A birth certificate is not a biological property title

Has an insidiously persistent idea finally reached its use-by date?

Jim Poulter

Particularly in western societies, the notion that children are biological property has been a strongly implicit idea for many generations. It has therefore also been an idea that has implicitly pervaded our child welfare legislation and practice for generations, despite frequent legal rhetoric about the rights of the child. In this paper, the author traces the negative effects on welfare practice that this notion of children as property has had over the last half century. In doing so, the author calls not only on his professional experience, but also on his personal experience as a foster, adoptive and permanent care parent. Some provisions within the new Victorian child protection legislation are examined to gauge their capacity to address the negative effects on practice of this persistent notion, and reason found for some guarded optimism.

A PERSONAL PERSPECTIVE ON SUBSTITUTE CARE

The idea that children are biological property has existed in some societies, particularly western societies, for many centuries. It is a persistent notion that tends to be implicit, but you nonetheless sometimes hear a parent make the flat proprietorial claim, 'It is my child and I will do what I like with them'.

Unfortunately, this notion of children as biological property has also implicitly underlain our child welfare practice and legislation for many years, and it has continued to have negative impacts on the welfare of children. With the imminent proclamation of new child protection legislation in Victoria, some longstanding previous deficiencies in the legislation have finally been addressed. However, it remains to be seen if these changes are focussed sharply enough to counter the implicit belief that children are biological property.

The intention of this paper, therefore, is to trace the history of this persistent but obsolete idea, and assess if it has yet reached its effective use-by date. However, this will not simply be an academic exercise, as I have a particular bias in the matter. This arises through my wife and I having been foster parents in 1965, before becoming adoptive parents three times, in 1968, 1970 and 1972, then becoming permanent care parents in 1997. These intensely personal experiences over the past forty years have given me the opportunity to see the practice and legislative issues of this field from a consumer perspective, as well as that of a professional worker in the field.

To start at the beginning, when my wife and I originally undertook fostering in 1965, we were warned that *foster parents should not get too close to the foster child, because there is always the plan to reunite them with their birth parents.* We both knew that in respect to the child we were fostering, family reunification was an absurd proposition. She was the youngest in a sibship of then eight children, all of whom remained in State care without any feasible prospect of returning to their birth parent's care. Even back then, problems of 'foster care drift' were endemic and many children remained in foster care without birth family reunification ever being achieved (Hegar 1993:369).

It was at this time of becoming a foster parent that I changed careers, began working in a youth institution and commenced formal studies in social work. My consciousness on issues of substitute care was crystallised when the late Len Tierney talked about how children were implicitly treated as parental property under the law, rather than reinforcing their right to be loved, nurtured and have a secure future. His words had great resonance for me and I quickly came to the realisation that ideas of biological ownership of children did indeed underlie the legislation and practice of the day. The Victorian Welfare Department, in

Jim Poulter
PhD. (Monash), Dip.Soc.Stud. (Melb.), Dip.Crim (Melb.), MAASW
Jim is a sessional lecturer at La Trobe University and Monash University, a member of the AASW Victorian Committee of Management and of the Victorian Branch Ethics Committee.
Email: jpoulter@aapt.net.au

which I now worked, was in fact little more than a lost property office for children whose parental ownership rights had been suspended. Those children not assigned to overflowing institutions were farmed out to foster parents and spent the rest of their childhood waiting for their State guardianship orders to expire. When I explored the issue more deeply, the problem of such children spending their childhood in a State sanctioned version of limbo was one that proved to be common to virtually all western societies at that time (Finklestein 1991: 3).

The Victorian Welfare Department ... was in fact little more than a lost property office for children whose parental ownership rights had been suspended.

CASE EXPERIENCES IN INFORMAL PARENTING

Unfortunately, over the next decade, ideas of biological proprietorship over children actually seemed to strengthen. This was in part due to the earlier formulations of attachment theory which leaned more heavily on concepts of biological bonding (Bowlby 1969:224). This gave rise to an ideological school of thought that a mystical biological bond existed between mother and child that could never be broken. The view was typified by Schneider in 1968 who stated:

> ... relationships by blood are relationships of identity and are inalienable. Birth mothers remain 'mothers' regardless of who raises their children. One cannot have an ex-mother (cited in Gardner 1993: 2).

