appropriate, but progressive and far-reaching.<sup>2</sup>

In fact these reforms, by adopting equality as the normative standard, and by removing gendered references and creating a gender-neutral paradigm, have in effect negated the reality of many women's experience and reinforced men's control over their ex-partner and children after separation.<sup>3</sup>

This article is concerned with the invisibility of women's interests in family law disputes about children which has resulted from the equality discourse adopted for family law reform. The notion of parental responsibility has been chosen to exemplify the way in which this invisibility has been entrenched, although the issue of the application of the best interests principle is also important in this context. The article advocates that the equality discourse be abandoned in the context of post-separation children's disputes, and that provisions be developed which more accurately and appropriately reflect the reality and

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\* BA/LLB (Hons) (ANU), LLM (Hons) (QUT), Solicitor and Barrister ACT, Solicitor QLD, lecturer - School of Justice Studies, Faculty of Law, QUT. Thanks to Professor TW and Dr BL Field, and to Ms Jennifer Batts for their comments on early drafts.

<sup>1</sup> This is notwithstanding a speech given by the Federal Attorney-General, Daryl Williams, at the National Press Club on 15 October 1996 where he listed amongst proposed Family Court changes that: "Greater weight [is to be given] to the contribution of the primary homemaker and parent.": K Sweetman 'Children gain in family law shake-up plan' *Courier Mail*, 16 October 1996.

<sup>2</sup> M Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press, Chicago, 1991) at 2 comments that this is also the case in the US.

<sup>3</sup> Fineman *supra* n 3 at 3.

difference of women's lives and experience.<sup>4</sup> It concludes with references to alternative strategies for making women and their interests more visible in the context of family law child-related disputes.

### **Equal Women and Invisible Women When it Comes to Laws About Child-Related Disputes**

Martha Fineman has said that

(f)eminists concerned with law reform considered the push for degendered rules a symbolic imperative even when they recognised that such reforms might actually result in removing an arguable advantage for women, as in the case of maternal preference rules for deciding custody cases.<sup>5</sup>

In Australia, many of our laws, as a result of the work of feminists, are gender-neutral and equality based and this is good.

Australia's family law is also gender-neutral and equality-based. This is in part a result of the feminist equality discourse, but in terms of the 1995 reforms to the children's provisions, it is mainly a result of the appropriation of that discourse by men's rights groups, and the influence of the experiences and perceptions of a male elite working within patriarchal institutions.<sup>6</sup>

The *Family Law Act's* children's provisions are based strongly on formal equality. As many feminists have said before me, however, whilst laws based on formal equality are persuasive and relatively easy to justify politically,<sup>7</sup> they often fail to provide substantive equality. And where parties, who are not in equal positions, are treated equally, significant inequities can arise.<sup>8</sup>

Because of the reality of the gendered nature of the lives of most women, it is dangerous ever to assume that women are in the same position as men. But in terms of family law and parental disputes the application of formal equality can rarely result in a parity of position between individuals. This is not only because of the societal and structural differences in the lives of men and women, but also because, in many important and fundamental ways, mothers and fathers and the work that they do in relation to children remain, in most cases, significantly different.

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<sup>4</sup> My thoughts in this area have been influenced by reading the work of the US feminist legal theorist Martha Fineman, *supra* n 3, who has written of the inequities for women arising out of equality based reforms to Family Law in the United. Whilst the specific issues faced in the US are different to those that apply in Australia, the same critique has a strong application to the policy behind the reforms.

<sup>5</sup> Fineman *supra* n 3 at 80.

