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A Response to M. Baker, ‘Lingering concerns about child custody and support’, *Policy Quarterly*, 4 (1), March 2008

Professor Maureen Baker talks of ‘lingering concerns’ about child custody and support (Baker, 2008). Baker raises some valuable points. There are ongoing concerns about policies in these areas, and it is most helpful that she attempts to stimulate discussion on the issues. I would like to respond firstly by giving a context for discussion, and then by considering her perspective in more detail.

Context

Any discussion on current policy issues, such as child custody and support, takes place in the context of existing debate. Writers on policy process frequently describe this debate as either competition between competing interests, or dominance of a particular perspective. Considine writes, ‘Problems are usually defined by interests, and often by the most powerful and persistent among them’ (Considine, 2005, p.30). Framing is a recognised dimension in such power games, with numerous ‘modes of policy argumentation’ (Dunn, 2004, pp.394-418), few of which are based on rigorous evaluation of evidence. For both strategic and practical reasons, usually few alternative policy options are considered (Bosso, 1994). Historical institutionalism suggests a momentum whereby developments in one direction tend to lead to further moves down the same track or expansion of the same institutions. Issues achieve traction and can then be overlaid at the cost of competing issues or group interests (Colebatch, 1998; Considine, 2005; Hudson and Lowe, 2004; Sowell, 2004).

Language is one of the tools used in the struggle for dominance in policy debates, including in relation to the issues Baker focuses on (Curran, 2006; Fairclough, 1995, 2001; Fiske, 1989). Fairclough, writing on critical discourse analysis (CDA), refers to ‘ideological-discursive formations’ (IDFs) (Fairclough, 1995, p.40). If an IDF dominates, it may be seen as the sole

and natural way of viewing a set of issues. If so, alternative views may be considered biased, ideological and iconoclastic. ‘Naturalization gives to particular ideological representations the status of common sense, and thereby makes them opaque, i.e. no longer visible as ideologies’ (Fairclough, 1995, p.42). Wolf (2007) also makes the point that false information can prevail because it conforms to a prevalent stereotype. The end result will be a partial description emphasising a dominant group’s preferred issues and perspectives.

It should also be noted that in policy research and debate a common approach is to classify people in groups (men, women, sole-parent households, etc.), and then to generalise about the members of those groups. Should separated and never-partnered mothers be grouped together as if they are the same, for example? Not only are there potential aggregation problems such as this, but also, grouping is not a neutral procedure, as it can affect both perceptions and choice of policies. Tyler, in his article on procedural justice, refers to ‘social categorization’ and its impact on views about the treatment of others: ‘we find that people are less concerned about justice when they are dealing with people who are outside of their own ethnic or social group’ (Tyler, 2000, p.123). Hargreaves-Heap and Varoufakis (2002) found that random allocation of people to groups followed by provision of information on these groups could result in distinct group behaviours and the development of perceptions of the characteristics of the groups.

A general basis for assessment of policy debate

The literature outlined above suggests that there may be inherent biases in policy discourse. It may be possible to identify or limit these, at least in terms of analysis of the debates. To this end,

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it may be helpful to consider three dimensions. First, as policy changes affect the future, is the debate looking at future problems, or those from the past? Second, as policy changes affect different sections of the population differently, are all affected sections being considered? Third, as policy changes alter the environment, is consideration being given to people's reactions to the changed environment and differing incentives?¹

These three dimensions are basic, and arguably essential for any reasonably comprehensive assessment. They are not routinely incorporated in policy discussion, and are frequently missing from policy analysis. Recently in New Zealand there

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has been some attempt to make improvements in this area through regulatory impact analysis (Regulatory Impact Analysis Unit, 2007a, 2007b).

Taking these three dimensions as a starting point, the information in Baker's paper and the issues she raises are useful, but there are limitations. She bases her analysis and recommendations on past data, with simple extrapolation into the future, assuming no major structural or behavioural changes. Her description of the past generalises without clearly describing differences between countries and developments over time. Baker focuses on sole-mother households despite acknowledging that many mothers re-partner, and gives limited consideration to fathers and their relationship to their children. Her concern about fathers who want to change caregiving arrangements implies that a one-off decision should meet the best interests of children for the remainder of their childhood. But this approach does not consider the incentive or disincentive effects of past, current or proposed policies on behaviour, such as relationship and family formation and stability, childbearing, child rearing and socialisation, and broader lifestyle and career decisions. The importance of current policies and outcomes as signals that may influence others' life decisions is not really addressed.² Baker's paper should therefore be seen as initiating debate, rather than a comprehensive assessment. This may be due in part to her compliance with a dominant, naturalised representation, in which case the need for wider debate may not be immediately apparent. If so, the following more detailed discussion should indicate some of the aspects that merit more attention.