This paralleling of human attachment to the biological bonding demonstrated in animals earned the school of thought the derisive label of the *Eat the Placenta School* by those who immediately saw its speciousness. Even by the early 1970s then, the idea of biological bonding was rapidly losing credibility and human attachment was already being seen as relating to more than one primary figure (Rutter 1972: 25). Rather than being seen simply as a biologically triggered response, it was now clear that human attachment occurred within a process of 'sensitive responsiveness' of carers (Ainsworth 1979: 1). This strengthening mid-seventies' view on attachment was also buttressed by the emerging conceptualisation of 'psychological family' which was first posited by Goldstein in 1973 (Goldstein, Freud & Solnit 1973: 2).

Within the Victorian Welfare Department of the mid-seventies, however, the ideology of birth parent bonding still strongly prevailed. I became acutely aware of this fact when I undertook some advocacy in some informal parenting cases brought to me in my new role as a municipal social worker with a local council. The first case concerned a drug abusing mother of two toddlers. Four years previously she had asked the next door neighbour to look after her then two-year-old and her newborn baby '... for a couple of weeks until I can get my head together'. Four years on, the mother had now returned, wishing to reclaim her lost property. By this time the children had, of course, been fully integrated into the caring family, with neither child having any memory of their natural mother. In both psychological and emotional terms the children regarded the neighbouring couple as their *actual parents.*

The neighbours refused to comply with the demand of the natural mother to immediately return the children, saying that she would first need to demonstrate her stability and earn the trust of the children again before this could happen. She refused to do this and appealed to the Welfare Department for help. At the same time, the substitute family approached me as the local social worker to help advocate for the children. In communicating with the Department and seeking to freeze the current situation while assessing the natural mother and developing a transition plan, I was informed that the Department supported the natural mother's rights because '... our Department's charter is to reunify families'. I was then advised that the departmental plan was to take the children into care at Allambie while assessing the mother's capacity to care. They would also assess the neighbours as potential foster parents, in case plan A failed. Obviously such a plan took no account of the children's attachment to their current carers and the trauma that would have been involved in expecting such a magical reattachment to their biological parent (Johnson & Fein 1991:407).

I was therefore not about to allow such a mindless disruption to their stability occur and, as back then the Supreme Court was the only avenue of redress, I took the matter there. It is worthwhile noting that S.169 of the new *Children Youth and Families Act 2005* mandates 'stability plans', but thirty years ago this was a foreign concept. Fortunately the matter was urgently heard by the Supreme Court, which duly agreed that the Department's plan was a needless disruption to the stability of the children. The court considered that psychologically and emotionally the children were integrated into the caring family and this therefore overrode any proprietorial claims of the natural mother. The children were accordingly made Wards of the Victorian Supreme Court, with custody being granted to the neighbouring couple. What the Supreme Court effectively found was that the children had two sets of parents with competing claims, the *birth parent* and the *actual parents.*

I struck a number of other cases of informal parenting in my time in municipal welfare, none of which came to the attention of the Welfare Department. These usually involved grandmothers taking grandchildren from their daughter's

care, when the daughter's lifestyle was placing the child at risk. Other cases involved long-term, informal placement with biologically unrelated 'aunts and uncles'. One other case, however, involved a two-year-old son of a single father who left him in the overnight care of a mate's parents. He then turned up again ten years later seeking to reclaim his lost property. The boy, of course, did not know him from a bar of soap and wanted no part of this demand. When I counselled the natural father, he fortunately saw sense and rather than just trying to repossess his son, he instead opted to try and re-establish a relationship with him.

Informal parenting in the Aboriginal community

During the late 1970s and early 1980s, I was closely involved in service development within the Aboriginal community for a federal department and, again, I became aware of many informal parenting situations. However, the cultural differences I observed on the way in which children tended not to be viewed as biological property helped sharpen my views. There is a traditional Aboriginal concept of parenthood as primarily a spiritual relationship, rather than a biological one, and the legitimacy of child self determination is strongly emphasised.