<sup>6</sup> See, for example, R Graycar 'Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia' in C Smart and S Sevenhuijsen *Child Custody and the Politics of Gender* (Routledge, London, 1989) at 158. See also M Kaye and J Tolmie 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 19, M Kaye and J Tolmie 'Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups' (1998) 22 *Melbourne University Law Review* 162, and R Kaspiew 'Equal Parenting or the Effacement of Mothers?: B and B and the Family Law Reform Act 1995 (Cth)' (1998) 12 *Australian Journal of Family Law* 69 at 71 and references at footnotes 13, 14 and 25. The Family Law Council's Report on parenting made a significant impact on the direction of the reforms: Family Law Council *Patterns of Parenting* (AGPS, Canberra, April 1992).

<sup>7</sup> Such laws are politically appealing because there are no messy "special treatment rules" - which are potentially seen as unjust or patronising. Further, as people are seen to be treated equally, simplistic notions of fairness are well satisfied.

<sup>8</sup> Fineman *supra* n 3 at 3.

The fact is that "(t)he theory of equal treatment of the sexes in family law ignores social and economic reality ...".<sup>9</sup> Even where mothers work outside the home as well as in it, care and responsibility for child-rearing continues to rest largely with the mother.<sup>10</sup> Both pre- and post-separation, women carry the bulk of the responsibility for fulfilling the most fundamental functions of the family:<sup>11</sup> the day-to-day care of children, and the nurture of each child's development both as an individual and as a member of society.<sup>12</sup> Importantly, an overwhelming majority of single parents are women, and single mothers experience levels of poverty not experienced by their former partners.<sup>13</sup>

Equality is simply not a concept which can be applied in a blanket way to parenting in any real or general sense. If equal parenting rarely exists, if at all, prior to the break down of a relationship, then it will be an even more rare occurrence for it to exist where parents are in conflict after their relationship has broken down.

Equality based children's provisions not only leave many mothers struggling before the family court or disadvantaged in imbalanced mediations, they also reflect a societal devaluation and negation of the mother-role and a disregard for the personal, career, emotional and financial sacrifices that role entails. These are sacrifices not often made equally by fathers.

The application of an equality based paradigm of law reform to children's matters has not therefore resulted in contemporary and far-sighted laws. Rather it has resulted in the reality of women's child-care work and their daily child-care experiences becoming invisible before the law.

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<sup>9</sup> F Steel and K Gilson 'Equality Issues in Family Law: A Discussion Paper' in K Busby, L Fainstein and H Penner (eds) *Equality Issues in Family Law: Considerations for Test Case Litigation* (1990) at 24-25.

<sup>10</sup> See Dickey's acknowledgment of this in A Dickey *Family Law* (3<sup>rd</sup> edn, LBC Information Services, Sydney, 1997) at 393, and that of Finlay, Bailey-Harris and Otlowski in HA Finlay, R Bailey-Harris, and MFA Otlowski *Family Law in Australia* (5<sup>th</sup> edn, Butterworths, Sydney, 1997) at 398. In the interim report on the research by Helen Rhoades, Reg Graycar and Margaret Harrison into the impact of the *Family Law Reform Act 1995* they say with regard to the issue of responsibility for children that "... nothing much has changed – the division of responsibility for children appears to remain gendered, with mothers still tending to be the primary resident parent and still doing much of the decision-making and 'the hard work'." H Rhoades, R Graycar, M Harrison *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* Interim Report, April 1999, <[http://www.familycourt.gov.au/papers/html/body\\_flachapter3a.html](http://www.familycourt.gov.au/papers/html/body_flachapter3a.html)> at 1.

<sup>11</sup> The Royal Commission on Human Relationships concluded that the principal purpose of the family is to provide for the care and upbringing of children: Royal Commission on Human Relationships *Final Report Volume 4* (AGPS, Canberra, 1977) at 3. It stated further that "[a]ll children need adults to nurture them, to give them love and security, stimulation and the chance to grow." *Ibid* at 1.

<sup>12</sup> Note, for example, that "[t]he quality of childhood experience, when learning is most rapid, (is) seen as crucial to later adult ability in personal relationships.": Royal Commission on Human Relationships, *Final Report Volume 2* (AGPS, Canberra, 1977) at 6.