Consideration of Baker's points

Baker's paper concludes her discussion of concerns with seven 'findings from the research'. Six of the seven points are

financial, with the other being on partner violence. Shared parenting is not listed, although the second sentence of her paper refers to 'continued love and support of both parents'. The paper's focus is really on financial support. The author mentions the United Nations Convention on the Rights of the Child (UNCROC) and 'supporting one's children', but does not spell out the implications of UNCROC's use of the phrases 'direction and guidance' (article 5), 'the right to know and be cared for' (article 7), 'direct contact ... on a regular basis' (article 9), 'respect the rights and duties of parents...to provide direction to the child' (article 14), 'both parents have common responsibilities for the upbringing and development of the child' (article 18), and 'development of respect for the child's parents' (article 29). It is clear from these that compliance with UNCROC requires more than enforcement of payments from one parent to the other.

Baker's paper 'focuses more on mother-led households', but it seems that the focus is entirely on those households. In part, Baker justifies this by the fact that few children live with their fathers post-separation. Society does not take this view when considering the proportion of MPs or company directors who are women. Presumably, Baker does not see children's loss of a close relationship with their fathers as a problem, either for individual children or as a wider social issue.

Baker's discussion is on the 'post-divorce family', but many 'sole-parent households' involve a parent who never married, and many separated parents find a new partner. Should all types be grouped together? Moreover, her use of households and household data should really be qualified to acknowledge the failure of the data to accurately reflect inter-household financial transfers and people spending time in more than one household. This was discussed in detail in Callister and Birks (2006), which she cites, but she misses its significance.

Unilateral divorce is addressed from the perspective that 'wives can no longer delay court proceedings to negotiate a better financial settlement, as some did in the past'. This is a particularly narrow perspective on a complex issue, especially as there is always potential for court delays, and many women initiate divorce against the wishes of their partners (and perhaps their children). From a father's perspective, women can unilaterally and with the backing of the Family Court deny them their fiduciary rights which enable them to fulfil their parenting responsibilities to their children (Hubin, 1999).³

There are some factual errors in the paper. Parenting plans are discussed under reforms in the 1980s, but New Zealand brought them in with the Care of Children Act 2004. It is also stated that joint custody/guardianship refers to legal, not physical, custody. In New Zealand, guardianship as long ago as the Guardianship Act 1976 gave legal responsibility and applied to all parents if married, or if living together at the time of birth. Joint custody in New Zealand referred specifically to physical custody and is included in today's shared day-to-day care. On her claim that it has become more prevalent since

the 1980s, in the second half of the 1980s about 7–8% of cases in New Zealand courts resulted in joint custody.⁴ No data were collected after 1990 until the recent release of data on award of day-to-day care covering July 2005 to June 2006.⁵ The data show little change in the proportion of father-only care, with 11% being shared mother and father. This figure is qualified by a note:

Shared day-to-day arrangements may vary. Any order made which grants some day-to-day care responsibility to more than one of mother, father or other party to the child, is classified as a shared arrangement, *no matter the nature or frequency of day-to-day care granted to each party.*

In other words, many of these cases would not have met the joint custody criteria of the earlier data. The data are not strictly comparable, and may even conceal a fall in shared care.

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Citing an Australian Institute of Family Studies publication, Baker makes the claim: ‘legislators have argued that linking father-child contact with child support is not in the best interests of the child’. They may have done, but there is adjustment in the New Zealand formula when both carers care for a child for over 40% of nights, and the Australian formula was more accommodating. The Australian formula is due to change from 1 July 2008, taking more account of this and other issues. In particular, the new formula will ‘Recognise the costs of care for both parents’.⁶ As New Zealand has always shared policy solutions with similar countries, perhaps New Zealand can learn from this also.

