

An Examination of Some Relationships  
Between The New Zealand Jurisprudence of  
Shared, Equal Parental Rights and Responsibilities  
&  
The Gendered Hierarchy of Care  
1994-2002

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## Abstract

This thesis examines relationships between contemporary jurisprudence and gendered patterns of parenting behaviour. Distinguishing between parental rights and parental responsibilities, it identifies a hierarchy of care as the basis for successful parenting when parents separate, and explores the difficulties of imposing this upon parents for whom “shared” parenting has different meanings. It asks whether a child benefits more if the Court supports and protects the primary carer in the exercise of her parental responsibilities or enforces the rights of an auxiliary parent.

At present the New Zealand Family Court bases its decisions on the principles that the welfare of the child is paramount, parents share responsibility and gender is not an issue. When either parent or both will not accept their role in a hierarchy of care, these principles may allow the Court both to depend on and leave unacknowledged the existence of the hierarchy and to make two assumptions.

The first is that mothers who have been primary caregivers before separation will and should remain responsible for primary care regardless of the conditions under which they are required to do so. The Court can therefore include fathers in the parenting process on terms that may privilege and institutionalise their rights while institutionalising women’s parental responsibilities, thus reinforcing economic and social gender inequities. This may also result in disadvantages for children, including the effects of ongoing interparental conflict.

The Court may also assume that it is more important to support a father’s right to an ongoing, direct relationship with his child than to end conflict by protecting and supporting the child’s relationship with the primary carer. In prioritising a relationship with a second parent the law may overestimate its value, prolong conflict and understate the effects of this on children. The court may also misunderstand and misrepresent the motivations of mothers.

The thesis concludes that it is better to support and protect a child's primary parental relationship than to enforce the rights of an auxiliary parent, arguing that rejecting the questioned assumptions is congruent with intentions expressed in the Preamble of the United Nations Convention on the Rights of the Child.

The methodology used is to explore the general context within which Family Court decisions are made, emphasising the assumptions made and values prioritised when parents cannot agree about the allocation of their responsibilities and the Court assesses how to best provide for the welfare of the child. The context includes research about gendered parenting patterns and the benefits of a relationship with a second parent (from New Zealand, United States and United Kingdom) local legislation, international instruments, and Family Court philosophy expressed outside the court. Some significant decisions about the allocation of parental responsibility are then analysed within this context. Finally suggestions are made for reform, with an exploration into how the proposed changes might affect the outcomes of the cases analysed.

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In spite of so much stimulus and support I may have made mistakes. They are all mine.

The cartoon on page 1, from Nicole Hollander's *I'm in Training To Be Tall and Blonde* (New York, St Martin's Press, 1979) is reproduced by kind permission of the author.

This thesis is for my three wonderful sons with much love.

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## Table of Cases

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*BPS v MNS* (11 October 1994) Family Court Porirua FP 351/91; [1998] NZFLR 289 (HC)

*Bramley v Commissioner of Inland Revenue* (22 October 1998) Family Court Wellington CS 2/98

*Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96

*Buckland v Minifie* (16 June 1998) Family Court Wellington FP 469/97

*C v C and H* (1988) 5 NZFLR 75 (FC)

*C v E* (11 May 1987) Family Court Palmerston North FP 050/53/83

*Cable v Ryan* (12 September 2001) District Court North Shore FP 366/98

*Collins v Sawtell* [1995] NZFLR 880 (FC)

*Crawford v Herlihy* (2 July 1999) District Court Porirua FP 291/92

*Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC)

*D v C* [2002] NZFLR 97 (CA)

*D v S*:

*D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99; *D v S* (no 2) (2

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(CA); *D v S* (no 8) *D v S* (18 December 2001) Court of Appeal CA 159/01; *D v S* (no 9) (20

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*Dellabarca v Christie* [1999] NZFLR 97 (CA)

*Director-General of Social Welfare v L* [1989] 2 NZLR 314; [1990] NZFLR 125 (CA)

*Dixon v Hatcher* (2000) 19 FRNZ 627 (HC)

*Douglas v Beyese* (3 July 1998) Family Court Christchurch FP 009/754/96

*E v M* (13 September 1979) High Court Wellington M361/779

*Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705 [2001] 1 AC 27 (HL)

*G v G* [1978] 2 NZLR 444 (CA)

*G v R* (1989) 5 FRNZ 78 (FC)

*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 (HL)

*Gledhill v Gledhill* (28 March 2002) Family Court Waipukurau FP 081/53/00

*Gough v Brittin* [1999] NZFLR 529 (FC)

*Haslett v Thornton* [2000] NZFLR 200 (HC)

*Hemer v Eden* [2001] NZFLR 913 (FC)

*Hes v Hes* (12 November 1997) Family Court Palmerston North FP 054/072/95

*Hewer v Bryant* [1969] 3 All ER 578 (CA)

*In re Marriage of Burgess* (1996) 13 Cal. 4<sup>th</sup> 25 (Calif SCT)

*In the guardianship of J* (1983) 2 NZFLR 314 (CA)

*In the marriage of Murray and Tam* (1993) 16 Fam L R 982 (FCA)

*J v District Court at Wellington* (1993) 10 FRNZ 481 (HC)

*J v C* [1970] AC 668 (HL)

*K v B* [1991] NZFLR 168 (FC)

*Leeds Teaching Hospitals NHS Trust v A and others* [2003] EWHC 259 (QB)

*Maaka v Field* (1995) 14 FRNZ 43; [1996] NZFLR 172 (FC)

*McClelland v McClelland* (17 December 1998) Family Court Wanganui FP 083/205/97

*McDermott v Kena* [2001] NZFLR 954 (FC)

*Makiri v Roxburgh* (1988) 4 NZFLR 673; (1988) 4 FRNZ 78 (FC)

*Makiri v Roxburgh* (no 2) [1990] NZFLR 182 (FC)

*Marshall v Soper* (1991) 9 FRNZ 358 (FC)

*Miller v Miller* [1973] 2 NZLR 380 (SC)

*Mills v Mills* (13 April 2000) Family Court Taupo FP 059/115/99

*Murray v Carver* (27 June 2001) Family Court Wellington FP 085 554 96

*Neho v Duncan* [1994] NZFLR 157 (FC)

*O v H* [1998] NZFLR 673 (FC)

*P v K*:

*K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02; *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02; *P v K* [2003] 2 NZLR 787

*Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997; [1968] 1 All E R 694 (HL)

*Partlow v Garrett and Garrett* (2 May 1997) District Court North Shore FP 22/96

*Payne v Payne* [2001] EWCA Civ 166; [2001] Fam 473 (HL)

*Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451

*Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94

*Quilter v Attorney-General* [1998] NZFLR 196 (CA)

*R v Hines* [1997] 3 NZLR 529 (CA)

*R v R* (1994) 12 FRNZ 211 (HC)

*Re an application by T* [1998] NZFLR 769 (HC); *T v T* [1998] NZFLR 776 (FC); *A v R* [1999] NZFLR 249 (FC/HC)

*Re B (A minor)(Abduction)*[1994] Fam Law 606; [1994] 2 FLR 249; 2 FCR (UK) 505 (CA)

*Re D (An infant)* [1971] NZLR 737 (SC)

*Re E* [1984] 1 WLR 156; [1984] 1 All E R 289 (HL)

*Re L* [1997] AC 16; [1996] 2 All E R 78 (HL)

*Re Patrick* [2002] 28 Fam L R 579 (FCA)

*Re Peach* (18 November 2002) Court of Appeal CA 81/02

*Re T* [1996] 1 NZLR 368 (HC)

*Re the Children, Young Persons, and Their Families Act and W* (9 July 1992) Family Court Hastings CYPF 020 078 92

*Re the guardianship of ACL* [2002] NZFLR 165 (FC)

*Richardson v Simpson* (19 April 1991) District Court, Wanganui FP 083/185/86

*S v M* (9 May 1996) Family Court Palmerston North FP 135/9

*S v M* (1997) 15 FRNZ 589 (HC)

*Sharman v Sharman* (1988) 5 NZFLR 91 (HC)

*Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA)

*Tavita v Minister of Immigration* [1994] NZFLR 97 (CA)

*Tito v Tito* [1980] 2 NZLR 257 (CA)

*Tripp v Hinckley* (2002) 290 AD 2d 767 (NY App Div)

*TVNZ v W* [2001] NZFLR 337

*U v U* [2002] 29 Fam LR 74 (HCA)

*V v T* [1994] NZFLR 454

*VP v PM* (1998) 16 FRNZ 621 (FC)

*W v C* (20 October 1999) Family Court Tauranga FP 070/213/96; *W v C* [2000] NZFLR 1057

*W v W* (16 January 1998) Family Court Palmerston North FP0544 427979

*W v W* (1983) FRNZ 37; [1984] 2 NZFLR 335 (CA)

*Wright v Wright* [1984] 1 NZLR 366 (CA)

*Y v M* [1993] NZFLR 609; (1993) 10 FRNZ 591 (HC); *M v Y* [1994] 1 NZLR 527; (1994) 11 FRNZ 186 (CA)

Notes:

1. Where cases are reported under several different titles, they are grouped together in this list. *D v S* has been given a running number series for clarity of reference.
2. When cited in the text, each case is given a single report reference only in a footnote.
3. A judge identifier is given in a footnote only when not included in the text.
4. In Chapters 5-8 the first reference to the cases to be analysed also includes judge identifiers.

## Abbreviations

Adoption Act	Adoption Act 1955
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Child Support Act	Child Support Act 1991
Children Young Persons, and Their Families Act	Children, Young Persons, and Their Families Act 1989
DPB	Domestic Purposes Benefit
Family Proceedings Act	Family Proceedings Act 1980
Guardianship Act	Guardianship Act 1968
New Zealand Bill of Rights Act	New Zealand Bill of Rights Act 1990
SCAA	Status of Children Amendment Act 1987
UNCROC	United Nations Convention on the Rights of the Child
UNDHR	United Nations Declaration of Human Rights

Judicial officers in the principal cases examined in Part 2 are named only at the first reference to the cases. In general judicial officers are named in the footnotes only if unnamed in the body of the text footnoted.

## Chapter 1. Introduction

*The normal duty and care owed by a parent to a child is to nurture the child to a state where it is independent of the parent. The nurturing process has some clearly identifiable characteristics that are shared by most humans. The provision of shelter, clothing, food, together with love and affection. In preparation for independence, education in its broadest sense. All this involves close and attentive physical and emotional involvement.*

- Jeffries J<sup>1</sup>

*... by far the greater responsibility for the care and upbringing of children is taken by mothers, married or unmarried, separated, or cohabiting. We know that the outcomes for children of separated parents are closely associated with how well the caring parent is able to cope: this is a more significant factor than the relationship with the other parent, important though this is. - Mrs Justice Hale, advising the Lord Chancellor's Department<sup>2</sup>*

*The Court is aware of a developing practice in the Family Court over the last decade to move away from the nomenclature of "custody" and "access" which, despite retained guardianship rights, often leave the "access" parent in the position of regarding him or herself as a second-class parent. - Priestley J<sup>3</sup>*

*... access law performs a disciplining function in relation to maternal behaviour. - S Boyd<sup>4</sup>*

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<sup>1</sup> *E v M* (13 September 1979) High Court Wellington M361/779, approved by Court of Appeal in *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 324-5.

<sup>2</sup> Cited in Sheldon, S "Unmarried Fathers and Parental Responsibility: A Case for Reform?" (2001) *Feminist Legal Studies* 9 93, 105.

<sup>3</sup> *P v K* [2003] 2 NZLR 787, 810.

<sup>4</sup> Boyd S "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) *Social & Legal Studies* 5(4) 495, 502.

## I. Background

This thesis investigates an aspect of the jurisprudence of the Family Court over the last decade. It analyses how the Court has interpreted the legislation to reinforce the status of each “access” parent in the selected cases, as an equal or, in Priestley J’s language, a “first-class” parent, although he<sup>5</sup> had historically had, and would continue to have, lesser responsibilities,.

In exploring the tensions between the gendered realities of parenting practice<sup>6</sup> and common assumptions made by the Court, it questions the development of a jurisprudence that aims to maintain or elevate an auxiliary parent’s status, while obscuring the primary parent’s greater responsibilities and possibly hampering their exercise. These tensions and the conflicts they cause, between an auxiliary parent who seeks “rights” (or a status) and a primary parent who has “responsibilities” are to some extent reflected in the cartoon on the previous page. The disjuncture between rights and responsibilities may mean that neither parent will understand the other’s situation. A court’s role in resolving the conflict with the best interests of the child in mind is an unenviable one.

In a recent article, Smart expresses concern about<sup>7</sup>

the apparently growing conflict between mothers and fathers over matters of residence of, and contact with, children after divorce and separation... Frustration over this conflict, which is seen as harmful to children, has led to punitive approaches to dealing with the issues and the situation is fuelled by an increasingly influential father’s rights movement which depicts the problem as a gender conflict, with men as the victims of over-powerful women.

She argues that because of complex cultural changes adults now place greater value on the quality rather than the legal status of their relationships and their relationships become less “permanent”. Any child they have becomes “invested with the idea of stability; of enduring and

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<sup>5</sup> In the 2001 Census, of families with dependent children about 70 per cent were two-parent families and 30 per cent single-parent. Of 140,178 single parents 23,163 (about 17 per cent) were men and 117,018 (about 83 per cent) were women: Statistics New Zealand *2001 Census: Families and Households (2001) – Reference Reports (2002)* Tables 1 and 28.

<sup>6</sup> As described by Mrs Justice Hale and explored in more detail below Chapter 2.II.1. and 2. It is noted that there is no supporting evidence presented in Sheldon for Mrs Justice Hale’s assertion that “the outcomes for children of separated parents are closely associated with how well the caring parent is able to cope: this is a more significant factor than the relationship with the other parent, important though this is.”



unconditional love; and as the one true relationship.”<sup>8</sup> As a result, mothers and fathers who do not share a household may both want to be emotionally close to their children. Any conflict about this pushes the children into a situation where they are “fought over like possessions rather than being allowed to take a participative role in determining the future of their shared family lives.”<sup>9</sup>

According to Smart, when family law shifted towards an emphasis on parenthood “defined in terms of the core *qualities* of parent-child relationships...prioritising active, emotionally involved parenthood”<sup>10</sup> (rather than legally defined paternity/parenthood, or “motherhood” and “fatherhood”) fathers were “still defined as insignificant actors in the psychology of parent-child relationships.”<sup>11</sup> The new legal emphasis on parenthood conflicted with the historical roles of fathers and mothers, which differentiated, and may continue to differentiate, between mothers and fathers. While the way individuals “do” parenting is constantly changing, parenting practices are still often gendered. However, rather than acknowledge and address the divergence between cultural and historical forces the law tends to interpret interparental tensions as a series of “private squabbles which need to be stamped on hard, or which require parental re-education.”<sup>12</sup>

Smart’s concern is that “we need to understand the gender conflict [and] refocus on children’s experiences and accounts while new methods of parenting...become normative.”<sup>13</sup> However, she notes, the divisiveness of the gender conflict cannot be resolved “by a recommendation that children’s voices [be] heard in the legal process.”<sup>14</sup> Furthermore, because mothers, fathers and children “will take time...to reorganise their expectations...family law needs to avoid becoming part of the problem it seeks to resolve.”<sup>15</sup>

In the meantime, children remain largely dependent on women for nurture. This thesis therefore highlights the interests of mothers who are primary carers and how they and their children may

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<sup>7</sup> Smart, C “Towards an Understanding of Family Change, Gender Conflict and Children’s Citizenship” (2003) *Australian Journal of Family Law* 20, 20.

<sup>8</sup> Smart, above, 28.

<sup>9</sup> Smart, above, 27.

<sup>10</sup> Smart, above, 24.

<sup>11</sup> Smart, above, 24.

<sup>12</sup> Smart, above, 36.

<sup>13</sup> Smart, above, 20.

<sup>14</sup> Smart, above, 36.

be affected by the law's contemporary tendency to respond to interparental conflicts in the way described by Smart and Boyd. It can be argued that viewing parenthood on a gendered basis perpetuates divisiveness. However, "fathering" and "mothering" are not yet gender-neutral parenting practices. Because of this, while parenting practices are in transition, it is argued that where there is conflict, solutions must be sought that support primary carers and ensure that children have peaceful family lives with them, without losing the opportunity to maintain and develop a relationship, in the long run, with their auxiliary parent.

The thesis examines selected decisions, in the High Court and Court of Appeal as well as the Family Court. Informed by social science findings, analysis of relevant legislation<sup>16</sup> and Family Court judges' extra-judicial statements it attempts to identify the assumptions used to justify decisions made on ideological grounds, using a feminist analysis derived in part from a strand of feminist legal writing from the United Kingdom, United States and Australia. This writing has examined legal ideologies of motherhood to establish how, in dealing with the disjuncture between historical parenting practices and cultural change identified by Smart, they construct a "good" or "bad" mother (in the way referred to by Boyd) and enable courts to discipline a "bad" mother. A court may do this by imposing shared parenting arrangements that undermine her capacity to parent effectively or by denying her custody or the right to relocate with her children.<sup>17</sup> One of these writers summarises judicial pronouncement in these circumstances as

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<sup>15</sup> Smart, above, 36.

<sup>16</sup> This analysis includes consideration of the parameters of s 23(1)(A) of the Guardianship Act reading that "there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child."

<sup>17</sup> Boyd S "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) *Social & Legal Studies* 5(4) 495; Fineman M A "Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking" (1988) *Harvard Law Review* 101(4) 72 Fineman M A *The Illusion of Equality: the Rhetoric and Reality of Divorce Law Reform* (1991) University of Chicago Press; Fineman M A *The Neutered Mother the Sexual Family and Other Twentieth Century Tragedies* (1995) Routledge; Kaganas F and Day Sclater S "Contact and Violence - The Winds of Change?" (2000) *Family Law* (September) 630; Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71; Smart C and Neale B *Family Fragments?* (1999) Polity Press, Cambridge; Wallbank J (1998) "Castigating Mothers: the Judicial Response to 'Wilful' Women in Disputes Over Paternal Contact in English Law" (1998) *Journal of Social Policy and Family Law* 20(4) 35 Wallbank J (2000) *Challenging Motherhood(s)* Longmans; and Bergeron M "Hegemony Law and Psychiatry; A Perspective on the Systemic Oppression of Rogue Mothers in *In re Aaron S*" (1996) *Feminist Legal Studies* 4(1) 49. This writing observes, inter alia, that the reasons why a mother may not want the child[ren] for whom she has primary care to have contact with their father are sometimes not heard or are misinterpreted. Some of this writing primarily addresses fact situations that in the New Zealand legal system would be covered by the Domestic Violence Act. However the concepts are transferable to other situations. Collier R

“subjugat[ing] the mother’s work of ‘caring for’ her child, in both an emotional and a physical sense, to the ‘higher’ abstract ideal of ensuring ongoing paternal contact.”<sup>18</sup>

The selected cases will be examined to discover whether, when a gendered hierarchy of care<sup>19</sup> is not working, the New Zealand legal system, too, subjugates mothers’ work of caring for their children to the ideal of ensuring that fathers who wish to can retain contact with their children. This scrutiny aims to address the underlying assumptions and related gender inequities that make this subjugation possible and to identify where, as part of the process, mothers are labelled as “bad” and disciplined. Suggestions for reform of decision-making about parental responsibilities, by Henaghan, Fineman, Eekelaar and Kelly and Ward are then summarised in relation to three discourses about parental responsibilities outlined by Trinder et al,<sup>20</sup> along with some theory about children’s wishes and views, before outlining an alternative proposal for reform.

Jeffries J identifies above three principal elements of nurturing responsibility. The first is to provide material things (or the money to purchase them). This may not involve a direct relationship with a child, or any other responsibility to nurture that child to independence. The other two responsibilities, the provision of close and attentive physical and emotional care, often called “day to day care” require direct interaction with a child on a daily basis. These

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“Waiting Till Father Gets Home’: The Reconstruction of Fatherhood In Family Law” (1995) *Social & Legal Studies* 4 5 discusses the development of ideologies of fathering.

<sup>18</sup> Wallbank J (2000) *Challenging Motherhood(s)*, 67. Wallbank acknowledges the work of Tronto whose concept of caring for has as its central idea that care is a practical activity, involving an association between cognitive input and action in contrast to caring about which is a recognition that care might be or is needed: see Tronto, J *Moral Boundaries; A Political Argument for an Ethic of Care* (1993) Routledge, 108-109. See also below Chapter 2 n 5.

<sup>19</sup> The term “hierarchy of care” comes from Trinder L Beek M and Connolly J *Children’s and Parents’ Experience of Contact After Divorce* (2002) <http://www.jrf.org.uk/knowledge/flndings/socialpolicy/092asp> (Trinder et al *Children’s and Parents’ Experience*) and Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact After Divorce* (2002) YPS for Joseph Rowntree Foundation (Trinder et al *Making Contact*). See below nn 25-28 and accompanying text.

<sup>20</sup> See below Chapter 2 nn 165-169 for details of Trinder et al’s discourses. Hengahan R M “Custody Decisions - Discretion Gone Too Far?” (2000) *Otago Law Review* 9(4) 731; Fineman M A “Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking” (1988) *Harvard Law Review* 101(4) 727 (the ideas in this article were further developed in *The Illusion of Equality; the Rhetoric and Reality of Divorce Law Reform* (1991) University of Chicago Press and *The Neutered Mother the Sexual Family and Other Twentieth Century Tragedies* (1995) Routledge); Smart C and Neale B *Family Fragments?* (1999) Polity Press; Eekelaar J, above; Kelly R F and Ward S L “Allocating Custodial Responsibilities At Divorce; Social Science Research and the American Law Institute’s Approximation Rule” (2002) *Family Court Review* 40(3) 350. The three discourses are outlined in Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation (*Making Contact*) 36-37. See below Chapter 2 nn 164-171 and accompanying text.

responsibilities may be shared among a group of people with differing legal relationships to a child: parents, extended families, teachers, child care workers. Research shows however that between parents, even when both are in paid employment, a gendered hierarchy of responsibility exists: mothers do most of the day to day care of children before and after parents separate and fathers' involvement tends to be auxiliary, less consistent and unpredictable.<sup>21</sup> While this does not per se preclude a valued relationship between a father and child, it is argued that it develops a different quality of positive attachment.<sup>22</sup>

Although the difficulties in developing, managing and maintaining effective arrangements for children after separation are well known,<sup>23</sup> many families manage separation and change well with a successful post-separation structure (however it is expressed in practical or legal terms<sup>24</sup>) characterised by "contact" (auxiliary parenting) that "works".

Trinder et al summarise contact that works as the maintenance of a relationship with a second parent that is a positive experience for all concerned, without risk of physical or psychological

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<sup>21</sup> See Chapter 2 II. Gender Issues and Shared Responsibility.

<sup>22</sup> See below, Chapter 2 nn 56-57.

<sup>23</sup> These difficulties are intensified at transition times: at initial separation, when one parent has a new adult partner, when step-families are formed or as children's needs change according to one authoritative consultation paper (Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department (*Making Contact Work: A Consultation Paper*), 6.) A further transition time that causes difficulties is when a primary carer seeks to relocate. This consultation paper and the subsequent report (Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (2002) Lord Chancellor's Department (*Making Contact Work: A Report*)) took into account material from 22 European jurisdictions, California, Australia and New Zealand. (*Making Contact Work: A Consultation Paper* 47-57; 64-87.) Although the solutions vary from jurisdiction to jurisdiction, the concerns, reflected in both the Consultation Paper and the Report are remarkably similar. They are summarised in a list of information defined as being "of critical importance" to parents who separate and their children. The broad areas of information were:

- (i) the importance to children of maintaining contact wherever possible with the parent with whom they are not living;
- (a) the very substantial difficulties involved in successful post separation parenting for both parents;
- (a) the serious harm caused to children by continuing acrimony between their parents; and
- (i) the services which are available to assist in the resolution of difficulties over contact (*Making Contact Work: A Report*, 11).

The New Zealand contribution to this discussion is analysed below, Chapter 4 nn 41-54 and accompanying text. "Contact" in these publications refers to the maintenance of a child's relationship with a second parent, who provides auxiliary care.

<sup>24</sup> For example as custody/access, residence/contact, joint custody, or shared custody.

harm to any party (either parent or the child). This requires the parties to be committed to and mainly satisfied with the arrangements, not wanting them to change significantly. If at least one of these factors is missing, if for instance one party wants significant changes made to existing arrangements, the arrangement stops working.<sup>25</sup>

The Trinder et al study found that arrangements worked best when there was an apparently conservative agreement about parental roles “based ... on the idea of a resident and contact parent, usually on a gendered basis.”<sup>26</sup> This agreement can be described as a gendered hierarchy of care. The contact parent (usually a father) was not seeking a change in his or her status and acknowledged that the primary parent had greater but not total responsibility for day to day care and decision making.

The primary parent (usually a mother), feeling secure in her role, fulfilled her side of the bargain by engaging in a wide range of proactive strategies to facilitate contact and elicit “relatively high and consistent involvement of fathers who might drop out of regular contact,”<sup>27</sup> essentially taking major responsibility for making it work.<sup>28</sup>

This description is supported by another, wider, analysis of children’s lives after separation.<sup>29</sup> It identifies an “emergent perspective” that children will benefit (before and after separation) where their mothers are autonomous and supported; and where fathers are supportive and involved, offering more than economic provision and their presence. When the mother provides the primary day to day care and is autonomous, children benefit. When the father provides auxiliary

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<sup>25</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact After Divorce* (2002) YPS for Joseph Rowntree Foundation (Trinder et al *Making Contact*). Although the hierarchy may exist before or after separation, Trinder et al attach the term “hierarchy of care” to post-separation arrangements. “Contact” is not equivalent to “access” in this research. It refers to a range of ways of managing shared responsibility for children, after separation.

<sup>26</sup> Trinder et al *Making Contact*, above, 27.

<sup>27</sup> Trinder et al *Making Contact*, above, 10.

<sup>28</sup> Trinder et al (*Making Contact*, above, 26-27) list these as: encouraging contact; encouraging a sense of ongoing parenthood; enabling contact to occur; promoting a positive image of the other parent and high quality relationships; peace-keeping or mediating between children and the contact parent.

<sup>29</sup> The Table (Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, 254) reproduced as Appendix 1 summarises the findings of this analysis, contrasting the “emergent” perspective with “conservative” and “liberal” perspectives. The authors acknowledge that they have been selective in the research they have considered, that there is much that is not known, and the issues are highly complex.

care, children benefit if he is supportive of the mother and involved with children as well as making an economic contribution. Children themselves, in this analysis, want involvement in decisions but not responsibility for them.

Autonomous motherhood appears to have many benefits for children regardless of whether a father is present. An autonomous mother provides authoritative parenting.<sup>30</sup> She creates a stable and predictable environment for the benefit of her children as well as for herself, with the kinds of positive outcomes reflected by the “activist mom” of the major *CASA Report* research.<sup>31</sup> The activist mom engages fully in “caring for” her children. Like the parents in homes with two parent present who keep their adolescents safe from drug abuse, she is described as someone who ensures that the family eats dinner together often, attends religious activities together,<sup>32</sup> who gives praise where it is merited and knows where her children are after school and at weekends. The “adult” mother described by Van Scoyoc is also active and autonomous, someone who consciously provides a positive family culture for her child.<sup>33</sup>

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<sup>30</sup> “Authoritative” parenting gives the child a feeling of closeness with a parent that advances the nurturing process, where the parent gives the kind of close and attentive physical and emotional involvement that includes shared school and leisure activities, open communication about problems and appropriate, age specific, limit-setting by the parent (Amato P and Gilbreth J G “Non-Resident Fathers and Children’s Wellbeing: A Meta Analysis” (1999) *Journal of Marriage and the Family* 61 557, 557.

<sup>31</sup> National Center on Addiction and Substance Abuse at Columbia University (CASA) *Back to School 1999; National Survey of American Attitudes on Substance Abuse V: Teens and Their Parents; Report* (1999) (CASA *Report*). The child of an “activist” single mother identified in this research was almost as safe in regard to drug and alcohol abuse as the child of two involved parents; and safer than children in households where either or both parents’ practices and home environment did not share the positive characteristics of hers.

<sup>32</sup> Whether this factor is helpful because of the family’s shared interaction with a (supportive) larger community, a shared spiritual practice, or for some other reason, is not explained.

<sup>33</sup> Van Scoyoc S *The Perfect Mother: Invisible Woman* (2000) Robinson 6, proposes a new model to replace the “perfect mother” whom she describes as one who, at cost to herself and her children, attempts to meet the expectations of others, loses her own identity in the process and does not in the end serve her children well. “The adult mother in contrast considers herself and stops doing everything for everyone; ensures she is taken notice of by others and takes care of herself, including making sure she has time for fun and happiness; considers her role and relationships with others and makes decisions based on choice rather than unthinking assumptions; and prepares her children to enter the real world successfully, a world that contains jobs that demand commitment to regular working hours and sometimes tedious tasks, is not always pleasant and contains other people with whom we have to communicate and co-operate. ... (219) The advantage of being the child of an adult mother is the strong sense of family and belonging that this can bring ... [W]hen a child is raised within a family where people co-operate in the running of the household, support each other and do not make derogatory remarks about each other, this is the family they want to belong to.” A sense of family and belonging is also referred to by Neale and Smart whose research evidence suggests “that recognition, respect and participation are key components of children’s well being in their families and that parenting which undermines these elements, particularly in a sustained way, may predispose children to unhappiness and low self-esteem. Family citizenship, it seems, is more than a matter of rights for children; it may be a matter of their well being too.” (Neale B and Smart C (2000) *Good To Talk? Conversations With Children After Divorce; Report for the Nuffield Foundation Centre for Research on Family, Kinship and*

Stable, predictable arrangements with an auxiliary parent benefit a mother as well as her child. Behrens lists some of these benefits.<sup>34</sup> The demands of parenting alone are alleviated; a mother can pursue economic independence or other activities outside the home; care for a child during illness and school holidays (especially when the mother is employed outside the home, or in training to make that possible) becomes a shared responsibility; the father offers another source of life experiences and emotional support for the child. Stable, predictable arrangements can also work well for an auxiliary parent. He can maintain and develop his relationship with his child while himself being autonomous and able to develop his career opportunities nearby or elsewhere and to create a new family, without the commitment to the primary care of a child from a former relationship.