<sup>13</sup> See, for example, J Behrens 'Shared Parenting: Possibilities ... And Realities' (1996) 21(5) *Alternative Law Journal* 213; K Funder, M Harrison and R Weston *Settling Down: Pathways of Parents After Divorce* (AIFS, Melbourne, 1993); P McDonald (ed) *Settling Up: Property and Income Distribution On Divorce in Australia* (Prentice-Hall of Australia, Sydney); and M Harrison and R Graycar 'The Family Law Reform Act: Metamorphosis or More of the Same?' (1997) 11 *Australian Journal of Family Law* 327.

## An Example of Invisibly Equal Women in Child-Related Disputes: "Parental Responsibility"

The *Family Law Act's* concept of parental responsibility illustrates this point well.<sup>14</sup>

Where family lawyers once worked with the unsatisfactory but relatively concrete terms 'custody' and 'guardianship'<sup>15</sup> they now work with a very vague concept of 'parental responsibility' (Division 2 of Part VII).<sup>16</sup> Put simply, 'custody' was the term that generally referred to the right to make decisions about the daily care of children and 'guardianship' involved a right to make decisions about the children's long-term welfare.

In the past a common order in the Family Court involved sole custody being awarded to one parent with joint guardianship being exercised by both. This would mean, practically, that the parent with custody, usually the mother, would have the necessary authority to make decisions on her own about daily care matters such as what food the child should eat, the child's daily schooling concerns, whether the child should see a doctor for a minor ailment. As a joint guardian the father had the 'right' to contribute to decision-making about long-term issues such as the child's religion and so on.

The term 'parental responsibility' is not clearly defined. Section 61B(1) of the Act says merely that it covers "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children." Interestingly, as no further elucidation of the concept is provided, the view has been taken that parental responsibility "... comprehends all the duties, powers, responsibilities and authority that a guardian and custodian of a child would have at common law."<sup>17</sup> The old law, rejected in part for its inappropriate semantics and emphasis on parental proprietary rights in relation to children, is therefore still required apparently to give meaning to the vagaries of the current law.

Parental responsibility is exercised by each of the parents until either they alter it by a parenting plan or the court makes an order to alter it. Section 61C specifically says that a change in the nature of the parents' relationship, separation for example, is insufficient to alter it.

<sup>14</sup> The provisions commenced on 11 June 1996 inserting a new Part VII into the *Family Law Act* 1975 (Cth). For an overview of the provisions see P Nygh 'The New Part VII - an Overview' (1996) 10 *Australian Journal of Family Law* 4.

<sup>15</sup> Before 1996 the terms 'custody' and 'guardianship' were used to cover the areas of parental authority in relation to children. The *Family Law Act* gave only little definitional assistance about the meaning of the terms, but by the time the 1996 amendments were introduced a significant body of case law had worked to make their meaning relatively clear. Also, in 1983 statutory definitions of the terms 'guardianship' and 'custody' were inserted. Guardianship was defined as including responsibility for the long-term welfare of the child and all powers, rights and duties other than the right to have the daily care and control of the child or to make decisions about the daily care and control of the child. Custody was defined as being the right to have the daily care and control of the child and the right and responsibility to make decisions concerning the daily care and control of the child.

<sup>16</sup> In addition to the equality objective, another policy objective behind this amendment was that it was consistent with developments in the UK *Children's Act* 1989, and resulted in part from the conclusion that the terms "custody and guardianship" were too possessive in nature and contributed to parents treating their children as chattels in parental disputes. See, for example, Family Law Council *supra* n 7 at 1.

<sup>17</sup> CCH, *Australian Family Law and Practice Reporter*, para 14-050. Further, the research of Rhoades et al indicates that many legal practitioners are treating the concept of 'residence' as a change from 'custody' in name only. They say, however, that family counsellors "... reportedly appreciate that the intention of the legislative changes was to alter fundamentally the previous custody and access division of responsibilities." *Supra* n 11 at executive summary, 2.