Baker could have explored further some aspects of the workings of family law. For example, on the issue of custody it is stated, ‘Fathers typically become the non-resident parent’ and that ‘Both parents usually agree with this arrangement’. This ignores the ‘shadow of the law’, whereby people are aware that they will be subject to a court decision if they fail to reach an agreement. If the court is seen as favouring mothers, agreement may be reached giving most of the time to the mother. Moreover, the Family Court has claimed that shared care cannot work when there is conflict. This creates a catch-22 situation whereby if a father goes to court for more time there is immediately a conflict, meaning that he may well receive *less* time than he already has (Birks, 1998). Baker is repeating a point asserted by several people closely associated with family law. It is hard to believe that none of them are aware of the weak reasoning. Moreover, court decisions are based on the situation at the time of hearing, with interim arrangements being made on little or no evidence. The process itself may determine the outcome.

Baker also states, ‘After divorce ... only one third [of fathers] are highly involved in ... [their children’s] care and

upbringing’. Here and elsewhere it is assumed that there is one decision and one outcome, rather than consideration being given to the effect of the passage of time. Under the wrong conditions, parent-child relationships can gradually erode or be undermined. The likelihood increases with time. Rather than just discount many relationships, should consideration be given to ways of strengthening them? Baker is not showing much awareness here of fathers’ perspectives. She sees it as a problem when fathers ‘change their minds’ and want more contact, presumably not realising how circumstances can change.

No discussion of gender issues seems complete without mention of partner violence (sometimes referred to as ‘domestic violence’). Baker voices disquiet at a ‘common judicial response to allegations of domestic violence’. She calls for allegations to be taken more seriously, but the dominant view of domestic violence is that it is almost entirely by men against women and children as an expression of patriarchal power and control. The context section of this paper may indicate why such a view has come to dominate, but there has been strong evidence for many decades that this view is a misrepresentation (Collins, 2006; Fergusson, Horwood and Ridder, 2005; Straus, 1993). Straus presents findings suggesting that about 50% of partner violence is mutual, with about 25% being man only and the other 25% being woman only. At the least this means that in two-in-three cases of partner violence by a man, the woman is also violent. Moreover, Pearson’s coverage of women’s violence includes a detailed description of women’s use of ‘indirect aggression’, whereby they use others (including the police and the courts) to act on their behalf (Pearson, 1997). Allegations of violence could be very effective if used in this manner, especially if there are no penalties for false allegations.

Baker makes an unsupported claim about ‘the gendered nature of ... unpaid work, which creates economic inequalities between partners that continue after separation’.

The highly gendered representation of partner violence may fit the model of an IDF to support a wider policy agenda. Other aspects of language on family issues may also shape perceptions. Consider ‘sole parent’, ‘absent parent’, ‘batterer’, ‘abuser’ and ‘victim’ (along with the claim that you should not ‘blame the victim’), and now, apparently, ‘fading fathers’, along with ‘weekend parents’. There is also a ‘social parent’, or a ‘person in a parenting role’, a social in place of a biological construct effectively excluding many biological parents (Hodgson and Birks, 2002).⁷

Baker makes an unsupported claim about ‘the gendered nature of ... unpaid work, which creates economic inequalities

between partners that continue after separation'. A classic overstatement of this point that has often been quoted is Weitzman (1985). However, this has been discredited (Faludi, 1992; Peterson, 1996). Even stronger research evidence to the contrary comes from studies that consider various actual payments and expenses faced by separated partners (Braver and O'Connell, 1998; Rankin, 1999).⁸

Baker's point that 'Child abductors are often portrayed as non-resident fathers ... but most Hague Convention cases involve mothers' may be easily explained. Women can go to a Women's Refuge without being labelled child abductors, whereas men have no such option. In other ways also, the author's claim that there are 'gender-neutral laws and programmes' does not bear closer scrutiny. There are the gender-specific 'male assaults female' and 'battered women's syndrome'.⁹ In addition, gender-neutral language may be used to achieve gendered objectives. The submission by lawyer Mary Capamagian to the Ministry of Justice's Review of Laws About Guardianship, Custody and Access in 2000 included the following suggestion:

Change the law so that if separated (or separating) parents cannot agree on which parents should have custody, it be prescribed that one parent, having a certain qualification, have custody. I suggest that the qualification be that the younger parent be automatically the custodial parent. Some of my colleagues think that the mother should be the custodial parent ... I suspect that designating the mother as the qualifying parent would be politically unacceptable, hence my suggestion that the younger parent qualify.

