

Motherhood & Autonomy in a Shared Parenting Climate

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Motherhood- Reclaiming our Past-Transforming our Future
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Caulfield v. Wong (2007)

A woman wanted to have a child and raise the child on her own. She accepted the offer of a man she dated sporadically that she use his sperm. Using IVF to conceive, she gave birth to twins. She never cohabited with the man and concluded that to do so would be unhealthy for her and her children. She planned to parent as a single mother, with her father's help. After the birth of the twins, the genetic father claimed and was awarded, more and more parenting rights, including joint legal custody when the twins were two. The mother was constructed as a problematic parent who unreasonably resists shared parenting. The father now has virtually equal time with the children under a parallel parenting order.

The judge stated: "A parent should not be deprived of the opportunity to play an active role in parenting because of an innate inability of the parents to get along.

Caulfield v. Wong, 2007 ABQB 732, 47 R.F.L. (6th) 144, at para 37.

Outline for Talk

Modern trends in child custody law

Feminist approaches to autonomy

What is relational autonomy?

Consequences of normative shared parenting for women's autonomy

Seeking norms that enhance autonomy

Modern Trends in Custody Law

Modern trends in child custody law include:

- the rise in fathers' rights
- increased emphasis on genetic ties to define legal fatherhood
- gender neutrality & gender convergence
- emphasis on children needing contact with 'both parents'
- increase of joint custody and shared parenting
- fewer maternal custody awards

Normative Shared Parenting

Legal Norms around Fatherhood have shifted:

- 1) Family law policy encourages men to take responsibility for children, at least *after* separation or divorce, by emphasizing maximum contact between children and “both” parents
- 2) fathers’ rights have been emphasized, and
- 3) sole custody awards have waned in frequency and popularity both inside and outside courts
- 4) Joint custody increasingly normative: 46% of custody orders on divorce in 2004 in Canada were for joint custody.

Feminist Approaches to Autonomy

The early women's movement was about:

- the freedom to choose one's own relationships;
- the ability to leave destructive relationships;
- the ability to choose when or whether to bear children;
- the ability to choose work that was not defined as appropriate for women.

BUT: Choices are often shaped and constrained by forces such as:

- the ties of family
- familial and heterosexual ideology
- and economic dependency.

What is Relational Autonomy?

Its vision of autonomy moves beyond strict individualism:

Meaningful individual autonomy depends on our relations with others.

- a complex web of social relationships surrounds individuals
- crucial to take into account the impact of social & political structures, including sexism and other forms of oppression, on the lives and opportunities of individuals

Example:

The relationship between mother-caregivers and children illustrates that:

- (1) none of us are completely autonomous individuals and we often rely on others to facilitate our autonomy
- (2) BUT relationships can constrain as well as facilitate autonomy.

Challenges of Normative Shared Parenting for Women's Autonomy

Trends to affirm fatherhood and shared parenting present serious challenges to women who choose to parent without the biological father for reasons such as:

- abuse at the hands of the father;
- concerns about his ability to be a constructive parent;
- plans to parent with a same sex partner;
- or a wish to parent autonomously or without a partner (“single mothers by choice”).

Social Sciences Studies

The research ... suggests that children do not necessarily benefit from greater contact with their non-custodial parent – rather it is the *type of parenting* the non-custodial parent engages in, *not the amount of time* that the parent spends with the children, that is most significant. ... the research to date indicates that children do not fare better post-divorce in joint custody arrangements than they do in sole custody, and some children – including those in high conflict families – may fare worse. ... –

Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26(3) Can. Fam. L.Q. 285 @ 287.

Social Sciences Studies (2)

Research shows a correlation between the way that parents functioned during their relationship and the way they function afterwards.

e.g. Recent Australian research on their shared parenting laws shows that shared time arrangements that operated with lower conflict were those where the father had taken an active parenting role before separation.

Belinda Fehlberg et al., "Shared post-separation parenting in 2009: An empirical snapshot" (2009) 23 Australian J. Fam. L. 247 at 249, 262.

Looking for Norms that Enhance Autonomy

Robert Leckey, *Contextual Subjects*, argues for:

- a contextualized legal subject in family law and
- a notion of ‘thick’ interdependent relationships that ideally enhance the autonomy of each individual involved.

How do we take into account the fact that women’s autonomy is often overridden in the name of the family and children’s best interests?

Contextual Subjects in Custody Law

In child custody contexts, what do we need to look at?

- interpersonal relationships between parents
- and parents and children
- But *also* the larger social context discussed earlier in order to understand
 - (a) the often different choices women and men make when parenting and
 - (b) the difficulties that post-separation parenting disputes pose for women in the face of complex, gendered relationships.

Norms for Decision-makers & Parents

Look to context and lived relations of the family:

- Past patterns of care and responsibility
- any climate of coercion or fear between the adults – or between adults and children
- meaningful engagement with children
- whether parents have elected a shared parenting arrangement, & how
- likelihood of retaining geographical proximity
- ability of parents to communicate and cooperate
- confidence in each other's parenting competence

Norms continued

In addition, look to the wider social setting:

- mothers are still often primary caregivers
- gendered patterns of domination in families
- impact of proposed arrangements on caregiver's ability to be emotionally available and attentive to a child and the child's views and needs

Conclusion

Rely less on the idea that rights should accompany genetic definitions of parenthood.

Rely more on relational aspects of parenting, including its larger, gendered social context.