There are a number of practical and legal problems that arise with this change in the law, and I am certainly not the first to raise them.<sup>18</sup>

First, from a practical perspective, although lawyers are deriving assistance with the meaning of the new law from the old, a high degree of uncertainty has undoubtedly been inserted into the law regarding who has what authority when it comes to parental decision-making. Uncertainty is just what angry or violent male ex-partners, who are looking to use litigation as a tool for venting their anger or continuing their abusive behaviours towards the mother of their children, are searching for.<sup>19</sup>

Women are potentially significantly disadvantaged by the scope for litigation that this uncertainty creates.<sup>20</sup> But the reality of women's lives in this regard has been ignored. Women and men are ostensibly equal before this law, notwithstanding the fact that it is men who more often have the funds after separation to afford litigation.<sup>21</sup> And notwithstanding the fact that many women are left to turn to a Legal Aid Office that is increasingly refusing to fund them, and then perhaps to an under-resourced community legal service, and finally often are left with the stress and anguish of self-representation.<sup>22</sup>

So practically, women's reality has not been accommodated, or acknowledged by this law or by relevant policy in areas such as Legal Aid funding. In being equal the difference of women's gendered lives is made invisible.

Secondly, from a legal perspective, the law is ambiguous as to whether parental responsibility is to be exercised cooperatively or independently on separation. A number of commentators have remarked on this issue,<sup>23</sup> and it has been the subject of judicial comment.<sup>24</sup> The cooperative model seems in fact to be the intention of the policy makers,<sup>25</sup> however, in the case of *Vlug v Poulos*<sup>26</sup> the Full Court refers to its own indication in the case of *In B and B: The Family Law Reform Act*, that whilst joint consultation is desirable in terms of major decisions concerning children, individual decision-making will

<sup>18</sup> See, for example, Behrens *supra* n 14, and Nygh *supra* n 15.

<sup>19</sup> See, for example, an acknowledgment of this practice by the Australian Law Reform Commission in its report *Equality Before the Law: Justice for Women* Report No69, Part 1 (AGPS, Canberra, 1994) at, for example, 169. The Women's Legal Service, Brisbane also discussed this issue in its *Submission to the Family Law Council's Enquiry on Violence and the Family Law Act*, November 1995.

<sup>20</sup> Rhoades et al confirm that there has been a steady increase in litigation under the current provisions and that this litigation is instigated in a majority of cases by non-resident fathers, *supra* n 11 Ch 3 at 2-3.

<sup>21</sup> See, for example, Funder et al *supra* n 14 and McDonald (ed) *supra* n 14.

<sup>22</sup> Women's Legal Service, Brisbane statistics and feedback provided in monthly staff reports to management committee – 1998.

<sup>23</sup> See for example, Nygh *supra* n 15 and J Behrens *supra* n 14 at 214.

<sup>24</sup> See *In B and B: Family Law Reform Act 1995* 21 Fam LR 676 at 9.27-9.30 and *Vlug v Poulos* (Appeal No EA 94 of 1996 No.SY 8205 of 1994) at 9-11. In *Vlug v Poulos* which was handed down after *In B and B: Family Law Reform Act 1995*, the joint judgment of Finn, Kay and Moore JJ states at 10 "But the question of whether (at least in the absence of an express order) parents may exercise parental responsibility independently of each other or whether they must do so jointly is not made clear by the amended legislation".

<sup>25</sup> Second Reading Speech of the Family Law Reform Bill, 1994, Parliamentary Debates, 8 November 1994 at 2759. Commentators such as Juliet Behrens agree that as a result of the underlying principles of this Division of the *Family Law Act*, this interpretation logically follows from the drafting, notwithstanding that the Act does not introduce a presumption of joint parenting post-separation: Behrens, *supra* n 14 at 214. See also Harrison and Graycar's finding from a survey of practitioners that when explaining the new concept of "parental responsibility" practitioners are relying heavily on words such as "equal", "shared" or "cooperative", *supra* n 14 at 335.