However, shared parenting - including its inevitable renegotiation as family members' circumstances change - works only when parents choose and re-choose it and it has shared meaning for them. If a primary parent refuses to facilitate contact or wants significant changes, conflict will result. If an auxiliary parent is unreliable, attempts inappropriately to control a primary carer's choices and will not accept the imperatives of his position in the hierarchy of care, conflict will result. Perhaps most notably in the present context, when either parent seeks significant change rather than accepting and supporting the operation of the hierarchy, and this cannot be successfully negotiated, the resulting conflict may be incapable of resolution within the legal system.<sup>35</sup>

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Childhood, University of Leeds, 18, cited in Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, 65).

<sup>34</sup> Behrens J Shared Parenting: Possibilities and Realities" (1996) *Alternative Law Journal* 21(5) 213, 213-214.

<sup>35</sup> Trinder et al's "recipe" for good contact (Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact After Divorce* (2002) YPS for Joseph Rowntree Foundation, 48) requires of parents that: both are committed to contact; the contact parent accepts their non-residential status and the resident parent proactively facilitates contact and includes the contact parent in decision-making; both support the children to have a relationship with the other parent and do not denigrate or verbally or physically threaten the other parent; they adopt a realistic appraisal of the other parent, recognising both strengths and weaknesses; they recognise that some conflict or disagreement is inevitable, but find a way to manage conflict without escalation; they consult children about contact arrangements; they find time to be alone with children without new partners always being present. "Where families had more extensive involvement with the legal system, there was little evidence that this enhanced the quality of contact, and in some cases it appeared positively unhelpful in helping families deal with challenges" (Trinder et al *Making Contact*, above, 43). *Making Contact Work: A Report* includes among the main themes that emerged from their consultation process as "a general dissatisfaction with the legal process as a mechanism for resolving and enforcing contact disputes; the need to address the problem by a wide range of different mechanisms

When parents cannot agree about the operation of the hierarchy of care and ask the Court to resolve the issue, the imposition of shared parenting may reinforce and extend conflict rather than bring it to an end. This has implications for the current ethic of shared parenting within the New Zealand legal system.<sup>36</sup> Although “shared” parenting<sup>37</sup> may to some extent be justified by changes in parenting practice, possibly as a result of economic factors<sup>38</sup> (as well as a concern for the rights and responsibilities of each parent) it may not always be appropriate.

The imposition of a solution justified by the ongoing rights and responsibilities of each parent appears to be based on the premise that children will benefit if primary carers (usually women) and auxiliary carers (usually men) are treated in the same way. There may be two gender-related assumptions underlying this. Both rely on the (unacknowledged) presence of the hierarchy of care as the central structural element of shared parenting.

The first assumption is that mothers who have been primary caregivers before separation are likely to agree to remain primary caregivers regardless of the conditions under which they are required to do so.

The second is that it is more important, when either parent or both will not accept their present role and function in the hierarchy, to support a child’s ongoing, direct relationship with his or her father than to protect and support the child’s relationship with the primary carer (though the

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which are not based on court proceedings; and the need to ensure that those alternative mechanisms ... are in place and accessible to those who need them.” Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (2002) Lord Chancellor's Department, 10.

<sup>36</sup> This has been expressed by the Principal Family Court Judge as being based on “the underlying concept of guardianship and the ongoing rights and responsibilities of each parent arising from it”, although this factor “is sometimes forgotten when issues of custody and access are under discussion with emphasis on the competing rights of mothers and fathers”. See Chapter 4 n 16 and accompanying text.

<sup>37</sup> See below nn 73-77 and Chapter 4 nn 21-23 and accompanying text for a discussion of the problems with definitions or “shared” and “joint”; and within the discussions of the cases in Part 2, for instance Chapter 8 nn 219-232 and accompanying text.

<sup>38</sup> See below Chapter 2 n 14 for discussion of the “reciprocity” theory that may explain this and Chapter 3 n 83 and accompanying text for a possible relationship between child support obligations and shared parenting.



Court may restrict the relationship if the parent has been physically or sexually abusive).<sup>39</sup> If these assumptions exist they may enable the Court to sustain interparental conflict, to respond inappropriately to mothers who find fathers' parenting-related behaviours objectionable and damaging to themselves or to their children and to institutionalise men's economic and social advantages and women's social and economic disadvantages.

The extent to which the first assumption is unquestioned seems to be reflected in the *Making Contact Work* list of issues "of critical importance" when parents separate.<sup>40</sup> The child's relationship with his or her primary parent and the conditions under which this relationship has to operate, is not listed as being of "critical importance" although the list does refer to the "very substantial difficulties involved in successful post separation parenting for *both* parents."<sup>41</sup> However a child's relationship with his or her primary carer is of critical importance if a child is to receive adequate nurture; the conditions under which the relationship is exercised will affect both the primary parent's capacity for nurture and a child's opportunity to flourish, as Mrs Justice Hale implied in her statement heading this introduction. Without women's continued provision of primary care the equal parental rights rhetoric underpinning "shared" care arrangements seem unlikely to work. If as many women as men were unavailable to provide primary care for their children because of other commitments – to a second family, employment, their own birth cultures or extended families – many children would be without care.

The second assumption underlying the imposition of shared parenting, that a relationship with a second (biological) parent is generally necessary for the wellbeing of a child, is included in the *Making Contact Work* list. This assumption articulates the abstract ideal of paternal rights<sup>42</sup> and children's needs for ongoing paternal contact. It underlies the belief that an auxiliary parent's

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<sup>39</sup> The presence of this assumption is supported by an influential document that claims that there are two conflicting values when deciding on how the welfare of the child will best be met: "for some time the assumption that the wellbeing of the custodial parent will ensure the wellbeing of the child was the overriding value. However, more recently the importance of the relationship between the non-custodial parent and the child has come to prominence." Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 1.

<sup>40</sup> See above, n 23.

<sup>41</sup> See above, n 23. Emphasis added.

<sup>42</sup> See above n 18.

guardianship rights should be compromised only if sexual or physical violence<sup>43</sup> is an issue or removed if the parent is “unwilling” or is otherwise for “some grave reason unfit.”<sup>44</sup>

This assumption’s credibility is arguably fragile. It is somewhat compromised in our society by the use of legal fictions around adoption and genetic material from strangers, where we accept that a child can be nurtured on a day to day basis (in the *E v M* sense) by someone who is not a genetic parent. There are also often individuals other than an auxiliary parent who can nurture a child and support the primary carer and biological parent-unique benefits appear to be limited. Trinder et al concur with Sturge and Glaser’s view<sup>45</sup> that a relationship with a second parent is not always consistent with child welfare. They propose that where a range of solutions have been tried and exhausted contact should cease on child welfare grounds, at least for a trial period.

Conflict during and as the result of the imposition process may also have adverse effects on a child.<sup>46</sup> Ongoing proceedings cause a standstill in the child’s overall life and development while his or her carer’s emotional energies are taken up with the case; and the child is aware of being at

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<sup>43</sup> Guardianship Act ss 16A – 16C.

<sup>44</sup> Guardianship Act s 10(2). See below Chapter 3 nn 10-26 and accompanying text on the use of this section.

<sup>45</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact After Divorce* (2002) YPS for Joseph Rowntree Foundation, 47; Sturge and Glaser, two British psychiatrists, were asked by the Official Solicitor to prepare a report on the implications of domestic violence for contact. This paper was published as Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615. It presents a detailed analysis of circumstances providing benefits and detriments from direct and indirect contact with a second parent who has been violent. Their definition of violence includes emotional violence. See below Chapter 2, III The Benefits and Disadvantages of a Relationship with a Second Parent, especially nn 161-174 and accompanying text. Two principles from this paper were later used as the basis for general discussion in *Making Contact Work* (Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department.

<sup>46</sup> In Trinder et al’s research, above, the necessary conditions for making contact work (see above n 35) were present only in 27 of the 61 families in a sample that aimed to incorporate a diversity of contact arrangements and families and to include “family sets” of both parents and children where possible. The families were divided into groups each with discrete characteristics. The first, of “consensual committed families” where parents and children were committed to regular contact and interparental conflict was low or suppressed included three groupings: “reconfigured continuing families” (3); “flexible bridgers” (2); and “tensely committed” (22). The second, of “faltering families” where contact was irregular or had ceased without court involvement included 8 families named as “ambivalently erratic”. The third group, named “conflicted” had disputes about the amount and form of contact caused by role conflicts or disputes about the amount and form of contact. These were divided into five groups: competitively enmeshed (5); conflicted separate worlds (2); rejected retreaters (2); ongoing battling (7); contingent contact (10). Allegations of abuse and risk featured in both the ongoing battling and contingent contact groups. However in the former, mothers were not prepared to facilitate contact and in the latter they were (Trinder et al, above, 5-23). See below Chapter 2 nn 122 and 165-169 and accompanying text about the different principles used by mothers in each of these groups to justify their actions over contact.

the centre of the dispute and somehow responsible for this and the resulting distress.<sup>47</sup> Some research indicates that children of parents who continue to fight after separation have low self-esteem and clinically significant levels of psychological distress which “become particularly apparent more than two years after separation if post-separation conflict continues at high levels.”<sup>48</sup> Pryor and Rodgers note one researcher’s conclusion that<sup>49</sup>

If conflict is going to continue, it is better for children to remain in an acrimonious two-parent household than to divorce. If there is a shift to a more harmonious household [a more harmonious situation] a divorce is advantageous both to boys and girls.

Furthermore, the impact of legal proceedings on a mother’s care together with an auxiliary parent’s unreliability may have a specific, compound effect on a child. As McDowell points out<sup>50</sup>

If access is irregular & unreliable then these needs [for reliability, predictability, consistency] are not being met & this particularly affects a child when these needs are not met by a primary person/parent/caregiver.

Trinder et al identify irregular contact as a “particular problem that [requires] further research and debate about possible solutions.”<sup>51</sup> would welcome a debate about the “merits or otherwise of the introduction of a statutory duty on non-resident parents to maintain regular contact ... [like] the Children (Scotland) Act 1995.”<sup>52</sup> This seems to imply that the writers speculate that a statutory duty to maintain regular contact is not necessarily helpful.

With these factors in mind, the actual benefits and advantages of an auxiliary relationship with a second parent will be analysed in the contextual material that follows and in the selected cases.

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<sup>47</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623. The authors know of no research that has systematically looked at the impact on children of drawn-out proceedings but it is their experience that the children are adversely affected.

<sup>48</sup> Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, 241. See also Maclean and Eekelaar who conclude that “while many of the problems manifested by children after divorce have their origins in the circumstances of the marriage, these may be aggravated by continued inter-parental conflict after divorce” (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 54).

<sup>49</sup> Pryor and Rodgers, citing Hetherington E M “Should We Stay Together for the Sake of the Children?” in E M Hetherington (ed) *Coping with Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective* (1999) Lawrence Erlbaum Associates, 101-102.

<sup>50</sup> McDowell, personal communication (email) 26 June 2000. See also below Chapter 2, n 191 and accompanying text.

<sup>51</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact After Divorce* (2002) YPS for Joseph Rowntree Foundation, 46.

<sup>52</sup> Trinder et al, above, 47.

There can be no single overarching ideology of motherhood, in view of the diverse culture of motherhood.<sup>53</sup> This is especially so in a legal context in New Zealand, given Te Tiriti o Waitangi/The Treaty of Waitangi. For this reason, cases involving Maori family issues are not included. However, it is possible to identify the institutionalised gender inequities common to all women<sup>54</sup> as well as some specific to single mothers.<sup>55</sup> Their effects vary, depending on the cultural, social and economic status of an individual.

The relationship of institutionalised gender inequities to Family Court ideology is highlighted by the current reluctance of the Family Court to allow mothers to relocate with their children, a good example of how possible assumptions underlying its “developing practice”<sup>56</sup> may work. Although the developing practice in relocation cases is justified by an “all factor” approach the Court now gives fewer mothers than formerly permission to relocate if their children’s fathers object.<sup>57</sup>

As a mother establishes an independent, autonomous household after separation, management of time, material resources and children’s needs will generate considerable demands on her and probably some hardship. To alleviate this an activist, adult, mother who wants to improve her own and her child’s wellbeing may decide to move elsewhere, to pursue educational goals or employment opportunities, to a less expensive home or city, to reunite with supportive family or a new partner, or be within her birth culture. She may be very willing to facilitate her child’s relationship with his or her father, albeit in a slightly different form, thus continuing to support the mechanisms of the hierarchy of care (just as she would if the father himself moved to a different locality). But if the father objects she will not be able to relocate. In contrast, an auxiliary parent is expected neither to relocate to maintain a relationship with his children nor to

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<sup>53</sup> The issues are elegantly canvassed in Boyd S “Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?” (1996) *Social & Legal Studies* 5(4) 495.

<sup>54</sup> “Gender equality is based on the premise that women and men should be treated in the same way. This fails to recognise that equal treatment will not produce equitable results, because women and men have different life experiences. Gender equity takes into consideration the differences in women’s and men’s lives and recognise that different approaches may be needed to produce outcomes that are equitable.” Global Development Research Center <http://www.gdrc.org/gender/framework/what-is.html> (accessed 3 July 2002). For more detail of gender inequities see below Chapter 2 II.3. *Conditions that affect women as parents* and Chapter 3 nn 82-86; and accompanying text.

<sup>55</sup> If she enters into a new relationship with another adult, the challenges are likely to be different; and are not addressed in what follows.

<sup>56</sup> See above n 3.

<sup>57</sup> See below Chapter 4 n 10 and accompanying text.

relinquish any opportunity to relocate of his own volition. He retains, and if he wishes, develops further, the social or economic benefits he enjoys, affected only by payment of child support.

To justify this practice the Court must, arguably, rely on the two assumptions referred to. Firstly, that a continuing relationship with his or her father on terms that support the geographical status quo and take into account the father's economic and social circumstances will benefit a child. The Court may also believe that this will ameliorate the disruption of separation. Secondly, that because of her commitment to her children the mother will stay where a father wants her and the children to stay and the Court orders her to stay, regardless of the economic and social consequences for her and the children.

## II. Methodology

The method used is to describe the selected context and then to analyse a group of cases decided under the Guardianship Act and, in one case, the SCAA. The strengths and limitations of the Act as it is currently interpreted are investigated. This is done within a framework of contextual material from three perspectives, a social science view that aims to illuminate the experiences of mothers responsible for day to day care and the benefits and detriments of auxiliary parental care; relevant legislation; and the belief system of judges within the Family Court as expressed in for a outside the Court. This material includes current research (from New Zealand, United States and United Kingdom) about the working of the hierarchy before and after separation (with an emphasis on the "willingness" of the auxiliary parent), the dynamics of patterns of psychological control after separation and the benefits of a relationship with a second parent as well as the phenomenon of the "bad" mother; local legislation, international instruments; and Family Court judges papers and submissions.

In the cases selected for analysis there is a hierarchical structure of care in place but not working. They have been chosen with a view to understanding the dynamics of the hierarchy of care and the role of gender among the "very substantial difficulties" involved in post separation parenting and highlighting the serious harm to children caused by "continuing acrimony between their parents." The analysis will focus on whether the importance to children of maintaining contact with a second, auxiliary, parent has been inappropriately prioritised above a primary carer's

difficulties due to systemic gender inequities and above possible adverse effects on children.<sup>58</sup> It will also examine whether it was possible to sustain any identified priority only by labelling as “bad” those mothers who challenge the assumptions it relies on.

### III. Structure and Content

The thesis is divided into three parts. Part 1 introduces the issues and presents the contexts within which the decisions in Part II were made. It is divided into three chapters. Expanding on this Introduction, Chapter 2 aims to survey research that identifies gender based parenting patterns and inequities and to explore the tension between these and the imposition of shared parenting regimes based on assumptions that mothers will be available as primary carers regardless of the conditions imposed on them and that children need a relationship with a second parent.

The roles of “willingness” in fathering practice before and after separation, the conditions under which mothers parent, and the place of power and powerlessness and psychological abuse are examined, with reference to the risk to mothers’ health from psychological violence. The benefits and risks of a relationship with a second parent are then discussed, and before turning to the legal system’s response to the “bad” mother who challenges the legal system’s perception of how a mother should behave in relation to an auxiliary parent.

Chapter 3 introduces the relevant law about parental responsibility. It summarises relevant provisions of the Guardianship Act and briefly discusses those relating to the gender, parental conduct and willingness to parent, and domestic violence, as well as the use of one provision to impose equal parental authority. Relevant provisions of the Adoption Act, SCAA and the Child Support Act are also summarised. The second part of this chapter describes and discusses provisions of relevant human rights provisions: the New Zealand Bill of Rights, UNCHR,<sup>59</sup> UNCROC,<sup>60</sup> and CEDAW.<sup>61</sup> It analyses the relationship of these to local decisions and the

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<sup>58</sup> This is arguably demonstrated even in the language of the title of *Making Contact Work: Consultation Paper* and *Making Contact Work: Report* as well as the lack of a complementary report entitled *Making Day to Day Care Work*.

<sup>59</sup> New Zealand ratified the two covenants to give legal effect to these rights contained in the Declaration – the International Covenants on Civil and Political Rights and on Economic and Social Rights in 1978.

<sup>60</sup> Ratified by New Zealand 13 March 1993.

limitations on their use and advocates reference to the principles articulated in the Preamble to UNCROC rather than its individual Articles.

Chapter 4 continues the contextual survey by considering recent papers and submissions by Family Court judges. The reading of their ideology is based on their recent joint submissions within and outside New Zealand and some individual conference papers. It aims to provide an understanding of the judges' collective conceptual framework and agenda, which inform their decisions in individual cases. It concludes that this ideology and framework has the potential to institutionalise abuse of women.

Part I: Summary briefly recapitulates the contextual material.

Part II consists of cases selected to illustrate how refusal of a role in the hierarchy of care by either a mother or a father can preclude agreement on caring for a child after separation, and the difficulties of imposing a solution within the court system. It highlights the Family Court's responses, with some reference to High Court and Court of Appeal decisions.

A mother may refuse to take responsibility for making a child's paternal relationship work or to engage in proactive strategies to facilitate it. Or, if she was not married to or living with her child's father when the child was born she may resist the assignment of a legal status to her child's father that has the potential to compromise her autonomy and the child's wellbeing. A father may resist a mother's attempts to facilitate his relationship with his child, or seek a change in his status that increases his capacity to exercise ambivalent or debilitating power and undermine the primary carer's autonomy. He may also refuse to honour and support her greater responsibility for day to day care and decision-making.

The decisions are analysed thematically. They include a group of cases where mothers sought the assistance of the Court when fathers either refused to develop or maintain their relationships with their children in a way that supported the primary carer or declined to make an equal parenting

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<sup>61</sup> Ratified by New Zealand 20 December 1984; the Optional Protocol, ratified in 2000, allows New Zealand women who allege a violation of the rights contained in the Convention and have exhausted domestic remedies to take an individual communication to the United Nations CEDAW Committee.

commitment; the leading case about entrenchment of fathers' guardianship rights; the many decisions in the leading case about relocation; and two recent cases where a child's biological father is not a guardian when the child is born and seeks a legal status that could erode the mother's autonomy.

In these decisions, the Court, constrained by the provisions of the Guardianship Act and arguably influenced by its understanding of parental responsibility and the assumptions discussed in Part I, may fail to recognise or misrepresent the concerns or needs of a primary parent for a child and the needs of her child to live a peaceful existence. Analysis of gender inequities and gender-based power differentials and the consequences of ignoring these may be absent. The actual benefits of supporting children's relationships with their fathers may not be rigorously enough examined.

Chapter 5 includes three cases that, collectively, foreclose on mothers' ability to engage the Court's assistance when fathers either refuse to participate in a hierarchical structure of care as "helpers"<sup>62</sup> (*Cunliffe v Cunliffe*,<sup>63</sup> *Collins v Sawtell*<sup>64</sup>) or will not accept equal responsibility, in *Bramley v MacDonald*.<sup>65</sup> A fourth case, *W v W*,<sup>66</sup> illustrates something of the potential for utilising judicial discretion to support a mother once the Court identifies that a father's behaviour is damaging.

Chapter 6 analyses *W v C*<sup>67</sup> and the meaning of "willingness" to parent in relation to the allocation of parental responsibilities; and the assumption that a mother will be constantly available as a primary parent regardless of the conditions under which she has to parent. *W v C* shows how difficult it is for parents to reach agreement when a father is focused on a concept of equality that is not reflected by the history of his relationship with his child and is not prepared to accept the imperatives of participating in the hierarchy of care.

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<sup>62</sup> See below Chapter 2 n 20 and accompanying text for the definition of this term as used in this thesis.

<sup>63</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 Judge Keane.

<sup>64</sup> *Collins v Sawtell* [1995] NZFLR 880 Judge Inglis QC.

<sup>65</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96 Judge Ellis.

<sup>66</sup> *W v W* (16 January 1998) Family Court Palmerston North FP0544 427979 Judge Inglis QC.

<sup>67</sup> *W v C* (20 October 1999) Family Court Tauranga FP 070/213/96 Judge Carruthers; *W v C* [2000] NZFLR 1057 Judge Inglis QC.



*D v S*,<sup>68</sup> the leading relocation case, is analysed in Chapter 7. In *D v S* the parents' engagement with the gendered hierarchy of care before and after separation, led to the father's and the Family Court's assumption that the mother would continue to accept her role as primary carer regardless of the conditions under which she was required to care for her children. The High Court and the Court of Appeal viewed the issues a little differently than the Family Court and, *inter alia*, overruled *W v C*.

In the past, if a father was not married to or living with his child's mother when the child was born, the mother alone held responsibility for her child. As sole guardian, her autonomous status was protected. She was not required to engage with her children's father in a hierarchical structure of care. Chapter 8 considers the erosion of this autonomy, in *Anderson v Paterson*<sup>69</sup> and when a mother and her woman partner are available as joint parents, in *P v K*.<sup>70</sup>

Each case is analysed separately. The facts are outlined, the judicial response is examined, and the outcome explained. A discussion follows each case, group or sub-group of cases. This compares the facts, the judicial response and the outcome in the context of relevant factors from those discussed in Part I. These factors include willingness to carry out guardianship responsibilities before separation; willingness to carry out guardianship responsibilities after separation; the role of gender inequities and the extent to which these are institutionalised or redressed by the decision under consideration; the role of power and powerlessness and behaviours that mothers may experience as unsupportive or abusive and which may affect their health; and the benefits and detriments of a relationship with a second parent, whether or not disguised as shared responsibility. Where appropriate reference will also be made to legislation

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<sup>68</sup> Listed within Chapter 7 as *D v S* nos 1-11: *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99 Judge Callaghan; *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 3) (11 May 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 4) (5 July 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 5) (10 July 2001) Court of Appeal CA 159/01 Gault, Keith and Blanchard JJ; *D v S* (no 6) (24 September 2001) Court of Appeal CA 159/01 Richardson P, Tipping and Anderson JJ; *D v S* (no 7) *D v S* [2002] NZFLR 116 Richardson P, Keith, Tipping and Anderson JJ; *D v S* (no 8) *D v S* (18 December 2001) Court of Appeal CA 159/01 Richardson P, Keith, Blanchard, Tipping, Anderson JJ; *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99 Somerville J; *D v S* (no 10) *S v D* [2002] NZFLR 865 Chisolm and Fraser JJ; *D v S* (no 11) *D v S* [2003] NZFLR 81 Gault P, Blanchard and Glazebrook JJ.

<sup>69</sup> *Anderson v Paterson* [2002] NZFLR 641 Judge Bisphan.

<sup>70</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02 Judge Inglis QC; *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02 Judge Doogue; *P v K* [2003] 2 NZLR 787 Priestley and Heath JJ.

and international instruments discussed in Chapter 3 and information from Chapter 4 about Family Court judges' ideology as expressed outside the Court.

Part II - Summary gathers together the main issues in the cases discussed in the four chapters.

Part III concludes the thesis with discussion of reform and a conclusion. Chapter 9 addresses a range of proposals for reform,<sup>71</sup> representing the three discourses about child welfare identified by Trinder et al<sup>72</sup> and presents ideas about children's wishes and views. It then offers an alternative proposal.

This is based on the argument that where either parent is unwilling to assume his or her role within the hierarchy of care, the best solution is to protect and support the family group providing primary care for a child, by allocating care along the traditional lines of custody and access, with the custodial parent able to make decisions about domicile.

It argues that the present legislative scheme, if interpreted according to a belief system that focuses on protection and support for the primary caregiver and supplemented by amendments, could provide appropriately for children and their primary carers. These changes would meet the underlying principles of UNCROC as expressed in the Preamble, recognising the child's right to a peaceful family life, as well as the issues facing a woman who is a primary carer. This would require that the provision outlawing the mother principle be interpreted narrowly, parental "willingness" before and after separation be rigorously examined. Amendments would extend the definition of violence to include psychological violence and gender inequities be considered as factors that affect the welfare of children. The possible outcomes for the cases considered in Part II under this system are then summarised.

Chapter 10, the Conclusion, summarises the findings of the thesis and suggests possible avenues for further research.

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<sup>71</sup> See above n 20.

<sup>72</sup> See above n 20.

#### IV. Fathers as Primary Carers

Over 80 per cent of single parents are mothers. The gender of those who have primary care of children from former relationships (their own and their current partners') within new relationships is not known, but anecdotally these carers are also believed to be women. Where parenting practice is to reverse the usual gender roles, this thesis places men who have taken the mother's role in the "mother" category. The overarching argument is that a primary carer should have autonomy. However, it is noted that men who are primary carers retain some privilege by not being subject to the gender inequities that women meet on a daily basis.

#### V. Terminology: The Language of Shared Parenting

In New Zealand, as elsewhere, arrangements for day to day responsibilities after parental separation used to recognise that a child was likely to live with one parent and receive less day-to-day care from another. This is provided for in the Guardianship Act which acknowledges that although each eligible parent is a guardian, in general one parent may have the greater responsibility for day to day care of children, expressed in the legislation as "custody". A lesser day to day commitment by the other parent is provided for by "access".<sup>73</sup>

In the last decade or so interpretation of the Guardianship Act has changed with the imposition of "shared parenting" becoming the norm. "Custody" and "access" arrangements are likely to be avoided where possible although shared care arrangements may mirror a similar, unequal, commitment.<sup>74</sup> One principle recently used in the Family Court interpreted the law on the basis that the "welfare" (or "best interests") of a child is best served by a jurisprudence that takes each parent's individual guardianship right (and authority) as a starting point for the allocation of parental responsibility.<sup>75</sup> A High Court judge has commented that:<sup>76</sup>

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<sup>73</sup> For definition of these terms and discussion of s 23 (1) (A) of the Guardianship Act, that proscribes placing a child in the custody of a parent because of that parent's gender, see Chapter 3 nn 2-10, 39-53, 59-62; and accompanying text.

<sup>74</sup> See discussion below Chapter 4 nn 18-23 and accompanying text.

<sup>75</sup> This principle was articulated in *W v C* [2000] NZFLR 1057 (FC), below Chapter 6; and overruled by the Court of Appeal in *D v S* (no 11) below Chapter 7. It appears to be the preferred view of the Principal Family Court Judge and may influence the result of a defended hearing or pressure put on the parties at mediation, see below Chapter 4 nn 36 and 47 and accompanying text.

<sup>76</sup> *P v K* [2003] 2 NZLR 787 (HC), 811 Priestley J.

[T]he Court is not persuaded that there is a significant qualitative difference between expressing the time which a child will spend with each parent as ‘custody and access’ or ‘custody and custody’. ... The nomenclature of appropriate orders need not take on a life of its own.

In this case, His Honour also stated that “ongoing contact by both parents is encouraged by orders of a sophistication and flexibility totally unattainable by the ‘custody’ and ‘reasonable access’ orders which used to attach to divorce decrees.”<sup>77</sup> He distinguished between one kind of joint custody giving parents discretion as to how the custody is exercised (working well if parents understand the dynamics of a successful hierarchy of care) and another, less flexible and useful where parents engage in persistent conflict, expressing shared (or joint) custody in terms of closely defined times that a child spends with each parent.

At one extreme of these “sophisticated” and “flexible” orders is an arrangement where care is rarely or unreliably undertaken and at the other shared care or joint custody where each parent’s responsibility is expressed in an equal commitment of time. In between is shared care and joint or shared custody that is in reality custody (in the sense of an arrangement where the custodial parent has most of day to day the responsibility) and access (where the auxiliary parent has far less). Arguably, any involvement by a second parent means that care for a child is shared. But there is grey area where a second parent does very little in the way of day-to-day care. In this grey area are issues around *how* an auxiliary parent shares care. Is a second parent who carefully prepares a lunch for his child to share with him at a supervised access centre, during the two hours of access once a fortnight giving less “close and attentive physical and emotional involvement” than the one who has his child from Friday night to Monday morning and on other night during the week, 40 per cent of the time, but has almost no direct contact at all because his second partner does all the child care; or the one who has his children once a year for a fortnight’s shared holiday? These questions matter because if any of these arrangements are defined as shared care, they obscure the reality of the commitment by and the cost of that commitment to, the primary carer.

Because the meanings of terms defining parental responsibility are currently unstable “joint,” “shared,” “custody,” “contact,” and “access” hold different meanings in different contexts, the

contextual rather than a fixed meaning of each term will generally be addressed each time it is used. “Primary” or “auxiliary” will be used to describe greater or lesser parental responsibility.

## VI. Social Science Research

In *Making Contact Work* the Advisory Board on Family Law established that there was “a dearth of good quality research data” on the dynamics of contact disputes, the experience of professionals within the court system and the effects and impacts of different dispute resolution processes, whether court orders endured and how they were enforced.<sup>78</sup> This was confirmed in research (completed in October 2002)<sup>79</sup> for this thesis. Where possible New Zealand research has been used and prioritised, supplemented by demotic and anecdotal material. However, since the issues around shared parental responsibility are similar in many western jurisdictions, New Zealand research is placed alongside research from Australia, the United Kingdom and the United States, selected because of its specific focus on issues raised within the parameters of this investigation.