These attitudes bestow some advantages onto the stability of informal parenting arrangements and this is perhaps best illustrated in the following anecdote. In the early 1980s I was visiting a Koorie family where the couple were caring for ten children they were not biologically related to, as well as their own four children. I had called there in the early evening for a 'cuppa' and a chat when there was a knock at the door. The mother of two of the children being cared for had arrived. She was somewhat belligerently the worse for drink and demanded the immediate return of her two children.

There was no angst in response and she was simply invited in, given a cup of tea and the two children fetched. They were then impassively informed that their mother wanted them to go home with her. The children were also completely impassive in the face of this situation and both simply said, 'No, we want to stay here'. Their mother was crestfallen and her belligerence immediately dissipated. She nodded in agreement to the children, said goodnight to them, finished her tea, thanked the carer for continuing to look after her children, and left. It was fascinating to observe how her cultural values did not allow her to impose her will on the children simply to satisfy her own needs. Rather than continuing to treat the children as biological property that she had the right to repossess, the natural mother had heard and respected the views of the children.

The lesson seemed loud and clear to me. It is quite easy for legislation to proclaim that the interests of the child are paramount, but how do societal values shape or even subvert the intentions of the legislation? Concepts of property and property ownership are fundamental to western society, but in Aboriginal society, the more central concepts are of stewardship and belonging. I believe it is values such as these that should become explicit in our child welfare legislation and practice, rather than our traditional implicit notion of biological proprietorship.

Parental rights or parental responsibilities?

It was therefore with these sorts of experiences in informal parenting behind me, that I watched with interest as the Carney review of Victorian child welfare legislation unfolded in the mid-eighties (Carney 1984). At this time, problems of welfare drift and the need for permanency planning were at last being seriously considered. Indeed, the first legislation enshrining the principles of permanency planning had already been passed in the United States in 1980 (Maluccio & Fein 1983: 195).

By the end of the review process, however, it was apparent to me from the type of submissions made by the Welfare Department, that there was still no comprehension of informal parenting issues or how to deal with them. There were no options envisaged to support or strengthen informal care networks within either the Aboriginal or the broader community. Neither was there any recognition of the need for a more accessible legal resource than the Supreme Court to determine issues of custody that fell outside the jurisdiction of the Federal Family Court.

There is a traditional Aboriginal concept of parenthood as primarily a spiritual relationship, rather than a biological one, and the legitimacy of child self determination is strongly emphasised.

Accordingly I organised a seminar attended by actual parents from both the Koorie and wider community for whom the system had no answers. Although it was the very last community consultation of the Carney Review, it fortunately influenced particular provisions of the Children and Young Persons Act 1989. In line with the recommendations of our seminar, the legislation provided a mechanism of regularising these informal parenting situations by way of a Third Party Custody Order (Poulter 1984: 6). Under this provision, members of the community would be able to make direct application to the court for such an order, and it was also envisaged that third party orders could also be a route to Permanent Care Orders.

However, in the protracted time taken to draft, debate, amend, enact, and finally proclaim the Act, there was a

serious attrition of these ideas, with the concept of biological ownership again becoming subtly predominant. For instance, even though the 1989 Act was intended to provide for direct application by a member of the public for such an order, and the 2005 Act adopts the same wording, no administrative forms have ever been designed to allow this to happen. A third party order is therefore only available in cases of protective intervention by the Victorian Department of Human Services (DHS).

To think of parental rights in an unfettered way, without equating it directly to responsibilities, can only mean that we are according some sort of biological property right to a birth parent over a child.

