LEGISLATION

The Privatisation of the Public Interest in Children

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1. Introduction

The public–private dichotomy is a pervasive theme in legal writing and has been viewed by some as central to an understanding of the role of law in family life.[1] Others have doubted the validity of a rigid demarcation between public and private spheres of activity and in particular the existence of a private, largely unregulated, area of family life.[2] They point out that the so-called private realm is heavily influenced by structures external to it and that its boundaries are drawn up by the State. Thus, it is not naturally preconstituted or beyond legitimate State regulation. The far-ranging and radical reform of both the public and private law affecting children, which will be brought about by the Children Act 1989 (hereafter 'the 1989 Act'), provides a timely opportunity for considering the place of children in this public-private discourse.

Those who believe in a clear divide between the public and the private view the family as a largely unregulated area beyond the reach of law, 'the last outpost of *Gemeinschaft*'.[3] There can be no doubt, at least in theory, that the nature of family privacy imposes significant legal and political constraints on state intervention. Mnookin[4] has explained how, in the United States, there is broad agreement between Liberal Democrats and Conservative Republicans that there are limitations on the power of the Government to intrude into the family and that certain 'private' actions should be presumed to be beyond legitimate governmental control. The consensus there breaks down only when it comes to the definition of which activities should be considered to fall within this private sphere. Liberal Democrats would include within it a broad range of personal activities concerning, *inter alia*, sexuality, marriage and child-rearing. Conservative Republicans, in contrast, emphasise the importance of the family for the stability of society and therefore regard it as a primary social institution appropriate for legal regulation. Although there may be sharp political disagreement about where the boundaries of the public and private are to be drawn, the concept of family privacy is itself entrenched and legally protected under the constitution. Parents and children have constitutional rights not to be subjected to unwarranted state interference in their family life.[5]

In Europe, similar interests are protected by the European Convention on Human Rights. Article 8(1), in particular, upholds the individual's right to 'respect for his private and family life, his home and his correspondence.' In the English domestic context, this meant

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1 See particularly Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1985) ch. 1; and M.D.A. Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153.

2 See John Eekelaar, 'What is Critical Family Law?' (1989) 105 LQR 244, 254–258; and John Dewar, *Law and the Family* (London: Butterworths, 1989) at 4–6.

3 O'Donovan, *op cit* note 1 at 11.

4 Robert H. Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *U Pa L R* 1429, 1430.

5 The right of privacy arises from the notion of substantive due process guaranteed by the fifth and fourteenth amendments. There is extensive case law on the protection of family privacy from state intrusion. See, for examples: *Meyer* v *Nebraska* 242 US 390 (1923); *Prince* v *Massachusetts* 321 US 158 (1944); *Wisconsin* v *Yoder* 406 US 205 (1972).

that the child care legislation had to be reformed to ensure that parents and others were accorded procedural rights, particularly in relation to access, where local authorities attempted to take their children into compulsory care.[6] A basic philosophy enshrined in the 1989 Act is that the state's role in the family is a primarily supportive one and that it should not intervene at all unless it is necessary to do so.[7] There is nothing in the reformed legislation which contradicts (and a great deal which supports) the notion that the family, and specifically child care, is an area which ought to remain unregulated by law unless the need for regulation can be positively demonstrated.

Yet non-regulation or de-regulation is arguably as legally significant as regulation. O'Donovan has criticised lawyers for failing to appreciate the importance of the private sphere precisely because they have not grasped the essence of this.[8] The short point is that the state has the necessary legal authority to regulate all aspects of family life. If it chooses not to do so, this amounts to an endorsement of the status quo. According to feminist theory, deliberate de-regulation of the family reinforces structural inequalities between the sexes.[9]

The very susceptibility of the family to legal regulation may lead to a rejection of the public–private dichotomy as a tool of analysis. In a recent article John Eekelaar[10] shows how, historically, the family was left substantially unregulated by law while it adequately performed functions which were thought to be in the public interest. Specifically, the legal protection of children came about initially because of the threat to the social order posed by large numbers of vagrant children in the early nineteenth century. This legal regulation was in effect a response to the failure of the family to operate as a 'sufficient mechanism of control.'[11] He concludes that where the family is properly meeting the public interest the law plays only a small role in the definition or enforcement of societal values. But, since the family is in this sense performing a public service, it is inaccurate to view it as operating entirely outside the public sphere. Familial obligations, on the contrary, 'can be viewed as integral parts of the public law system as a whole'. It may thus be a mistake, according to this mode of analysis, to talk in terms of state intervention in the family as if this were an unproblematic concept. Child-rearing may be seen with equal justification as either a private matter, subject to state involvement only when public norms are transgressed, or as a public matter in the sense that the task of giving effect to the community's standards and expectations for child-rearing is delegated to parents. Each perspective according to Eekelaar, is equally valid and contradicts the existence of a well defined public–private dichotomy. In his view, the concept of 'the public interest' is a more valuable tool in understanding family law and 'the focus should be upon the nature of the conception of the *public interest* current at any given time within a community and not some presupposed classification which has small legal relevance'. His preferred approach entails examination of 'the process of transition from the perception that behaviour, whether within the private or public realm, adequately serves the public interest without the invocation of law to the conviction that the public interest demands a legal response.'[12]

In this note I shall attempt to apply Eekelaar's analysis to certain aspects of the 1989 Act. It will be my contention that it is possible to observe the above process of transition

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6 See for example, *H* v *United Kingdom* Series A, No 120 (1987).

7 The non-intervention principle derives from the Law Commission's Report *Review of Child Law: Guardianship and Custody* (1988), Law Com No 172 especially paras 3.2–3.4. It is now contained in s 1(5) of the 1989 Act.

8 *op cit* note 1 at 19.

9 This issue is discussed in section 3 below.

10 *op cit* note 2.

11 Recent suggestions that parents should be criminally liable for acts committed by their children below the age of criminal responsibility is, perhaps, a modern manifestation of the same attitude.

12 *op cit* note 2 at 258.

in reverse. I shall argue in section 2 that the fundamental orientation of the legislation is away from the perception that the public interest in children demands a legal response and towards the position that it is best served by the private ordering of family relationships. In effect the Act does not deny the public interest in children but redefines it by identifying it more closely with support for parental discretion. In the more traditional language of the public–private division the latter sphere may be considered to have been enlarged at the expense of the former, since child rearing is likely to be viewed increasingly as a private matter unsuitable for legal regulation. In seeking to demonstrate this, I concentrate on those parts of the Act which are directly concerned with the so-called 'private' law affecting children.[13] I look particularly at the allocation of parental responsibility during marriage and reallocation of such responsibility on divorce and also at the choice between adoption and the other legal alternatives for securing long term substitute care. In section 3 I will then re-assess, in the light of the reformed legislation, the feminist claim that the private sphere of family life is the site of oppression for women and children at the hands of men. I argue that the new regime for the reordering of family relationship following divorce adjusts the power relations in the family (if at all) in favour of women. Finally, in section 4 I conclude that the formal commitment in the Act to the primacy of the welfare of children[14] is in reality subordinated to the new principle of non-intervention[15] which reflects the dominant ideology of the legislation.