## VII. Parameters of Legal Research

All family law cases decided between June 1996-31 January 1999 and from 1 August 2000 to 31 August 2002 and held by Butterworths were read. The law is as at the end of December 2002. What follows has been developed with an understanding that Maori family law issues may best be resolved in by the development of parallel family law systems under the terms of Te Tiriti o Waitangi/ the Treaty of Waitangi, with Maori being able to choose the system they wish to engage with. There would be mechanisms available for dealing with cases where each parent, or a child, has a different preference.

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<sup>77</sup> *P v K*, above, 814 Priestley J.

<sup>78</sup> Advisory Board on Family Law: *The Children Act Sub-Committee Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department, 5.

<sup>79</sup> Some appropriate 2003 material was added.

## Part I: The Context

*This Part provides a contextual framework for analysis of the cases in Part II. It highlights information about the operation of the hierarchy of care and key assumptions, legislation and belief systems that may affect judicial decision-making, from three sources: social science research, the law - local legislation and international instruments, and presentations made by Family Court judges, outside the courtroom. It identifies tensions and inconsistencies that may be reflected in the cases.*

*Chapter 2 foregrounds social science research about the gendered parenting patterns reflected in the hierarchy of care, and gender inequities that may affect the conditions under which women parent. These include the exercise of ambivalent and debilitating power as a form of abuse distinguishable from the situational powerlessness likely to be experienced by all family members when parents separate. The discussion provides a basis for understanding why it is possible to assume that women will provide most of the parenting for their children regardless of the overall conditions in which they do so. The chapter also includes material about the benefits and detriments of a child's relationship with a second parent, challenging the assumption that a relationship with an auxiliary parent should be privileged, absent physical or sexual abuse.*

*Current legislation relating to the care of children when their parents do not share a household is described and discussed in Chapter 3, with reference to provisions used in the cases and the relationship of some of these to material in Chapter 2, including how the legislation demonstrates inconsistency about the rights of and necessity for contact with biological parents. The chapter also addresses some implications of New Zealand's adherence to international obligations, in UNCROC and CEDAW.*

*Chapter 4, attempting to identify a possible philosophy behind Family Court decision-making, explores a selection of recent judicial contributions to the jurisprudence of shared responsibility when parents live apart, with some reference to judicial perspectives on enforcement to be used to "discipline" mothers who are primary carers.*

## Chapter 2. Social Science and Parental Responsibility

### I. Introductory Remarks

This chapter aims to identify and synthesise information relevant to the assumptions that mothers will continue to parent regardless of the conditions under which they are required to do so, and that a relationship with a second parent, usually a biological father, is necessary for a child's wellbeing.

The "caring for" components of parental responsibility will be emphasised, and the gendered elements of the hierarchy of parental responsibility before and after separation identified. Gender inequities that challenge mothers will be described. Analysis of the role of power and powerlessness after separation and the potential ill-effects on mothers of fathers' abuse of their power follows, before a discussion of the inappropriate assignment of responsibility to mothers defined as "bad". The benefits and detriments of a relationship with their fathers for children whose mothers have primary care of them are then surveyed.

### II. Gender Issues and Shared Responsibility

As the structure of the hierarchy of care shows, "parenting" and "shared parenting" may have different meanings for fathers and mothers, as concepts and in practice. Gendering of responsibility, characterised by the divergence between contact and parenting referred to by Rhoades,<sup>80</sup> and noted as an issue to be remedied by Pryor and Rodgers<sup>81</sup> may therefore affect children before and after separation.

Natural and social parenthood coincide for almost all mothers, who may therefore tend to place more emphasis on natural parenthood, their own and their children's fathers'. A mother's relationship to a child is generally not conditional on anything relating to the father. In contrast, fathers tend to place more weight on social parenthood. Men tend to choose whether to assume

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<sup>80</sup> Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71.

<sup>81</sup> Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, 254. See Appendix 1: "[Fathers'] economic provision and presence are not enough ..."

parenting responsibilities, and to what extent, during a relationship with their child's mother, or by establishing a relationship with the child independently of that family context.<sup>82</sup>

As well, parental responsibilities tend to be exercised differently by men and by women. Traditionally the provision of material things - food, clothing, shelter - has been undertaken primarily by fathers and much of the close and attentive physical and emotional involvement by mothers. Smart and Neale contrast the "caring for" responsibilities often undertaken primarily by mothers, summarised in a New Zealand context by Jeffries J's statement,<sup>83</sup> with a "caring about" role often undertaken by fathers or by others in a child's extended family, both social and biological, who have a lesser commitment. They argue that "caring for" is a moral activity in need of greater value and recognition.<sup>84</sup>

Although family structures and parenting practices are diverse, and to some extent fluid, the hierarchy of care appears to be a common way of organising "caring for" responsibilities before and after separation. Mothers who have cared for their children and facilitated the involvement of fathers before separation seem likely to continue to do so afterwards. Fathers who regard "caring for" responsibilities - as defined in *E v M* - as optional and to be facilitated by their children's mothers while they all live together may expect to continue in a similar way after separation. One result of this is that the overwhelming majority of single parents are mothers.<sup>85</sup>

The cumulative effect of these different histories, concepts and practices is that a child's opportunities for receiving full *E v M*-style parenting from a father may be fragile, whether or not that child's parents share a household. The social and economic status of women who are parents will also tend to be different than that of men who are parents before and after separation.

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<sup>82</sup> See Dolgin J L "Just a Gene: Judicial Assumptions About Parenthood" (1993) *UCLA Law Review* 40 637 on "unwed" fathers; Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart 149-150; and Polikoff N D "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?" (1996) *Santa Clara Law Review* 36(2) 375 on constructing a family without fathers, especially through "new" birth technologies.

<sup>83</sup> *E v M* (13 September 1979) High Court Wellington M361/779 Jeffries J, approved by Court of Appeal in *Director-General of Social Welfare v L* [1990] NZFLR 125, 136: "The normal duty and care owed by a parent to a child is to nurture the child to a state where it is independent of the parent. The nurturing process has some clearly identifiable characteristics that are shared by most humans. The provision of shelter, clothing, food, together with love and affection. In preparation for independence, education in its broadest sense. All this involves close and attentive physical and emotional involvement."

<sup>84</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press, Chapters 6 and 8. Like Wallbank above Chapter 1 n 18 the authors acknowledge Tronto's influence on their thinking.

<sup>85</sup> See above Chapter 1 n 5.



## 1. The hierarchy of care and willingness before separation

Detailed discussion of pre-separation responsibilities for children is rare in written decisions. Possibly this is because a decision about guardianship responsibilities involves “a predictive assessment ... a decision about the future,” is “not a reward for past behaviour and has “no room for a priori assumptions”<sup>86</sup> and possibly because the Court wants to avoid any sense of making a presumption that “the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.”<sup>87</sup>

However, past and present behaviour is a good prediction of future behaviour; and the Court is entitled to have regard to the conduct of any parent if it is relevant to the welfare of the child.

Although there is a wide range of practices, before separation only one parent may have a committed engagement with the “close and attentive physical and emotional involvement” described in *E v M*, exercising “the right of control over the upbringing of a child”<sup>88</sup> that guardianship includes along with custody. The other parent may have been “unwilling to exercise those responsibilities”<sup>89</sup> believing that he or she has in fact fulfilled his or her responsibilities as a provider of material things and by having some contact and relationship with the child. In these circumstances, if there is conflict between the parents the wellbeing and stability of the child may be best served by honouring the status quo after separation and supporting the autonomy of the person who has made a commitment to caring for responsibilities, usually the mother. Other practices may demand a different solution.

The extent to which a parent has been willing to exercise responsibilities for a child is measurable. Smart and Neale<sup>90</sup> in England, Ritchie<sup>91</sup> in New Zealand and Deutsch<sup>92</sup> in the United States have all measured the sharing of parental responsibility and reached some similar conclusions, consistent with the idea that parental responsibility before separation before separation is often exercised within a hierarchy of care. Fathers are more likely to be involved in

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<sup>86</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116, 128 (CA).

<sup>87</sup> Guardianship Act s 23(1)(A). See below Chapter 3 nn 57-62 and accompanying text.

<sup>88</sup> Guardianship Act s 3.

<sup>89</sup> Guardianship Act s 10(2). See below Chapter 3 nn 10-27 and accompanying text.

<sup>90</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press.

<sup>91</sup> Ritchie J “Women and the Family in New Zealand” in H Margolis and A Else (eds) *Hui Raranga Wahine/Women's Studies Association (New Zealand) Conference 1999: Papers* (2000).

<sup>92</sup> Deutsch F M *Halving It All; How Equally Shared Parenting Works* (1999).

direct childcare responsibilities if the mother is in paid employment,<sup>93</sup> but generally not on an equal basis.<sup>94</sup> This may affect each parent's identity whether or not earning and childcare are equally shared, according both to Deutsch and to Smart and Neale. If both parents are in paid employment and managing the day to day care of their children, mothers begin to see themselves as workers as well as parents. Fathers who involve themselves with childcare began to identify as

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<sup>93</sup> This is congruent with a "reciprocity" hypothesis presented in Silverstein L B and Auerbach C F "Deconstructing the Essential Father" (1999) *American Psychologist* 54(6) 397, 401-2. This suggests that in cultures where women have significant resources to offer men in return for childcare, paternal involvement is higher than in cultures where women have fewer resources. Fathers participate more in childcare if their partners make as much money or more money than they do. Paternal involvement is low in social contexts where either the fathers or the mothers have few benefits to exchange. The authors report that the least amount of involvement in the United States has been observed in two groups of fathers: poor teenagers and upper-class men, the former because they have few economic benefits to offer, the latter because their wives have few economic benefits to offer. Maclean and Eekelaar found a strong association, after separation, between the payment of support and the exercise of contact, which may be evidence of another kind of exchange of benefits (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 149). In New Zealand, under s 13(1) of the Child Support Act a parent who shares care of his or her child "substantially equally" and therefore has a lesser child support liability under the Act must care for the child at least 40 per cent of the nights of the child support year (see below, Chapter 3 n 82-83 and accompanying text). This may be a powerful motivator for fathers to share day to day care of children. Wilson refers to fathers rights sites on the Internet that refer to joint custody (shared parenting) as a means of lowering or eliminating child support. She also quotes a family law specialist's statement to *Achieving Equal Justice for Men and Women in the Courts – The Draft Report of the Judicial Council [California] Advisory Committee on Gender Bias in the Courts*: "... [O]ne thing that I'm finding quite often is that dad says that [he wants not only quality time, but quantity time with his children ... a wonderful motivation as long as it's in good faith] and dad gets that, and dad also gets something else when he gets that, generally, he gets a smaller child support award. And then, lo and behold, dad doesn't exercise that joint custody he fought so vehemently for. All of a sudden he's on a more traditional, once every other weekend, once a month, maybe on Christmas, all of a sudden the children aren't hearing from dad at all, and what mom has is the children on a full-time basis, which she probably likes, but she has half as much money as she would have had had it meant a traditional child custody and child support situation. Her remedy, then, of course, is to go back to court, and more times than not there's a financial disparity. It's going to cost mom to go back, if she even has any money to obtain the services of an attorney, she probably is going to get a token award of attorney's fees at the end." (Wilson T "Testimony on SB 571 – Rebuttable Presumption for Joint Legal Custody; Family Law and Fathers' Rights Antics in Maryland *Feminista!* 2(2) <http://www.feminista.com/v2n2/wilson.html>, 2.) In New Zealand, for the 75 per cent of single mothers on a DPB (see below n 62) the use of shared parenting to reduce child support liability may not be an issue because it is paid directly to the government to defray the cost of the DPB. On the other hand, in April 2003 almost 16,500 mothers on DPB paid a \$22 per child penalty for not naming their children's fathers who therefore had no child support liability, about 6 per cent; this may be a reciprocal agreement with the fathers in return for other kinds of support from the fathers (McLoughlin D "Crackdown Aims at DPB Mothers" *The Dominion Post* 8 April 2003 A6). However, if a woman wants to work, with pay equity not being a reality, child support is useful. If then an auxiliary parent has a shared parenting agreement (caring for the child at least 40 per cent of the time) but is not exercising this responsibility as arranged *and* is only paying part of the child support, a primary carer is likely to be in the same position as her Californian counterpart.

<sup>94</sup> Deutsch, above, 3-4 cites many studies from the 1970s that show that men whose wives worked outside the home did not seem to be taking on more domestic work than those whose wives were at home full-time. Sometimes the percentage of the men's contribution increased, but only because their wives were doing less. Many studies, she found established factors that existed where men did more domestic work: if their wives compared with other women earned relatively more of the family income, worked more hours per week in the paid work force or they or their wives had relatively liberal ideas about gender, but even so these men did a lot less than their wives. Inequity persisted.

people who care for their children as well as being providers.<sup>95</sup> However couples tend to overestimate the father's contribution.<sup>96</sup>

One less affluent group in Deutsch's research nevertheless tried to retain three aspects of their gender identities: the father as breadwinner, the idea that the mother works only "to ensure the economic survival of the family,"<sup>97</sup> and the mother as the primary parent. Even when they took on the responsibility for doing domestic tasks - as they often did - rather than merely "helping", the fathers still defined their contribution as "helping". This seems to indicate that where fathers identify more with their work and mothers as those who have "real" responsibility for the children either party or both parties may undertake "gatekeeping" related to their chosen parental identity. This can be viewed as a useful fiction, maintaining the prerequisites for the successful operation of a hierarchy of care.

Engagement with the parenting process may not be negotiated (that is, the hierarchy and the parents' respective roles are taken for granted); and is sometimes non-negotiable (because one parent or other wants to retain the hierarchy and refuses to negotiate the parameters of their responsibility). This is supported by Maclean and Eekelaar's research. They found "little evidence of widespread 'joint' parenting or joint decision-making either while the parents were living together or afterwards"<sup>98</sup> in any of their three groups of parents, those who had been married, those who had co-habited and those who had never lived together.

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<sup>95</sup> Deutsch, above, Smart and Neale (Smart C and Neale B *Family Fragments?* (1999) Polity Press) and Ritchie (Ritchie J "Women and the Family in New Zealand" in H Margolis and A Else (eds) *Hui Raranga Wahine/Women's Studies Association (New Zealand) Conference 1999: Papers* (2000)) all note that mothers did not work outside their homes only for financial reasons. They derived satisfaction from working. Although they tended not to be as committed to work as the fathers were, they were often more committed than the fathers wanted them to be.

<sup>96</sup> Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 93, 121-122, 137, note that of the formerly married parents 30 per cent of the male respondents claimed to have shared parenting during marriage and only 11 per cent of the women; the authors required "strong indication of sharing" before placing couples in a sharing category. They found that 17 per cent of the couples did in fact share, compared to 12 per cent for formerly co-habiting parents none of whom reported joint decision making after separation, and whose reporting of sharing during their relationship did not show the same gender bias. After married couples separated it was "difficult to distinguish between the parent looking after the child and the 'outside' parent" only in between 2 and 10 per cent of cases, although 10 per cent of them reported joint decision-making on some issues. Both Smart and Neale, above, 47-48 and Deutsch, above, 241-2 and 261 found that parents over-reported equality or interchangeability of responsibility and that these reports changed when there was examination of the specific tasks involved.

<sup>97</sup> Deutsch, above, 184.

<sup>98</sup> Maclean and Eekelaar, above, 137.

Where dual income, comparatively affluent, couples in Deutsch's research did share equally, it was often simply a practical solution (and since the couples also employed carers this did not involve them in the commitment of time invested by less affluent couples who alternated work and childcare). It was also a hard won solution; the process of achieving an equal balance usually required major conflict that brought the couple to the brink of divorce. The sharing had to be continually renegotiated and the wife was always the one pushing for equality.

Deutsch identifies three kinds of father roles, implicitly and explicitly negotiated by unequally sharing dual income couples:<sup>99</sup>

- (i) the "helper" who does an assigned task if he has time but does not feel responsible for remembering that the task must get done or for doing it, even if he does have time;
- (a) the "sharer" who is committed to his paid work but is as fully involved as he can be; and
- (a) the "slacker" who relaxes after coming home from work while his wife does a "second shift".

All these roles are consistent with a hierarchical structure where a primary carer facilitates the involvement of an auxiliary carer. This has consequences for children. Mothers in Smart and Neale's study for instance noted that "fathers rarely seemed to be 'in tune' with the children or that they did not notice or anticipate emotional states, illnesses or preferences."<sup>100</sup> They summarise their perception of the parents in their study as: "Fathers [with one exception] were one step removed from their children and their relationship with them was sustained via their relationship with the mother."<sup>101</sup>

In summary, this research supports a view that there tends to be a hierarchy of care in place before separation, sometimes modified by economic factors, with the primary parent facilitating her child's relationship with the auxiliary parent. Maintenance of this hierarchy may cause conflicts. But conflicts about gendered responsibilities *before* separation do not generate legal proceedings if fathers are "unwilling to exercise" guardianship responsibilities. The conflict, which may cause separation, remains private until parents separate. Or there may be no conflict until separation.<sup>102</sup>

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<sup>99</sup> Deutsch, above, 45-46.

<sup>100</sup> Smart and Neale, above, 49. They identify this as a "pattern of relationships" very similar to those described in Backett's *Mothers and Fathers* (Backett K *Mothers and Fathers; A Study of the Development and Negotiation of Parental Behaviour* (1982) Macmillan).

<sup>101</sup> Smart and Neale, above, 47.

<sup>102</sup> David Burns, Chair of the Family Law Section of the New Zealand Law Society had this to say: "If you go into any maternity hospital right now and ask 100 women who have just given birth who is going to look after that child

## 2. The hierarchy of care and willingness after separation

Most children live with their mothers after separation.<sup>103</sup> Some fathers share parenting responsibility, often, as noted, taking an appropriate role in the hierarchy of care. But many fathers are committed only to “contact”; or gradually have no direct involvement in their children’s lives: many fathers stop having contact with their children in the two or three years after separation.<sup>104</sup> Although there is often continuity of fathering practices, and this reinforces a belief that past behaviour is a good predictor of future behaviour, fathering practices are also fluid. If there is high conflict between them parents may not be able to work together to make amicable, co-operative arrangements, and may have to settle for parenting separately with minimal communication.

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they will all put up their hand and say ‘Me’. Most of their male partners will accept that as the way it should be, the way it is, and the way they want it to be. There tends to be a status quo building up over several years. The question is why change that because of separation? Men’s groups say they want to re-empower themselves, that they don’t like the feeling that they lose power because she has the children. My answer to that is why didn’t you organise your lives so that you had 50-50 in the first place?” Haines, L “Society’s Dirty Washing” (2004) *Dominion Post* 10 April E3. Mr Burns’ views in his official role and as a practitioner are included as a senior practitioner’s counterpoint here and there through this thesis. See also below n 131 and Chapter 7 nn 4, 95, 365; and accompanying text.

<sup>103</sup> See above Chapter 1 n 5. There are no figures for mothers who care for children from previous relationships (their own or their partner’s) from within another relationship.

<sup>104</sup> Lee A *A Survey of Parents Who Have Obtained a Dissolution* (1990) Department of Justice Policy and Research Division, 47: 25 per cent two years after separation; and elsewhere, for example Kruk E “The Disengaged Noncustodial Father: Implications for Social Work Practice With the Divorced Family” (1994) *Social Work* 39(1) 15, 16: gradually to more than half, with the sharpest increase a year after separation; Wolchik S, Fenaughty A and Braver S “Residential and Non-Residential Parents’ Perspectives on Visitation Problems” (1996) *Family Relations* 45 230: about 45 per cent of fathers who were seeing their children at least once a month after filing for divorce were no longer doing so after three years. These were all fathers who had been married rather than living in de facto relationships, for which the figures may be different. In Smith et al, where 86 per cent of the children, interviewed at an average of 6.2. years since separation lived with their mothers, 7.5 per cent with their fathers, 6.5 per cent with both parents on a shared time basis, only 6.5 per cent had no contact at all with the non-residential parent, though others had “minimal” contact (Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children’s Issues Centre, 6). 107 children from 73 families took part in the research; and 111 out of a possible 146 parents also contributed. Because there is no indication of the criteria used to recruit the participants, it is impossible to establish whether the small percentage of children who had no contact with their non-residential parent is the result of changed policies and practices - including increased emphasis on shared parenting regimes - in the 13 years since Lee’s report or of the study’s selection of participants. However, since around 15 per cent of the parents of these families had taken part in a defended hearing, while the Court itself records that only 5 per cent of separated families who do this (see Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000), 2) perhaps defended hearings generate a higher proportion of children whose remain in touch with their fathers. In the sample studied by Trinder et al (Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation) in ten of the 61 families contact was irregular or had ceased.

Trinder et al found no examples of successful “equal rights” sharing of responsibility in their sample. Instead they found that the most active proponents of shared care were fathers in two groups that included 20 per cent of the sample, where contact was not working. In many of these families, where either parent (or both) was unwilling to accept a role bargain, the conflict was very distressing for the children and ongoing court involvement seemed to “sustain and even exacerbate the conflict.”<sup>105</sup> In conjunction with the success of role-based agreements this seems to argue against prioritising rigorous regulation for equal parental responsibilities where these have not been a family practice.

This research may explain Kruk’s finding that fathers who had been most closely involved with their children and who were more likely to provide similar definitions of mothering and fathering were more likely to lose contact with their children.<sup>106</sup> These may be the fathers who are unwilling to accept a gender role bargain, having challenged gender roles in their fathering practice before separation. Kruk found that these fathers’ disengagement often came from their difficulty in resolving intense mourning for the loss of their children; and they often felt very guilty about their disengagement. Trinder et al did not find that fathers “without commitment” after separation were those who had been most involved in care before separation, although non-resident parents in their “ambivalently erratic” group did find contact with their children and former partner painful.<sup>107</sup>

Kruk also found that those who differentiated between the mother and father roles and who had been previously on the periphery of their children’s lives were more likely to retain contact and develop their relationships with their children.<sup>108</sup> These outcomes were not affected by the remarriage of one or both parents,<sup>109</sup> the proximity of the parents’ homes,<sup>110</sup> the kind of housing,

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<sup>105</sup> Trinder et al, above, 20. There were 5 “competitively enmeshed” families and 7 “ongoing battling” families who shared similar difficulties in regulating their responsibilities but were distinguished by their choices vis a vis the legal system; the “competitively enmeshed” families did not engage with the legal system in attempts to resolve their difficulties.

<sup>106</sup> Kruk, above, 20.

<sup>107</sup> Trinder et al, above, 46.

<sup>108</sup> In my own research (*7 Risks for Single Mothers; & the Art of Managing Them*, forthcoming) one woman described this transformation in this way: “He used to lie on the couch doing nothing, watching me mother and shouting instructions and criticism when we lived together; now he treasures [their daughter] and is a wonderful father.”

<sup>109</sup> However Smith et al refer to Wallerstein and Lewis (Wallerstein, J and Lewis J “The Long-Term Impact of Divorce on Children: A First Report From a Twenty-Five Year Study” (1998) *Family and Conciliation Courts Review* 36 368) who found that father-child contact was difficult to sustain and varied with the father’s remarriage, the attitude of his new partner and the presence of children in the second family (Smith A, Gollop M, Taylor N and

income or the work commitments of the father. In view of the research of Trinder et al, this may be because these fathers had always accepted a gender-based role and the facilitation of their fathering involvement by their children's mothers and their post-separation responsibilities were simply an extension of this, with a structured and supported opportunity to develop their former role in new ways.

Most of the fathers in Smart and Neale's study however remained "good provider" fathers who paid child support and saw their children occasionally or fell back on a minimalist, biological, paternal identity. Some who had not been involved in childcare to any great extent before their divorce or separation, became involved afterwards and gradually developed a new identity as fathers because their children lived with them for part of the time.<sup>111</sup> In their small, qualitative, sample, about a third of the fathers were willing either to abandon or reduce their commitment to their career commitments, to become the caring parent after separation.

When a father chooses to develop his parenting practice significantly, albeit still notionally as a "helper", a mother, who is likely to maintain similar practices before and after separation, has to accommodate this change. The transition to contact that works, where extensive contact with a father has the potential to become equally shared care, is challenging even if a mother is committed to the process and has a role bargain with their child's father.

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Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, 63). Smith et al's own findings support this to some extent; see below nn 176-188 and accompanying text.

<sup>110</sup> Maclean and Eekelaar (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 73, 97, 122) report that parents in early separation (most of whom did not have new partners) who were in contact with their children tended to live nearby. However, many parents who lived nearby did not exercise contact. When parents had been married those who maintained a relationship were almost evenly divided between those who lived nearby and those who lived more than ten miles away, in two cases overseas. Of auxiliary parents who had never lived together or had co-habited those who were in contact with their children tended to live nearby, there were also many who lived nearby but had lost touch with their children. The authors were unable to say whether those who were still in contact (most of whom had not repartnered) were doing so because they were nearby, or were living close to the child so they could stay in touch easily. "This implies that distance need be no real barrier to the exercise of contact if that is desired, and [auxiliary parents who are living more than ten miles from a child without staying in touch] are not so much inhibited by distance from exercising contact as by other factors" (Maclean and Eekelaar, above, 122).

<sup>111</sup> Smart and Neale (Smart C and Neale B *Family Fragments?* (1999) Polity Press, 50) suggest that this might be because of their position in the labour market, as men seem able to assume "caring for" parenthood as a core identity only if they leave or are ejected from the labour market or have some flexibility in or control over their working lives. Of the three fathers who assumed this identity, two for some time blocked contact between the children and their mothers (Smart and Neale, above, 207).

It may be difficult for a mother to share her practical and emotional responsibilities with a father who has not shared them before separation.<sup>112</sup> This difficulty may be exacerbated if a father “imagines” that he had been equally responsible during marriage and becomes resentful of a mother who does not maintain this fiction after separation. This is possible, because couples tend to overestimate fathers’ contribution to the “caring for” responsibilities. In these circumstances:<sup>113</sup>

[M]others felt undervalued and fathers ... that they were losing out. These feelings were often quite intense because mothers and fathers ... had invested their identities in being mothers and fathers - albeit very different sorts of identity.

These may be the parents who become, in the terms of Trinder et al, “competitively enmeshed” or part of the “ongoing battling” group,<sup>114</sup> engaging in conflict which may be similar in intensity to the conflicts described by Deutsch in relation to affluent parents where the wife pushed for equality.

Rodwell<sup>115</sup> to whom “many women have spoken ... about how hard it is to share responsibility they once held primarily alone and to trust that their children will be safe emotionally and physically [with their father]”<sup>116</sup> provides a New Zealand example of how pre-separation parenting practices and the fluidity of fatherhood can affect family members after separation.

One father was a traditional breadwinner while the mother cared for the children and worked part-time. He said<sup>117</sup>

[I] realised I couldn’t be without my children ... I did not want to be left with only my work ... I realised for the first time that I could control what hours I worked ... on many occasions[while married]I could have been flexible in terms of when I started or finished work.

For his children’s mother, who agreed to share the care of the children on a week-about basis:<sup>118</sup>

My initial reaction was rage, and then tears. It was enormous. I used to think, If only you had done ten per cent of what you are doing now things would have been so different, and why did you have to wait until we separated before you decided you wanted to be a more involved father?

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<sup>112</sup> See for example Smart and Neale, above, 51.

<sup>113</sup> Smart and Neale, above, 51.

<sup>114</sup> See above Chapter 1 n 46, above n 26 and below n 125; and accompanying text.

<sup>115</sup> Rodwell, *J Repartnered Families: Creating New Ways of Living Together – Beyond the Nuclear Family* (2002) Penguin.

<sup>116</sup> Rodwell, above, 42.

<sup>117</sup> Rodwell, above, 40.

<sup>118</sup> Rodwell, above, 43.



She was hurt and offended that the children would consider living with their father. But she had no hesitations about their safety, knew he would not hurt or neglect them and knew that he supported her parenting as she did his. And although it was “diabolical” initially, eventually she received the benefits of sharing the parenting, more time for her own needs and more “patience humour and energy” with her children. The father found it “really difficult” to meet the practical and emotional needs of the children initially, but adjusted.

Transformations by both parents are possible. They can be managed, with support (which the parents in Rodwell’s story had from her as a therapist).

But not by every mother. If a father was unwilling before separation to exercise guardianship “caring for” responsibilities, or content to exercise them as a “helper”, with his contribution facilitated by the mother, and her care of the children has been fairly autonomous a mother may believe that gatekeeping after separation is reasonable. In terms of the hierarchy of care it is also appropriate for her to continue to facilitate the relationship and for the father to accept this, even if their roles had begun to merge because she was working. She may want to continue to parent while he continues to have contact. If the father wants to change so he has a more equal role, it may be impossible for them to reach agreement.

Alternatively a mother may believe that her children’s father had long ago relinquished his guardianship by being unwilling to exercise it and it is therefore not appropriate for him to choose to resume it on separation. She may take responsibility for protecting her child from what she believes would be unsatisfactory, damaging, experiences, if for instance her child’s father is consistently unreliable.

In these circumstances, if neither parent changes their parenting practices, divergence between contact that does not include a significant “caring for” element and “caring for” primary parenting practices will continue. This divergence is suggested in various studies. In New Zealand the custodial parents surveyed for one study, the majority of them women, claimed that the non-custodial parent did not keep agreed arrangements or look after the children properly

during access visits.<sup>119</sup> I became familiar with some of these concerns when I was researching for a book on single mothers. I was asked “Would you let a stranger who could not change a nappy care for your child?”; “Would you employ a carer for your child when you knew he would leave your child with one of his family members whom you did not know, or did not trust, while he went to the pub?”<sup>120</sup> These may be the kinds of reasons on which a “good” mother, characterised by a court as a “bad” mother makes her judgment that the contact is so unsatisfactory that it should be discouraged or terminated.