However, the need to regularise an informal guardianship arrangement of a child is not one of the protective grounds provided in either the 1989 or 2005 Act. Similarly, whilst irreconcilable differences with a *carer* is grounds for the making of a protective order, irreconcilable differences with a biological parent who is not the child's carer, is not grounds. Under both the new and the old Act then, the likelihood of emotional or psychological harm therefore seems to be the only feasible grounds of protective intervention, except there is a catch. Although the Act is able to recognise any person with the custody of the child as a parent, the protective grounds would require the court to regard them as *not* being the parents in order to intervene.

This would then place such actual parents in exactly the same boat that all foster parents had been under the 1989 Act, where they were simply viewed as paid agents of the Department of Human Services, not as the actual parents. Fortunately this deficiency of the 1989 Act, in relation to the legal standing of foster parents as advocates for the child before the court, has been rectified in the 2005 Act, but the situation of informal parents outside the Department's purview remains problematic. It would seemingly require the court to first recognise their role as a protective parent in order for them to have standing before the court. The court would, however, then have to deny that standing in order to find the child in need of protective intervention and issue a third party order.

But what actual parent would want to take the risk of participating in such a convoluted decisional process? Obviously any parents in an informal custody situation, where there is no biological relationship with the child, would still be far better off seeking to have their matter heard and determined in the Supreme Court. This situation thus defeats the original intentions behind the legislation of direct community access to the Children's Court in such cases, and also of possible subsequent linkage to Permanent Care Orders.

In many ways, the problems of long-term foster parents and permanent carers are just the same as the informal parenting situations already discussed. These actual parents all go through processes of attachment with their children and the identity of the children becomes integrated with their family. The 2005 Act better recognises this reality and it is clear that many of the improvements have been informed by attachment theory. However, the point remains that the law still does not contain psychological and emotional definitions of family and, as such, it is still likely that it will remain difficult within Victoria to terminate natural parent 'rights' (Scott 1993: 6).

But what are these 'parental rights' we often glibly talk about? If you think about it for a moment, there is in fact no such thing in itself as parental rights. There are only parental responsibilities. The only rights that a parent does have can only flow from and relate directly to the degree to which a parent meets their responsibilities. To think of parental rights in an unfettered way, without equating it directly to responsibilities, can only mean that we are according some sort of biological property right to a birth parent over a child. I therefore believe that, despite the improvements to the 2005 Act, it still remains deficient in this regard. Future legislation should enshrine the principle that parental rights are directly tied in equal measure to the degree to which a parent actually discharges their parental responsibilities.

This lingering view of parental property rights tends to obscure the fact that when children are placed on Permanent Care Orders, it is a clear indication that parental rights have been terminated. This is irrespective of whether or not access conditions for birth parents are included in the order, because access conditions need to be determined around issues of identity and closure, not with some vague notion of biological ownership in mind.

In this regard, it is therefore important to note that similar to the 1989 Act, Section 321(1)(a) of the 2005 Act in fact clearly states that custody and guardianship of the child under a Permanent care Order is made '... to the exclusion of all other persons'. However, even despite the presence of this legal provision since 1989, the idea of biological ownership can be seen to have persisted and influenced departmental practice. This has been no more evident than when a child has in the past expressed a wish to change their surname to that of their permanent care family.

THE IMPLICIT VIEW OF BIRTH CERTIFICATES AS BIOLOGICAL PROPERTY TITLES

My view on this situation is informed by the fact that in 1995, I was charged with the responsibility of clearing the backlog of Permanent Care cases in the Western Region of DHS. Of the 33 cases I took through court during the course of 1995, it was interesting to note that in all but one of the cases, the children used the family name of their carers. The exception was an extended family placement and this continued use of birth name therefore reflected no sense of conflict over identity.

With the children who had come to their placement at a very early age, the assumption of the carer's family name seemed more by osmosis than conscious choice, but with other children it was by active choice. The sense of identity in all children was clearly demonstrated in the fact that, on reaching school age, all had elected to use only the names of their substitute family when enrolling. It was an interesting parallel experience for my wife and me at this very time because our own son, who had only come into our care on his fifth birthday, chose to use our family name when enrolling in primary school only six months later.