2. The Children Act 1989 — Redefining the Public Interest

The Re-ordering of Parental Relationships

The public interest in children may be thought to derive from society's concern for its own self-preservation and its appreciation of the need to safeguard the future generation. Alongside this there is today, at least in principle, much greater community commitment to the welfare needs of individual children and a growing awareness that children have 'rights'.[16] Specifically in the context of divorce, there is now general recognition that the process may be damaging to the welfare of the children concerned. The developmental risks which attend divorce have been well-documented. They include behavioural and psychological problems, delinquency and economic difficulties associated with single parenthood.[17] For over 30 years the principle has existed that the public interest in protecting these children demands judicial scrutiny of the arrangements proposed for their care. This has been a pre-condition of dissolution. The current provision is contained in section 41 of the Matrimonial Causes Act 1973. The procedure is commonly known as 'the declaration of satisfaction' although this is something of a misnomer since the court is not precluded from granting a decree where the arrangements for the children, although perceived as unsatisfactory, are 'the best that can be devised in the circumstances.'[18]

13 Parts I and II. It should be noted, however, that the general principles in Part I are intended to have equal application to the 'public' law affecting children. See section 4 below.

14 The 'welfare principle', as slightly modified, is reaffirmed in s 1(1). It was previously enshrined in s 1 of the Guardianship of Minors Act 1971 and, before that in s 1 of the Guardianship of Infants Act 1925.

15 s 1(5), discussed in section 2 below.

16 On the general question of children's rights see: M.D.A. Freeman, *The Rights and the Wrongs of Children* (London: Frances Pinter, 1983). On the distinction between the protection of children's 'welfare' versus respect for their 'rights' see Andrew Bainham, *Children, Parents and the State* (London: Sweet & Maxwell, 1988), especially at 5–7.

17 For an excellent review of the social science literature on the effects of children on divorce, see Susan Maidment, 'The Matrimonial Causes Act, s 41 and the children of divorce: theoretical and empirical considerations' in M.D.A. Freeman (ed) *The State, the Law and the Family* (London & New York: Tavistock, 1984) at 159.

18 For a succinct and informative review of the history and development of s 41 see John C. Hall, 'Scrutiny of arrangements for children of divorcing parents' (1989) 1 *Journal of Child Law* 71.

Criticisms of the way the procedure operated in practice were widespread. It was generally felt that some reform was required.[19] These criticisms centred on the perfunctory manner in which the judicial duty was sometimes performed, in part the inevitable result of the escalating numbers of divorces and the relative powerlessness of the court to impose child care arrangements other than those agreed between the parties. The result of the exercise was, thus, preservation of the status quo in the vast majority of cases.

The Law Commission essentially took the position that, if what was happening in practice amounted to little more than judicial approval of parental agreements, the existence of a court order in most cases was of little value and might even be detrimental to the interests of all concerned. It argued that orders for custody and access were too often seen as 'part of the package' and that there was a risk that they could have the adverse effect of polarising parental roles or alienating the child from one or other parent. It thought that where the child already had a good relationship with both parents this should not be jeopardised by unnecessary court intervention.[20]

The 1989 Act gives effect to this philosophy of public support for parental responsibility in a number of ways. First, it introduces a general principle of non-intervention, whereby the court must refrain from making *any* order unless it considers that doing so would be better for the child than making no order at all.[21] Secondly, it substantially modifies section 41 and, while not abolishing judicial superintendence of care arrangements, is likely to curtail severely the extent of court involvement in divorce cases.[22] In future, the court will not be required to form a judgment as to the adequacy of arrangements made by divorcing parents. Parents will continue to be required to provide the court with details of the proposed arrangements from which the court will have a duty to decide whether it should exercise any of its powers under the legislation. It might, for example, wish to consider making one of the new residence or contact orders in contested cases.[23] But it will no longer be obliged to make a declaration of satisfaction and the power to withold the decree while the welfare of the children is investigated will be a very limited one arising only in 'exceptional circumstances'. Thirdly, the Act asserts the primary status of parenthood which is to be characterised by the acquisition of 'parental responsibility', a concept introduced by the Act and replacing the former concept of 'parental rights'. Married parents will acquire this automatically and will not lose it by virtue of divorce. The Act is seeking to establish parenthood as a continuing or enduring status.[24] The theory is that parents do not cease to be parents because they divorce or even because their child is in the care of a local authority.[25] If no order is made (as will increasingly be the case in a system favouring non-intervention) the two parents will, in principle, retain their joint responsibility for the children. This was, of course, the position before the Act in the comparatively few cases in which no order was made. But the Act goes further, both by discouraging orders and by providing for the continuity of parental responsibility even where a sole residence order (replacing the custody order) is made in favour of one parent. This is a necessary implication from the legal effect of a residence order which is simply to regulate

19 Valuable critiques of s 41 are: G. Davis, A. MacCleod & M. Murch, 'Undefended Divorce: Should section 41 of the Matrimonial Causes Act 1973 be repealed?' (1983) 46 MLR 121; and Gwyn Davis, 'Public Issues and Private Troubles. The Case of Divorce' (1989) 19 Fam Law 299.

20 *op cit* note 7.

21 s 1(5). The principle is of general application and applies to any of the 'private' or 'public' orders available under the Act; *viz* residence, contact, specific issue and prohibited steps orders under Part II and care or supervision orders under Part IV.

22 Sched 12, para 31.

23 Such orders are available under s 8 and replace custody and access orders. Their effect is not, however, precisely the same.

24 It should be noted, however, that although parental responsibility is normally a concomitant of parenthood this is not so in the case of the unmarried father by virtue of s 2(2).

