

## IRRATIONAL FAMILY LAW

by David Shackleton

I have been reading with great interest of late about evolutionary psychology [see my review of *The Moral Animal: Evolutionary Psychology and Everyday Life*, by Robert Wright, on page ??? of this issue.) This relatively new science sheds a great deal of light on gender attitudes and behaviours, and has stimulated my thinking about gender into new directions. For example, the comparison I offered in my editorial on page 5 of this issue is built on a foundation of evolutionary psychology. I wrote: “The most fundamental differences between men and women lie in those attitudes that have been shaped by evolution because they were directly related to the survival of our genes. For men, historically, a good genetic survival strategy has been to have as much sex as possible. For women, with a practical maximum of one pregnancy a year, and the issue of the child to care for, promiscuous sex usually wasn’t such a good strategy, but sex with the right guy, the guy who would stay around and help out with the childraising, *that* contributed to the survival of her genes. Above all, once she had the child, she needed to ensure that the child survived to maturity if it was to carry her genes into the next generation. And so women became very focused on children.

“As a result of these pressures operating over thousands of years, men are, to this day, pretty irrational and compulsive about sex, while women tend to be irrational and compulsive about children. And neither gender really gets the attitudes of the other. For the most part, compulsive sexuality (pornography, use of prostitutes, child sexual abuse, rape, etc.) is a male behaviour pattern, and women struggle to understand what it is all about (that is, if they don’t judge it out of hand). And for the most part, compulsive parenting, overattachment to children, is a female behaviour pattern, one which we have yet to recognize as the serious problem that it can be. For a mild illustration of this female irrationality, recall the way that everything stops when a woman walks into an office with a baby, as most of the women gather round, talk about, hold and play with the baby. This fascination with babies has been shaped in women in the same way that fascination with sex has been shaped in men. But today we live in uniquely unbalanced times, and we view the two differently. Men talking about and ogling attractive women is not regarded as benevolent or “evolved” (sic) behaviour, but women talking about and ogling babies is just not a concern. Similarly, pin ups in the workplace are “sexual objectification” or harassment (and typically illegal) today, while baby pictures (which could just as logically be called “emotional objectification”) are regarded as evidence of love and affection. At the moment, it seems to this (male) writer that women’s values have pretty much captured the moral high ground.”

I intend to go further with this contention, and to explore in this article the possibility that this capturing of the moral high ground by female values in our contemporary culture goes a long way to explain the current irrationality of family law.

The preeminent doctrine of contemporary family law is that the best interests of the child(ren) should take precedence over other considerations in a post-divorce settlement. This is so widely accepted as to raise no eyebrows even among those most opposed to family law processes. Of course the interests of the children should come first. The fact that this doctrine actually overturns a thousand years of evolution of legal philosophy is not widely known. The fact that it has done so quite irrationally is even less understood.

What am I talking about? Well, there is in legal thinking a well established hierarchy which is applied strictly in every area of law except for family law, that rights must always take precedence over interests. In particular, only rights, and never interests, can justify the coercing of another. For example, it is in my interest to take all of your money. However, the property right that you have in your money entirely and completely trumps my interest in your money, so that my taking it from you without your consent is rightly recognized as a crime. Similarly, your right to free speech trumps any interest I might have in silencing you, your right to freedom of movement and association trumps my interest (if I should have such an interest) in coercing you to

come with me (which is the crime of kidnapping), etc. In fact, just about the entire edifice of law and court practice concerns itself with protecting rights, and especially with managing the issues when rights conflict with rights (when your right to free movement conflicts with my right to control who is in my living room, for example). And this, it seems to me, is how it should be, this is indeed the proper concern of law.

Within this context, then, it is clear that something very strange has happened in family law, where the *interests* of the child are held paramount, and superior to the rights of the parents. For instance, the current child support formula which assesses child support obligations at a proportion of the parent's income is clearly compelling a parent to part with their *property* (a right) in service of a child's *interest*. For interests are infinite: no matter how much money I might have I will typically still have an interest in acquiring more. But rights are limited, as we can easily see in the way that welfare is handled. Welfare is the same for everyone: a minimum amount that is considered sufficient to provide the basic necessities of life. The interests that a welfare recipient may have in receiving more than the basic necessities are not considered to have weight to *compel* others to part with their property. Similarly child support, to fit with the basic, rational and longstanding moral tradition that only rights and not interests can be used to compel others, should be of the same form: a basic entitlement which is taken from the parents by force of law, and which is the same for all children. Any further contribution to advance the child's *interests* by raising their standard of living above the basic minimum which is guaranteed as a right should be voluntary on the part of the parents or custodians and other parties (typically family) with an interest in the child's welfare.

Is this proposal outrageous? Am I a cold and heartless, unfeeling brute? Well, you will have to judge for yourself. By my own lights, I am a thinker, someone who attempts strenuously to examine issues on their own merits and to free myself from common cultural presumptions and prejudices. I think that we are well served by examining the principles behind what we do, and when we find that we are departing seriously from well-established principles, I believe we should at least have a meaningful dialogue about whether such departures are really justified. Have we had such a dialogue in this case? I think not. I cannot recall ever seeing this issue of the inappropriateness of interests trumping rights in family court being raised for public discussion. And yet it is right there in front of us: is there a person in Canada or the USA who doesn't know that the overarching principle of family court is "the best interest of the child"? The phrase is ubiquitous.

Which brings me to my original point about female values being pre-eminent today. The only explanation that I can imagine for why we haven't had such discussions of so basic a departure from moral and legal principles is that we have been operating out of strong feelings about what is right, feelings so strong that we feel no need to question them. And this is a form of irrationality. Like the feelings of romantic fusion associated with falling in love that give rise to the absolute conviction that this love is something rare and unique, that it will last forever, etc., we are currently in irrational cultural fusion with the interests of children. This is not hard to understand in the context of evolutionary psychology. As I remarked at the beginning of this article, "For women, with a practical maximum of one pregnancy a year, and the issue of the child to care for, promiscuous sex usually wasn't such a good strategy, but sex with the right guy, the guy who would stay around and help out with the childraising, *that* contributed to the survival of her genes. Above all, once she had the child, she needed to ensure that the child survived to maturity if it was to carry her genes into the next generation. And so women became very focused on children." What is fascinating to me is how that female focus on making the child the centre of her world, that had such obvious survival benefit for the mother's genes and so virtually eliminated other attitudes and values from the gene pool, has moved onto cultural centre stage in our time for both men and women.

Now, let me be clear here. I am not making any of this wrong. It makes no sense at all to blame people for attitudes that were selected for over thousands or millions of years (though that hasn't stopped us from doing so around men's sexuality, for instance). What I am doing is raising it for discussion. I want *GRIP* to discuss the undiscussable, to open the conversations that no one else is willing to host. So let's hear from you about this and other issues. What do you think? What should the basic, overarching principles of family court be? Just what does it make sense for the law and courts to do in the arena of family relationships, marriage and divorce?

Let's speak honestly and courageously about how we see these questions, and seek genuinely caring, well founded, solidly reasoned answers.

David Shackleton is a thinker and writer on gender and spiritual growth, and publisher and co-editor of *GRIP*. Contact him at [david@gripmagazine.org](mailto:david@gripmagazine.org), phone (613) 832-2284.