

JUDGEMENTS AS SOCIAL NARRATIVE:
AN EMPIRICAL INVESTIGATION OF APPEAL JUDGEMENTS IN
CLOSELY CONTESTED PARENTING DISPUTES
IN THE FAMILY COURT OF AUSTRALIA 1988 – 1999

Submitted by
Lawrie Moloney
M.A (Melb), M Sc (Edin).

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Institute for Education
La Trobe University
Bundoora, Victoria 3083
Australia

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For Jack & Kath

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SUMMARY

The thesis is divided into two sections. Section 1 explores the psycho-social and legal constructions of family, parenting and children that have influenced judicial decision-making in parenting disputes following separation and divorce. Particular attention is paid, first, to the circumstances surrounding the shift from paternal to maternally-based presumptions about the parenting of children; and second, to the more recent and somewhat puzzling shift to a presumption of gender neutrality. The extent to which fault has continued as a less overt decision-making criterion is also considered.

In Section 2, judgements in recent closely contested parenting cases in the Family Court of Australia are analysed as contemporary socio-legal narratives. A systematic, in-depth examination of a heterogeneous sample of publicly accessible cases revealed that gender-based assumptions continue to dominate judicial thinking about parenting and family structure. In particular, it was found that outcomes that favoured mothers correlated with perceived evidence of conformity to a maternal stereotype of self-sacrifice on behalf of the child(ren). Outcomes favouring fathers usually resulted from situations in which mothers were judged to fall short of these stereotyped expectations. Fathers' roles, even in cases in which their applications were successful, generally continued to be equated with breadwinning and support. Their capacities as nurturers to their children were either not mentioned or treated with scepticism.

In the light of the findings, tensions between continuing gender-based roles in families, public attitudes to parenting and preferred family structure, and recent changes in our scientific knowledge base regarding gender and parenting are reviewed. Implications of the persistence of the breadwinning/nurturing dichotomy both within the Australian culture and family court judgements are discussed. Particular attention is drawn to the impact of the confused circumstances in which gender-neutral parenting principles came about in the 1970s.

STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma.

No other person's work has been used without due acknowledgement in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Lawrie Moloney
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The legal and non-legal professionals who work effectively in what is known as family law are very special people. Perhaps appropriately, their success is rarely recognised or appreciated outside of the families they assist and outside small clusters of other colleagues. Nonetheless, their thoughts and struggles to understand better the complexities of their trade have inspired me to write on child and family issues in the past and to undertake and complete the present project.

Due to a number of contingencies, especially the unfortunate financial cuts to universities in recent times, the present project experienced several false starts. In retrospect, the rather lengthy gestation period was probably no bad thing. Thus with the support of my university’s outside studies program and the opportunity to spend that time at the Australian Institute of Family Studies (AIFS), I found I was able to complete the bulk of the writing in a relatively short space of time.

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