25 Where the child is subject to a care order under s 31 the authority will also acquire parental responsibility which will be shared with the child's parents.

where a child is to live.[26] The order does not transfer or re-allocate parental responsibility for the child.[27] In principle, therefore, on the assumption that the child will be living primarily with one parent under a sole residence order, the 'non-residential' parent will nonetheless retain his or her equal parental status. Accordingly, he or she should preserve the right to have a say in all significant issues of upbringing and should be authorised to deal directly with schools, hospitals and other third parties.[28]

The hope appears to be that this scheme will result in a significant number of parents continuing to accept the parental roles of the other by agreement and without needing to have recourse to the courts. A great deal of time and money could be saved and children ought to benefit both from ongoing relationships with each parent and from the removal of one area of dispute during the divorce process.

These aims are laudable. I have no quarrel with either the intended marginalisation of the judicial role or with the view that child care arrangements brought about by agreement are more likely to work than those which result from attempts at compulsion.[29] But I want to suggest that this scheme, by regarding private agreements as sacrosanct, fails to give adequate recognition to the *public* interest in children. In developing this argument it must be conceded that, on one interpretation, the Act has simply re-defined the public interest and has not diluted it. On this view, the public interest is seen as best served by facilitating parental agreements. In other words, the theory would be that it is in children's best interests (and consequently the public interest) that parents should agree on their future care.[30] But, returning to Eekelaar's analysis, whichever way the policy shift is described there can be little doubt that an area which hitherto was thought appropriate for legal regulation will in future be substantially de-regulated.

The crucial point is that there has been no attempt in the legislation to influence the nature or content of parental agreements following divorce other than through the somewhat nebulous and indirect notion of continuing parental responsibility. Parental agreement would arguably have been a more acceptable means of meeting the public interest if the legislation had also established some normative standards for child rearing, both in the context of united families and on divorce, to act as a benchmark or basis for private ordering.[31] Yet the legislation tells us nothing about what is involved in the discharge of parental responsibility.[32] As was the case under the former concept of parental rights, the content and extent of parental powers and obligations, and how these interact with the civil capacities of children, has to be inferred from the general law.[33] My concern here is specifically with the absence of any statutory requirement of parental co-operation.

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26 s 8(1).

27 This is why an additional order under s 12(1) and s 4(1) conferring parental responsibility is required for the unmarried father who succeeds in obtaining a residence order.

28 This is somewhat at odds with the Law Commission's earlier view that parental responsibilities 'run with the child'. See Law Com Working Paper No 96, *Review of Child Law: Custody* (1986), especially at para 4.53. At least in theory, the statutory scheme allows parental responsibility to be exercised by a parent without physical care of the child, but in practice it may be difficult for him to do this.

29 There has, for example, been a singular lack of success in attempts by the courts to enforce access under the old law. See Bainham, *op cit* note 16 at 22–23 and the cases cited there.

30 This does involve a rather crude equation of the public interest with the welfare of children but, as noted above, this may be justified in view of the primary place occupied by the welfare principle in modern legislation affecting children.

31 On the connection between legal norms and private ordering of family matters see R. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 Yale LJ 950 (1979).

32 The Law Commission did not favour any attempt to provide an exhaustive list of the incidents of parental responsibility on the basis that it would be a practical impossibility to do so. See Law Com No 172, *op cit* note 7, para 2.6.

33 This general issue has arguably been clouded rather than clarified by the decision of the majority of the House of Lords in *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112. The question of the longer term ramifications of the decision on the position of children under the civil law is raised in S.M. Cretney, 'Gillick and the Concept of Legal Capacity' (1989) 105 LQR 356.

In defence of the new approach it could no doubt be said that the legislation has sought to achieve co-operative parenting by providing for the continuation of the status of parenthood and the responsibility which goes with it. Yet, on a closer examination of the Act, it is evident that this is not likely to amount to much in practical terms. An opportunity has been missed to insert provisions which could have backed-up the philosophy of dual parenting and evidenced a much greater commitment to it.

The starting point for this analysis must be the legal position of parents arising by operation of law since, under a system relying heavily on an anti-interventionist stance, this is the regime which will be preserved or will 'spill over' into the post-breakdown situation.[34] Under the old law the 'rights and authority' of father and mother were expressed to be equal and 'exercisable by either without the other'.[35] It was widely thought that this right of independent action was qualified by a provision in the Children Act 1975 which prohibited the unilateral exercise of parental powers where someone else having such power signified his disapproval beforehand.[36] The effect was to give each parent a right of veto, although there was no duty to consult before taking action. In the case of everyday matters of upbringing this was clearly the only practicable arrangement, but some felt that it made less sense in relation to major strategic or irreversible decisions such as whether the child should undergo elective surgery. The existence of the veto, however unworkable in practice, did lend some support to the notion of co-operative parenting. There was only partial endorsement of the idea of *independent* parenting during the subsistence of a marriage.

Where parents separated or divorced, the former law recognised that it might be necessary to provide expressly for the continued involvement of the non-custodial or 'absent' parent in matters of upbringing. Thus, a joint custody order might be made, one effect of which was thought to be to preserve the right of veto and arguably to create correlative rights and duties of consultation with regard to significant issues affecting the child.[37] A similar result could be achieved where the parents were separated by reserving 'rights' over specified areas of upbringing to the parent without legal custody.[38] It is arguable that one justification for the existence of these provisions was grounded in practical commonsense. A regime which allows independent decision-making, without prior consultation, may work perfectly well where parents are living together amicably. It is likely that the main issues affecting the child will be discussed and that parents will reach a consensus where they initially disagree. The situation of parental estrangement or divorce is quite different. Here there may well not be harmonious relations or any inclination to co-operate. That this can be so is well-illustrated by the intractable problem of enforcing access orders.[39] It cannot be assumed that an ex-wife will be well disposed to inform her ex-husband (or vice versa) about plans for the child or that, if she does, she will take his views into account when they clash with her own. The chances are that in many (if not most) cases the non-custodial or non-residential parent will be kept at a distance and in the dark.

If, therefore, a major aim of the reformed legislation is to strengthen and encourage dual parenting we might have expected to see written into the Act provisions relating to co-operation or consultation. Such provisions are wholly absent. The Act not only fails to embrace consultation, it also removes the former right of objection which parents had during marriage. In future, where parental responsibility is shared, anyone having it may act independently in discharging this responsibility except where statute expressly requires

34 It was noted above that even where a residence order is made this will not in theory at least, upset the balance of parental responsibility which existed before the breakdown of the family unit.

35 Guardianship Act 1973, s 1(1).

36 s 85(3). The only doubt was whether this provision applied to parents as well as non-parents.

37 The precise legal effects of a joint custody order, when compared with a sole custody order, were obscure following remarks by the Court of Appeal in *Dipper* v *Dipper* [1981] Fam 31.