All the permanent carers I worked with reported that this common law adoption of their name by the child had been officially resisted by departmental workers. The carers had all been informed, wrongly, that this practice was illegal and could only be done with the active consent of the birth parent. This again reflected my own personal experience at that time in relation to my son. None of the departmental workers seemed aware of the common law rights of the child and carers in choice of name, or to the issues of attachment that were embedded in such a choice.

This issue was brought into closer focus when departmental workers considered whether or not access conditions should be included in a permanent care order. Again, it seemed there was often an implicit view of children as property that lay behind the high frequency of access conditions being sought. This was so even when the child had living memory of abuse and showed no desire to maintain birth parent contact. The permanent carers also frequently noted that if they voiced an opposition to access conditions, they were commonly reproached by workers that their attitude was *unhealthy* and that they were *not dealing with the fact that the child was not theirs.* Fortunately the 2005 Act goes some way to addressing this issue by giving permanent carers and foster parents legal standing and the right to be heard at court as advocates for the child.

However, in the previously existing situation, the views of actual parents were often effectively not heard. It seemed that an implicit view of children as property tended to result in departmental workers not giving sufficient attention to whether termination of access might in fact assist a child's sense of identity or reduce future identity conflict (Poulin 1985:18, Tiddy 1986:56) Certainly there seemed to be inadequate attention paid to the child's need for psychological closure, to mourn losses, resolve issues and move on (Eagle 1990:121). The permanent carers, however, commonly handled the matter by simply ignoring the instruction of the worker. They all simply respected the child's wishes, enrolled the child under their family name and did not raise the matter again with departmental workers. To the credit of the workers, they all subsequently turned a blind eye to the practice.

By the time the court stage was reached in the backlog of permanent care cases I was handling, it was also intensely interesting to note the way the bureaucratic forms and procedures were constructed to subtly reinforce the notion of biological ownership. None of the forms gave any recognition to the child's sense of family identity that had been reflected in the common law assumption of their permanent care family name. Their birth name continued to be used, in effect as a form of property title, on all departmental files and documents. In fact, some of the older children, when shown the documents to be lodged at court, spontaneously expressed confusion and resentment that their birth names were the only ones being used. I therefore immediately tackled the problem by redesigning the informal 'Certificate of Permanent Care' to highlight the child's chosen family name, whilst including their birth name under *'also known as'*. The result was that the children all accepted the new certificates with glowing pride and commonly chose to have them framed and hung in their rooms. It was quite obvious that a certificate only containing their birth names would have been received with indifference, if not disdain.

> *Hopefully, the implicit idea of a birth certificate being a biological property title over a child can at last be seen as a thoroughly outdated notion, inappropriate to welfare practice in the twenty-first century.*

AN UNFORTUNATE IDEA STILL ALIVE AND WELL IN THE 21ST CENTURY

Again this paralleled my own experience with my son when our permanent care order was made in 1997 and I was no longer an employee. At the time of the granting of the order, we were told that the child's birth certificate could not be changed without the birth parent's consent. Such is the power and influence of the Department over its clients that even though I was discomfited by this advice and have a

professionally trained scepticism, I did not think to question it. That is, not until 2004 when we planned a family trip overseas. My son, now fifteen, was disconcerted by the prospect of his passport having to be in his birth name rather than his chosen family name, and that his status was seemingly different to that of his siblings.

I therefore again inquired with the Department about the prospect of formal name change, but the advice was again that birth parent consent was required. This time I was not satisfied and read the permanent care legislation myself. I then extracted my son's permanent care order and, sure enough, the Children's Court form 26 accompanying the order reflected the provisions of now S.321(1)(a) of the Act, that 'custody and guardianship is granted to the exclusion of all other persons'.

My wife, son and I accordingly filled out the name change application forms, highlighted the exclusivity of custody and guardianship on the permanent care order, and presented the documents to the Registrar of Births, Deaths and Marriages. The name change then went through without a hitch. I accordingly then advised the Department that their advice on the necessity of parental consent was demonstrably wrong, and asked that all permanent carers and their children be advised of their rights and the availability of this procedure should they wish to utilise it.