These concerns and choices are not necessarily due to “implacable hostility”. They may also be unrelated to the process of ending the intimate relationship with a child’s father. One study<sup>121</sup> examined parents’ experiences on the basis that the literature suggested that access problems experienced by primary carers (usually mothers) differed from those experienced by access parents; and studied the relative contribution of mothers’ concerns about fathers’ parenting abilities and their feelings of hurt and anger about their divorce.

The researchers interviewed both mothers and fathers within two and a half months of their filing for divorce and on the first and third anniversaries of the first interview. The “overwhelming majority” of mothers reported several problems with access, and a smaller number of fathers. Although at the first interview the mothers’ concerns related either to hurt and anger or to concern about the fathers’ parenting competence, by the third interview the concerns were related primarily to concern about fathers’ parenting abilities.

The mothers’ most common concern was that the access parent spoilt the child during access.<sup>122</sup> “Spoiling” was not defined; perhaps it was providing the children with junk food and material things that were not available at “home”. One analysis<sup>123</sup> supports this view; it suggests that fathers find it easier to provide entertainment and gifts than to be “involved” parents because it is less demanding.

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<sup>119</sup> Lee A *A Survey of Parents Who Have Obtained a Dissolution* (1990) Department of Justice Policy and Research Division.

<sup>120</sup> Evans, M *7 Risks for Single Mothers and the Art of Managing Them* (forthcoming).

<sup>121</sup> Wolchik S, Fenaughty A and Braver S “Residential and Non-Residential Parents’ Perspectives on Visitation Problems” (1996) *Family Relations* 45 230.

<sup>122</sup> First interview: 74 per cent, third interview 76 per cent (Wolchik et al, above, 232).

<sup>123</sup> Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, 216-217.

Mothers also believed that the access parent was a bad role model;<sup>124</sup> that the child was more difficult than usual to manage on arrival home;<sup>125</sup> that the child was upset or depressed on arrival home.<sup>126</sup> There was a substantial ongoing problem with reliability: only a small proportion of fathers<sup>127</sup> picked up and returned the child at the scheduled time.

Fathers' concerns were the mother's (un)willingness to change access on request;<sup>128</sup> arguments about access;<sup>129</sup> access changed at short notice;<sup>130</sup> the child not being ready;<sup>131</sup> threats to prevent access;<sup>132</sup> other kinds of interference with access;<sup>133</sup> and attempts to control activities during access.<sup>134</sup>

From a child's point of view, one outcome of mothers having had primary responsibility not only for the physical but also for the emotional care of children is that on separation some fathers and children will have a relationship characterised by a limited emotional connection. One recent research project examined children's confidants after separation. It found that of those children who discussed their concerns after separation many did so with grandparents or with friends rather than parents, with fathers being "particularly infrequent"<sup>135</sup> confidants compared to mothers and friends. It was a common theme that fathers "did not understand." Another found that teenagers consistently rate their mothers more favourably than their fathers.<sup>136</sup> Where this is so, it seems unreasonable to continue to privilege a relationship that offers less than a grandparent

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<sup>124</sup> 70 per cent-58 per cent (Wolchik et al, above, 232).

<sup>125</sup> 69 per cent-68 per cent (Wolchik et al, above, 232).

<sup>126</sup> 58 per cent-60 per cent (Wolchik et al, above, 232).

<sup>127</sup> 12 per cent-14 per cent (Wolchik et al, above, 232).

<sup>128</sup> 45 per cent at first interview and 30 per cent at the third; it seems that this willingness/unwillingness to change access was the changing of it at the access parent's request (Wolchik et al, above, 233).

<sup>129</sup> 44 per cent-39 per cent (Wolchik et al, above, 233).

<sup>130</sup> 41 per cent-42 per cent (Wolchik et al, above, 233).

<sup>131</sup> 32 per cent-38 per cent (Wolchik et al, above, 233).

<sup>132</sup> 31 per cent-17 per cent (Wolchik et al, above, 233). By the third interview when access had ceased for 45 per cent of the men, perhaps some of these threats had been realised.

<sup>133</sup> 24 per cent-31 per cent (Wolchik et al, above, 233).

<sup>134</sup> 23 per cent-33 per cent (Wolchik et al, above, 233).

<sup>135</sup> Dunn J, Davies L C and O'Connor, T G (2001) "Family Lives and Friendships: The Perspectives of Children in Step-, Single-Parent, and Non-Step Families" *Journal of Family Psychology* 15(2) 272, 283.

<sup>136</sup> Teenagers in consistently rated mothers more highly than fathers as a source of an excellent or very good relationship (71 per cent and 58 per cent); find it easier to talk with their mothers about drugs or discuss drugs alone with their mother (57 per cent and 26 per cent; 15 per cent and 4 per cent); and as sole sources of support when they have important decisions to make (27 per cent and 9 per cent). National Center on Addiction and Substance Abuse at Columbia University *Back to School 1999; National Survey of American Attitudes on Substance Abuse V: Teens and Their Parents; Report* (1999), 5.

or friend, simply because a father became a guardian through his relationship with a child's mother, now ended.

As shown above,<sup>137</sup> after separation, the continuing hierarchy of care will work if primary carers feel secure in their role and engage in a wide range of proactive strategies to facilitate their children's relationships with their fathers, taking major responsibility for making them work. However, doing this as well as maintaining autonomy and dealing with the consequences of gender inequities, can be very difficult for a mother, especially if the father attempts to control rather than to support the new family unit.

In this context, gender inequities affecting women as primary carers, including the exercise of power and control, as a discrete expression of gender inequity, become crucial issues.

### 3. Conditions that affect women as parents

The conditions under which women parent, in a two parent or a single parent household, are affected by gender inequities. Some of these are due to New Zealand's systemic failure to comply with United Nations instruments.<sup>138</sup> For example, because pay equity is not a reality,<sup>139</sup> if a mother is employed outside the home, because she is a woman, her earning power is likely to be less than a man's.<sup>140</sup> It is most likely that a single mother will receive DPB with the economic limitations that entails.<sup>141</sup> Whether or not she is employed, if she had previously shared a

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<sup>137</sup> See above Chapter 1 n 35 for details.

<sup>138</sup> A summary of structural factors affecting a single parent family is provided by Maclean and Eekelaar (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 57-58). These include relative poverty and the loss of social capital through dislocation of social and community networks.

<sup>139</sup> "Pay equity means that women have the same average pay as men (once clearly justifiable differences, say in qualifications or hours, are accounted for." Ministry of Women's Affairs *Next Steps Towards Pay Equity: A Background Paper on Equal Pay for Work of Equal Value* (2002), 4.

<sup>140</sup> Pay equity will also affect any woman with a student loan differently than a man, as well. In February 2004 the New Zealand University Students Association (NZUSA) is supporting a claim to the Human Rights Commission based on their figures that female graduates take twice as long to repay their student loans as male graduates and as a result incur more interest and thus pay up to 20 per cent more for the same education. According to NZUSA this is due to women's earnings being only 83 per cent of equally qualified men's hourly earnings and "time spent out of the workforce bearing and rearing children:" Monk, F "Loan Justice" (2004) *Listener* 7 February 26, 27).

<sup>141</sup> In the March 2001 54 per cent of single parents had an income of less than \$20,000. 64 per cent had an income of less than \$25,000 with 17,736 12.7 per cent not stating their income or away from home. (Statistics New Zealand *2001 Census: Families and Households (2001) – Reference Reports* (2002)

<http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Reference+Reports+2001+Census:+Families+and+Households+2001?open> (accessed 10 October 2003) Table 28). Children (as well as adults) in sole parent families are on average disadvantaged in terms of family income when compared to their peers in two-parent families, even after incomes have been adjusted for family size. The explanation for this lies partly in the different labour force participation patterns of single and partnered parents and also the varying proportions of children in sole-parent

household with her child's father, her immediate family is likely to live under less favourable material conditions than before separation, with a reduced income, unless the father had been unemployed or working for very low wages.<sup>142</sup> Because a mother has primary responsibility for children, her commitment to paid work, education or training will usually be compromised by their needs. If a family newly headed by a single mother had been part of a family owning a house, the new family may have to move, following division of matrimonial or partnership property, because the mother is unable to buy out her ex-husband or partner, or to service a mortgage; and then to live in rented accommodation which often provides only a temporary home.<sup>143</sup>

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families among different ethnic groups. The difference between the family income of children in sole-parent families and those in two-parent families continued to widen between 1991 and 2001 (Statistics New Zealand, above, Table 13). When the Census was taken there were 104,309 people receiving a DPB, 74 per cent of all single parents: 38 per cent of all male single parents – a greater proportion of whom were responsible for older children – and 81 per cent of all females – excluding 9109 who were receiving Widows Benefits and who may have had children. 89 per cent of those receiving DPBs were women (personal communication Ministry of Social Development 6 November 2003). This seems to indicate that those who did not state their income or were away from home must all have been on the DPB, on which it is difficult to have an income of more than \$20,000. In September 2003 103,633 single parents were receiving the DPB (personal communication Ministry of Social Development 15 October 2003) of whom 91 per cent were women.

<sup>142</sup> For further detail see for example Law Commission/ Te Aka Matua o Te Ture *Family Court Dispute Resolution: A Discussion Paper* (Preliminary Paper 47) (2002) 103-114; and Birks S *Submission to the Law Commission on Preliminary Paper 47: Family Court Dispute Resolution* (2002). Maclean and Eekelaar (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 57-58) refer to their own research and American evidence that shows that after divorce a father's economic status invariably improves while that of a mother who is looking after children declines. This may be true in New Zealand also. In a 1988 survey of Family Court clients Maxwell and Robertson found that most custodial mothers' incomes declined to well below \$15,000 per annum after separation while income for both custodial and non-custodial fathers actually increased. "Circumstantial and anecdotal evidence" supports the view that the consequences for men are better than those for women, according to economist Susan St John (St John S *Income Expectations of Men and Women After Separation* (1995) (Paper for the Family Law Conference October 1995), 6). Lee (Lee A A *Survey of Parents Who Have Obtained a Dissolution* (1990) Department of Justice Policy and Research Division) asked her survey response to compare their standard of living just before separation and at six months, one year and two years afterwards. Initially a higher proportion of men experienced a fall in their standard of living but after two years a slightly higher percentage of women than men said that their standard of living had fallen "a little" or "a lot". Some respondents gave the term a broader meaning than their standard of material comfort: about a third of each gender (the largest proportion of the men) gave as a reason for an improved standard of living that they were happier in themselves or felt better. Most women whose standard of living had risen gave as a reason that they had regular money, were not living day to day and could budget; some women reported that in spite of having a lower income they had a better standard of living, possibly because they had control over their income. Of those whose standard of living had fallen, 48 per cent of the women and 25 per cent of the men were financially worse off. While 30 per cent of the men had a lower standard of living because of a property settlement and because they had to start afresh, for 29 per cent of the women going from two incomes to one or on to the DPB (23 per cent) lowered their living standards (Lee, above, 24-27).

<sup>143</sup> The differences in the housing tenure patterns of children in sole and two parent families have also widened in recent years. Between 1991 and 2001 the proportion of children in sole parent families living in homes owned either with or without a mortgage fell from 53.7 percent to 42.4 percent. Over the same period the proportion of children in two parent families living in homes owned by their parents fell less markedly, from 81.1 percent to 73.5 percent (Statistics New Zealand *2001 Census: Families and Households (2001) – Reference Reports*, above, Table 24).

Any mother's mental wellbeing is "particularly vulnerable to the impact of socioeconomic factors and the demands of childcare."<sup>144</sup> A recently single mother may have to support her children through any grief and anger they have as a result of the separation as part of her "close and attentive physical and emotional involvement" with them, often in isolation, with very little social support and encouragement. Since a single mother-headed family is often not seen as a "legitimate" family<sup>145</sup> she is also likely to have to deal with inappropriate criticism from family, friends, teachers, employers and others.<sup>146</sup> Subject to considerable stress (the perception of threat to her physical or psychological wellbeing from a variety of sources) she will be vulnerable.

Susceptibility to domestic violence before or after separation is an inherent part of gender inequity: a woman is much more likely than a man to have been or to become the applicant for a protection order.<sup>147</sup> After separation there are specific kinds of psychological violence a mother

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<sup>144</sup> Pryor J and Rodgers B *Children in Changing Families; Life After Parental Separation* (2001) Blackwell, 157.

<sup>145</sup> See Paterson L *Making Up Mums: Changing Discourses of Single Motherhood in New Zealand 1975-1995* (2002) (Paper delivered at Conference on Mothering Law Politics and Public Policy 26-28 October 2002, Center for Research of Motherhood) York University for a discussion of the hierarchy of maternal legitimacy.

<sup>146</sup> Susan Van Scoyoc, a therapist working in a family systems context, claims that one of the most common difficulties facing newly separated women is the feeling that they will be criticised for whatever they do. For instance, she asks (Van Scoyoc, S *The Perfect Mother: Invisible Woman* (2000) Robinson, 206-207) "How many of these do you recognise?"

If you are not at home being the perfect mother, your ex-partner will complain that you are not raising the children properly;

If you are not reliable at work because of emergencies at home with the children, you will be criticised and may lose your employment (and the essential salary it provides);

If you upset the children by telling them off, you will hear the dreaded words: "I don't want to live with you any more. I want to live with ..."; and

If you upset your ex, the child maintenance payments will be mysteriously delayed or not appear at all, causing you financial chaos ...

If you try to be the perfect mother, perfect employee, perfect everything, you are doomed to failure. This is where the idea of adult motherhood is so important. You are an adult and you do have responsibilities. But at the same time, you do not have to answer to anyone else. Your ex will criticise you because he wants to hurt you. Be as firm with him as you would be with anyone else who is rude to you, and tell him what is acceptable to you now as an independent woman. Your children, too, need to know that you are sure of yourself. Their misbehaviour should be dealt with in the same way you have always dealt with it. You are the adult mother, the head of the household, so it is important to ask yourself: 'Is this acceptable to me?' If the answer is 'no', act to put a stop to it." This is advice fits with the emergent perspective of Pryor and Rodgers: see Appendix 1 who note (Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, 226) that overall "parental death is not such an important risk factor as parental separation"; they do not speculate about the reasons for this. From my observation this could be due not only to such things as ongoing interparental conflict (before and after separation) but also to the fact that widowed women do not attract the kind or degree of criticism that those who are single mothers do. Nor are they subject to the scrutiny that other single mothers are if they decide that it is good for their children if the family relocates, although their children's lives have presumably been as disrupted as those whose parents have separated. This could support the theory that it is good for children to live with a mother on her own who is autonomous.

<sup>147</sup> According to the Family Court database which represents about 90 per cent of the Court's workload (smaller courts do not have access to the database) 89 per cent of applicants for protection orders between January and December 2002 were women, 9 per cent men and 3 per cent unknown. 88 per cent of the respondents were men, 10

may have to deal with (as well as situational powerlessness).<sup>148</sup> Because of all these things a single mother's life expectancy probably alters, especially if she had been married.<sup>149</sup>

All these inequities are also likely to affect children's wellbeing more than being parented by a single parent per se, whether or not the child also has contact with a second parent.<sup>150</sup> While any conflict with an auxiliary parent may be only one of many problems to be faced, the difficulties these conditions cause may be exacerbated if arrangements with an auxiliary carer are problematic. In many cases these problems may be due to an inappropriate exercise of power by the auxiliary parent.

#### 4. Control, power and powerlessness

##### (i) Definition and Dynamics of Psychological Abuse

Psychological (or emotional) abuse occurs when a state, institution or individual exerts power and exercises a mechanism of control over a weaker entity in a way that generates fear and compromises the weaker party's ability to act autonomously.

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per cent women and 3 per cent unknown. There were 6058 applications over that period and 20 per cent of the applications were on notice (Robyn Munro, Department for Courts, personal communication 25 March 2003).

<sup>148</sup> See below II. 4. *Control, power and powerlessness*.

<sup>149</sup> Weitoft G, Haglund B and Rosen M "Mortality Among Lone Mothers In Sweden: A Population Study" (2000) *Lancet* 355 (9211) 1215; Whitehead M, Burstrom B and Diderichsen F "Social Policies and Pathways to Inequalities in Health: A Comparative Analysis of Lone Mothers In Britain and Sweden" (2000) *Science and Medicine* 50(2) 255.

<sup>150</sup> Damage can be in the short or longer term and from a variety of sources. The "vortex of violence" describes how that violence devolves from the most powerful to the least, from institutional violence to men, women, children and pets. If institutions or men abuse women, women may then abuse their children. (Perry B "Neurodevelopmental Adaptations to Violence: How Children Survive the Intragenerational Vortex of Violence" in *Violence and Childhood Trauma: Understanding and Responding to the Effects of Violence on Young Children* (1996) Gund Foundation, 3-4). Maclean and Eekelaar (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 58-59) name the consequences for children of a single parent (and thus exposed to risk from the institutionalised violence of gender inequities) as being lower educational achievements, less employment participation and earlier entry into new families. But those (particularly girls) whose single mothers had been employed were more likely to achieve a similar income and household status to those who had been brought up in a household with both parents. The major Dunedin and Christchurch Child Health and Development longitudinal studies in New Zealand characterised families at risk as having social and material disadvantage, parent criminality, substance abuse and "other problems of adjustment", impaired parenting and lowered standards of child care, family instability, change and marital conflict (Fergusson D M Horwood L J Lynskey M "The Childhoods of Multiple Problem Adolescents: A Fifteen year Longitudinal Study" *Journal of Child Psychology and Psychiatry* 35(6) 1123). One website quotes Fergusson as saying that the "evidence certainly does not support strong claims that single parenthood or father absence make a major contribution to the educational achievement or social adjustment of children. ... [I]t would be unwise to elevate single parenthood or father absence to being either a major cause of childhood difficulties or being a key policy variable in addressing these issues." (Coalition for Safe Families – Anti Fathers' Group Propaganda [http://www.menz.org.nz/News\\_per\\_cent20archive/truthmen.htm](http://www.menz.org.nz/News_per_cent20archive/truthmen.htm)) Maclean and Eekelaar refer to the "ambiguity" of the evidence about effects of contact, below n 152 and accompanying text.

All abuse arises from belief systems that justify the circumstances in which control is exerted. These may be explicit or covert, conscious or unconscious and focused on gender, ethnicity, age, sexuality, ability, resources, appearance or role. One definition (created in connection with emotional child abuse) is “an act of omission or commission that is judged by a mixture of community values and professional expertise to be inappropriate or damaging.”<sup>151</sup>

Abuse is regulated when a belief system is developed that understands the abuse as harmful. The Domestic Violence Act is a good example of this: it resulted from greater understanding of the mechanisms of power and control that generate abuse in the domestic sphere. This has resulted in two of the factors noted by Henaghan in connection with relationships with a second parent, where there are allegations of sexual abuse and the Court “errs on the side of possible risk and restricts access;”<sup>152</sup> and the presumption that if a parent has been physically or sexually violent to another, that parent should not have unsupervised access.<sup>153</sup> It has also resulted in Guardianship Act provisions that require the Court to consider whether an applicant (usually the mother) considers whether the child will be safe while the person who has been physically or sexually violent (usually the father) has custody or access and consents to that person having custody, or access other than supervised access.<sup>154</sup>

The diversity of belief systems that lead to abusive behaviour is well represented in other New Zealand statutes that recognise psychological abuse, sometimes described outside legislation by a specific term such as racism, within the public and the private sphere.<sup>155</sup>

The role of belief systems is not however articulated in statutes that regulate physical and sexual abuse. This may be because the regulation of physical abuse, including sexual abuse, has a

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<sup>151</sup> McDowell H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study* (1995) Unpublished Doctoral Thesis University of Auckland, 88.

<sup>152</sup> See below Chapter 4 n 5 and accompanying text.

<sup>153</sup> See below Chapter 4 n 6 and accompanying text.

<sup>154</sup> Guardianship Act s 16B (5)(f) and (g). See below Chapter 3 nn 50-54 and accompanying text.

<sup>155</sup> For instance: Human Rights Act 1993; Employment Contracts Act 1991; Children, Young Persons, and Their Families Act; Domestic Violence Act; Guardianship Amendment Act 1995. If psychological violence occurs in the public sphere, the Human Rights Act and the Employment Contracts Act also provide - where it is found that someone has breached the provisions of either Act through sexual or racial harassment (which usually involves a kind of psychological violence) - a range of remedies including monetary compensation, which may be quite substantial, for humiliation, loss of earnings, a need to retrain and so on. These remedies are available whether or not physical or sexual violence has occurred. It is to be hoped that eventually there will be a conceptual shift that allows the continuum of violence, both public and domestic, to be seen as a whole and to attract similar redress and compensation.



different history, largely within the criminal and international law. As a result, there tends to be a false distinction between physical and sexual abuse and emotional abuse.

Physical and sexual abuses are as much psychological abuse as abusive behaviour that does not involve physical touch. The emotional effects (where the victim does not die) of this kind of abuse are often as significant as its immediate measurable physical effects. This significance is recognised by McDowell. She argues that because the emotional harm from abuse is often the most difficult to heal physical and sexual violence are a subset of emotional abuse.<sup>156</sup> But because physical and sexual violations are not defined as subsets of emotional (psychological) abuse in the legislation, psychological violence is excluded as a reason for limiting a relationship with a violent parent when parents are separated.

MANALIVE (Men Allied Nationally Against Living in Violent Environments) is a United States organisation concerned with men's control of women. Like all kinds of control this process compromises independence and autonomy by generating fear; and attempts to make a victim's choices dependent on the abuser's wishes. This exercise of control includes sexual and physical violence and its purpose is defined by MANALIVE as being "... to destroy your partner by depriving her of commonly held resources that are essential to her well being and sense of [physical and emotional] integrity."<sup>157</sup>

Although the MANALIVE Program is concerned with men's violence against women its list of controlling behaviours<sup>158</sup> can be used in any context where a person or group uses their power as

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<sup>156</sup> McDowell H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study* (1995) Unpublished Doctoral Thesis, University of Auckland.

<sup>157</sup> Evans P *Verbal Abuse Survivors Speak Out; On Relationship and Recovery* (1993) Bob Adams, 33.

<sup>158</sup> In Leibrich J, Paulin J and Ransom R *Hitting Home: Men Speak About Abuse of Women Partners* (1995) Department of Justice in Association with AGB McNair, New Zealand's first formal study of men's violence towards their partners the authors studied physical and psychological violence as separate entities among around 2000 randomly selected New Zealand men. It lists eleven psychologically abusive behaviours. Each can be assigned to one of MANALIVE'S categories. They are: making her do something humiliating or degrading; deliberately harming or destroying something belonging to her; preventing her from having money for her own use; humiliating her in public; threatening to hurt her; threatening to hit or throw something at her; humiliating her in front of family or friends or mates; throwing or smashing or hitting or kicking something; trying to keep her from doing something she wants to do; putting down her family and friends; insulting or swearing at her. 55 per cent of 2021 men surveyed reported some sort of abusive behaviour towards their women partners in the previous year; 53 per cent reported psychological abuse (and 21 per cent physical abuse). Of 2226 men surveyed 65 per cent reported having somehow abused their partner at some time during their lives, 62 per cent reported that they had abused their partner psychologically (and 35 per cent physically).

though having the right to undermine another's use of time, space, material resources, language or gesture; and to impose their understandings of reality, motivations, responsibility and status.

The MANALIVE list includes:<sup>159</sup>

- (b) controlling her time (by restraining her from using her time as she chooses, physically or through threats, demands, or verbal abuse; by habitually not showing up at an agreed time, or by showing up saying he is ready and then doing something else while his partner - or ex-partner – waits; and by being unwilling to discuss or negotiate his plans);
- (b) controlling her space (by dominating shared space or intruding in her personal space; displaying images that she finds offensive; controlling her movement; isolating her and limiting her contacts with friends and family; using physical and sexual maltreatment, threats, or verbal abuse with or without the intention to “make” her act in a particular way or refrain from an action she wants to take; controlling her intellectual or spiritual space by belittling her ideas, beliefs or capacity; invading her quiet time or her privacy);
- (i) controlling her material resources (by withholding or stealing her money or possessions or shared money or possessions; preventing her from earning; withholding information);
- (i) controlling her speech, body language and gesture (by ridicule, threats or physical force: “Speak English!” “Shut up;” “Don’t shake your head at me”);
- (i) controlling by defining her reality and motivations (“Mothers are responsible for the day to day care of children;” “All women...;” “You don’t want to do that;” “You like it really;” “You want to exclude me from our child’s life because you hate me;” “Your family is useless;” “Your friends are sluts”);
- controlling by making her responsible (“It’s your fault;” “You asked for it;” “As a mother, you must...”);
- controlling by assigning status (“You’re my wife, so you’ll do what I say;” “Women do what men decide they will do;” “I’m right and you are wrong;” “I am the one who decides”).

These kinds of control are inappropriate and abusive. They can be described as psychological or emotional abuse as well as, where relevant, physical or sexual abuse. Because single mothers may have a reduced life expectancy due to their status as single mothers,<sup>160</sup> the effects of psychological abuse on their health in relation to a second parent's care arrangements may be a significant issue for them as well as their children.

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<sup>159</sup> I have expanded on the examples supplied in the text.

<sup>160</sup> Weitoft G, Haglund B and Rosen M "Mortality Among Lone Mothers In Sweden: A Population Study" (2000) *Lancet* 355 (9211) 1215; Whitehead M, Burstrom B and Diderichsen F "Social Policies and Pathways to Inequalities in Health: A Comparative Analysis of Lone Mothers In Britain and Sweden" (2000) *Science and Medicine* 50(2) 255

(ii) The effects of psychological abuse

Western neuroscience, especially psychoneuroimmunology, has now developed an understanding of the difficulties of healing emotional abuse and knowledge about the longer term physical consequences of emotional harm. It reflects what non-western knowledge systems have understood for a long time,<sup>161</sup> that people need the capacity for anger to define boundaries, for grief to deal with loss and for fear to know when to protect themselves from danger. But when an emotion is experienced, if the feelings generated are not processed, they remain in the body, cause stress on the organs, become toxic and compromise the immune system. Physical illness results, sometimes manifesting itself many years later.

Traditional Asian medicine describes the process in an easily understood way. Emotions are connected to specific organs, anger with the liver, grief with the lungs and fear with the kidneys. The heart is associated with joy and the spleen with anxiety or worry. Too much joy can be as damaging as too much sadness. And the heart, sometimes understood as the home of the spirit, is particularly vulnerable to emotional abuse. When someone is emotionally harmed anger, grief or fear may affect their respective organs and constrict the flow of energy through the various channels to the heart. Energy then gets stuck in the head (possibly causing mental illness) or in the lower part of the body (possibly causing a range of imbalances and illness among the organs there). The individual's response depends on individual resilience and inherited or developed strengths and weaknesses.<sup>162</sup>

The mind/body connection expounded by scientific knowledge systems explains the internal consequences of abuse which manifest as emotional or physical illness independently of any external trauma. In legal practice, I found that clients who had been sexually abused exemplified this: they tended to have addiction histories and a need for ongoing counselling for the emotional

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<sup>161</sup> See, for instance Larre C and Rochat de la Vallee E *Rooted in Spirit: The Heart of Chinese Medicine* (1995) Station Hill Press; Niehoff D *The Biology of Violence: How Understanding the Brain, Behavior and Environment Can Break the Vicious Circle of Aggression* (1999) Free Press; Pert C *Molecules of Emotion; Why You Feel the Way You Feel* (1997) Scribner; Sternberg E M *The Balance Within; The Science Connecting Health and Emotions* (2000) Freeman. The physical effects of racism were addressed in a recent *Listener* article, which concluded "Some researchers believe that everyday minor incidents or slights, what they call 'micro-aggressions', and the perception that society is discriminatory may have a greater impact on an individual's health [than overt racist attacks]:" O'Hare, N "Sticks and Stones" (2004) *Listener* 24 April 38. Micro-aggressions may also be part of mothers' daily experience as women, compounded by racist attacks on those mothers who receive them.

<sup>162</sup> Information from Dr Martine Darrou, personal communication March 2002.

effects of the abuse as well as immune deficiency illnesses, ranging from the well known, like arthritis, excema, cancer or chronic fatigue to the less common Sjogren's syndrome.

Emotions are an inevitable part of being human. Individuals need to take notice of them and to *think* about what to do with them, so that they do not damage themselves or others.

But it is difficult to do this when “flooded”, a physiological condition that occurs when overcome with a sudden, intense, emotion, and which paralyses capacity for rational thought. This condition, identified by the “new” neuroscience, and acknowledged in some legal contexts<sup>163</sup> is a predictable response to a stressful situation and takes 15-20 minutes to dissipate, slightly longer for men than women. Too much flooding, too often, compromises health. The concept of flooding is also familiar within cultural environments with a much longer tradition of linking emotion with illness. For instance His Holiness the Dalai Lama has written<sup>164</sup>

[E]ven though anger gives us energy to act or speak out, it is blind energy, and difficult to control. Human intelligence is one of our best attributes. It can assess the long and short-term consequences of our actions. But it cannot function properly when we are under the sway of a strong emotion. When we react in anger, we do not know whether our action will be effective or not. But, without anger, we can analyze the situation and see whether a strong counter-measure is called for, and, if it is, we can take such an action with no ill feeling.

Smart and Neale and Rhoades have analysed fathers' patterns of behaviour after separation and noted how these are addressed or unaddressed in the legal system. They have focused on and named these patterns as discrete kinds of inappropriate use of power but they may also be understood as forms of emotional abuse. While both women and men can be emotionally abusive, given the other conditions of women's lives and in particular mothers' lives, that have been discussed, and which place them in a comparatively weaker position, it is understandable that women and men often perceive, exercise and experience power differently. It is also understandable that the effects of abuse will be more severe in a household where the primary carer is a woman and subject to other gender inequities.

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<sup>163</sup> See Tesler P H *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (2001) Section of Family Law American Bar Association.

<sup>164</sup> Bstan-'dzin-rgya-mtsho Dalai Lama XIV *Worlds In Harmony; Dialogues on Compassionate Action* (1992) Parallax. Pinpoint citation not available.