This suggests both that there are lawyers who believe that custody should be awarded to the mother, and that laws may be specified in gender-neutral language while still aimed at achieving gendered outcomes. Such an approach is actually incorporated into existing child support legislation. The Child Support Act Working Party (1994) asserted that the legislation was not gender-biased as it was expressed in gender-neutral language, while stating that the formula did not consider the custodial parent's income because '84% of lone parents are women' (Child Support Act Working Party, 1994, p.24).

Conclusion

Professor Baker's focus is clearly on existing mothers, and is based especially on those in 'lone-parent households'. Implicit in her discussion is a picture of fathers where parents live apart. The discussion assumes that the fathers all lived with the mothers at some stage. While the author does not give a father-focused perspective, she does say a lot about fathers. They are described somewhat unfavourably in broad generalisations, such as being:

- commonly not highly involved in their children's lives, with many showing little interest;
- potentially abusive, the source of domestic violence;
- less important because children are less likely to live with them;
- getting better financial settlements because mothers can no longer delay court proceedings;
- generally happy with existing custody and access

arrangements;

- relevant for financial support, but little else;
- preferably paying through an agency 'to avoid parental contact or conflict';
- some avoiding child support obligations or being identified as fathers (but she makes no mention of mis-specification of paternity or paternity fraud);
- changing their minds after legal custody and access arrangements are confirmed in court;
- unwilling to partner 'welfare mothers', re-partnering with younger women, not being around as old men;
- meriting restrictions on international travel if there are 'unmet family obligations';
- favoured by the gendered nature of paid and unpaid work (there may be economic gains, but there are costs also, including a reduced chance of ongoing relationships with their children);
- giving problems if they are avoiding their obligations;
- overlooked in family comparisons because a person living alone is not considered a family type.

Baker has raised some concerns about some fundamental and far-reaching policies, but her discussion reflects the current dominant frame. It therefore gives a narrow perspective. For example, female violence and abusive behaviour is ignored, and, while mentioning the best interests of children and their wish for an ongoing relationship with both parents, Baker does not give much weight to this. Although Baker sees problems with child support, these do not include the issue of accountability for the use of money, or even whether it is actually spent on the children. She says nothing about future behaviour patterns in response to policies and their associated signals. In particular, the author does not consider the impact on future generations of adults of the implicit perspective on, and treatment of, fathers. We are not seeing the issues as comprehensively as we should. This may be a common problem. To quote the historian G M Trevelyan (1948, p.218):

The amount of noise made over economic and social change is determined, not by the extent and importance of the changes that actually occur, but by the reaction of contemporary opinion to the problem.

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- 1 A fourth question could be added, namely, if current policies affect future policy developments, what further policy developments might be anticipated?
 - 2 There is a significant signalling dimension associated with law changes on relationship and family formation and breakup (Rowthorn, 2002). People who have already made a commitment have limited scope to adapt, but others are not so constrained. Judges also commonly use sentencing to give signals about the acceptability of behaviour. People respond to signals as they are acting 'in the shadow of the law'. This is discussed below.
 - 3 This highlights an alternative perspective to the somewhat derogatory and dismissive reference to 'fathers' rights' sometimes observed (Kaye and Tolmie, 1998; Nash, 1992).
 - 4 Parliamentary Question for Written Answer 9879 (1995).
 - 5 Parliamentary Question for Written Answer 9643 (2006).
 - 6 <http://www.csa.gov.au/agency/formula.aspx#changing>
 - 7 We could speculate on society's reaction if mothers were told they were not needed by their children (except as financial contributors) because other women were acting as 'social mothers'. To go a step further, might such mothers' protests be considered selfish attempts to maintain power over their ex-partners against the best interests of their children?
 - 8 One fundamental data distortion is that household income figures are not reduced to account for child support paid to another household. There is also commonly no adjustment when a child's time is split between two households.
 - 9 Battered women's syndrome, whereby women can behave irrationally due to their circumstances, was considered in an unpublished Law Commission report on psychological syndromes, but the report omitted parental alienation syndrome, whereby children have an irrational dislike of an alienated parent (New Zealand Law Commission, 1997).

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