38 Domestic Proceedings and Magistrates Courts Act 1978, s 8(4) and Guardianship of Minors Act 1971, s 11A(1). Under these provisions it was not possible to make an order for joint legal custody as such.

39 See note 29, above.

the consent of more than one person or where the action would be incompatible with a court order.[40] In practice, the first limitation will only affect fundamental issues such as adoption.[41] It may, of course, be argued that in an ongoing marriage the removal of the parental veto will make little, if any, practical difference.[42] But the implication is nonetheless, that joint *independent* rather than *co-operative* parenting, is the normative standard approved by society and reflected in the law. I doubt the wisdom of this message even in the context of a functioning family. It is difficult to square with the stated aims and purposes of the reforms which are ostensibly to encourage the practical involvement of two parents where possible. But the message is even less appropriate in the post-divorce context where (it must be assumed) the automatic allocation of parental responsibility will increasingly be carried over by the non-interventionist policy of the Act.

Is the reality, perhaps, that parental responsibility can only be exercised meaningfully by a parent who has the physical care of a child? At one point the Law Commission seemed to think that this was so.[43] If this is right, the focus of attention should really be on what the Act is doing to promote 'time-sharing', a concept alien to English law, whereby the child spends a significant amount of time in the physical care of each parent. If this yardstick is used, the conclusion must again be that there is little real commitment in the legislation to the principle of dual parenting following divorce.[44] The Act does remove one significant obstacle to this type of arrangement. In *Riley* v *Riley*[45] the Court of Appeal disapproved of time-sharing in principle largely because of its view that children require a settled home. This decision cannot stand with the provision in the Act that a joint residence order may be made in favour of two or more persons who do not live together and may specify the periods during which the child is to live in the different households concerned.[46] In this way it will be possible to provide by order for time-sharing arrangements. But beyond this there is no provision in the Act positively encouraging these arrangements where practicable either by means of a presumption in favour of joint residence or by encouraging parents to enter into time-sharing arrangements. This contrasts with the position in certain other jurisdictions in which there are statutory presumptions in favour of joint custody including shared physical care.[47]

The preponderance of expert opinion now favours some form of joint custodial arrangement as having the best chance of mitigating the adverse effects of divorce on children although this view is currently being contested in certain feminist writing.[48]

It is not my purpose here to re-open the debate about the merits and demerits of joint custody.[49] The point I am seeking to emphasise is that Parliament could have drawn on expert opinion and taken a stand on what are to be considered, all other things being equal, as the optimum form of child care arrangements following divorce. Instead it chose to place unlimited faith in individual parental preferences and a largely unfettered judicial

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40 s 2(7) and (8).
41 Adoption Act 1976, s 16(1).
42 Guardianship Act 1973, s 1(3) which enabled parents to bring disagreements over upbringing before the courts was, for example, hardly (if ever) used.
43 This appears to have been the basis of the Commission's thinking that parental responsibility should 'run with the child'. See *op cit* note 28.
44 It was acknowledged by the Law Commission in its working papers on custody that any encouragement of joint custody or time-sharing in the reforms would be implied and not express. Law Com Working Paper No 96 (1986), para 4.53(b).
45 [1986] 2 FLR 429.
46 s 11(4).
47 Reference is made to the position in California, New Zealand and Scandinavian countries in Law Com No 96 (1986), para 4.44.
48 See particularly Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (London & New York: Routledge, 1989).
49 But for a recent reaffirmation of the value of joint custody from a psychological perspective see M.P.M. Richards, 'Joint Custody Revisited' (1989) 19 Fam Law 83.

discretion in the event of parental disagreement.[50] In short, it chose not to regulate the issue. It could just as easily have chosen to do so. This can be demonstrated by examining those parts of the Act governing the 'public' law affecting families, i.e. the law relating to voluntary and compulsory 'care' by local authorities.[51]

Where a child is accommodated voluntarily by Social Services parental responsibility will remain vested in the parents and the authority's powers to look after the child and take decisions affecting him or her derive from, and depend on, parental delegation.[52] Where a child is formally 'in care' under a compulsory order the authority is itself vested with parental responsibility.[53] In each case, the right of consultation is written into the legislation and extends not only to parents but to non-parents with parental responsibility and also to the child. Consultation is mandatory before decisions are taken by the authority and the authority must give 'due consideration' to the views expressed.[54] This gives practical expression to the Act's central philosophy of a 'voluntary partnership' between parents and the State.

This partnership principle could have operated in the 'private' sphere. It was not employed despite the general objective of securing coherence in the public and private law affecting children.[55] It might be argued that statutory duties of this nature are appropriately imposed upon public agencies like local authorities but could not be properly placed on parents. The answer to this is that parents already are subject to statutory duties which the State has deemed necessary in order to regulate aspects of upbringing. The obvious example is education where the duty to educate is a positive one appearing on the face of the Education Acts.[56] Other duties arise by implication from the general law, particularly criminal law and the law of torts. Thus, the existence of criminal offences and tortious liability for various forms of abuse and neglect implies the positive duty to care properly for a child.[57] There is, therefore, no reason in principle why parents should not be under a duty to consult with one another and co-operate over upbringing. Problems of enforcement must be conceded but these were evidently not regarded as insurmountable where a child is in care.

The conclusion must surely be that the dual objectives of promoting agreements and providing for parental independence were considered to reflect the public interest in children better than the assertion of a partnership between parents based on co-operative decision-making.

What is the likely practical result of this policy? I suggest that it will be to perpetuate, in a different form, the sole custody paradigm which has operated for many years.[58] If parents are to be given a totally free hand, with no indication of what society regards as optimal child care arrangements, many are likely to decide that it is in their interests to relinquish their parental role. Whether this wholesale renunciation of parental effort is in the interests of children is more debatable. Parliament and the Law Commission seem to have been oblivious to this. It may of course be contended that law is a blunt instrument in seeking to influence or remould parental behaviour[59] but the Commission itself

50 The discretion will however be more structured than before in that the court will now be obliged for the first time to have regard to a statutory checklist of factors. See s 1(3).
51 Parts III and IV respectively.
52 See the White Paper, *The Law on Child Care and Family Services* Cm 62 (1987), para 23.
53 s 33(3).
54 s 22(4) and (5).
55 See section 4 below.
56 Education Act 1944, s 36.
57 The principal criminal offence is contained in the Children and Young Persons Act 1933, s 1.
58 The Law Commission's own research revealed that in 1985 sole custody orders were made in 86 per cent of cases, 77.4 per cent being in favour of the wife and 9.2 per cent in favour of the husband. See Priest and Whybrow, 'Custody Law in Practice in the Divorce and Domestic Courts', supplement to Law Com No 96 (1986).
59 See Michael King, 'Playing the Symbols — Custody and the Law Commission' (1987) 17 Fam Law 186.

acknowledged that it is better to have legislation reflecting a model of behaviour which is generally believed to be desirable.[60] It is disconcerting that the model apparently believed to be representative of what society considers desirable should be one in which private ordering is seen as an end in itself whatever the quality or nature of the agreements reached. We should also pause to reflect that the children who are the objects of these agreements (and whose welfare is supposedly paramount) are not generally going to be privy to them and in many cases will have little say in the matter.[61] The Act is manifestly not a blueprint for achieving dyadic parenting. Any encouragement of this is at best implicit and at worst merely rhetorical.