(iii) Debilitative power

Smart and Neale, concerned to explore “how power is deployed by both husbands/fathers and wives/mothers’ and acknowledge that “the exercise of power is manifested ... in subtle ways ... by women as well as men”<sup>165</sup> found that the mothers in their study wanted autonomy. This was “found in being yourself, speaking for yourself, and in deciding the course of your own life.”<sup>166</sup> To achieve this, it was necessary for many of these women “to disconnect themselves and to cease to be bound up with their former partners,”<sup>167</sup> in a way that was not articulated by the men who were interviewed.

These mothers often felt that they had to struggle for autonomy, particularly if the father stayed as he was during the marriage and was not prepared to change once it was over. Many of the fathers “took more than they gave and put obstacles in the way of personal growth and autonomy”<sup>168</sup> and mothers interviewed viewed this pattern of behaviour - named by Smart and Neale as “debilitative power” - as more significant than physical abuse.

According to Smart and Neale “... we still seem to assume that mothers should not have selves, or certainly not selves that need to be attended to.”<sup>169</sup>

One mother’s experience was that without attending to herself and building her self-esteem, she had become “a mere appendage ... who regretted the ending of her marriage but who was not living her life.”<sup>170</sup> Her ex-husband found it difficult when she started to take control of her life; he resorted to legal action and “bitter recriminations” to stop her taking control of her own space. Until her ex-husband began to change himself in relation to her new self it was not possible to build a more positive relationship.<sup>171</sup>

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<sup>165</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press, Cambridge, 138.

<sup>166</sup> Griffiths M *Feminisms and the Self: The Web of Identity* (1995) Routledge, 141 cited in Smart and Neale, above, 141.

<sup>167</sup> Smart and Neale, above, 141.

<sup>168</sup> Smart and Neale, above, 139.

<sup>169</sup> Smart and Neale, above, 143.

<sup>170</sup> Smart and Neale, above, 143.

<sup>171</sup> Some mothers whose partnerships or marriages end may share the concerns of women who choose not to marry. In a study of low-income African American and white single mothers in three United States cities the researcher found that although they might aspire to the “respectability” of marriage the women she studied believed that marriage usually entailed more risks than rewards. In most mothers’ views, the presence of fathers often interfered with parental control, particularly if the couple married. They sought autonomy; and seemed willing to take on the responsibilities of child rearing alone if they were also able to enforce the rules. Many of the participants did not

Many of the fathers continued to enter and behave in the home shared by the mother and children as though it were still their own rather than the woman's space. The mothers felt "at risk of being effaced"<sup>172</sup> while the fathers had access both to their independent lives and to their former family. Former husbands who may have started another relationship continued to move in and out of the lives of their ex-wives "... without acknowledging the extent that things had changed and being unwilling to accommodate those changes."<sup>173</sup> This made it hard for the women to move forward in their own lives with the children. Some women in Smart and Neale's sample found that "Being forced to sustain contact, even indirectly through their children, was unbearable and completely distorted their attempts to make a new life for themselves."<sup>174</sup>

Mothers in the Trinder et al study also found it hard to move forward emotionally especially where care of infants required more contact between parents:<sup>175</sup> "... she was still breast-fed, so he would actually come over and babysit for me. Which is quite difficult because then that means he is in my home."

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trust men, feared domestic violence and did not want to lose control over their material resources. They believed that they could mitigate the risks if they waited to marry until the tasks of early child rearing were complete. If they could then get a stable job they would have equal bargaining power and the right to share in economic and household decision making with a partner: Edin K "What do low-income single mothers say about marriage?" (2000) *Social Problems* (February) 47(1) 112.

<sup>172</sup> Smart and Neale, above, 144.

<sup>173</sup> Smart and Neale, above, 143. This pattern of behaviour and its possible consequences is illustrated in a story reported in *North and South*. Although used as an example of situational powerlessness, where a father was deprived of contact with his daughter through an accusation that he abused the daughter, it can also be read in another way, as primarily a story about the debilitating use of power by the father. "For the first five months after John ... left his wife ... he visited her and his three-and-a-half-year-old daughter every day. 'I was quite happy for our relationship and my support to the family to continue after I left, so I visited every day and supplied them with as much money as they needed. There were no substantial arguments of any sort I can remember in the six months after I left and in many ways I thought I'd done the right thing.'" (Quaintance, L "Court of Injustice" (2001) *North & South* (June) 35, 38). Then his wife, seeking custody of their daughter, accused him of sexually abusing their daughter and applied for a non-molestation (protection) order. The Family Court found that there was an element of risk to the daughter. The father believed that he was being punished for his former wife's "delicate psychological state" because the judge said that unsupervised access would so distress his former wife that she could not effectively care for their daughter. The obvious question is whether he *caused* or contributed to the "delicate psychological state" by choosing to leave his ex-wife and then turning up on her doorstep each day, effectively hindering her efforts to create a separate life.

<sup>174</sup> Smart and Neale, above, 148.

<sup>175</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 29.

It seems that the exercise of debilitating power can be a reason for a custodial parent to take “a position of implacable hostility.” Sturge and Glaser describe the reason as the aftermath of a relationship:<sup>176</sup>

... in which there was a marked imbalance in the power exercised by the two parents and where the mother fears she will be wholly undermined and become helpless and totally inadequate again if there is any channel of contact between herself and ex-partner, even when that only involves the child. The child can be used as a weapon in such a bid to continue to hold power over the mother ... this can be a sequelae of domestic violence.

Many fathers Smart and Neale interviewed also refused to negotiate access issues. Possibly because “their concept of being powerful was associated with an outdated mode of masculinity and fatherhood,”<sup>177</sup> they found it demeaning to have to negotiate with their ex-wives:<sup>178</sup>

They didn't want to negotiate, they wanted to make demands ... to see the children when they felt like it, they did not want the mothers to complain if they took them back late or if they fed them with junk food, they wanted to see the children more but only when it suited them and not when it suited the mothers.

This kind of behaviour may have been tolerated while the family lived under one roof, may have led to the end of the parents' intimate relationship, or may have developed at the end of the relationship. Whenever it occurs, it is debilitating for the primary parent and may therefore have consequences for her children.

The exercise of debilitating power fits into the MANALIVE definitions of emotional abuse.<sup>179</sup> It involves controlling time and space, and assigning a status no longer valid to the family of being one whose life the father is entitled to participate in at will. It compromises family stability. This is of concern especially if, as Pryor and Rodgers claim, children benefit most when mothers are supported to be autonomous.

Cohen<sup>180</sup> discusses paternal narcissism. This is perhaps one endpoint for men who exercise debilitating power. Narcissistic fathers<sup>181</sup> refuse to take any responsibility for the breakup of their marriage or the severed relationships with their children, but blame others: ex-wives, courts and

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<sup>176</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623.

<sup>177</sup> Smart and Neale, above, 138.

<sup>178</sup> Smart and Neale, above, 146.

<sup>179</sup> See above nn 78-80 and accompanying text.

<sup>180</sup> Cohen O "Parental Narcissism and the Disengagement of the Non-Custodial Father After Divorce" (1998) *Clinical Social Work Journal* 26(2) 195.

<sup>181</sup> These could also be mothers, but Cohen studied fathers. She points out (Cohen, above, 207) that access and custody arrangements can be unfair to narcissistic men, as to other fathers; and many of the feelings and attitudes she

social workers, the children themselves. Their sense of injury is so implacable that it justifies in their own minds the abandonment of their children:<sup>182</sup>

[T]he real issue for these men is not inadequate post-divorce access, but any limitation to their possession of their children. [They] insist on an all or nothing relationship with their children, an insistence which is consistent with both the black and white thinking that has been found among narcissistic individuals and the possessiveness that has frequently been noted in narcissistic parents.

The “all or nothing” demanded from children includes requiring the children to give up friends and activities for him if he is to remain engaged with them.

Some fathers respond to separation and access by exercising ambivalent power. This has some similarities to debilitating power. It too appears to be exercised primarily by men.

*(iv) Ambivalent power*

Rhoades<sup>183</sup> identifies ambivalent power as typical of those fathers who are ambivalent about parenting and do not keep to the terms of their access order or agreement.

In her research of contact enforcement litigation in Australia, she found that many of the files she examined also demonstrated that a dispute about contact was:<sup>184</sup>

a continuation of abuse that had been part of the parties’ relationship prior to separation...the [father was] able to exert considerable power over the post-separation lives of the resident parent and children.

The files showed that fathers used the threat of enforcement proceedings and the proceedings themselves as a form of control. Rhoades found that in a high proportion of cases where a father sought enforcement of access, following a hearing his access was actually reduced because of his violence.

As well, fathers breached the terms of the orders they had without any sanction. The files suggested that some fathers’ contact with their children had been sporadic and irregular by choice, although contact orders existed. Some of them had not exercised access for several years before the application for an enforcement order.

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notes “including the enormous anger at the ex-spouse, the feelings of depression, the digging in of heels, and the rigidification of defences” are quite common in both men and women after separation.

<sup>182</sup> Cohen, above, 205.

<sup>183</sup> Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71, 77-79.

<sup>184</sup> Rhoades, above, 76-77.



Their approach to access in general was often self-interested rather than child-centred; for instance they left the children in the care of a partner during contact periods and were unwilling to accommodate children's own activities. The files "suggest ... that there remains a wide divergence between contact and parenting, and that some men continue to opt for the former."<sup>185</sup> Rhoades does not use the term "narcissism" but this kind of behaviour does seem to relate to the narcissistic behaviour described by Cohen.

Debilitative and ambivalent power are both control mechanisms, patterns of behaviour that arise in this context from a system of belief about parenting and the respective roles of fathers and of mothers. They are emotionally abusive of both women and children.<sup>186</sup>

*(v) Situational power(lessness)*

Situational power, as identified by Smart and Neale, is perhaps most easily understood as situational powerlessness. Situational powerlessness is often experienced by family members after separation as parents and children experience the loss of "privileges" that they may have taken for granted. Smart and Neale define it as being experienced as "an inability to control others and a denial of rights," in contrast to debilitative power which is experienced as "an effacement of self."<sup>187</sup> For parents the lost privileges tend to be gendered.

A father generally loses domestic privileges. If, as is usual, his children are based with their mother he can no longer choose how and when to spend time with them. He feels powerless because they and their mother have lives that he can no longer enter at will although he may try to do so, exercising debilitative power, as described. Negotiation is necessary and if he used not to negotiate childcare responsibilities before separation this situation may be unacceptable to the

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<sup>185</sup> Rhoades, above, 79.

<sup>186</sup> Phyllis Chesler ("Is every woman one divorce away from financial disaster?" *On the Issues* (1997) Winter 17, 58) vividly describes debilitative **and** ambivalent fathering that is also an example of the ways "good" fathers may change their behaviour after separation. Her ex-husband had been a house husband and cared for their child while she worked: "My ex was soft-spoken, easygoing. It was years before I understood that his abandonment of our son was a supremely violent act. Over the years, my ex-husband saw our son whenever he wanted to, whenever it was convenient for him. He saw him every other weekend, overnight, for nearly three years. (See how good he was?) True, he's pick him up two to four hours late, return him wearing dirty clothes and wet diapers, his undone laundry rolled up in a smelly snarl. Sometimes he'd return him hungry, or with a fever. I was shocked. Outraged. This was a father who knew the drill. Over the years, he did not feel obliged to meet with our son's teachers, attend school, sports, or music events, transport our son to Hebrew School or to doctors and dentists. He never once invited our son to join him for any national or religious holidays. No matter what I said, I could not get this man to take any bottom-line responsibility."

<sup>187</sup> Smart and Neale, above, 146.

mother. He may view a now autonomous mother's request that he negotiate as an unacceptable exercise of maternal power, as did the men in Smart and Neale's study. The anger that many of the fathers felt about this seemed to bear no relation at all to the amount of contact they actually had with their children. In New Zealand, too, some non-custodial parents feel they lack control over access to their children because they perceive that custodial parents can dictate the terms of contact.<sup>188</sup> The gender bargain may be unarticulated by and unacceptable to these fathers.

While the women in Smart and Neale's research felt powerless "in their inability to become their own person again"<sup>189</sup> as a result of the men's exercise of debilitating power, situational powerlessness after separation may also affect mothers when they lose economic and social privileges or become aware of their social and economic disadvantages. In particular, they may feel powerless because they cannot fulfil some of the children's material needs and cannot earn as much as men. They may feel powerless because they have the larger part of daily responsibility for children while fathers may have more free time and a larger disposable income they use for other purposes than to support the children.

Mothers may also feel powerless if their new household and their children suffer ill-effects from contact with the children's fathers, especially if conflict over parenting responsibilities was a reason for separating. The exercise of ambivalent power by fathers may generate situational powerlessness of itself and during consequent attempts to address this through the legal system. Trinder et al cite mothers' "considerable frustration" with the powerlessness of lawyers and the Courts to encourage or force fathers to establish a contact regime.<sup>190</sup>

Children may also experience situational powerlessness as their lives change. According to Smart "The most difficult thing for most children (depending to some extent on their maturity and experience) was a complete lack of control over their lives."<sup>191</sup> Children may want their parents to reconcile. They may resent being based in a household with access to fewer resources than

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<sup>188</sup> Lee A *A Survey of Parents Who Have Obtained a Dissolution* (1990) Department of Justice Policy and Research Division, 68.

<sup>189</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press, 144.

<sup>190</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 43. The authors identify those cases where contact was irregular or had ceased as a problem that required further research and debate (Trinder et al, above, 46).

<sup>191</sup> Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307, 318.

were previously available. They may want to live with their father who is not prepared to have them living with him. They may feel powerless in relation to arrangements for seeing their father.

### 5. The response of the legal system: The “bad” mother

Smart and Neale note that only the situational powerlessness experienced by men over relationships with their children, defined as power exercised by mothers, is acknowledged within the legal system. Fathers attempt to control the situation by making mothers responsible for facilitating arrangements that meet their needs and the needs of their children as they see them, to accept the post-separation role expected of “good” mothers in the hierarchy of responsibility, regardless of their own history of responsibility and any debilitating or ambivalent power issues to be resolved. When they initiate proceedings against the mothers the system too tries to make mothers responsible: “It focuses on mothers and getting mothers to change simply because they are the ones who have the children in their charge and are therefore the ones who must be persuaded to give something up.”<sup>192</sup>

According to Smart and Neale, the legal system also defines fathers “as being in deficit while mothers are defined as being in surplus but unwilling to share.”<sup>193</sup> They argue that any legal process that prioritises fathers’ feelings of powerlessness caused by the circumstances of separation over the effects on mothers of fathers’ exercise of debilitating power (or, it follows, ambivalent power) is discriminatory. I would further argue that any legal process that privileges one parent’s struggle with situational powerlessness over another is also discriminatory.

It appears that the current judicial belief system about parental responsibility not only reinforces emotional abuse of women and children but may also generate further, institutional, abuse.<sup>194</sup> Sometimes this expresses itself through defining a mother’s reality and motivations in an attempt to control her responses to the demands of the biological father of her children, her choices, her space and her resources.

As the Family Court - and legislation - further entrenches the privileged status of fathers, father figures, and extended family members, it is possible that the concept of the “bad mother” who

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<sup>192</sup> Smart and Neale, above, 146-147.

<sup>193</sup> Smart and Neale, above, 146-147.

<sup>194</sup> See below Chapter 4 nn 48-55.

opposes a direct relationship between her child and his or her father may develop in New Zealand.<sup>195</sup>

Some mothers refuse to engage with the gender-based realities of the hierarchy of responsibility that require them to do all the hard work of facilitating successful exercise of responsibility by their children's fathers, as found by Trinder et al.<sup>196</sup> This may include resisting a commitment to limiting their choices in regard to their freedom of movement, association, employment and personal relationships.<sup>197</sup> Some women may believe that opting into the hierarchy of responsibility after separation will compromise their health and jeopardise their ability to care for their children.

Some mothers may identify problems fathers generate for them and their children and seek to rectify them by refusing to engage with the mechanisms of the hierarchy of responsibility. They do this in the hope of establishing "a spirit of peace, dignity, tolerance, freedom, and equality and solidarity"<sup>198</sup> within their family, for their children. Mothers may not be able to articulate clearly this refusal and the reasons for it, perhaps because it runs against the social norms in relation to contact or because of the difficulty in finding language for emotional abuse.<sup>199</sup> Nevertheless the problems may exist for her family. Her response may be appropriate; and the sign of a "good" rather than a "bad" mother. It may be a valid expression of a mother's autonomy of the kind that generally benefits children.

Judicial assumptions that mothers who choose not to engage with the mechanisms of the hierarchy of responsibility are unreasonable, or "bad" may unwittingly reinforce and extend

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<sup>195</sup> One example of the differing language to describe fathers and mothers appears one of Henaghan's papers: "... there still is unwillingness by some parents [fathers] to exercise their share of parenting, and there still is an unwillingness by *hostile* (my emphasis) resident parents [mothers] to share the care of the child with the other parent": the parents (usually fathers) who are unwilling to exercise their share of parenting responsibility are not described as hostile, while mothers who do not want to share are. (Henaghan M "Shared Parenting: Where From? Where To? Children's Rights and Families" (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 60).

<sup>196</sup> See above Chapter 1 n 35 and accompanying text for Trinder et al's recipe for "good" contact.

<sup>197</sup> See also below Chapter 4 nn 53-54 and accompanying text.

<sup>198</sup> UNCROC, Preamble.

<sup>199</sup> McDowell H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study* (1995) Unpublished Doctoral Thesis (Auckland) 204: "It is very difficult to find words that refer to both an action, such as an act of abuse and a lack of action, such as an act of neglect. Virtually all of our language around pain and abuse refers to that of a physical nature. The paucity of adequate language to describe emotional abuse and emotional effects was a constant

fathers' exercise of ambivalent or debilitating power. They may also facilitate the privileging of fathers' experience of situational powerlessness above those of mothers. In addition, these assumptions make it possible to disregard the consequences for children when the mothers with whom they live experience situational powerlessness. The assumptions also preclude examination of the powerlessness and emotional effects children experience as a result of debilitating and ambivalent behaviour by fathers and a court's failure to recognise that ongoing conflict detracts from their entitlement to a family life imbued with "an atmosphere of happiness, love and understanding."<sup>200</sup>

Not surprisingly, courts do not recognise or articulate the benefits for children of a mother making a choice to challenge a father's right to access. There may be difficulty discriminating among cross-accusations of emotional abuse.

Trinder et al were unable to deconstruct the issues and behaviours in the conflicted family groups in their study to discover why some mothers continued to facilitate contact where there was perceived or actual risk and some did not. However, they found that some who facilitated contact where violence was alleged did so because of their belief in a dominant welfare discourse holding that the best interests of the child are met by contact with his or her father. Some mothers who did not accept the imperative of their responsibility to facilitate contact, varied their choice of belief systems to justify their views, again possibly because there was "no socially sanctioned explanation" for them "in the context of what appear to be strong social norms in support of contact."<sup>201</sup>

Refusal to accept the demands of the hierarchy of responsibility may be erroneously conceptualised within the Family Court's current awareness as described by His Honour Judge Blaikie, that "acceptance by both parents that their 'adult' relationship is over is usually a

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source of frustration to myself and [research] participants and provided a possible explanation as to why ECA [emotional child abuse] has been so difficult theoretically."

<sup>200</sup> UNCROC, Preamble. See below Chapter 3 III. The Role of Human Rights in the Allocation of Parental Responsibility.

<sup>201</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 37. For further details about Trinder et al's "welfare" discourse, see below nn 165-169.

prerequisite for the development of co-operation and communication,”<sup>202</sup> although this view does not fit with the findings of Wolchik et al.<sup>203</sup>

If an adult relationship is not over however, and the transformation of that relationship to one where two parents have a mutual understanding of their responsibilities is not achieved, the opportunities for co-operation and communication without inappropriate use of power may be fewer. The group identified as “competitively enmeshed” by Trinder et al exemplify parents caught in this situation, though they did not resort to legal action. However, as Wolchik et al discovered, mothers may continue to believe that fathers do not exercise their responsibilities in a way that benefits their children, some time after they accept that their relationship is over.<sup>204</sup>

In New Zealand, the “bad” mother concept may be in the process of being extended to mothers who seek to relocate, to move on with their own lives sometimes, understandably, in circumstances that include a desire to ameliorate the effects of a difficult transition.<sup>205</sup> Its development is perhaps well illustrated by articles in two of New Zealand’s largest newspapers, within a month or so of each other. Separately and together they appear to warn primary carers that wanting to relocate for whatever reason(s) is not a “good” thing. One, “in a series looking at Family Court deliberations” concludes, in an apparent reference to *D v S* (no 7)<sup>206</sup> that “the Court has emphasised that relocation for a parent will not necessarily be followed by relocation of a child.”<sup>207</sup>

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<sup>202</sup> Blaikie E O K *Keep the Mediation Process Simple: It’s My Party and I’ll Go if I Want To (Access Issues)* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts, [3].

<sup>203</sup> See above nn 42-55 and accompanying text.

<sup>204</sup> Trinder et al, above, 14-16, identified group of parents that continued to be “competitively enmeshed” and arguably had not accepted that their respective relationships were over.

<sup>205</sup> This is identified as being one of the most problematic transition times, see above Chapter 1 n 12. (Crawshaw V “Boys Caught up in Tug-of-Love” (2003) *New Zealand Herald* October 15 A21, October 29 A20, November 12 A24). Collectively these articles seem designed to give the message that the threshold for women who seek to relocate to be allowed to do so is very high indeed, that a “good” mother does not seek to relocate regardless of personal cost. Ironically, on the page before the third part in the series is an article by Di Paton, Executive Director of Auckland’s YWCA in defence of the retention of the Ministry of Women’s Affairs. In her concluding paragraph she states: “until childbearing and childcare are seen as major investments in the economic future of the country, and the harmful downstream effects for women of family violence, financial deprivation and social isolation are dealt with, there needs to be a ministry that works solely on behalf of women” (Paton D “Specific Needs of Women Still Have To Be Catered For” (2003) *New Zealand Herald* November 12 A23).

<sup>206</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA). See below Chapter 7.

<sup>207</sup> Sturm D “Focus is on Interests of the Child” (2003) *Dominion* 2 October 35.

The other article, a three-part fictional scenario by a legal practitioner, made it clear that the mother, a primary carer in Auckland, was “bad” for finding it difficult to deal with her children’s father’s new relationship and new child and wanting to move on with her own life, to live in Tokoroa, where she had family, the opportunity for better housing and a promotion in her professional life. In both of the second two articles there was also reference to “the latest Court of Appeal case (*D v S* (no 7)<sup>208</sup>) that had decided that there was no presumption in favour of the primary parent moving and the overriding consideration was the welfare of the particular child.” The emphasis appears to be on reminding mothers that there is no assumption that they may relocate with the children, while *D v S* is equally a reminder that there can be no assumption that they may not.

The children invented for the article were cared for by their father (a primary school teacher) after school most days; the benefits to them from a relationship with their father appeared to be real. However, since the father was available during school holidays, the relationship arguably could have been sustained by holiday contact phone calls and emails. On the facts, the children were arguably unlikely to have been at risk if the family had left Auckland before separation; nor if their father left Auckland; and were not at risk going to Tokoroa in these circumstances.

The issue, as always in the relocation cases, was the maintenance of their relationship with their father.<sup>209</sup> There was no case found in researching this thesis where a father living in another town objected to relocation because it would disturb the status quo, that is, those aspects of a child’s life which do not involve access to an auxiliary parent: school and friends, relatives and a part-time job, much loved home. “Disturbing the status quo” appears to be above all the need to amend access arrangements. This view is further supported by the absence of cases where a primary parent objects to an auxiliary parent’s relocation on the grounds that it is not in a child’s interests.<sup>210</sup> While this kind of objection could be seen as an attempt to restrict an auxiliary parent’s freedom of movement, it is arguable that just as a primary parent is permitted to move

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<sup>208</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA).

<sup>209</sup> See below Chapter 7 nn 2-6 and accompanying text for a discussion of maintaining a relationship with an auxiliary parent in relation to relocation.

<sup>210</sup> David Burns (author of Burns D “Relocation – ‘Solomon’s Choice’” in *Child Relocation and Abduction Cases* (2002) Auckland District Law Society) wrote in answer to a query about unreported decisions, that the relocation of access parents usually “involve[s] a practical assessment of re-jigging access and ... doesn’t involve the hard decisions that relocation cases involve” (personal communication 18 December 2002).

but not to take the children with her, so an auxiliary parent could be permitted to move but not necessarily to continue to be a guardian, as a parent “unwilling” to be responsible for care.

The mother in the fictional story is described unsympathetically throughout while her children’s father and his new partner are empathised with, to the extent that the new partner’s desire to be close to her family with a new baby is one of the “acceptable” reasons why she and the father could not also go to Tokoroa. The “close” relationship with their father and grandmother and the “developing relationship” with his new partner and their half-sister were all reasons given for the children to stay in Auckland. The mother’s desire to relocate is described as a “means of escaping what had become a difficult situation for her.”

While on the facts as given, it appears to be reasonable that the mother was not allowed to relocate with the children since her desire to relocate was motivated in part by the change in family circumstances for her children’s father, it is possible to read her actions in another way. When either parent repartners is a difficult time.<sup>211</sup> The parent who has not repartnered may want to move on, just as one parent may do in deciding to separate (as the father had here). In the paradigm offered by Smart and Neale the mother may have experienced the situation as one of debilitating power and situational powerlessness.<sup>212</sup>

If it is possible for the children to stay in touch with the second parent, as here, and their welfare is going to be enhanced in other ways is it really so harmful? Otherwise, in effect, what the law is saying is that a “good” mother must not only care for her child but also for their father by taking responsibility for his children in a way that ensures that he can be settled in his job and with a new family and ready access to his other children. In some ways this kind of policy legislates for fathers to create harem-like conditions for themselves, while mothers like the one in this story are unable to improve their conditions of work, housing, income and family support. (From statistics given by Henaghan it is possible to infer that the shift in judicial attitude to relocation is a

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<sup>211</sup> See above Chapter 1 n 23.

<sup>212</sup> See above II.4. *Control, power and powerlessness* especially nn 86-100 and 108. The expression of debilitating power is experienced as an effacement of self (an inability to move on with one’s life, here experienced by the mother) and situational powerlessness as an inability to control others and a denial of rights, here experienced by both parents).



“policy”: a far higher proportion of custodial parents were allowed to relocate in 1998 than 2000.)<sup>213</sup>

Henaghan et al state<sup>214</sup>

For some time the assumption that the wellbeing of the custodial parent will ensure the wellbeing of the child was the overriding value. However, more recently the importance of the relationship between the non-custodial parent and the child has come to prominence.

Disguising this change in attempts to justify the refusal of permission for mothers to relocate by constructing a mother who wants to relocate as “bad” institutionalises the control of women.

In overseas jurisdictions the “bad” mother who opposes access has often done so in a context of domestic violence.<sup>215</sup> In New Zealand, the mother who opposes access because of sexual or physical violence towards her is provided for in the Guardianship Act.<sup>216</sup> This offers a precedent for honouring the judgment of a mother about the safety of a father, requiring her consent to his ongoing contact with her child. Although referred to in the amendment as “the other party,” given the statistics relating to protection orders,<sup>217</sup> realistically here the other party will generally be a mother. Her judgment is accepted as valid just as it is on a daily basis as she monitors the wellbeing of her child as part of her “close and attentive physical and emotional involvement.”

Because “violence” in the Guardianship Act excludes psychological (emotional) abuse, a mother who identifies a pattern of behaviour by her children’s father that was abusive of her and of her children and who might be labelled as a “bad” mother for attempting to protect her children and herself from ambivalent or debilitating behaviour cannot seek help from the Court. Although psychological violence can be considered under section 23 of the Act, its exclusion from the definition of violence allow the behaviour to become invisible or to be unaddressed in the legal system.

When a “bad” mother is labelled as “intractable”, hostility from her child’s father is neither identified nor named although he may be equally hostile. Sturge and Glaser use “implacable” to

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<sup>213</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 1.

<sup>214</sup> Henaghan et al, above, 1.

<sup>215</sup> See for instance Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71.

<sup>216</sup> Section 16B (5)(f) and (g): see below Chapter 3 nn 50-54.

<sup>217</sup> See above n 68 for figures.

describe the “intensity and unchanging nature of ... hostility” unlikely to be affected by mediation. They add that it is<sup>218</sup>

important to note that it is often two-way ... the non-resident parent is as implacably hostile to the resident parent as the other way around. It is more often not directly expressed or camouflaged as the non-resident parent has ‘more to lose’ by its being obviously stated.

Sturge and Glaser prefer to use “implacable hostility” instead of the term “parental alienation syndrome” which has been used to describe a discrete kind of “bad” mother and which they do not find “a helpful concept.”<sup>219</sup> Instead they list five possible reasons for implacable hostility:<sup>220</sup> only one is defined as “wholly biased hostility which is not based on real events or experience.”<sup>221</sup> One of these reasons, already referred to, is the effects of the aftermath of a relationship with a marked imbalance in the power exercised by the two parents. The mother then fears that even contact that only involves the child will make her “wholly undermined ... helpless ... totally inadequate.”<sup>222</sup> This has obvious similarities to Smart and Neale’s description of debilitating power.

The parental alienation syndrome, a term coined by Richard Gardner,<sup>223</sup> refers to a situation where a child shows a strong affinity for his or her mother and is alienated from his or her father, usually when the parents live apart. A counter syndrome defined by Morris as “maternal alienation” describes the dynamics and effects of the implacable hostility of some access fathers who alienate their children from the mother who is their primary carer.<sup>224</sup>

The parental alienation syndrome is associated with the attribution of negative behaviour to the alienated parent by the child, with the encouragement of the primary carer. This behaviour may

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<sup>218</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623.

<sup>219</sup> Sturge and Glaser, above, 622.

<sup>220</sup> The other four (Sturge and Glaser, above, 622) are: (1) A fully justified fear of harm or abduction resulting from any direct contact with the non-resident parent; (2) A mother’s fear that indirect contact through the child will lead to direct contact and violence towards her; (3) Post-traumatic symptoms in the custodial parent which are acutely exacerbated by contact or the idea of contact; (4) The aftermath of a relationship where there was a “marked imbalance in the power exercised by the two parents and the mother fears that even contact that only involves the child will make her “wholly undermined ... helpless ... totally inadequate.”