Eighteen months later, having heard nothing, I called to check how the permanent carers had received this advice. I was dismayed to find that the Department of Human Services had in fact withheld the information from carers on the grounds that the Registrar of Births, Deaths and Marriages had tightened procedures again in 2005 to exclude such cases. I was appalled that somehow the Department seemed to think that the exclusive guardianship provisions of the Act did not really mean what it said and they had unquestioningly accepted the right of the Registry to regulate itself above the law. The Department also seemed to falsely assume that it maintained some sort of residual guardianship role in permanent care cases; that is, they seemed to believe they could continue to make decisions on behalf of permanent care parents and need take no responsibility to advocate the interests of this powerless group and their children.

I accordingly made representations to the Minister suggesting that if this was indeed the situation, a legal case should be mounted to test the legislation's exclusivity provisions in the Supreme Court. It was most gratifying to receive a response in due course, indicating that the matter had indeed been investigated closely and appropriate action taken, as the following words from the Minister's reply of 24th August 2006 indicates.

> As you have noted, a permanent care order grants exclusive guardianship of a child to permanent carers, and this status makes them eligible to apply for a change of name for the child.
>
> ... the Registry has always been able to work through matters where there are different views from the birth parents, and it has never been necessary to go to court to seek a ruling. ... I have instructed the Department of Human Services to ensure that regions and community service organisations, including permanent care agencies, are aware of the relevant legislative provisions, and the approach followed by the Registry of Births, Deaths and Marriages.

Therefore, while the 2005 Victorian legislation may not formally denounce the idea of children as parental property, the weight of this Ministerial instruction may help permeate the consciousness of workers within the Department of Human Services as well as the child welfare field generally. Hopefully, the implicit idea of a birth certificate being a biological property title over a child can at last be seen as a thoroughly outdated notion, inappropriate to welfare practice in the twenty-first century. □

REFERENCES

Ainsworth, M. (1979) 'Attachment as related to mother child interaction', *Journal of Advanced Study of Human Behaviour,* Vol. 9, pp. 1-51.

Bowlby, J. (1969) *Attachment and loss, Volume One: Attachment,* Hogarth, London.

Carney, T.R. (1984) *Report / Child welfare practice and legislation review*, Government Printer, Melbourne.

Eagle, R. (1990) 'Denial of access, past, present and future', *Journal of Canadian Psychology,* Vol. 31, No. 2, pp. 121-131.

Finklestein, N. (1991) *Children and youth in limbo,* Praeger, New York.

Gardner, H. (1993) *Who do children in foster care think comprise their family?*, Fourth Australian Family Research Conference, Manly NSW, pp. 1-15.

Goldstein, J., Freud, A. & Solnit, A. (1973) *Beyond the best interests of the child,* The Free Press, New York.

Hegar, R. (1993) 'Assessing attachment, permanence and kinship in choosing permanent homes', *Journal of Child Welfare,* Vol. 72, No. 4, pp. 367-378.

Johnson, D. & Fein, E. (1991) 'The concept of attachment: Applications to adoption', *Children and Youth Services Review,* Vol. 13, pp. 397-412.

Maluccio, A. & Fein, E. (1983) 'Permanency planning: A redefinition', *Child Welfare,* Vol. 62, No. 3, May-June, pp. 195-201.

Poulin, J. (1985) 'Long term foster care, natural family attachment and loyalty conflict', *Journal of Social Service Research,* Vol. 9, No. 1, Fall, pp. 17-29.

Poulter, J. (1984) *Issues in informal parenting,* Victorian Consultative Committee on Social Development, collected papers, Melbourne.

Rutter, M. (1972) *Maternal deprivation revisited,* Penguin, Ringwood, Victoria.

Scott, D. (1993) 'Inter-agency collaboration: Why is it so difficult? Can we do it better?', *Children Australia,* Vol. 18, No. 4, pp. 4-9.

Tiddy, S. (1986) Creative co-operation: Involving biological parents in long term foster care, *Child Welfare,* Vol. LXL, No.1, Jan/Feb, pp. 53-61.