<sup>26</sup> See the judgment above n 25 at 10-11.

necessarily have to occur.<sup>27</sup> Despite this uncertainty the provision has remained unchanged since its introduction.

Under either scenario (cooperative or independent) women who have residence of their children are potentially placed in an extremely problematic position when faced with an ex-partner who wants to use a particular interpretation of the Act to make the mother's life difficult.<sup>28</sup> In either situation a woman who has residence of her children, and therefore primary responsibility for them, does not have primary authority to make decisions relevant to that care work. Not unless she takes the legal step of formalising her decision-making abilities in a parenting agreement or specific issues order.

For those women whose partners assert that the Act requires a shared parenting approach there is unlimited scope for interference in their daily decision-making about the children. That is, unless such a woman can orchestrate an agreement to a parenting plan which limits this scope, or unless she can fund proceedings in the Family Court for some specific issues orders to this effect, she is left with little power to counteract, for example, endless phone-calls, visits and disagreements about the way she is caring for the children.

To turn to the alternative at the other end of the spectrum, a woman who is faced with an ex-partner who believes the Act allows an independent model of parenting<sup>29</sup> (and this seems to be the current position of the Full Court) may find that her children return to her from a contact visit with their braces on their teeth removed, with their school having been changed, or even minus an appendix or a kidney.<sup>30</sup> After all in the Full Court's words it is only *desirable* that consultation occur on major issues affecting the children, not mandatory.<sup>31</sup> Again such a mother needs a clause in a parenting plan or a court order before such action on the part of a contact father would be considered outside the scope of his parental responsibility 'rights'.

Coping with a father's exercising of his parental responsibility in this way has serious practical, financial and emotional implications for mothers.

Peter Nygh said of these provisions prior to their introduction that "[m]uch will depend on the approach taken ... by judges and practitioners. The revolution may be more apparent than real."<sup>32</sup> It is, indeed, extremely important to monitor the way in which the Court and its judges continue to deal with the concept of 'parental responsibility'. It matters little, however, that these concerns could be more technical than real.<sup>33</sup> The fact is that the effect of the legislation, on either interpretation, is to deprive women of the necessary definite authority for decision-making in relation to their children post-separation. And this reflects a political and legal disregard for the realities of women's lives.

<sup>27</sup> The Full Court in *In B and B supra* n 25, refers to the UK Law Commission's report on family law, *Review of Child Law and Guardianship and Custody* (1988) which suggested the need for joint but independent parenting at 9.28.

<sup>28</sup> Note Harrison and Graycar's comments *supra* n14 at 332 on anecdotal evidence that there are clear misconceptions and unrealistic expectations that arise from the amendments.

<sup>29</sup> The implication that *this* is what the Act means arises from the wording of s 61C which states that "[e]ach of the parents of a child who is not 18 has parental responsibility". Several responsibility would result in each parent having the independent right unilaterally to exercise the full gamut of decision-making options in relation to the children.

<sup>30</sup> See Nygh's comments to this effect, *supra* n 15 at 5-6.

<sup>31</sup> See *Vlug v Poulos supra* n 25 at 10.

<sup>32</sup> Nygh *supra* n 15 at 16.

<sup>33</sup> For the most current research on certain aspects of the reality of the operation of the provisions introduced by the *Family Law Reform Act 1995* see Rhoades et al *supra* n 11.

Women's interests and concerns, as the ongoing primary caregivers to the children, have been made invisible. Women with residence of their children have the primary care of them and responsibility in relation to them but, unless they take additional legal steps, do not have the primary say in issues to do with raising them. Women are denied the clear enunciation of authority that should accompany the responsibility they have in being the continuing primary caregivers.