<sup>221</sup> Sturge and Glaser, above, 623. This may be conscious and malign or perceived to be true.

<sup>222</sup> See above n 97 and Sturge and Glaser, above, 623.

<sup>223</sup> For instance Gardner R *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse* (1987) Creative Therapeutics; and *The Parental Alienation Syndrome; A Guide for Mental Health and Legal Professionals* (1992) Creative Therapeutics. Gardner publishes his own work and refuses to submit it to peer review.

<sup>224</sup> Morris A "Adding Insult to Injury" (1999) *Trouble & Strife* (40) 30.

be trivial, highly exaggerated or totally untrue and may include allegations of sexual abuse. If the alienated parent has actually maltreated the child that is not the syndrome.

Sturge and Glaser refer to Faller's "elegant rebuttal" of the parental alienation syndrome.<sup>225</sup> In this rebuttal Faller identifies, inter alia, a fundamental flaw in the syndrome as being that it fails to take into account alternative explanations for the mother's or the child's behaviour; and even in cases where an accusation of the father is false it does not take into account the full range of motivations and behaviours of children, mothers, and fathers.

In summary, there is a multiplicity of direct and indirect factors determining a child's ongoing relationship with a second parent; Trinder et al identify the limitations of analyses that "blame, or praise, the actions of a single individual for making contact work, whether it is a mother or a father."<sup>226</sup> These factors include the situational powerlessness experienced by the parties, the conditions under which the primary parent must parent, the presence of gender inequities including the exercise of ambivalent or debilitating power, and the actual rather than assumed benefits of contact.

### III. The Benefits and Disadvantages of a Direct Relationship With a Second Parent

*Q1 Do you agree that the principles set out by Dr Sturge and Dr Glaser<sup>227</sup> ... represent a generally accepted professional view? If not, what is your basis for disagreement?*

*Yes. In particular the statement that " ... the purpose of any proposed contact must be overt and abundantly clear."*

*By focusing on the purpose of contact the attention must necessarily be drawn to the children's needs and away from the assumption that contact should merely occur because of some parental entitlement.<sup>228</sup>*

As this quotation from the New Zealand Family Court's submission to *Making Contact Work* shows, New Zealand Family Court judges agree with the Sturge and Glaser proposition that "...

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<sup>225</sup> Faller, K "The Parental Alienation Syndrome: What Is It and What Data Support It? (1998) *Child Maltreatment* 3(2) 100. Gardner replied to this at *Child Maltreatment* 3(4) 309 reproduced at <http://www.rgardner.com/refs/ar18.html> (accessed 3 June 2003).

<sup>226</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 45.

<sup>227</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 616.

<sup>228</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) 2.

the purpose of any proposed contact must be overt and abundantly clear.”<sup>229</sup> The actual benefits or risks of a relationship with a second parent thus become to some extent significant.<sup>230</sup>

However there is “a dearth of good quality data”<sup>231</sup> on how different kinds of access arrangements affect children. One recent survey of reviews and other material about continuing contact with non-custodial parents found that studies do not show strong support for believing that continuing contact with a non-custodial parent is per se a factor influencing positive adjustment by children to their parents’ separation.<sup>232</sup> The ability of parents to recover from the distress associated with separation is also important; and this is in turn influenced by social and economic wellbeing as well as the presence or absence of conflict.<sup>233</sup> In contrast, conflict before during and after separation causes difficulties for children. Good quality contact – rather than a great quantity of it – and positive, co-operative parenting practices do seem to have constructive effects. It is possible that limited contact with a father may make interactions with them “more memorable and more valued.”<sup>234</sup>

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<sup>229</sup> Sturge and Glaser, above, 616.

<sup>230</sup> The “purpose” is not the same as an analysis of benefit and detriment, although an analysis of benefit and detriment could be included as part of an exploration of the purpose. A series of cases illustrate the difference, where a father was not living with or married to the mother of his child when their child was born and sought to be appointed a guardian. Although Judge Ellis ruled in one case that a father needed to demonstrate that his becoming a guardian “will be of positive benefit to the child and will outweigh any potential disadvantage” (*Crawford v Herlihy* (2 July 1999) District Court Porirua FT 291/92, 16) his fellow judges in subsequent decisions suggested a lower burden of proof. This required the applicant to demonstrate only “the reasonable probability” that to appoint him as a guardian is in the child’s best interests. Judge Ellis adopted this standard in *Re the guardianship of ACL* [2002] NZFLR 165, 170. However, since the father’s availability as a parent was “secondary to other concerns in his life” and his application “more to do with his own perception of his rights” than the child’s welfare, his application was declined (see below: Chapter 3 nn 24-27, Chapter 6 n 146 and Chapter 8 nn 5, 199-200, 204-205, 209; and accompanying text.)

<sup>231</sup> Advisory Board on Family Law: *The Children Act Sub-Committee Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor’s Department, 5. Maclean and Eekelaar (Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 56) refer to the “ambiguity of the evidence”, the importance of regularity rather than frequency of visits and the “caution that must be exercised ... [as] so much has gone unmeasured in research to date.”

<sup>232</sup> Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children’s Issues Centre. See especially the Introduction 1-5 and 64-65. The authors cite Amato P and Gilbreth J G “Non-Resident Fathers and Children’s Wellbeing: A Meta Analysis” (1999) *Journal of Marriage and the Family* 61 557; and Rodgers B and Pryor J (1998) *Divorce and Separation: Outcomes for Children* Joseph Rowntree Foundation.

<sup>233</sup> Smith et al, above, 64.

<sup>234</sup> Smith et al, above, 4.

Kelly and Ward, like the authors of *Making Contact Work*,<sup>235</sup> noted that research on the effects of the level and quality of access “is not abundant.”<sup>236</sup> They concluded however that joint physical custody either has no effect or a modest positive effect on children’s psychosocial wellbeing, if the conflict between parents before or after divorce is at a low level. But, “it is fair to say”<sup>237</sup> that although some studies show either no effects or inconsistent effects, there is an increasing consensus that “more frequent contact between nonresidential parents and children is associated with better psychosocial adjustments of children.”<sup>238</sup> This conclusion, as with the conclusion about joint parenting was qualified by low levels of parental conflict being necessary.

In contrast, Maclean and Eekelaar surveyed the evidence on the effect of family disruption on children and saw that it was “by no means clear” that “continuation of contact between children and an ‘outside’ parent necessarily enhanced their ‘wellbeing’ ” though contact could provide access to social resources not otherwise available to the children.<sup>239</sup>

Sturge and Glaser identify the best context for access as one where the adults involved organise it jointly with the child’s best interests at heart, where each adult understands and responds appropriately to the child’s needs and where the access takes place in a positive and supportive way. The benefits to the child depend on the age and development of the child “and his or her situation, which is the present situation but includes the impact on that situation of past experiences and events.”<sup>240</sup>

In summary, they write:<sup>241</sup>

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<sup>235</sup> Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department, 29.

<sup>236</sup> Kelly R F and Ward S L "Allocating Custodial Responsibilities At Divorce; Social Science Research and the American Law Institute's Approximation Rule" (2002) *Family Court Review* 40(3) 350, 362.

<sup>237</sup> Kelly and Ward, above, 362.

<sup>238</sup> Kelly and Ward, above, 362.

<sup>239</sup> Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 147. The authors also note that it has not been established that “a child whose separated parents behave gently and reasonably to her and to one another, but who sees the outside parent rarely or never somehow does ‘less well’ than a child of similar parents who sees the outside parent often.” (Maclean and Eekelaar, above, 55).

<sup>240</sup> Sturge, C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 617.

<sup>241</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 619.

[I]n contested contact cases it is unlikely that the best contact situation for the child can be established – one which both parents support and in which the child’s needs are consistently met. Hence the balancing act between the potential benefit versus the detriment of contact.

They define the benefits of direct access for a child as being: warmth, approval, feeling unique and special to a parent; extending experiences and developing (or maintaining) meaningful relationships; information and knowledge; reparation of distorted relationships or perceptions.<sup>242</sup>

Trinder et al found that where there was lack of parental commitment to contact or high levels of parental conflict, the benefits of contact were harder to identify than in other fact situations.

Contact was:<sup>243</sup>

a significant source of stress for children and adults in the “not working” group. Emotional costs were more evident than reported benefits.

This research identifies three dominant discourses around the benefits and detriments of access. The dominant child welfare discourse puts the child first (and implies that contact is per se beneficial);<sup>244</sup> an alternative emphasises the value of building the relationship with the child and the parent who has custody and possibly her new partner, and a third gives parental needs equal prominence with the child’s needs. The researchers identify the third discourse as often being used by fathers in their “consistently battling”<sup>245</sup> group. This discourse may also underlie some jurisprudence supporting shared parental responsibility, though it is usually justified as being in the interests of the child, within the dominant discourse.<sup>246</sup> As already noted mothers in the “consistently battling” group used elements of all three discourses.<sup>247</sup>

There appear to be no primary carers arguing explicitly for their needs being considered equally with their child’s though they may argue for them being considered equally with those of the

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<sup>242</sup> Sturge and Glaser, above, 617.

<sup>243</sup> Trinder L Beek M and Connolly J *Children's and Parents' Experience of Contact after Divorce* (2002) <http://www.jrf.org.uk/knowledge/findings/socialpolicy/092asp> (accessed 9 March 2003), 1.

<sup>244</sup> In the ten “contingent contact” families in the sample where the primary issue was the attempt to continue contact while managing risk, the mother’s support of continuing contact was based on her belief in the dominant discourse, i.e. the benefits of contact to the welfare of her child: Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation (*Making Contact*) 37.

<sup>245</sup> See also above Chapter 1 n 35 and above, nn 26, 166-168; and accompanying text.

<sup>246</sup> See also Eekelaar J "Beyond the Welfare Principle" *Child and Family Law Quarterly* (2002) 14(3) 237; and discussion below Chapter 9 II. 1. *Competing theories*.

<sup>247</sup> Trinder et al *Making Contact*, above, 37. See above n 122.

child's other parent<sup>248</sup> although maternal needs may be part of the basis for relocation applications. The paramountcy principle, the rhetoric of shared responsibility and the strong social norms in support of retaining contact with auxiliary parents all militate against this.

Trinder et al "concur with Sturge and Glaser ... that [direct] contact is not always consistent with child welfare, or indeed the welfare of adults."<sup>249</sup> They suggest that where a range of solutions have been tried and do not work, contact "should cease on child welfare grounds, at least for a defined period."<sup>250</sup>

Sturge and Glaser list<sup>251</sup> the risks to the child from contact as: the escalation of the climate of conflict around the child; direct experiences of abuse, neglect or danger; continuation of unhealthy relationships including situations where the child is aware of continuing fear about the contact parent on the part of the custodial parent; undermining the child's sense of stability and continuity by deliberately or inadvertently setting different moral standards (particularly likely to occur when parents unable to communicate well or at all); showing little or no interest shown in the child him or herself; unstimulating experiences; continuation of unresolved situations, for example where the child has a memory or belief about a negative aspect of the contact parent and where this is left unaddressed as if unimportant; unreliable contact; contact against child's wishes, to the extent that the child feels undermined; difficult contact which fails to prioritise the child's needs. Ongoing proceedings also create a risk.<sup>252</sup>

According to Sturge and Glaser, replacing direct with indirect contact brings benefits that include experience of the continued interest of the absent parent, which, in a very partial way, will meet the need to feel valued and wanted [rather than] rejected by that parent; knowledge and information about the absent parent; the keeping open of the possibility of the development of a

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<sup>248</sup> The arguably most salient New Zealand examples for this are in *Bramley v MacDonald*, below Chapter 5 and *D v S*, below Chapter 7.

<sup>249</sup> Trinder et al *Making Contact*, above, 47.

<sup>250</sup> Trinder et al *Making Contact*, above 47. The authors also suggest (47-48): "At this point it might be helpful to have on record the desire of the non-residential parent to have had contact. In such cases there should be a requirement that schools should provide copies of school photographs and reports to both parents unless contra-indicated on child protection grounds". They recommend that resident and non-resident parents be encouraged to keep some sort of indirect or direct contact in place, provide children with reasons why contact is not possible, and consult children on an ongoing basis without burdening them with making decisions where parents cannot agree. See also on children's wishes below Chapter 9 II. 1. (ii) *Children's wishes and views*.

<sup>251</sup> Sturge and Glaser, above, 617-618.

<sup>252</sup> See above Chapter 1 n 47 and accompanying text.

relationship, for example, when the child is older or has some specific need of that parent. There may be some opportunity, through letters or phone calls, for reparation.<sup>253</sup>

Some of Sturge and Glaser's risk factors – as well as custodial mothers' concerns – are mirrored in recent research about children's views of access that aims to give children a voice in relation to their perceptions of access. These offer information relevant to Sturge and Glaser's benefit and risk analysis as well as raising issues not directly addressed by Sturge and Glaser.

The English studies were qualitative,<sup>254</sup> the New Zealand study, already referred to<sup>255</sup> a mixture of quantitative and qualitative. Neither demonstrates directly the benefits of access: both describe what children like and do not like. In the New Zealand study only a small proportion of the parents who responded<sup>256</sup> had been involved in defended hearings, that is, had engaged in protracted conflict about custody and access (though it is possible that some of the others who had been through mediation may have had significant conflict arbitrated in “directed” mediation.)<sup>257</sup>

The English research documents significant difficulties for children. In the New Zealand research overall although some of them wanted more access or wished their parent spent more time with them during access, children mentioned more negative (3.9 per child) than positive (2.5 per child) aspects of access. Perhaps in New Zealand too the emotional costs of access are greater than the benefits. The benefits of access will now be considered under four headings. Two of these “Developing or maintaining meaningful relationships” and “Extending experience or knowledge” refer to the Sturge and Glaser analysis. A third considers factors not referred to by Sturge and Glaser and the fourth discusses benefits believed to be exclusively father-related: identity and role-modelling.

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<sup>253</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 617.

<sup>254</sup> Carole Smart discusses three projects she has been involved with in Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307.

<sup>255</sup> Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre. There was also an earlier pilot study, which is discussed briefly in Chapter 7 n 99-102 and accompanying text: Smith, A, Taylor, N, Gollop, M, Gaffney, M Gold, M and Henaghan, M *Access and Other Post-Separation Issues; A Qualitative Study of Children's, Parents' and Lawyers' Views* (1997) Children's Issues Centre.

<sup>256</sup> 111 out of a possible 146 parents contributed, 69 mothers and 42 fathers of whom 41 per cent and 24 per cent respectively had attended mediation; 15 per cent and 14 per cent took part in defended hearings. 86 per cent of the children lived with their mothers; 7.5 per cent with their fathers; 6.5 per cent lived with both parents on a shared time basis; 6.5 per cent had no contact with the non-residential parent.



## 1. Developing or maintaining meaningful relationships

For the children in both studies, sharing was not about how much time they spent with each parent but about how good the relationships were: a great deal depended on the trust and warmth that had been established before separation and then on the quality of post-separation parenting. One benefit identified in England was that parents came to be seen as separate individuals.

In New Zealand, the process of "developing (or maintaining) meaningful relationships" was demonstrated by the children's reports of their relationships during access. These show that about a third reported positive relationships/interactions with their access parent (86 per cent of whom were fathers).<sup>258</sup> A small number liked seeing both parents.<sup>259</sup> Some children, like those in the English study, saw access as an opportunity to enjoy time with each household, or to have a break from a parent they found difficult.

But about a third of the children reported negative relationships or interactions with the access parent, separately from the other things they disliked about access.<sup>260</sup> A few of the children reported positive relationships and interactions with step-parents or step-siblings<sup>261</sup> but significantly more reported negative relationships<sup>262</sup> with them. And although just under half of the children thought the amount of time they spent with the access parent was just right, almost the same number wanted more time alone together. The authors of this study heard this as a "strong message."<sup>263</sup>

[The children] were resentful ... Many ... felt that as the relationship between the new partner and their parent had developed, their own relationship with their parent had declined.

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<sup>257</sup> See below Chapter 4 nn 36, 43-48 (especially), 76; and accompanying text.

<sup>258</sup> 29 per cent (Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, 12).

<sup>259</sup> 8 per cent (Smith et al, above, 12). These figures contrast with research evidence summarized by Pryor and Rodgers (Pryor and Rodgers *Children In Changing Families; Life After Parental Separation*(2001) Blackwell, 220) as "With few exceptions children want their fathers around and loss of them from their lives can be [but is not inevitably] a source of ongoing pain." One explanation for the divergence is that much research prioritises children's relationships with their 'external' parent without also inquiring into other significant relationships that are lost, e.g. with friends and grandparents and other family members. These losses can also be a source of "ongoing pain".

<sup>260</sup> 30 per cent. Children's comments were grouped in the report under indifference, poor relationship, anger (their own), lack of interest (by the parent), being let down, violence (Smith et al, above, 13).

<sup>261</sup> 4 per cent/7 per cent (Smith et al, above, 12).

<sup>262</sup> 26 per cent/13 per cent (Smith et al, above, 13).

<sup>263</sup> Smith et al, above, 38. This is echoed in Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) where the researchers found that children had particular difficulties relating to a new non-resident step-parent and found they had too little time alone with their non-resident parent. This sometimes meant that teenage children chose to reduce contact.

A few children found it positive to stay with or see full siblings<sup>264</sup> and have access to friends.<sup>265</sup> But significantly more missed their friends/ sports/ socialising.<sup>266</sup>

Being let down also affected almost a third of the children; this study noted not only hurt but also anger when children were let down by an access parent.<sup>267</sup> These feelings of hurt and anger, combined with longing and resistance are widely recorded, in many contexts.<sup>268</sup> Unreliability is given particular attention in the Sturge and Glaser list of risks from contact:<sup>269</sup>

Unreliable contact in which the child is frequently let down or feels rejected, unwanted and of little importance to the failing parent. This also undermines a child's need for predictability and stability. We believe the legal processes tend to underestimate the impact on the child and the child's situation of a parent who does not arrive on time or at all, who cancels at the last minute ... makes a great fuss over a child's request to miss a contact in order to do something important to the child ... breaks promises, is unreliable [during] contact.

As a psychologist who has done Family Court work McDowell believes that<sup>270</sup>

irregular & unreliable access can be emotionally abusive - I think that children need reliability, predictability, consistency - that these all contribute to feeling safe (in addition of course, to the basics like love, good care etc.) & to a sense of stability & making sense of their world. If access is irregular & unreliable then these needs are not being met & this particularly affects a child when these needs are not met by a primary person/parent/caregiver.

It seems likely that a caregiver caught up in conflict with a second parent as well as struggling with difficult social and economic circumstances will have fewer resources for making sure a child feels safe.

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<sup>264</sup> 5.6 per cent (Smith et al, above, 12).

<sup>265</sup> 6.5 per cent (Smith et al, above, 12).

<sup>266</sup> 15.9 per cent (Smith et al, above, 13).

<sup>267</sup> 26.2 per cent (Smith et al, above, 13).

<sup>268</sup> In Blundy *A Every Time We Say Goodbye; The Story of a Father and a Daughter* (1998) Century, her memoir of her relationship with her journalist father Blundy articulates some of the feelings I have also heard articulated by others. He was "killed in the field" and his death probably made it easier to write about the pain that he caused her while he was alive. She writes, (32): "When my mother and I lived in a flat on a main road I would sit in the window counting the cars going past until Dad came. Sometimes he was hours or days late. At first I would be angry that he had forgotten, then terrified that something had happened to him, then angry again as news item after news item bore no sign of an air crash. Ultimately I would be relieved and grudgingly elated. Even when I was eighteen I was pleading with him to come home and see me ... (40) ... I was always flattered that he had called, like a mother waiting for a word from her errant son - pathetically grateful when it came ....(41) ... he was lonely and glad to have someone who was always waiting for him on the other side of the world, always pleased to hear his stories in the middle of the night when the whisky was finished. I never knew who to call, myself."

<sup>269</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 618-619.

<sup>270</sup> McDowell, personal communication (email) 26 June 2000. See above nn 72 and 77 and accompanying text for her analysis of emotional abuse.

Unreliability is also a salient issue in one English study. It found that “one of the most difficult situations that children had to deal with was waiting for a nonresidential parent to visit or take them out” and<sup>271</sup>

[I]n this situation ... children felt particularly powerless ... time spent waiting appeared to them to be a measure of how much they were cared for ... for children with reliable parents, the time they might have to spend waiting was just an inconvenience. But for children who had experienced many disappointments, or who were routinely let down, the time spent waiting had a very different significance.

Trinder et al found that where contact parents were unreliable and uncommitted<sup>272</sup> resident parents abandoned the primary child welfare principle for the alternative one and advocated a clean break; this was also favoured by some of the contact parents. Some children “desperately missed their parent and found it hard to understand why they could not see them.”<sup>273</sup> Others “seemed to reflect back the parents’ disinterest and did not want more regular contact.”<sup>274</sup> For most of these families ongoing contact was maintained with members of the contact parent’s family who became important in the child’s life.

These aspects of the research seem to indicate that for many of these children developing (or maintaining) meaningful relationships may not be being achieved during contact. They may not be experiencing warmth, approval, feeling unique and special. Conflict between their parents also caused children in both studies pain and unhappiness.<sup>275</sup> However, almost half the New Zealand children wanted more frequent contact. This may have been due to wanting the material things available, and interesting/fun activities that extended their experience or knowledge or to other needs, like identity or belonging.

Some interviewees disliked their lack of control over arrangements and their changeability.<sup>276</sup>

The English study noted that expectations of parents who each want to have the children for more time causes difficulty because the children have far less autonomy in choosing how they allocate time and may find it difficult to manage to find time to be alone or with friends. This is stressful for them. Some English interviewees wanted to “stay still,” to enjoy doing nothing and to be free

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<sup>271</sup> Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307, 316-317.

<sup>272</sup> Eight of the 61 families.

<sup>273</sup> Trinder L, Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 13.

<sup>274</sup> Trinder et al, above, 14.

<sup>275</sup> 20.6 per cent (Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, 13).

<sup>276</sup> 23.4 per cent (Smith et al, above, 13).

of an expectation that they should be somewhere else, even though their relationship with an access parent was good.

Both New Zealand and English studies also record that negative aspects of access experiences include the inconvenience of moving from one home to another.<sup>277</sup> Smart and Neale note that children are disoriented by the emotional transitions from household to household and the different cultures that existed in each one. But this too cannot be viewed simplistically. Rodwell for instance refers to the story of a young person who was talking about the difficulties involved in living in two households to someone who heard this as evidence that the arrangement was not working and had started to explore other options when the young person said: “Oh no! Yes it can be a hassle, and yes I’m always leaving stuff behind, but I wouldn’t want it any other way.”<sup>278</sup> Interviewees’ acknowledgement of negative aspects of access may only indicate its complex reality. Overall they may or may not have been satisfied with it. As well, children’s resilience varies.

## 2. Extending experience or knowledge

A high proportion of the New Zealand children<sup>279</sup> liked interesting/ fun activities that happened on access. Around a fifth of them liked the material<sup>280</sup> and environmental<sup>281</sup> things that their access parent offered: money, treats, junk food, computers, Play Stations, space to play. Access to these kinds of things - available in other contexts, but may not be available at “home” due to financial constraints - may explain why.

However, the researchers do not attempt to distinguish between [positive] activities that “offer experiences ... information and knowledge”<sup>282</sup> from those that are arguably less so, like eating junk food; nor to establish the extent to which the boredom reported by a quarter of the interviewees co-existed with the interesting/ fun activities.

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<sup>277</sup> 40.2 per cent in New Zealand (Smith et al, above, 13).

<sup>278</sup> Rodwell, J *Repartnered Families: Creating New Ways of Living Together – Beyond the Nuclear Family* (2002) Penguin, 33.

<sup>279</sup> 53.3 per cent (Smith et al, above, 12).

<sup>280</sup> 21.5 per cent (Smith et al, above, 12).

<sup>281</sup> 19.6 per cent (Smith et al, above, 12).

<sup>282</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 617.

But there are suggestions that some of the Sturge and Glaser risk factors are present: around a fifth of the interviewees<sup>283</sup> disliked the activities of the access parent; more disliked aspects of the access parent's physical environment.<sup>284</sup> Smart too reports that the children she studied were sometimes bored when with a parent who was inattentive, away a lot, had a less comfortable home than the other parent, or lived a long way from their friends. Some children found the rules were too strict, or varied between houses; this is a risk to be measured, according to Sturge and Glaser.

### 3. Factors unrelated to the Sturge and Glaser analysis

Children also wanted information. Most of the children Smart interviewed wanted to understand what was happening in their family and to be heard. Smart notes that "there is some indication that parents' worries over their children give rise to a tendency to avoid speaking to children about what is happening in the family."<sup>285</sup>

In another study only 5 per cent of the children interviewed, aged 10-11, were given full information about their parents' separation and encouraged to ask questions. This research endorsed guidelines for children when their parents separate to ensure they do not interpret the separation as meaning "that they are no longer loved by the parent who is gone."<sup>286</sup> These would include provision of a coherent story about the separation, talk about predictable and reliable practical arrangements, about two homes and the reassurance that the children will still be able to see their friends. Where this is not possible, an honest, coherent and reassuring story about what *is* possible would presumably be helpful.

Sometimes, a "good" mother may identify that her child's father does not offer enough unique and positive benefits for her to continue to support his relationship with their child, particularly if the father does not offer the two exclusively father-specific benefits named by Sturge and Glaser - identity and role modeling<sup>287</sup> - or offers them in a way that appears to undermine the wellbeing

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<sup>283</sup> 21.5 per cent (Smith et al, above, 13).

<sup>284</sup> 29 per cent (Smith et al, above, 13).

<sup>285</sup> Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307, 308.

<sup>286</sup> Dunn J, Davies L C and O'Connor, T G "Family Lives and Friendships: The Perspectives of Children in Step-, Single-Parent, and Non-Step Families" *Journal of Family Psychology* 15(2) 272, 285.

<sup>287</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 616-617.

of the child or the new family. She may choose to present an honest, reassuring and coherent explanation about this to her child.

#### 4. Exclusively father-related benefits

These two benefits highlight the narrow parameters of the unique contributions fathers, especially biological fathers, can make (and by extension, mothers). They have five inter-related elements: the [biological] father's unique role in the creation of the child; the [biological father's] sharing of 50 per cent of his or her genetic material; the history of his or her conception and the parental relationship; the consequent importance of the father in the child's sense of identity and value; the role modeling a father can provide of the father's and male contribution to the parenting and rearing of children which will have relevance to the child's concepts of parental role models and his or her own choices about choosing partners and the sort of family he or she aims to create.

The identity-related benefits are supported within UNCROC;<sup>288</sup> and to some extent by the documented experience of children whose identity needs have been compromised.

##### (i) Identity and the genetic connection

*... there is a compelling and instinctive desire on the part of people to know their lineage; to know who their parents were; to place themselves in the pattern of time and history by reference to their immediate antecedents. This is an almost atavistic compulsion on the part of human beings. It is manifest in the case of adopted persons who get to adolescence and throughout their lives search for their natural parents. All of this is known to people.*<sup>289</sup>

Legal fictions created in the Adoption Act and SCAA can foreclose on the possibility of children locating one side of their genetic family, denying them their right to know one parent and to preserve an identity.<sup>290</sup>

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<sup>288</sup> See below Chapter 3 n 111 and accompanying text.

<sup>289</sup> *Sharman v Sharman* (1988) 5 NZFLR 91 (HC), 94.

<sup>290</sup> See below Chapter 3 II.2. *Laws that preclude the involvement of biological parents.*

Various researchers have identified and discussed the effects of closed adoption.<sup>291</sup> Many of these relate to secrecy, denial and shame.<sup>292</sup> And recent research<sup>293</sup> shows that children born through donation of anonymous genetic material – by far the majority by sperm donation – may also face lifelong emotional problems not only with identity but also with confusion and mistrust within the family.<sup>294</sup> In one literature survey, the authors note that “recipients of donor spermatazoa express concerns about disclosing to their children because of societal stigma and also because of the stigma surrounding fertility.”<sup>295</sup>

There may be many children who will never know that they were conceived by new birth techniques. As McGrail points out in her book, aptly entitled *Infertility, The Last Secret*<sup>296</sup>

For parents with a child conceived by DI or through egg donation, a major issue is whether or not to tell the child about their origins. Unless you tell your child, he or she may never know.<sup>297</sup>

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<sup>291</sup> See for instance Else A *A Question of Adoption: Closed Stranger Adoption in New Zealand 1944-1974* (1991) Bridget Williams Books and Else A “The Uses of History in Adoption and Healing” in *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption Education and Healing Trust.

<sup>292</sup> One group of women who were placed for adoption during New Zealand’s closed adoption era knew nothing of their background until adulthood. However they found that they shared a group of issues around loss, self-esteem, constant anxiety, insecurity, a withholding of part of themselves (to negate issues of rejection particularly from those they were closest to) and psychological exhaustion. These had been evident since childhood. The extended families of adopted children have also been affected. (Willis J and Sharp N “Traversing the Many Layers of Adoption” in *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption Education and Healing Trust.)

<sup>293</sup> Turner A and Coyle A “What Does It Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy” (2000) *Human Reproduction* 15(9) 2042. I have however found no writing analogous to Verrier’s “primal wound” theory (Verrier N *The Primal Wound: Understanding the Adopted Child* (1993) Gateway) about adopted children who appear to experience the loss of the birth parents/birth family at birth (or earlier?) as a deep emotional trauma. They store this, according to Verrier, in a preverbal unconscious way and it is thought to have long-term implications for the psychological functioning of the adopted person during his/her lifetime. However, Humphrey and Humphrey (Humphrey M and Humphrey H “A Fresh Look at Genealogical Bewilderment” (1986) *British Journal of Medical Psychology* 59 133) concluded (139) that “when the quality of surrogate family relationships is sufficient to meet the child’s emotional needs, then there is no reason why ancestral knowledge should be a prerequisite to mental health ... It is primarily where family relationships are disturbed, or in some other way unsatisfactory, that ... genealogical bewilderment is likely to arise.”