To Adopt or Not To Adopt?

A similar redefinition of the public interest in children can be observed by considering the effect of the 1989 Act on the issue of when adoption should be the preferred solution for long-term substitute care. The old law, contained in the Children Act 1975 and later consolidated in the Adoption Act 1976, derived from the Houghton Committee Report in 1972.[62] The Committee was concerned about the escalation in adoptions by relatives and step-parents which, in its view, could give rise to the distortion of family relationships. In step-parent cases a natural parent might artificially be turned into an adoptive parent. Adoption by relatives could lead to such results as a grandparent becoming a parent and a parent becoming a sibling. In the context of step-parenthood following divorce, there was the additional concern that the effect of adoption could be to sever links between the child and the non-custodial parent and, indeed, that entire side of his family.[63]

In an effort to meet these concerns the Children Act 1975 incorporated a number of provisions which were designed to discourage the use of the ultimate remedy of adoption where some lesser order could provide substitute carers with adequate legal security. Their primary concern would be to prevent the sudden removal of children from their care by the natural parent or someone else having parental 'rights' such as a local authority. This anxiety, it was thought, could be satisfactorily met in many instances by an order for joint custody (in favour of a step-parent following divorce) or by an order for legal custody under the custodianship procedure established by the Act, but not implemented until 1985.[64] In the case of relative and step-parent applications the courts were essentially directed not to make an order where they were satisfied that the matter would be better dealt with by means of the alternative order.[65]

The interpretation of these provisions, first in relation to the alternative of divorce court custody and later the alternative of custodianship,[66] can only be described (and has been described[67]) as subversion of the original purpose of the legislation. The statutory provisions by common accord, were ill-drafted[68] and there is nothing to be gained by recounting the technical difficulties which arose.[69] The essential point is that, after one early decision which was broadly compatible with the Houghton philosophy,[70] the courts

60 Law Com No 96 (1986) para 4.12.
61 They will generally not have party status nor be independently represented in private proceedings. The provisions in the Act relating to the appointment of guardians *ad litem* are predominantly concerned with 'public' proceedings, i.e. care and related proceedings. See s 41.
62 *Report of the Departmental Committee on the Adoption of Children*, Cmnd 5107 (1972).
63 This might of course be the express purpose of such an application.
64 Children Act 1975, s 33.
65 Adoption Act 1976, ss 14(3), 15(4); and Children Act 1975, s 37(1) and (2).
66 *Re D (Minors) (Adoption by step-parent)* (1980) 2 FLR 102; *Re S (A Minor) (Adoption or Custodianship)* [1987] Fam 98 and *Re A (A Minor) (Adoption: Parental Consent)* [1987] 1 WLR 153.
67 See H.K. Bevan, *Child Law* (London: Butterworths, 1989), para 6.86.
68 See particularly the technical problems exposed in *Re M: (A Minor) (Custodianship: Jurisdiction)* [1987] 1 WLR 162.
69 They are discussed by Bevan, *op cit* note 67, para 6.85 *et seq.*
70 *Re S (Infants) (adoption by parent)* [1977] Fam 173.

refused to construe the provisions governing step-parents in a way which would have placed the onus on the applicant for adoption to demonstrate why this was the optimum solution. Indeed at one point they interpreted them as requiring the opposite; *viz.*, that adoption should be presumed to be the preferred course unless it could be shown that greater benefit could be derived from custody.[71] The subsequent decisions on the choice between custodianship and adoption again appeared to favour adoption except where it could be clearly shown that custodianship was preferable. In some cases this result was almost inevitable from one poorly drafted provision. Under this, custodianship could not be utilised in lieu of adoption unless agreement to adoption had been given or could be dispensed with by the court.[72] Yet in such cases, adoption would almost by definition be appropriate. Why else would a parent voluntarily relinquish parenthood and be prepared to sever all links with the child or why would a court be willing to bring this about by compulsion? The situations in which custodianship could not operate were the very ones in which the procedure was *intended* to operate; *viz.*, where a parent reasonably objected to the severance of all legal ties with the child or where a court was convinced that some meaningful link between parent and child ought to be preserved.[73]

The Law Commission's assessment of these provisions (and the courts' interpretation of them) was that they appeared 'to add little to the requirement to choose whichever order would be best for the child'.[74] Its solution was to propose that adoption be brought within the definition of 'family proceedings' for the purposes of the 1989 Act and thereby to make available the flexible new orders introduced by it.[75] It expressed the hope that by these means 'the puzzling provisions' which had attempted to encourage custody rather than adoption could be repealed and that the court would have a freer choice of outcomes which would enable it to make whichever order was best in the particular case before it.[76]

This provokes the immediate response that while the draftsmanship of the old provisions was 'puzzling' their purpose was certainly not. No-one who has read the Houghton report could be in any doubt that its intention was to discourage adoption in cases involving relatives and step-parents. The statutory provisions flowing from it were intended to crystallise the public interest in arrangements for long-term substitute care by reflecting the prevailing view of what these should be. In short, the legislation gave expression to an official policy of favouring inclusive rather than exclusive substitute parenthood in the postulated circumstances.[77] It was not thought generally desirable that a child should be artificially transplanted into a new family where the child's welfare could be adequately safeguarded by giving the substitute carers a measure of a legal security at the same time as preserving the legal link with the natural family. It was not the intention of Houghton, nor of Parliament acting on its recommendations, that the courts should have a wholly free choice in this matter. On the contrary, it was public policy, enshrined in the Act, that they should not. The truth is that this policy was abandoned, or at least undermined, by the courts. In this they have now been aided by the Law Commission. The result is that there is now no official view of the circumstances in which adoption is to be preferred to the new residence order or vice versa. This reposes considerable faith in the courts which on past evidence is