### **Making Women More Visible in Child-Related Disputes**

How then can women's interests and issues be made more visible in the law of post-separation care of children?

In terms of the parental responsibility issue, under the current equality-based regime the safest strategy would seem to be to ensure that women seek extremely detailed parenting agreements or specific issues orders that ensure they have the necessary authority to correspond with the level of responsibility they have for the children.

In broader terms, however, what we need are post-separation children's provisions that send a positive, clear and unambiguous message to society that the legal system values and acknowledges the child-care work that women do.

An initial criticism of any post-separation child-care rule developed with women's issues and interests in mind, however, is certainly to be that its central focus is not the best interests of the children. This is not the case. Rather, research such as that of John Bowlby, can be used to show that where the interests of the primary care-giver are protected, the best interests of the children will consequently follow.<sup>34</sup>

What then are some of the alternative strategies for making women and their interests more visible in the context of family law child-related disputes?

It is certainly true that, from a practical perspective, women had a comparatively clearer and more certain position under the old concepts of custody and guardianship. That is, once custody had been awarded to a mother there was no need to seek additional orders to clarify what her decision-making abilities in relation to the children were. A mother with custody had the necessary authority to make decisions about their daily care and control. It is also true that prior to 1979 mothers benefitted in practical terms as a result of the

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<sup>34</sup> See, for example, the research of John Bowlby: J Bowlby *Child Care and the Growth of Love* (2<sup>nd</sup> edn, based by permission of the World Health Organisation on the Report *Maternal Care and Mental Health* Penguin Books, London, 1965). This research, with its emphasis on the importance of the mother as primary care-giver has been said only to have served the interests of patriarchal society by relegating women to the private sphere. Focussing on the research's emphasis of the value of mothers' work could be one way in which to use it more positively for women.

paternalistic operation of the mother principle.<sup>35</sup>

Reverting to the mother principle would not, however, be a progressive step for mothers. This is despite the more obvious benefits of such a principle such as more appropriately acknowledging and valuing a mother's work in the primary care-taking tasks of child-rearing.<sup>36</sup> It also allowed mothers relative certainty in knowing that as primary caregivers and decision-makers in relation to their children pre-separation, they would usually also be the primary caregivers and decision-makers post-separation.

As Martha Fineman has said:

The old rules have become labeled as impermissible sexist manifestations of a paternalistic system which should be purged in the interests of equality and justice. But, in fact, these old rules were more than simpleminded sexist manifestations. They also paralleled fairly well the situation that existed in most families with regard to which parent assumed primary care for the children.<sup>37</sup>

The fact is that these old rules still parallel the situation that exists in most families today.

There are many pitfalls to gendered presumptions such as the mother principle; and the more valid aspects of its practical operation are negated by its restrictive philosophical assumptions. For example, the principle is limited to valuing the position of women in the private realm of the home. In responding to the reality of women's child-care work, it fails to acknowledge the reality of the broader position of women in society.

The primary caretaker presumption, on the other hand, which in children's disputes provides a presumptive advantage to the person who has been the primary care-giver to the children, avoids these false assumptions about women, and a number of feminist

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<sup>35</sup> Sir John Romilly MR stated the principle in 1865 in the following terms: "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, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place.": *Austin v Austin* (1865) 35 Beav 257; 55 ER 634 at 626-37. The principle was based largely on what judges considered to be impressions of common sense, but was many years later supported by the work of John Bowlby's *Child Care and the Growth of Love* *supra* n 35. The principle was clearly rejected, however, in the High Court case of *Gronow and Gronow* (1979) 144 CLR 513. In that case the Court held that there is no principle or presumption that a mother should have residence of a young child. The joint judgment of Mason and Wilson JJ endorsed the approach of the Full Court of the Family Court which was to say that a mother has no preferred role, but rather her role is simply an *important factor* to be taken into consideration when determining what will be in the best interests of the child: See also *Mathieson and Mathieson* [1977] FLC 90-230, *In the Marriage of Hobbs and Ludlow (formerly Hobbs)* (1976) 29 FLR 101, *In the Marriage of Raby* (1976) 27 FLR 412.