<sup>294</sup> Turner and Coyle, above, note that many participants felt shocked to learn of their background, regardless of the context in which they learned about it, felt their whole identity was threatened, and that they had a right to know their genetic origin. Many fantasised about their biological fathers as a coping strategy, most had tried to trace their biological fathers and had been frustrated by the secrecy that surrounded their origins. While this study, of 16 adults from Britain, America, Canada and Australia, was of a small sample, and of people in support groups and although in New Zealand the process is sometimes a bit more open, it is likely that there are people here who feel similarly undermined. In a *Listener* advertisement (*Listener* 21 October 2000, 39), where the advertiser requests information that might help her find the person who donated her male genetic material. She asked: “Are You Any Of The Following? A patient of Professor Dennis Bonham between 1975-77, whose husband was asked to donate sperm? A person conceived by donor insemination? A sperm donor in Auckland, 1976? I am a donor-conceived person looking to find any information about the missing half of my background. If you can help me in any way please contact...”

<sup>295</sup> Turner and Coyle, above, 2042.

<sup>296</sup> McGrail A *Infertility, The Last Secret; What Happens When You Want to Have a Baby* (1999) Bloomsbury, 163.

Genetic and historical family identity may therefore be an issue whenever a child has no blood relationship with one or both of her or his social (rather than biological) parents. However, it seems that some of the problems around genetic identity can be managed if family relationships are satisfactory, and if children are given age-appropriate information and the opportunity, as they grow older, of making contact with their biological families. Lack of truthful information, secrecy and shame can be damaging but information and support can be provided by others as well as by a parent: social parents or extended family.

In the context of the complexity of the parenting process and of identity as a whole, the identity related benefits of father contact may be quite small. Genetic connection, the child's conception history and so on are arguably relatively insignificant and a tiny part of daily physical and emotional care, at least until a child is adolescent.

A child's sense of being valued can be nurtured in many ways other than contact with biological parents: identity is multidimensional and children's identity-related needs will vary within any family. These needs may relate to gender identity and immediate family social identity, but also to sexuality, culture, class, ethnicity and spirituality as well as relationship to place. Meeting these needs sometimes offers challenges. However, close and attentive parenting will deal with any identity issue appropriately, including identity needs that might be met by a biological father.

#### *(ii) Role modelling*

Role modelling of the various kinds an individual child may need can be effectively offered by people who are not blood relatives, including step-fathers, teachers and others. Mothers, for the reasons already discussed, are more likely to provide models for the taking of responsibility for

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<sup>297</sup> In a recent study in Sweden where the law requires parents to tell children about their genetic origins, researchers found that 90 per cent of parents had not done so. Only half intended to comply with the legislation, though 60 per cent had told someone else about the child's history and 30 per cent had told many people, increasing the risk of their child hearing from other sources. Nelson R (2000) "Where Did I Come From? Studies Raise Issue of What to Tell Children Conceived with Donor Sperm" <http://my.webmd.com/content/article/1728.60883> (accessed 28 October 2002) referring to Gottlieb C, Lalos O and Lindblad F "Disclosure Of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes" *Human Reproduction* (2000) 15(9) September 2052. In another piece of research, based in California, found that parents from 45 households (40 per cent headed by lesbian couples, 38 per cent by single women and 22 per cent by heterosexual couples, almost no parents regretted using an open-identity donor and almost all parents had told their (now adolescent) children about their DI conception early on, with a neutral to moderately positive impact. The research concluded that disclosure did not appear to have a negative impact on the families regardless of parental sexual orientation and relationship status (Scheib J, Riordan M and Rubin S "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 Years Later" *Human Reproduction* (2003) 18(5) May 1115).



physical and emotional needs within a family. Furthermore, although it is possible to provide a model for a child's future family this may be problematic: the role modelling a father provides in our culture does not necessarily have predictable or positive outcomes in adult life.<sup>298</sup>

Looking closely at these issues, and assessing the way her child's father has exercised his responsibility for their child before, and, especially, after separation and at the impact of his parenting practices, a mother may conclude that he has been and is emotionally abusive of the child and of her. For instance, his unpredictable, unreliable or incompetent parenting practices before separation may have developed into a pattern of ambivalent or intrusive behaviour after separation. His unreliability may distress the child and debilitate the mother as she works to get an autonomous household up and running well. Both she and the child may be feeling undermined and facing the kinds of outcomes that develop for the emotionally abused. She then has to consider whether and how to address this abuse.

#### IV. Concluding Remarks

This chapter has expanded on the social science material included in the Introduction, presenting a narrative about the validity of the assumptions being questioned in this thesis. It has shown that research supports the assumption that mothers will continue to care for their children regardless of the conditions inherent in doing so, often within a gendered hierarchy of care. However, the gender inequities inherent in these conditions may compromise their ability to provide care and thus the children's wellbeing. These inequities include social and economic disadvantage as well as the inappropriate exercise by fathers of ambivalent or debilitating power. The research surveyed also indicates that assuming an auxiliary parent is necessary to a child, absent sexual or physical abuse, is unfounded, except in relation to a small number of biological father-unique factors that may become important at adolescence. This assumption should therefore not be relied

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<sup>298</sup> See for instance Deutsch (Deutsch F M *Halving It All; How Equally Shared Parenting Works* (1999) Harvard University Press) who found that role models sometimes made it easier to be a less engaged father. A quarter of the equally sharing fathers did not know other equal sharers and a few who joined men's groups did so to find models that they could follow. The lives of their own fathers provided little guidance for most of the men, except as anti-models. About half the fathers who shared childcare significantly were disappointed by the quality of parenting provided - or not provided - by their own fathers; and three quarters of the alternating shift fathers who may have spent more time with their children than any of the fathers in the study gave negative reports.

on, it is argued, to achieve an abstract ideal of paternal contact if it compromises a mother's capacity to provide primary care.

It is submitted that decision-makers should be aware of the hierarchy of care and its gendered nature as well as the prerequisites necessary for it to operate successfully. They should be aware that a mother cares for a child within difficult societal conditions including gender inequities and that the effects of these conditions may be compounded by a father's exercise of debilitating or ambivalent power. Decision-makers should be aware too of possible consequences if they do not address these issues or do not address equally the situational powerlessness of all parties, understanding the potential physical as well as emotional effects on women and children of their failure to do this. In particular they should resist labelling as "bad" a mother who does not wish to agree to a gender-based regime and to take responsibility for making contact work in the way desired by the auxiliary parent, without fully investigating the facts and the mother's reasoning.

It is further submitted that the research provides evidence to endorse a position that, where there is conflict about allocation of parental responsibility, support for a primary carer should be prioritised because that will help protect the child's principal environment. Any assumption that a primary parent (usually a mother) will - and must - continue to parent regardless of the conditions under which she is required to do so, should be resisted. Solutions should be sought that attempt to achieve the actual rather than assumed benefits of a relationship with and care-giving from an auxiliary parent.

## Chapter 3. The Law

### I. Introductory Remarks

This chapter describes the law relevant to the selected cases analysed in Part II. It also explores how local legislation and international instruments might reflect values and assumptions in relation to the issues discussed in Chapter 2. It will examine how local legislation and international instruments might advance the welfare of a child through protecting and supporting that child's primary carer and relationship with that primary carer.

In New Zealand, parenting choices and responsibilities are articulated in the Guardianship Act, the Adoption Act, the Children, Young Persons, and Their Families Act,<sup>299</sup> the SCAA and the Child Support Act. These all provide for the allocation of caring for or financial parental responsibilities in a variety of circumstances. The New Zealand Bill of Rights appears to qualify these laws only in a very limited way, as do international human rights obligations, although UNCROC is often referred to in cases about parental responsibility.

The first part of this chapter summarises provisions of the Guardianship Act, the Adoption Act, the SCAA and the Child Support Act. Provisions particularly relevant to the allocation of parental responsibility when parents will not exercise their responsibilities according to the imperatives of a hierarchy of care, in the cases in Part II, will be described and discussed. There will be reference to gendered parenting patterns and gender inequity and to the assumptions that mothers will continue to parent regardless of the conditions under which they are required to do so and that a continuing relationship with a second parent is necessary. Special attention will be given to parental conduct and gender; parental willingness to take responsibility; how a section designed to resolve disputes has been used to allocate responsibility; the exclusion of psychological violence from the provisions that deal with domestic violence; provisions that preclude biological parents from sharing day to day care; and Child Support Act shared parenting and gender provisions.

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<sup>299</sup> Use of the Children, Young Persons, and Their Families Act to resolve issues raised is outside the scope of this thesis and will be referred to only in passing.

The second part of this chapter addresses related issues raised by international human rights instruments. It discusses some relevant provisions of UNCROC and CEDAW and their potential role and contextual and inherent limitations.

## II. Local Legislation and the Allocation of Parental Responsibility

### 1. The Guardianship Act: An overview

The long title to this Act describes it as

An Act to define and regulate the authority of parents as guardians of their children, their power to appoint guardians, and the powers of the Courts in relation to the custody and guardianship of children.

In this Act, parental authority, or power, is referred to in terms of custody, guardianship and access. “Guardian” has a meaning corresponding to “guardianship”, meaning “the custody of a child ... and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child”<sup>300</sup> and guardian “has a corresponding meaning.”<sup>301</sup> Guardianship is subject to any custody order made by the Court. This implies that guardianship rights can be reduced by the awarding of custody, including both the element of care and the element of possession inherent in the term.

Custody is defined as the “right to possession and care of a child.”<sup>302</sup> This definition expands on a standard dictionary definition of custody (when not defined as imprisonment) as being “guardianship, or protective care.”<sup>303</sup> Adding “possession” to the definition means that “custody” has imported for some people the concept of a child as a chattel, property to be haggled over rather than a commitment importing the kinds of responsibilities that good parents manage without needing to “possess” their child. However “possession” also fits with the idea of authority as power. Caring for a child arguably does not carry the idea of having power whereas possession implies that the owner has the power to prevent authority being exercised by another person. This distinction is perhaps a fundamental source of the conflict between fathers’ concern for the abstract ideal of enforcing the right of paternal contact and mothers’ concern for the work of “caring for” in decided cases.

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<sup>300</sup> Guardianship Act s 3.

<sup>301</sup> Guardianship Act s 3.

<sup>302</sup> Guardianship Act s 3.

<sup>303</sup> *Oxford Encyclopedic Dictionary* (1991).

The definitions have in common the element of protection. Both custodians and guardians exist to protect children who are dependent on their protection for survival and to “nurture the child[ren] to a state where they are independent of the parent.”<sup>304</sup>

The father and mother of a child shall each be a guardian of that child.<sup>305</sup> However a mother will be the sole guardian if she is not married to the father of the child and never has been or their marriage was dissolved before the child was born and she and the father of the child were not living together as husband and wife when the child was born.<sup>306</sup> The Court may also appoint a guardian “either as sole guardian or in addition to any other guardian and either generally or for any particular purpose.”<sup>307</sup> A parental guardian may be deprived of his or her rights of guardianship only if “for some grave reason unfit to be a guardian of the child, or ... unwilling to exercise the responsibilities of a guardian.”<sup>308</sup>

Given the explicit reference her to “responsibilities”, unusual in the Act, and the role of “willingness” in both men’s contribution to nurturing and Trinder et al’s hierarchy of care, the second part of this provision becomes significant. There is nothing in the Parliamentary Debates about Parliament’s intentions when enacting this provision.<sup>309</sup> However, according to the High Court decision in *A v D-GSW*<sup>310</sup> “for some grave reason unfit” or “unwilling” are to be considered as alternatives, and the second perhaps subjectively by the guardian concerned, rather than by the Court: “Clearly Mr A is not unwilling, in his own perception, to exercise the responsibilities of a guardian.”<sup>311</sup> Termination of guardianship is “extremely rare.”<sup>312</sup> There

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<sup>304</sup> *E v M* (13 September 1979) High Court Wellington M361/779, approved by Court of Appeal in *Director-General of Social Welfare v L* [1990] NZFLR 125 (CA), 136.

<sup>305</sup> Guardianship Act s 6(1). According to the Minister of Justice when the Act was passed s 6 “establishes the principle of complete equality of parents in relation to their children ... that is, to put the mother on exactly the same footing as the father ... [who] is theoretically still the one in whom guardianship is vested” and that “although guardianship [can] be exercised from a distance ... a child cannot be at the same time in the possession of two people if they are not living together ... The Bill... makes it plain that guardianship need not be disturbed merely because the circumstances compel the Courts to make a decision in regard to custody.” Hon J R Hanan (26 November 1968) 358 *New Zealand Parliamentary Debates* 3387-3389.

<sup>306</sup> Guardianship Act s 6(2).

<sup>307</sup> Guardianship Act s 8.

<sup>308</sup> Guardianship Act s 10(2).

<sup>309</sup> A guardian may be deprived of his or her rights of guardianship only if “for some grave reason unfit to be a guardian of the child, or ... unwilling to exercise the responsibilities of a guardian.” See below n 34 for one view of the section, used to justify using s 13 and joint guardianship to replace a sole custody arrangement.

<sup>310</sup> *A v D-GSW* [1995] NZFLR 241 (HC), 243 McGechan J.

<sup>311</sup> *A v D-GSW*, above, 243.

<sup>312</sup> Webb P R H *Butterworths Family Law Service* (2002) 6.201. The cases listed, seemingly decided under the “for some grave reason unfit” criterion include one of natural parents who had “virtually washed their hands of the child

appears to be no case where a custodial parent argues that an auxiliary parent is unwilling to exercise the responsibilities of a guardian, as defined in *E v M*, and therefore should have his or her guardianship terminated.<sup>313</sup> Nor does there seem to be a case where an auxiliary parent whose access is being obstructed argues that “willingness” on the part of a guardian who is a custodian includes being willing to facilitate access, although this is perhaps an implicit understanding in circumstances where the Court threatens a change in custody.<sup>314</sup> The ambit of responsibilities and the meaning of “willingness” to exercise the responsibilities of a guardian do not appear to have been fully argued.

According to *Buckland v Minifie*<sup>315</sup> the second reason for terminating guardianship is not provided to acknowledge that there are parents who choose not to exercise any guardianship rights and to affirm their right to do this. It does not contemplate, for policy reasons, that a parent might apply to be removed as a guardian of his or her own children.<sup>316</sup> However, it could be argued by a custodial parent, or a parent who shares custody but carries out most of the “caring for” responsibilities, that an access parent who is unwilling to exercise guardianship responsibilities appropriately should have his or her guardianship rights suspended or removed. Judges in cases examined in Part II present two possible views, one that conceptualises deprivation of guardianship on the grounds of unwillingness as happening only “the extreme and unusual case”<sup>317</sup> and the other who conceptualises it as requiring a minimum of maintaining of regular contact.<sup>318</sup>

Arguably, this provision could have been part of a legislative scheme that intended to remove the protection of guardianship rights if a parent were unwilling to exercise them. It provided a mechanism so that the provision empowering the Court to grant access to other family members

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for the first 11 years of its life” *Re D (An infant)* [1971] NZLR 737 (SC); and others where a father had raped one of his children, continually denied responsibility and was removed as guardian of all his children: *S v M* (9 May 1996) Family Court Palmerston North FP 135/9 and a mother who had a psychiatric history was unable to care for and was indifferent to her child, *Re the Children, Young Persons, and Their Families Act and W* (9 July 1992) Family Court Hastings CYPF 020 078 92.

<sup>313</sup> However, it is noted without comment in *T v T* [1998] NZFLR 776 (FC), 778 that in a lesbian family when the parents separated the custodial parent “made moves to terminate [the other parent’s guardianship of the children and] orders were made to that effect ... without opposition [from the other parent].”

<sup>314</sup> See Chapter 4 n 50-52 below and accompanying text for the *in terrorem* strategies used against custodial parents who are “unwilling” to facilitate access.

<sup>315</sup> *Buckland v Minifie* (16 June 1998) Family Court Wellington FP 469/97.

<sup>316</sup> Among other undesirable consequences this might make it possible to argue against child support liability.

<sup>317</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 542.

<sup>318</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 10.

if a parent were not exercising access could formally be activated.<sup>319</sup> The combination of the second reason for terminating guardianship in section 10(2) and the provision in section 16 allowing for a replacement auxiliary parent may have been a 1968 *in terrorem* provision: a mechanism to resolve an impasse, available in a highly discretionary context. Because enforcement of access was not provided for and arguably not possible, the legislators may have intended to protect children whose access parents were unwilling to care for them and their custodial parents from abuse of access rights by having these fallback provisions. They are not unlike a contemporary “trigger” device whereby custody is transferred if arrangements for auxiliary care are not honoured by a custodial parent and the auxiliary parent is a viable custodian.<sup>320</sup>

During the final debate on the 1980 amendments to the Guardianship Act, including the *in terrorem* provisions of section 20A, it was acknowledged that “abuse of access rights, whether by the custodial or non-custodial parent, is one of the most difficult problems in family law;” it was the Select Committee’s “strong hope that access problems will be alleviated to a large extent by the availability of information and counselling.”<sup>321</sup> Perhaps, twelve years earlier, the “willingness” aspect of section 10(2) had been considered another way of resolving the problem within the overall scheme that prioritised a child’s welfare over parental rights, providing a useful mechanism that has for some reason been ignored.

In one recent case a father’s application to become a guardian was refused on the basis that the mother did not want to be legally obliged to consult with him, because he wanted to be an “access” parent only. The mother and father had been in a seven year relationship that ended after she became pregnant and he questioned the paternity of their child. She was prepared to reconsider her opposition to his becoming a guardian “if he showed himself willing to take more responsibility as a parent.”<sup>322</sup> He was not prepared to do that. He was not (as is the case with many fathers) “asserting a claim to an equal share of the rights and responsibilities for all aspects

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<sup>319</sup> The three sets of circumstances, provided for in s 16, are when a parent dies, has been refused access or is not exercising access.

<sup>320</sup> See below Chapter 4 n 50.

<sup>321</sup> (7 August 1980) 432 *New Zealand Parliamentary Debates* 2502-2503. Mr Brill presented the Select Committee’s report.

<sup>322</sup> *Re the guardianship of ACL* [2002] NZFLR 165 (FC), 171 Judge Ellis. See also above Chapter 2 n 151 and below Chapter 6 n 146, Chapter 8 nn 5, 199-200, 204-205, 209.

of the child's care, nurture, and upbringing."<sup>323</sup> His position was however articulated in an honest way that perhaps reflects a common perspective. It was:<sup>324</sup>

based on the premise that the mother will at all other times [than when he is exercising access] be responsible for all aspects of the child's life. [His argument is based on] the assumption that his availability as a parent will be secondary to other concerns in his life. The mother does not have that luxury. She has had to order her life so that she is available to the child full time and she has done so at some cost. That was the position she accepted since she left the father in the early stage of pregnancy.

Judge Ellis, concluded that the application was "not so much about the child's welfare but was more to do with his own perception of his rights,"<sup>325</sup> as may be true in other cases where paternal rights appear to be privileged over maternal exercise of responsibility for children. The father's application was declined, because on the balance of reasonable probability, it was not in the child's best interests for him to become an additional guardian. If this is a possible outcome for a father who was not a guardian at the outset, it seems also a viable argument in support of removal of guardianship for others who are "unwilling". Those children whose welfare needs are provided for by primarily by their custodial parent and whose auxiliary parent's availability is "secondary to other concerns in his life" may then benefit from having a single guardian.

"Willingness" raises many issues. How is it to be measured? Is willingness before separation relevant? Given the imperatives of the hierarchy of care, is willingness different for primary parents than auxiliary parents? Is a primary parent "unwilling" when she refuses to facilitate a child's relationship with an auxiliary parent? Or does her willingness to parent include choosing if and when contact with other adults will benefit her child? Is it a "pattern" of willingness or willingness on one occasion only? If someone is willing to make an agreement to exercise "reasonable" access and does so but then chooses not to exercise that access or to exercise it unreliably is that person "willing" or "unwilling"? Is the "willingness" dependent on what is "reasonable" and what does "reasonable" mean? These are all problems of interpretation to be resolved if the Court were to address the concept of willingness.

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<sup>323</sup> *Re the guardianship of ACL*, above, 171.

<sup>324</sup> *Re the guardianship of ACL*, above, 171.

<sup>325</sup> *Re the guardianship of ACL*, above, 171.



If married parents there is a requirement that where there are children of a marriage being dissolved at dissolution there must be arrangements made for them.<sup>326</sup> As well, a guardian can seek direction about guardianship issues from the Family Court.<sup>327</sup>

Section 13 confers a wide discretion on the Court to give directions when guardians<sup>328</sup> or joint custodians<sup>329</sup> are unable to agree on any matter. Its place within the scheme of the Act and its parameters are described in the Court of Appeal in *W v W*, by Cooke J (as he then was):<sup>330</sup>

Generally, and subject to exceptions not relevant in this case, the father and the mother of a child are each, by virtue of s 6 of the Act, a guardian of the child. Each may be a guardian although they are divorced or, as in this case, separated. One parent may then have custody by order or agreement. But, as is plain from s 3 and was stressed by this Court in *Seabrook v Seabrook* [1971] NZLR 947, guardianship is a wider concept and the other parent has a right to a share of control in the upbringing of the child. This necessarily includes a right to be consulted in decisions of importance. Section 13, in so far as it covers disputes between guardians, is obviously intended to provide a relatively simple machinery for resolving such disputes. The paramountcy of the child's welfare applies as provided in s 23(1). Typical cases dealt with under s 13 include disputes as to education, religion, medical treatment, surname. It is clear, however, that s 13 does not authorise decisions as to custody or access. Those subjects are dealt with elsewhere in the Act, the main provisions being ss 11 and 15, and there are full rights of appeal.

However, there are many examples of section 13 being used to make decisions in custody and access disputes, thus blurring the operation of the hierarchy of care. The case which conceptualises the reasons for this most fully is *Makiri v Roxburgh*.<sup>331</sup> In refusing to give either parent custody, but ordering a detailed regime or shared guardianship (which in effect changed custody of a child from a mother to a father) Judge Inglis QC noted that<sup>332</sup>

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<sup>326</sup> Family Proceedings Act s 45.

<sup>327</sup> Guardianship Act s 13.

<sup>328</sup> Guardianship Act s 13(1).

<sup>329</sup> Guardianship Act s 13(2).

<sup>330</sup> *W v W* (1984) 2 NZFLR 335 (CA), 339. See also below Chapter 5 nn 34 and 136; and accompanying text.

<sup>331</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC). See also below Chapter 4 n 56, Chapter 5 nn 133, 137, 142, Chapter 6 nn 3-4 and Chapter 7 n 234; and accompanying text.

<sup>332</sup> *Makiri v Roxburgh*, above, 683. Judge Inglis QC used s 10(2) as part of his reasoning: "an order granting sole custody ... limits or reduces [the] other parent's guardianship rights to a very significant degree. While s 10(2) does not directly apply to prevent the limitation or reduction of guardianship rights by an order for sole custody, the pain spirit and intent of s 10(2) tells us, at the very least, that there needs to be caution in putting in place any order which has those consequences. ... the practical effect of a custody order, in many cases, is to exclude the non-custodial parent from his or her guardianship and to convert entrenched rights of joint guardianship into the sole guardianship of the custodial parent. Section 10(2) tells us that such a result cannot be achieved in law unless one or other of the specific grounds for the removal of a guardian is proved. Unless the principles of s 10(2) are borne in mind in exercising the discretion whether or not to make a custody order, there is a real danger that what cannot be achieved in law will be achieved in practice." (*Makiri v Roxburgh*, above, 683.) In contrast to the position advocated above nn 10-26 and accompanying text this arguably illustrates the view summarised by Wallbank above Chapter 1 n 8 and accompanying text. as "subjugat[ing] the mother's work of 'caring for' her child, in both an emotional and a physical sense, to the 'higher' abstract ideal of ensuring ongoing paternal contact" (Wallbank J (2000) *Challenging Motherhood(s)*, 64), or, here, to using the abstract ideal to remove a child from his mother's care while maintaining a fiction that she retains her "caring for" relationship with him.

the practical effect of a custody order, in many cases is to exclude the non custodial parent from his or her guardianship and to convert entrenched rights of joint guardianship into sole guardianship of the custodial parent.

His Honour recommended using section 13 as a first resort to resolve guardianship disputes rather than awarding one parent custody, with the advantage that neither parent's guardianship rights are reduced or enlarged and neither parent feels excluded. He distinguished *Makiri v Roxburgh* from *W v W* where the father's guardianship rights had already been limited by an agreement conferring sole custody on the mother (including the sole right to choose the child's place of residence). There was therefore "no issue of guardianship left in dispute" in *W v W*.<sup>333</sup>

There are no rights of appeal from section 13. The Court's decisions made under the section cannot be challenged except through judicial review.<sup>334</sup> In addition, orders made under section 13 cannot be enforced under section 19.<sup>335</sup> In *Makiri v Roxburgh*, His Honour resolved this difficulty by being explicit that his intention, if any of his directions needed to be enforced, was to "entertain an application by the party concerned for an interim custody order which would be granted solely for the purpose of enabling that direction to be enforced,"<sup>336</sup> that is, placing the party who sought enforcement of any direction in a position where section 19 could be used to enforce it.

There is no legal requirement for a father (or a mother) who does not live, or no longer lives, with the other parent and their child to have contact with the other parent or the child again.

A parent, step-parent, guardian, or with the leave of the Court any other person, can apply for custody of a child and (if a child is under 16)<sup>337</sup> the Court can make any interim or permanent order as it thinks fit, subject to any conditions as it thinks fit.<sup>338</sup> The Court's discretion throughout the Act is very wide.

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<sup>333</sup> *Makiri v Roxburgh*, above, 685.

<sup>334</sup> There appear to be no cases where a parent has sought judicial review of a s 13 decision. Austin (n 95 below and accompanying text) refers to case law that makes unlikely judicial review of any discretionary decision-making in the Family Court.

<sup>335</sup> See below n 46 and accompanying text.

<sup>336</sup> *Makiri v Roxburgh*, above, 687.

<sup>337</sup> Guardianship Act s 24.

<sup>338</sup> Guardianship Act s 11.

These conditions may include granting access and making that access subject to conditions.<sup>339</sup> If a parent dies, has been refused access or is not exercising access, the Court may grant access to other family members.<sup>340</sup>

Only a parent has access rights.<sup>341</sup> “Access” is not defined in the Act. Its dictionary meaning is “right or opportunity to reach, or use, or visit.”<sup>342</sup> “Use”, like “possession” imports the idea of a child as a chattel. It is not helpful in understanding the concept of access except to the extent that one parent may sometimes “use” a child, and access, for purposes that do not benefit the child. However, “visit” and “reach” are both useful in understanding the idea of access as well as to the exercise of guardianship rights; the former implies the right of physical access and the latter other kinds of access, reaching by telephone, email and other means.

“Access” can be ambiguous. It includes a range of practices: occasional phone calls, letters or emails; brief, supervised access for a few hours or less; taking full responsibility for the day to day care of a child for periods of time ranging from a few hours to occasional days or nights, to regular weekends and school holidays. It may involve enough contact to be defined as “shared” parenting under the Child Support Act. Custody/access arrangements may be very similar to shared custody arrangements where one parent, usually the mother, has primary responsibility for the day to day care of a child and the other parent has auxiliary responsibility. Whatever the nomenclature, arrangements for sharing parental responsibilities involve similar issues around the way they are organised and the conflicts they raise and tend to involve a hierarchy of care.<sup>343</sup>

An agreement between a father and mother about custody, upbringing or access shall be valid but not enforced “if the Court is of the opinion that it is not for the welfare of the child.”<sup>344</sup> If there is an access order, there is no compulsion to exercise that access. It is an offence to hinder or

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<sup>339</sup> Guardianship Act s 15; for reference to use of a *Tito* order (where a custody order has a condition attached that gives access to someone who otherwise would or might not be eligible to apply) for a father who is not a guardian, see below Chapter 8 nn 57, 67, 123, 130, 132, 144, 263 and accompanying text.

<sup>340</sup> Guardianship Act s 16.

<sup>341</sup> *Oxford Encyclopedic Dictionary* (1991).

<sup>342</sup> Guardianship Act s 15, where “parent” and “child” include “step-parent” and “step-child”.

<sup>343</sup> Alternative ways of defining and expressing the exercise of parenting responsibilities are also discussed Chapter 1 V. Terminology: The Language of Shared Parenting and below Chapter 4 nn 18-23 and Chapter 8 nn 118-136, 219-226; and accompanying text.

<sup>344</sup> Guardianship Act s 18.

prevent access<sup>345</sup> but although there are also provisions to enforce custody and access<sup>346</sup> there is no provision that recognises the possibility that someone with access may “hinder” custody by behaving towards the child or the custodian in ways that make the custodian’s life difficult.

The Guardianship Amendment Act 1991, as amended by section 2(1) of the Guardianship Amendment Act (No 2) 1994 states that the removal or retention of a child is to be considered wrongful if it is in breach of “rights of custody” attributed to a person and that those rights were actually exercised or would have been if the child were not removed or retained when a child is removed or retained. It reflects article 5 of the Hague Convention which defines “rights of custody” as including rights “relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” “Rights of access” are defined as including “the right to take a child for a limited time to a place other than the child’s habitual residence.” In *Dellabarca v Christie* the Court of Appeal held that “in particular the right to determine the child’s place of residence” in section 4 was “just one qualifying instance and not a necessary qualification ... the existence of that right is sufficient but not necessary.”<sup>347</sup> Section 18 of the Guardianship Amendment Act 1991 provides for the making of a declaration as to whether the removal or retention of a child is wrongful within the meaning of article 3 of the Hague Convention.