71 *Re D (Minors)* note 66 above.
72 Children Act 1975, s 37(1).
73 It should be noted in this respect that the courts have usually viewed an access order in favour of natural relatives as incompatible with adoption and would only attach a condition of access in exceptional circumstances. See Bevan, *op cit* note 67, para 5.94 and the decision of the House of Lords in *Re C (A Minor) (Adoption: conditions)* [1988] 1 All ER 705.
74 Law Com No 172 (1988), para 4.36.
75 *ibid.* 'Family Proceedings' are defined by s 8(3) and (4) to include proceedings under the Adoption Act 1976.
76 *ibid.*
77 The concepts of inclusive and exclusive parenting are used particularly in the context of foster care, as to which see Robert Holman, 'The Place of Fostering in Social Work' (1975) 5 Brit J of Social Work 3.

misplaced. There is every reason to believe that they will continue to exhibit a leaning towards adoption. The general point to be made about this change of policy is that it again reveals the reluctance of Parliament to take a lead in expressing a view of what is good for children. It has preferred to leave this to be determined on an individualistic 'case by case' basis, in this instance by individual courts rather than individual parents.

3. The 1989 Act and the Balance of Power in Family Relationships

Those who assert the existence of a distinct demarcation between public and private spheres see the family as falling exclusively within the latter. The family is portrayed as the site of oppression for 'weaker' members (women and children) by the 'stronger' (men). If, therefore, the effect of the 1989 Act is to enlarge the private sphere it might be expected that this would be to the further disadvantage of women in their power relations with men. I shall contend that the reverse is likely to be the result of the reforms. To the extent that the balance may be expected to shift at all, this will be to the advantage of women and the relative disadvantage of men.

The public-private division as an element of thinking in Family Law has been associated both with certain strands of feminism and with the 'Critical Legal Studies' movement.[78] The principal argument is that the definition of the family as a private area precludes legal intervention. What, *prima facie*, looks like the defence of civil liberties in the face of unwarranted state intervention can have the effect of concealing power inequalities within the family. In particular, it is said that this masks the ascription of social roles according to gender. Men are thought to operate in both the public and private spheres but are primarily located in the public ('Gesellschaft') while women are expected to remain in the private sphere ('Gemeinschaft') and to exhibit the altruistic qualities associated with it, principally self-sacrifice in the interests of the community.[79]

A refinement of this position, which has been termed 'familialism', has been offered in some modern feminist writings.[80] One feature of this is that the emphasis placed on the welfare of children can operate as an insidious form of coercion of women. Women, it is said, are expected to make personal sacrifices in the interests of children. Thus, an apparently neutral determination of a child's best interests may in reality be a device for overriding the interest of adults, in this case women. This may simply be another way of saying that the interests of women and children, though frequently coincidental, may on occasions diverge or even become directly opposed.[81] In so far as these writers alert us to these potential conflicts of interest they perform a valuable service. Yet behind their arguments may lie a value judgment that, in the event of a clash, the interests of women should receive priority over those of children. The difficulty in finding an acceptable way of meeting the public interest in the family is to discover a neutral mechanism for accommodating the competing interests of individual members which avoids the polarisation of views which is arguably a characteristic feature both of some feminist writing and of the work of father's rights organisations. It is an intractable problem of family law that the interests of women or men may always be dressed up in the guise of children's interests. Anyone, for example, arguing for recognition of the parental status of men runs the risk

78 For a recent critique of the Critical Legal Studies contribution to family law see Eekelaar, *op cit* note 2.

79 O'Donovan, *op cit* note 1, at 11 *et seq.*

80 Discussed by Dewar, *op cit* note 2 at 4–7.

81 Conflicts of interest between women and children can come to a head where the mother wishes to emigrate with the children thereby cutting them off from any effective involvement with their natural father. Most of the reported cases have allowed the immigration and supported the mother's freedom of choice – see, for example, *Lonslow* v *Henning (formerly Lonslow)* [1986] 2 FLR 378 and *Belton* v *Belton* (1987) 2 FLR 343. The recent decision of the Court of Appeal in *Tyler* v *Tyler* (1989) 19 Fam Law 316 suggests that the tide may be turning.

of being accused of being anti-women.[82]

A particular manifestation of this strand of feminist thinking is its opposition to the growing phenomenon of joint custody.[83] In the general preface to a recent collection of feminist essays on child custody, edited by Smart and Sevenhuijsen,[84] two modern approaches to the respective roles of men and women are identified. The first is described as the 'optimistic scenario' in which fathers become more involved in child care and conflicts over custody are resolved by changing legal procedures to give fathers greater legal 'rights'. The second or 'pessimistic scenario' involves the suspicion that the law may impose a model of shared care on separating couples irrespective of the degree of actual involvement by the father and that this will perpetuate the power of men over women which existed before the family breakdown. In short, the autonomy of women will be curtailed by external male intervention. It is also pointed out that the traditional English form of joint custody enables men to exert decision making power without accepting the responsibility of providing physical care.[85] The essays are dominated by adherence to the 'pessimistic scenario' and by denial of the emergence of the 'new father'.[86]

Julia Brophy, in her offering on the English position, criticises the recent reforms as conforming to this perspective.[87] I disagree fundamentally with her interpretation of the statutory provisions and her predictions for their operation in practice. It is my opinion that feminists will have much to celebrate when the legislation is implemented. Brophy alleges that the Law Commission's proposed legal framework, which forms the basis of the 1989 Act, was grounded in the concept of 'time-sharing' of child care following divorce and support for the notion of co-parenting. She argues that this concept ignores the realities of the organisation of child care in most families in which the burden falls disproportionately on women. She also argues that 'a legal presumption based on the notion of existing co-parenting may simply be a presumption to continue substantial inequalities of power and responsibilities'.[88]

The difficulty with this view is that it elevates to the level of a legal presumption what is at best an underlying philosophy of the legislation. In fact, the Act contains no such presumption in favour of co-parenting, time-sharing, joint custody or anything else. The Law Commission specifically rejected the introduction of a statutory presumption in favour of a form of joint custody embracing time-sharing. It took the view that this would be generally unworkable in England. It is also difficult to see how the removal of any right of consultation (previously thought to be a feature of joint custody) and the veto exercised during marriage can be said to result in the 'up-grading' of the non-residential parent's position which Brophy argues is likely to be a general effect of the legislation.[90] On the contrary, it is a distinct down-grading. The most likely practical outcome, it is suggested, is that parents will continue to agree in droves that mothers should have sole responsibility for the post-divorce care of children.[91] There is nothing in the legislation to prevent them

82 I have taken this risk on two occasions. See *op cit* note 16, chap 2 and 'When is a parent not a parent? Reflections on the Unmarried Father and his Child in English Law' (1989) 3 Int J of Law and the Family 208.