<sup>36</sup> Fineman *supra* n 3 at 84.

<sup>37</sup> *Ibid* at 94.

commentators support it.<sup>38</sup> There are many benefits to the primary caretaker rule,<sup>39</sup> and, again, as Martha Fineman says:

(t)he rule may currently operate to the advantage of mothers, but, if we value nurturing behaviour, then rewarding those who nurture seems only fair. ... Men who choose not to devote their time and attention to the children during the marriage but wish to care for them after the marriage ends can bargain against the mother's entitlement as primary caretaker by making financial or emotional concessions at (separation)<sup>40</sup>.

This presumption still fails, however, to address the issue overtly. Its inference is that child-care work is gender-neutral work. Legally, it still pretends that mothers and fathers are equal whilst practically allowing mothers an upperhand. Realistically, however, it is to be considered a vast improvement on the current children's provisions, and should be strongly advocated.

### Conclusion

The application of abstract "supernorms" such as "equality" or "justice",<sup>41</sup> to the very real and difficult situation in which women find themselves caring for their children post-separation has resulted in provisions which negate the mother-role, and which perpetuate male power and control within the family. The current laws ignore the social, emotional, and financial differences between the lives of men and women. In making parents equal, they have made the issues and interests of women invisible. The laws rely largely on the superficial appeal of the symbols and language of the "equality revolution", and on idealistic notions of the family,<sup>42</sup> and have no regard for the stark reality beyond the discourse; namely that women and children continue to suffer after separation.<sup>43</sup>

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<sup>38</sup> *Ibid* at 181. K Sandberg 'Best Interests and Justice' in C Smart and S Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (Routledge, London, 1989) at 104. The 'primary caretaker preference' has been adopted in a number of jurisdictions in the USA. For example, in West Virginia in the USA the primary caretaker presumption operates until children are 6 years of age after which the presumption still lies but can be rebutted by the child's own preferences. See R Neely 'The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed' (1984) 3 *Yale Law and Policy Review* 168. Minnesota also adopted the primary caretaker rule. The reasoning behind the primary caretaker preference is that it recognises the importance of the stability of the child's relationship to its primary caretaker in serving the child's best interests; that is, it protects the child's most vital parent-child relationship, it avoids error, litigation and abusive threats of litigation, and it is in fact compatible with gender neutrality and the interests of the child: G Crippen 'Stumbling Beyond the Best Interests of the Child: Re-Examining Child Custody Standard Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference' (1990) 75 *Minnesota Law Review* 427 at 440.

<sup>39</sup> For example, it recognises and values past caretaking behaviour, recognises that no expert can accurately predict the future best-interests of children, it focuses on past proven behaviours rather than on speculation about future possible behaviours, it removes speculation about the quality or extent of bonding between parents and children, it is particularly suitable to legal analysis and application because of its focus on past fact-finding, and it also allows parents to clearly predict who might be successful in legal proceedings: Fineman *supra* n 3 at 183.

<sup>40</sup> Fineman *supra* n 3 at 183. She adds: "In cases in which both parents acted as true primary caretakers, I predict that few custody battles would ensue and the cooperative patterns concerning the children established during the marriage would continue."

<sup>41</sup> Fineman *supra* n 3 at 8.

<sup>42</sup> Behrens *supra* n 14 at 215.

<sup>43</sup> Fineman *supra* n 3 at 7.

Equality rhetoric should be abandoned in favour of provisions informed by women's material circumstances. This is not a call for "maternal revivalism",<sup>44</sup> but rather a call for making visible the issues and interests of women in post-separation children's disputes.

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<sup>44</sup> See L Segal *Is the Future Female? Troubled Thoughts on Contemporary Feminism* (Virago, London, 1987).