83 The expression is used here in the non-technical sense of any arrangement whereby legal or physical custody is shared between two parents who are no longer cohabiting.

84 *op cit* note 48.

85 This is not a new argument. See, for example, Anne Bottomley, 'Resolving Family Disputes: a critical view' in M.D.A. Freeman (ed), *The State, the Law and the Family* (London & New York: Tavistock, 1984) at 298.

86 On this see also Charlie Lewis and Margaret O'Brien (eds), *Reassessing Fatherhood* (Sage Publications, 1987).

87 Julia Brophy, 'Custody Law, Child Care and Inequality in Britain', *op cit* note 48 at 217.

88 *ibid* at 233.

89 Law Com No 94 (1986), paras 4.45 to 4.46.

90 *op cit* note 87 at 228 *et seq*.

91 The point has been well made by Eekelaar that the current prevalence of sole custody in favour of mothers is at least as attributable to agreements between parents as it is to any apparent maternal preference on the part of the judiciary. See John Eekelaar, *Family Law and Social Policy* (London: Weidenfeld & Nicolson, 2nd ed 1984) at 79–80.

from doing so or to suggest that the courts should be unhappy with this type of agreement.

What is striking about the work of the Law Commission and also some feminist works is the way in which this large scale evasion of parental responsibility is viewed with apparent equanimity. For Brophy, any change in parenting roles at the point of the marriage breakdown can only be acceptable when radical changes to the organisation of child care during marriage have been effected by, for example, the introduction of comprehensive public child care provision and changes to existing employment patterns.

It may readily be agreed that the existing socio-economic structure of British society militates against the adoption of equal parenting roles within the context of a functioning family. It is incontestable that women are frequently expected to take low paid part-time employment with a built-in expectation that they are the primary providers of child care. Conversely, men are expected to act out the role of breadwinners in full-time employment and not to assume any responsibility for daily child care during the working week. The reality in many families is that the man who might conceivably wish to assume a co-parenting role will find it difficult (if not impossible) to do so. The failure of the 1989 Act to institute a national plan for comprehensive nursery provision, in line with most other European countries, may certainly be criticised.[92] But it does not follow from any of this that we must accept Brophy's view that legal reform should be contingent upon a sea-change in socio-economic policy or parental patterns of behaviour during marriage. It may just as validly be argued that it is a function of law to seek to influence and shape attitudes to the respective roles of parents both during marriage and following divorce. As the Law Commission has said, it is 'an important function of law to provide a model of behaviour which is generally believed to be desirable'.[93] While there may be legitimate disagreement about the efficacy of law in influencing social attitudes (in this case parental behaviour) it is surely right that legislation affecting the family should hold up some normative standard of what society regards as good practice in child-rearing. I do not, therefore, criticise the Commission's attempt to assert the value of dual parenting, the responsibility of parents or the notion of a continuing status of parenthood. But I doubt the seriousness of the attempt in view of the failure to underscore it with the kind of provisions which would have a chance of pushing towards the realistic achievement of co-parenting in practice.

If real progress is to be made towards genuine dyadic parenting men and women, and society in general, must be persuaded of the equal parental roles of fathers and mothers. One way in which law might conceivably assist this process is by the consistent use of gender-neutral terminology in legislation affecting the family. The search for gender-neutral solutions to the problem of child custody has caused some feminists to argue for a 'primary carer' principle. According to this, custody decisions should give effect to the status quo by reinforcing the legal position of the parent who already has physical care of the child. Although in most cases this would be the mother, there would be instances in which the father would have primary care. Thus, Smart has argued that the principle would 'give benefits to those who do the caring without imposing any inflexible set of norms which presumes that only women can or should be the primary carers'.[94] It would not, she says, confiscate the rights of men who would be in a position to alter their behaviour in relation to child care, which would in turn alter their legal position.

A number of responses may be offered. The principle, while in theory encapsulated in gender-neutral terminology, would in practice be bound to favour women massively precisely because of the existing pattern of child care. In fact it would take us no further than current practice which strongly favours preservation of the status quo through the

92 The Act gives local authorities a wide discretion in deciding what provision to make for day-care but does at least place them under a new statutory duty to keep day-care provision in their areas under review. See s 19.

93 *op cit* note 60.

94 Carol Smart, 'Power and the Politics of Child Custody' in Smart and Sevenhuijsen (eds), *op cit* note 48, at 24 *et seq*.

imprimatur of sole custody orders in favour of mothers.[95] It makes no allowance for the possibility that it may be in the interests of children for the status quo to be disturbed on marriage breakdown. It is a principle which strongly suggests that its adherents are content to allow existing practice to continue without any attempt being made to change it. The principle appears to be grounded in the notion that *exclusive* parenting is in the best interests of children. Whether the primary carer is the father or mother, it assumes that there must be a primary carer and a second parent with either no role in upbringing or a significantly reduced one. In short, it is antithetical to the very idea of dual parenting. While the principle recognises that some men are involved with child care, it seeks to restrict legal recognition of their rights/responsibility to situations in which women are not asserting their own parental role. Given the well-documented social and economic disadvantages which can attend single parenthood,[96] it is surprising to find some writers in effect promoting this model of child care following divorce.

A better gender-neutral concept in my view is quite simply the concept of 'parenthood' which the 1989 Act ostensibly supports. This can be applied equally to men and women, and by using it, it is possible to avoid references to 'fathers' or 'mothers' and the sexual discrimination which this might imply. The attempt in the 1989 Act to distinguish between different fathers (i.e. married or unmarried) is a particularly glaring example of legislative discrimination, both between men and women and between different categories of men in their role as parents.[97] I have argued elsewhere that the failure to assimilate the legal position of unmarried fathers with that of other parents is an impediment to the intended establishment of parenthood as a primary legal concept and to the abolition of illegitimacy.[98] It must be conceded that legislative change cannot of itself convince anyone of the sexual equality implicit in parenthood but it could at least give expression to societal expectations of parental co-operation. To persist with statutory references to 'fathers' and 'mothers' may only serve to underline the schism between feminism and the supporters of fathers' rights. Concentration on parenthood recognises the equality of two parents and at the same time affirms the child's interest in both of them. It ought to make it more difficult to align the child's interest with either father or mother. Without this commitment to parenthood as a unifying concept there remains the danger that children will continue to occupy an uneasy position in the power struggle between the sexes.

4. The Confluence of the Public and Private

One of the central aims of the reformed legislation is to bring together and collect in one statute as much as possible of the public and private law affecting children.[99] It is hoped that this will make for a more coherent and comprehensible system. An important element in this process is the intended harmonisation of public and private law at both the substantive and procedural level. A total fusion would be out of the question since state intervention in family life is of its nature quite different from private disputes between individual family members.[100] The process which will be brought about by the 1989 Act is probably more accurately described as one of confluence. The detailed aspects of public and private law will remain distinct but the two streams are intended to run together through the equal application of the fundamental principles enshrined in Part I of the Act in public and private proceedings. Both types of proceedings will be 'family proceedings' for the purpose of the Act.[101] In addition to common principles, the Act will make available common

95 *op cit* note 58.
96 See M. Finer, *The Report of the Committee on One Parent Families* Cmnd 5629 (1974).
97 s 2(1) and (2).
98 *op cit* note 82.
99 See generally Law Com No 172 (1988), Part I.
100 This was recognised by the Law Commission, *ibid* para 6.28.
101 See s 8(3) and (4).

remedies so that orders normally associated with private disputes will be available in public proceedings and vice versa.[102] It is also intended that the legal effect of public and private orders will be assimilated.

I want to suggest that this alignment of public and private law is more in the nature of a 'take-over' of the former by the latter than the neutral application of common principles. The harmonisation of the two will be brought about largely by importing the non-interventionalist values of the private sphere into the public procedures for child care. If we prefer to use the concept of the public interest, it can be said that the public interest in the welfare of children is going to be identified more closely than ever before with state support for families and non-interventionism whether through the court or other social welfare agencies.

The Act reiterates and reaffirms 'the welfare principle' as the cardinal principle in child law[103] but in effect superimposes upon it the 'non-intervention principle'.[104] In 'private' proceedings I have sought to argue above that the clear implication of this juxtaposition of the two principles is that where parents can agree the courts and parliament should stand aside and allow them to give effect to their own conceptions of the best interests of their children. But the Act does not stop here. This emphasis on parental agreement will now become an important feature of 'public' procedures. In addition to the non-intervention principle (which will also apply in care and related proceedings) the Act conceives of a 'voluntary partnership' between parents and the state.[105] A range of provisions sharpen the distinction between voluntary and compulsory procedures for child care. Some of these were long overdue and extend basic procedural protections to parents when faced with state intrusion.[106] Yet others arguably go to an inordinate length in defending the parental position. Thus, where a child is being voluntarily looked after by a local authority, parents will no longer be required to give any period of notice before physically resuming control of the child.[107] The reasoning is that the voluntary nature of the service must be preserved, but it is doubtful whether this kind of summary removal, without adequate preparation, would be in the interests of the child concerned. Parents must now be consulted and their views taken into account before any significant decision is taken by an authority and this applies even where a child is formally 'in care' by compulsory order of the court.[108] Where the arrangement is voluntary this is readily understandable since the authority's powers are dependent on parental delegation. But it is surely more questionable that authorities should have to share parental responsibility with parents from whom a child has been compulsorily removed.[109] Criticism that this might interfere with the

102 Thus a care or supervision order may be made during the course of private proceedings while a residence order will be available in 'care' or public proceedings. This interchangeability of remedies is a novel feature of the legislation and may be contrasted with the trend elsewhere towards procedural exclusivity in public and private law. See H.W.R. Wade, *Administrative Law* (Oxford: OUP, 6th ed 1988) chap 18.

103 s 1(1) expresses the child's welfare as the 'paramount' consideration in proceedings relating to the upbringing of the child or the administration of his property. It replaces the 'first and paramount' formula previously contained in Guardianship of Minors Act 1971, s 1. No change of substance is intended.

104 This is because the welfare principle cannot come into operation at all unless the court is called upon to determine an issue affecting a child, but the non-intervention principle may result in the court having no issue before it.

105 The 'voluntary partnership' principle was a central feature of the DHSS *Review of Child Care Law* (1985) which formed the basis of the reforms to the public law affecting children now particularly incorporated in Parts III and IV of the 1989 Act.

106 These include extending party status to parents in care proceedings, the abolition of administrative resolutions assuming parental rights without a judicial hearing, and reducing considerably the length of time during which a child may be kept away from home under an emergency order.

107 Previously 28 days' notice was required where a child had been in care for 6 months or more under Child Care Act 1980, s 13(2).

108 See note 54.

109 This represents a significant change from the previous law, at least in theory. Under Child Care Act 1980, s 10(2) the effect of a care order was to vest parental powers and duties exclusively in the local authority.

statutory responsibility of authorities[110] led to an amendment conceding that parental powers should not be exercised in a way which is incompatible with the authority's plans.[111]

All of this illustrates the deference which the Act accords to parents' wishes. The dominant ethos of the legislation is the supremacy of parental preferences and the identification of the welfare of children with these. It might of course be argued that parents are themselves subject to the legal limitations of the welfare principle, i.e. that they are required in law to exercise their responsibility in the best interests of their children. I have argued elsewhere that without external superintendence or control, this is a meaningless restraint on parental power.[112] The welfare principle has in reality been hijacked by non-interventionism.

5. Conclusion

I have argued here that the non-interventionist stance taken throughout the 1989 Act indicates not an absence of a public interest in children but a privatisation of that interest. The public interest is deemed to be served by allowing parents to decide among themselves the extent to which they wish to provide for, or contribute to, the upbringing and socialisation of their children where their own relationship has broken down or where public intervention in the family has proved necessary. It is my contention that this is liable to result in *exclusive* or *independent* parenting remaining the norm in the post-breakdown situation and not the dual parenting which was ostensibly supported in the process of reform leading up to the enactment of the legislation. Moreover, this exclusive parenting is likely to fall as much (if not more) on women as was the case before the Act. The social values reflected in the legislation are predominantly those of support for the autonomy or liberty interests of adults, in this case parents, to order privately their family relations. Beyond this there is no attempt in the Act to identify a distinctive societal view on which child-rearing practices are best for children. Neither parents nor the courts are given any statutory directive about what is the optimal arrangement for child care in given circumstances. It would perhaps be unduly churlish to describe this as a 'parents' charter' but it is certainly arguable that concern for the independence of parents has resulted in a devaluation of the independent interests of children and the role of the state in protecting these.

110 See, for example, John Eekelaar, 'Parental Responsibility for Children in Care' (1989) 139 NLJ 760.
111 s 33(3)(b), which enables the authority to determine the extent to which a parent or guardian of a child in care may meet his parental responsibility for him. Nonetheless, responsibility is still shared between the parent or guardian and the authority.
112 *op cit* note 16, at 214.