Since 1995 there have been special provisions relating to violence.<sup>348</sup> “Violence” in this context means physical or sexual abuse only.<sup>349</sup> The Court is required to consider “so far as is practicable” if the “other party to the proceedings,” (usually the mother)<sup>350</sup> considers whether the

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<sup>345</sup> Guardianship Act s 20A. Mr Palmer referred to a report from the Justice Department that identified only Families Need Fathers, the Family Law Reform Association and Mr Scott as those who stressed that enforcement of access “was a serious problem ... [and] were critical of the provision of a fine as a method of enforcement but were unable to offer any practical alternative ... The custodial parent would always come up with a reasonable excuse ... The provision is largely *in terrorem* in nature.” He did not refer to the difficulties for the custodial parent: (7 August 1980) 432 *New Zealand Parliamentary Debates* 2502-2503. In Clarkson the author states “No prosecution [under 20A] has proceeded in at least the last 5 years. Furthermore to prosecute successfully there must be proof of an ‘intent to prevent’ (an order for an access to a child from being complied with) together with evidence of actual hindering or preventing access to a child. The defendant has the defence of ‘reasonable excuse’. The concern about this particular provision is that a defence of reasonable excuse lends itself to a risk of re-litigation of the original issue” (Clarkson D F *Response to Questions Posed in “A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law”* (2001) Department for Courts, 23-24).

<sup>346</sup> Guardianship Act ss 19-19C.

<sup>347</sup> *Dellabarca v Christie* [1999] NZFLR 96 (CA), 101.

<sup>348</sup> Guardianship Act s 16A-16C; the amendments were made in association with the Domestic Violence Act 1995.

<sup>349</sup> Guardianship Act s 16A.

<sup>350</sup> See above Chapter 2 n 68 for statistical details.

child will be safe while the “violent party” (usually the father) has custody or access and consents to the violent party having custody or access other than supervised access.<sup>351</sup> This, uniquely in the legislation, acknowledges the experience and understanding of parents who have been abused, usually mothers.

In an environment where protection of women is seen as necessary and given, for present purposes, that physical and sexual violence are subsets of psychological violence<sup>352</sup> it is unfortunate that “violence” in the Guardianship Act excludes psychological violence. This means that where a second parent is exercising debilitating or ambivalent power as a means of control, although a mother may seek protection under the Domestic Violence Act, it cannot be an issue around a child’s relationship with a second parent, regardless of its effects.

Preceded by the heading “Miscellaneous Provisions” section 23 contains the heart of the Act in its first sub-section. The Court must “regard the welfare of the child as the first and paramount consideration.”<sup>353</sup>

The child’s welfare is prioritised in the Act. What this means or should mean however, and how best to provide for a child’s welfare when parents separate and when they disagree, is the subject of considerable debate.<sup>354</sup>

Part of the decision in *VP v PM* is often used to explain the basis of how to establish what will best provide for the welfare of a child:<sup>355</sup>

No two families fit the same mould or pattern. As one New Zealand Judge has observed, the Court must look at the circumstances of “this child with this father, this mother ... and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child.”<sup>356</sup>

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<sup>351</sup> Guardianship Act s 16B (5)(f) and (g).

<sup>352</sup> See above Chapter 2 n 77 and accompanying text.

<sup>353</sup> Guardianship Act s 23(1).

<sup>354</sup> A range of viewpoints from this debate are presented and discussed in Chapter 9 I.1. (i) *The best interests of the child*.

<sup>355</sup> *VP v PM* (1998) 16 FRNZ 621, 626. A fuller version, referred to in *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 128 Richardson P is: “The expression ‘welfare of the child’ embodies the most central and pervading principle in family law concerning children. It is not defined in the statute because case by case the elements of welfare to be taken into account will vary, depending on the circumstances of particular children within their families and of families themselves, circumstances which vary enormously across a very wide range of factors which Family Courts are asked to take into account ... In the end, however, the Court must deal with the questions raised in a particular case. No two families fit the same mould or pattern ... the Court must look at the circumstances of ‘this child with the father, this mother, and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child’.”

It is an individualised assessment. Notably, this summary does not say “this child with these parents.” In spite of the gender-neutral requirement that immediately follows the paramountcy rule, this appears to differentiate between parents on the basis of gender. Whether it also implies that the expectations of a mother who parents are generally different than those of a father who parents is not clear. Furthermore it does not and cannot address the issue of each judge’s subjective view of how to provide for the welfare of each child in a situation where the legislation gives him or her a very wide discretion.

Section 23(1)(A) requires the Court to have

regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child ... there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.

Section 23(1)(A) was enacted for two purposes. The first seems to have been to remove adultery as a reason for refusing a parent custody.<sup>357</sup> The second (although it uses the term “parent”) was to make sure that the “mother principle” ceased to exist: if a father offers care that best serves the welfare of a child, that father, rather than the child’s mother may be given custody of the child.<sup>358</sup>

Possibly because of section 23 (1)(A), a perception that parental roles are generally interchangeable and fluid, and the Court’s practice of using gender neutral language (“parent” in particular), some persistently gendered practices have become obscured or glossed and discounted when exploring the best interests of “this child, in this family.” It appears that the parameters of section 23(1)(A) have never been fully argued; the values it enshrines have been taken for granted. However, it is arguable that “there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child” is limited to a single situation, the point at which custody is allocated. It is submitted that this provision was intended only to eliminate the “mother principle” from decision

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<sup>356</sup> *C v E* (11 May 1987) Family Court Palmerston North FP 050/53/83.

<sup>357</sup> According to Hon J R Hanan “... opinions have been expressed that justice to a parent who has not been guilty of misconduct requires that he should be given preference if the other parent has been. ... It is possible for a woman to be a bad wife but a good mother and for a man to be a bad husband but a good father. ... There is some danger under the present practice that a parent’s guilt will be assessed by looking at the more spectacular and obvious types of misconduct, particularly sexual misconduct. This means that more subtle and hidden faults in the other spouse can be overlooked.” (26 November 1968) 358 *New Zealand Parliamentary Debates* 3388.

<sup>358</sup> Mr Palmer stated “[The Act] removes any vestige that might be thought to have remained concerning the mother principle in the law of custody. The mother principle is gone and buried completely.” (7 August 1980) 432 *New Zealand Parliamentary Debates* 2503.

making; it is therefore possible to address gender equity issues where they appear in the process of exercising parental authority. Interpreting this provision widely, it is submitted, does not serve children well when it fails to protect their primary carer: it should not preclude consideration of gender-related issues and behaviour that affect the quality of parenting practices and the welfare of children, including gender inequities before and after separation.<sup>359</sup>

The parenting ideal (and the rhetoric) is of gender neutrality with parents equally responsible for all aspects of nurturing a child. However, as identified, the hierarchy of care after separation provides the most successful way for nurturing a child. This affects the nature and expression of the parenting each offers and a child receives.<sup>360</sup>

In section 23(2) the Act provides for children's wishes to be taken into account. The Court must ascertain the wishes of the child if the child is able to express them and has discretion to take them into account, having regard to the age and maturity of the child.

There are three mechanisms in the Act to ensure that children's voices are heard. Section 29 provides for the Court to direct that a report to be made by a social worker "in respect of any application for guardianship or custody or access." Section 29A "may, if it is satisfied that it is necessary for the proper disposition of the application, request any person whom it considers qualified to do so to prepare a medical, psychiatric or psychological report on the child who is the subject of the application."<sup>361</sup> The third provision, under section 30 is for any child whose care is disputed to have independent counsel appointed to represent him or her. According to Clarkson<sup>362</sup>

This person ought also to be responsible for conveying to children involved in these disputes information about their position and be a vehicle for their voices to be heard, even if the children's views are not accepted by such counsel as being in the children's best interests.

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<sup>359</sup> For a definition that distinguishes gender equity and gender equality see Chapter 1 n 54 and accompanying text.

<sup>360</sup> See a discussion of this issue in above Chapter 2 II.2. *The hierarchy of care and willingness after separation.*

<sup>361</sup> In contrast to Mr Palmer above n 45 Mr Brill referred at the final reading of the Bill to a "... powerful lobby that believes that the outcome of a custody application should be determined generally by medical experts such as child psychologists rather than by the Court. The committee could not accede to this..." (7 August 1980) 432 *New Zealand Parliamentary Debates* 2502.

<sup>362</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 6.

The Guardianship Act has over time been interpreted to reflect societal values as understood by the judiciary and the writers of section 29A reports, as will be seen from discussion of the cases in Part II.

## 2. Laws that preclude the involvement of biological parents

Historically the needs and desires of adults have sometimes compromised the rights of the child to have contact with each parent. Adult interests, whether due to infertility or other reasons, become paramount.<sup>363</sup> In adoption and for children conceived under the SCAA the only parental functions unique to a biological parent, those relating to identity,<sup>364</sup> become unavailable to that child unless the process is one of open adoption or there is open use of donated genetic material, by a named donor, along with contact with the otherwise dormant biological family. For these children, the philosophy about relationships with a biological parent, especially an auxiliary parent, is the converse of that espoused by the Guardianship Act and interpretation of it; there is no assumption that a relationship with a second (biological) parent is necessary for the wellbeing of a child. Instead, the amendments to the Adoption Act allow for the “unique” contribution of parents identified by Sturge and Glaser, relating to identity and family history. There is no parallel provision in the SCAA.

### *(i) Adoption Act*

The Adoption Act provides that an adopted child becomes the child of the adoptive parent and ceases to be the child of his existing parents and that the child’s existing parents cease to be his or her parents.<sup>365</sup>

Adoption lawyer Robert Ludbrook defines the Adoption Act 1955 as a law which reflects “patriarchal attitudes”, by creating a series of legal fictions, establishing parallel truths that give a

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<sup>363</sup> During 2002 Fertility Associates advertised for sperm donors in this way: “How to become a sperm donor 1. Think about infertile couples wishing for a baby. 2. Realise you could change their lives. 3. Telephone Fertility Associates. 4. Feel good about what you are doing. Sperm – the next generation gift.” It is not clear how a gift to parents is justified as a gift to the next generation. Fertility Associates website [www.fertilityassociates.co.nz](http://www.fertilityassociates.co.nz) notes, November 2003, that “More than 200 men have become regular donors”. “Regular” is not defined and legal lack of liability to resulting children is emphasised as well as the possibility of later becoming identified.

<sup>364</sup> See discussion Chapter 2 III.4. (i) *Identity and the genetic connection*.

<sup>365</sup> Adoption Act s 16 (2) (a) and (b).



child a double identity.<sup>366</sup> It has, according to him, more in common with property law than family law, as the parents transfer their right, title and interest in a child to new parents. It breaches fundamental principles of family law by failing to state that the welfare of the child is the first and paramount or even a primary consideration.

Like the SCAA, it may be antithetical to deeply held Maori values<sup>367</sup> and can cause unacceptable distortions in family relationships. It breaches UNCROC, that requires States parties to respect the right of the child who is separated from parents to “maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”<sup>368</sup> UNCROC also requires that if a child is “illegally deprived of some or all of the elements of his or her identity” the State must “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”<sup>369</sup>

Ludbrook points out that adoption law meets the needs of adults rather than a child and that adoption policy and legislation have moved in different directions: 90 per cent adoption placements of new-born children today are open, where some ongoing contact with biological parents is agreed to.

But while the Adult Adoption Information Act 1985 has been successful in providing for those who wish to have identifying information, information remains difficult to obtain for those whose circumstances fall outside the Act, as well as those for whom some of their genetic material comes from an anonymous donor.<sup>370</sup>

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<sup>366</sup> Ludbrook R “Closing the Wound - An Argument for the Abolition of Adoption” *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption and Healing Trust.

<sup>367</sup> “Maori values” are not necessarily fixed and may vary among Maori.

<sup>368</sup> UNCROC art 9.3.

<sup>369</sup> UNCROC art 8.

<sup>370</sup> Iwanek M “Adoption in New Zealand - Past Present and Future” *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption and Healing Trust.

(ii) Status of Children Amendment Act (SCAA)

Sections 4 and 5 of the SCAA deal with artificial insemination by donor, the issue affecting a case considered in Chapter 8.<sup>371</sup> Section 5 headed “Status of Child” is in two parts, the first about married women and the second about a woman who is either “not a married woman or a married woman who has undergone the procedure without the consent of her husband.”<sup>372</sup> In the first case “the husband shall, for all purposes be the father” and the man “not being her husband ... shall, for all purposes, not be the father.”<sup>373</sup> In the second, “any child ... shall not have the rights and liabilities of a child of [the man who produced the semen]”<sup>374</sup> who shall himself “not have the rights and liabilities of a father”<sup>375</sup> in relation to that child. This has implications for the autonomy of single women who become mothers and of lesbians who are single or in partnership. The Ministry of Women’s Affairs has indicated that this section may change to treat all mothers equally, thus excluding biological fathers from the definition of “father”.<sup>376</sup>

Section 16 has the effect of overriding sections of the principal Act and deals with conflicting evidence of paternity and in combination with section 5(1) makes it impossible to prove that the child of a “wife” by [AID] is not the child of her “husband”. It is possible however to prove that the male partner is not the father if it can be established that he did not consent to the AID procedure. Furthermore, if there is proof that the donation resulted in conception, the genetic father-child link is accepted as a fact, although it does not create the legal status of father-child.

These Acts offer some support for relinquishing the assumption that contact with a second parent is necessary.

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<sup>371</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02; *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02; *P v K* [2003] 2 NZLR 787 (HC).

<sup>372</sup> SCAA s 5(2).

<sup>373</sup> SCAA s 5(1)(a) and (b).

<sup>374</sup> SCAA s 5(2)(a).

<sup>375</sup> SCAA s 5(2)(b).

<sup>376</sup> Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002), 136.

### 3. The Child Support Act

Unlike the Guardianship Act, the Child Support Act refers to equity between parents.<sup>377</sup> The provision is unusual in the context of responsibility for care of children and particularly in relation to the ambiguous language of “shared responsibility.”<sup>378</sup> Its application may also be problematic for women.<sup>379</sup>

#### *(i) The Child Support Act and Shared Day to Day Care*

The Child Support Act provides a basic formula of  $(a-b) \times c$ , where “a” is a liable parent’s income, “b” is a liable parent’s living allowance and “c” is the child support percentage. The percentage varies with the number of children: for one child it is 18 per cent, for two 24 per cent and so on. The amount of support payable is changed only if a departure order has been granted, applying the formula results in less than the statutory minimum being payable, or care is “substantially equally”<sup>380</sup> shared and the formula modified.

A parent who shares care of his or her child “substantially equally” must care for the child at least 40 per cent of the nights of the child support year. If each parent then applies for formula assessment the formula will be modified so that each receives 50 per cent of the total amount of child support. Each child concerned is defined as a half child and the child support percentage to be paid varied depending on the numbers of children, in accordance with a set table which results in .5 of a child being 12 per cent, 1 child 18 per cent and so on. If a father wants to reduce child

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<sup>377</sup> Equity is included in the Objects of the Act set out in Section 4. While it has been suggested that “equity” may include the costs of access and co-operation in effecting it for the non-custodial parent, the costs of access for the custodial parent when it is exercised unreliably and irregularly appear not to be considered relevant: Webb P R H et al *Family Law In New Zealand* (10<sup>th</sup> edn, 2001) v1, 344. Section 7(1) defines “parent” as someone whose name is registered in New Zealand or overseas as a parent; was a party to a marriage during which the child was born; adopted the child under the Adoption Act; had been found by a New Zealand Court, a specified Court or other authority overseas to be a parent and that finding has not been set aside; has acknowledged parentage and a Court has not made a finding of paternity that is contrary; the Court has made a paternity order under the Family Proceedings Act; is the natural mother; has been declared to be a step-parent of the Child by a Family Court under s 99 of the Act; has been appointed or declared to be the guardian of the child by a New Zealand or other Court or public authority, as the father of the child and that has not been cancelled or set aside. Section 7(4) provides that if someone has been involved in a procedure under the SCAA and does not have the rights and liabilities of a father or mother under that Act, he or she is not a parent of the child for the purposes of the Child Support Act.

<sup>378</sup> As noted above Chapter 1 V. The Terminology of Shared Parenting, shared responsibility for day to day care at one extreme can mean an arrangement where the care is rarely or unreliably exercised and at the other joint custody where each parent takes equal responsibility. In between is shared custody that is in reality custody and access and reflects the hierarchy of care.

<sup>379</sup> See above Chapter 2 II. 1. *Willingness before separation*, about the difficulties met by mothers who sought to introduce equal responsibility for children before separation.

<sup>380</sup> Child Support Act s 13(1).

support liability this may be a powerful motivator for becoming more involved in the day to day care of his children.<sup>381</sup>

(ii) The Child Support Act and Equity

The Act provides for equity between parents in section 4(h), reading: "To ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children". "Equity" is not defined and where parents share "caring for" responsibility there may be engrained judicial attitudes that discriminate against women. In *D v C*,<sup>382</sup> for instance the children spent half their time with each parent. Their mother was a lawyer who earned about a fifth of the amount earned by their father, a surgeon. In calculating an assessment, Elias CJ stated that<sup>383</sup>

Section 4(h) speaks of equity between custodial and non-custodial parents; but obviously there must also be equity between parents who are in effect both custodial parents. While s 35 provides for financial consequences in relation to the formula when there is shared custody, the position should be viewed on a wider basis in a case like this when there is both shared custody and a case for a departure order. The combination of circumstances in this case can truly be described as special as against the norm envisaged by the Act. The father's capacity to contribute to the support of his children at the appropriate level is not confined to financial contributions. *He is making a major contribution of a non-financial kind. Equity requires that to be tangibly recognised*, a factor which incidentally the Judge's proportionality approach to this second stage did not seem to recognise. *The mother's earning capacity is increased on account of the father's non-financial contribution*. An assessment of the present kind, once one has moved away from the concept of strict arithmetical proportionality is one of judgment in the sense of informed discretion.

Her Honour did not acknowledge that the mother was making it possible for the father to increase his earning capacity because of her non-financial contribution. This failure to recognise a mother's major contribution to responsibility for children, of a non-financial kind, tangibly or not, and the consequent increase of the earning capacity of fathers is arguably due to the assumption that women will continue to care for children regardless of the conditions under which they are required to do so.

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<sup>381</sup> However, s13(2) provides that s13(1) "is not to be taken to limit by implication the circumstances in which a person shares ongoing daily care of a child substantially equally with another person": the proportion is arguable. See Chapter 2 n 14 for details of the "reciprocity" theory, where if women have significant resources to offer men in return for childcare, paternal involvement is higher than in cultures where women have fewer resources. The "significant" resources being offered where men share childcare on a 40:60 basis are arguably offered passively, as men's liability for child support is reduced in circumstances where they are likely to have a greater income than the mothers of their children. Research by Maclean and Eekelaar shows that in England "[contact with a second parent] is certainly a major factor in the likelihood that financial support will be provided [by him]" (Maclean and Eekelaar Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart, 147), implying that either fathers enter into mutually beneficial arrangements with the mothers of their children along the lines of the hierarchy of care, exchanging child support for access rights, or may be simply be responsible fathers. Child Support owing to DPB recipients is paid to the government to offset the costs of their benefits rather than directly to the beneficiary for the benefit of her children. See above Chapter 2 nn 14 and 62.

<sup>382</sup> *D v C* [2002] NZFLR 97 (CA).

In summary, whether and how second parent shares day to day care may be affected by child support issues, whether or not the parent who does most of the care actually receives the child support paid. Reduced child support liability may be a strong motivator for second parents to engage in shared care.

### III. The Role of Human Rights in the Allocation of Parental Responsibility

*[T]he international principles ... help put ... controversies into a conceptual context and express the basic values which must be taken into account [... but i]nternational law merely reflects, and repeats, the considerations which give rise to ... problems. - Kirby J<sup>384</sup>*

Kirby J's statement articulates succinctly the benefits and limitations of human rights provisions as expressed in international instruments and local legislation. While they have an actual and potential role to play in issues around parental responsibility, their use is constrained by the limits of their influence in domestic courts, their historical context and the conflicts that they present.

This discussion will focus on the local human rights context and factors that limit the use of international human rights instruments in family law; and some significant issues within and between two international instruments: CEDAW and UNCROC. It will be argued that these instruments' basis in UNDHR principles means that they are arguably no longer useful because of the present fluidity of family structure and practices and that it is difficult – but not impossible - to reconcile their inherent contradictions. There are however two possible uses of the instruments. The statement of intention offered in the Preamble of UNCROC provides a way to move past some of its dated provisions; and CEDAW could sometimes resolve ambiguity and lacunae, for instance in section 23(1)(A) of the Guardianship Act, by allowing the Courts to address the effects on women of indiscriminate use of that section to prevent their gender realities from being addressed.

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<sup>383</sup> *D v C*, above, 111. Emphasis added.

<sup>384</sup> *AMS v AIF* 24 Fam L R 756 (HCA), 801.

## 1. The local human rights context

In recent years international human rights instruments have to some extent affected domestic jurisprudence throughout common law jurisdictions. The New Zealand Bill of Rights reflects this change. As will be discussed, ideas about parental responsibility from other parts of the world have influenced the rhetoric and decision making of the New Zealand Family Court.<sup>385</sup> These ideas have been influenced and supported by reference to UNCROC and other international human rights instruments, including, in the United Kingdom particularly, the European Convention.

In 1989, New Zealand acceded to the Optional Protocol to the Covenant on Civil and Political Rights. This gives individuals subject to New Zealand jurisdiction who have exhausted all available domestic remedies a right to apply to the Human Rights Committee of the United Nations "in substance a judicial body of high standing ... [which] is in a sense part of this country's judicial structures."<sup>386</sup> Unlike the European Court of Human Rights and European Commission of Human Rights the Committee is neither a court nor a body with a quasi-judicial mandate. Its decisions are described as "views" not "judgments".

But the role of human rights provisions in family law is limited by a number of factors, discussed in an article by Austin, written shortly after UNCROC was ratified in New Zealand.<sup>387</sup>

Austin acknowledges the increase in status of international human rights. He notes that international obligations form an important part of the current social and legal context within which a statute must be interpreted and that ratification enhances the status of an international instrument for statutory interpretation purposes. He refers to the New Zealand Bill of Rights Act as evidence of the increase in status of international human rights in New Zealand's domestic jurisprudence without direct reference to that Act's provision that a court cannot hold any other Act's provisions to be "impliedly repealed or revoked" or "in any way invalid or ineffective" or

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<sup>385</sup> See below Chapter 4 nn 19, 29, 37 and Chapter 9 n 11 (Children (Scotland) Act 1995); and accompanying text.

<sup>386</sup> *Tavita v Minister of Immigration* [1994] NZFLR 97 (CA), 106 per Cooke P who also referred to the Balliol statement of 1992, reaffirmed in the Bloemfontein Statement of 1993, "with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights." Although the discussion was obiter it remains a local reference point for discussion of the role of human rights.

<sup>387</sup> Austin G "The UN Convention on the Rights of the Child - and Domestic Law" (1994) *Butterworths Family Law Journal* 1(4) 63 and 1(5) 87.

to decline to apply any provision” only because it is “inconsistent with a provision of the Bill of Rights.”<sup>388</sup> If only one meaning for a domestic provision is possible and that meaning is contrary to an international instrument, that instrument is not relevant. In addition, although the presumption that domestic law is consistent with international obligations is rebuttable, if the relevant obligation was not contemplated by the legislature that alone does not rebut the presumption. Whether a specific human rights norm has sufficient “bearing” to fetter discretionary powers is not easy to determine with only one, obiter, authoritative statement to support the potential use of human rights instruments, in *Tavita v Minister of Immigration*<sup>389</sup> decided shortly before Austin’s article was written. In *Tavita* the Court of Appeal considered UNCROC in the course of judicial review proceedings and Cooke P stated (obiter) that:<sup>390</sup> Legitimate criticism could extend to New Zealand courts if they were to accept the argument that because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

Because the Guardianship Act gives the Family Court wide discretionary powers for regulating parental responsibility, in general terms, without detailed guidance on how these discretionary powers are to be exercised it might seem possible that international obligations could affect their exercise: if an Act provides detailed guidance on how discretionary powers are to be exercised it is less likely that international obligations may affect their exercise.<sup>391</sup> However, Austin points out that there is case law on judicial review in family law that demonstrates that because evaluation of the best interests of a child is often a “delicate balancing exercise,”<sup>392</sup> that evaluation is rarely suitable for judicial review.

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<sup>388</sup> New Zealand Bill of Rights Act s 4.

<sup>389</sup> *Tavita v Minister of Immigration* [1994] NZFLR 97 (CA).

<sup>390</sup> *Tavita v Minister of Immigration*, above, 107. Austin notes, (Austin, above, 89) that the Te Tiriti o Waitangi/Treaty of Waitangi has been held not to be a fetter on the Court’s discretion. He also compares the decision in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 with *Tavita*. In *Ashby*, the Convention on the Elimination of All Forms of Racial Discrimination was not seen as important enough to create a fetter. In *Tavita*, UNCROC and the International Covenant on Civil and Political Rights and the Optional Protocol which provides a right to apply to the Human Rights Committee of the United Nations after domestic remedies are exhausted, were seen as possible fetters on decision making. It may be significant that the decade or so following *Ashby* saw the steady evolution of the development of human rights concerns; today the status of the provisions of the Convention on the Elimination of All Forms of Racial Discrimination might have more weight.

<sup>391</sup> Austin, above, 89 presents as an example the Child Support Act; the SCAA and the Adoption Act are also good examples in their detailed provisions for new parents and new identities for children.

<sup>392</sup> Austin, above, 89.

If UNCROC's direct influence is limited by this factor, it could perhaps nevertheless be used to fill lacunae and resolve ambiguity. Austin refers to an observation in the Family Court of Australia that UNCROC is<sup>393</sup>

within [a] category of conventions [that have been] been ratified by Australia [but not] given specific statutory recognition. It can thus be used to resolve ambiguities in domestic primary and subordinate legislation. If we are correct it can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children.

However, New Zealand family law decisions do not appear to use UNCROC in this way, or to refer to the potential for UNCROC to be so used.

All these factors point to the likelihood that international instruments will not play a central role in decision making about parental responsibility. In spite of this, Austin concluded that there would be an "inevitable increase in the importance of human rights norms in family law" while hoping that this importance would be viewed as a "supplement to rather than a substitute for ... careful and individualised analysis of the facts of individual lives."<sup>394</sup>

If New Zealand family law were to use international human rights instruments that have been ratified here to fill lacunae and resolve ambiguity, conventions, CEDAW could become significant.

However any potential role for CEDAW is affected by the paramountcy of the interests of the child within the instrument itself.<sup>395</sup> In addition, legislative of concern for the rights of each family member<sup>396</sup> is unlikely and judicial analysis of concerns unique to women is unusual. Justice Kirby's dissent in a recent relocation case<sup>397</sup> before the High Court of Australia includes a rare, Australasian, judicial attempt to resist the elevation of the paramountcy of the child's interests to the sole factor for consideration. He acknowledges that the child in that case would want to maintain regular physical contact with her loving and attentive father but states that if excessive weight were given to this consideration, even though it was very important, the price to the child's mother (and in the long term to the child herself) would be too high. The principles of international law were concerned that the father and child should have and maintain regular

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<sup>393</sup> *In the Marriage of Murray and Tam* (1993) 16 Fam L R 982, 999 (FCA).

<sup>394</sup> Austin above, 89.

<sup>395</sup> See below III. 2. (iii) *The limitations of CEDAW*.

<sup>396</sup> See below Chapter 9 nn 31-35 for Eekelaar's position on this.

<sup>397</sup> *U v U* [2002] 29 Fam L R 74 (HCA).



contact which could include telephonic, Internet, photographic, filmed and intermittent physical contact. However:<sup>398</sup>

The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too ... Today contact does not have to be exclusively physical or face to face if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents, who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the Convention on the Elimination of All Forms of Discrimination Against Women ... That Convention requires that such discrimination and inequality should be eliminated from the law of this country.

This analysis could be helpful in considering the freedom of movement, association, employment and personal relationships of mothers who wish to relocate. But it could also be usefully transposed into decision making about other aspects of parental responsibility, for example, when considering whether it is appropriate to impose a regime of shared day to day care for a child when a mother's autonomy will be eroded and she has and will continue to have primary responsibility, or if a father is unreliable. Finally, it could be useful to resolve the ambiguity and lacunae in section 23(1)(A) of the Guardianship Act by allowing the Courts to address the effects on women of indiscriminate use of that section to prevent their gender realities from being addressed.

2. The reflection and repetition of problems: UNDHR, UNCROC and CEDAW  
Relevant to Kirby J's concern that international instruments merely provide context and reflect and repeat family law problems at the local level is that the usefulness of international human rights provisions in relation to parental responsibility is to some extent compromised by their limitations in relation to current family practices.

They may now be too simplistic for fact situations that affect contemporary, diverse, family practices. Provisions in UNDHR and UNCROC referring to "the" family and "both" parents, UNCROC's commitment to a child's right to identity and CEDAW's provisions in respect of family relationships, sex roles and stereotyping are especially problematic.

*(i) The limitations of UNDHR*

The evolution of contemporary family-specific human rights began with the UNDHR. Its terminology particularly where it refers to "the" family and "both" parents carried through to UNCROC and CEDAW. UNDHR states that<sup>399</sup>

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<sup>398</sup> *U v U*, above, 110-111.

Men and women ... have the right to marry and found a family ... The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Each man and each woman has the right to marry someone of the opposite sex and then to found a family that fits the definition of “the family”, the natural and fundamental group unit of society. The language used with its single infinitival signifier makes it difficult to separate the right to marry from the right to found a family. In this context, “a” family is “the” family. It does not exist unless a marriage is a part of the equation.<sup>400</sup>

“Founding” a family implies that each party comes to the activity without previous family ties, genetic or social. The language echoes the “founding father” rhetoric of the United States and the colonial and colonising constructs of “family” perhaps mediated by the desire or need of immigrants or migrants to cut ties with the past, family, place and history. This kind of process invites denial, secrecy and expediency and presents a model for the fictions of the Adoption Act and the SCAA.

One article<sup>401</sup> on the Children Act 1989 in the United Kingdom, published in New Zealand refers, for example, to “The child’s perspective and the role of the family”. It exemplifies much analysis of what is best for children. It does not explore what “the” family is and can be. “Both parents” is used without comment. Divorce (which implies the existence of a marriage) features without reference to those many parents and children who are outside a marital context.

Many parents and many children view their families more broadly and flexibly than the family type described by article 16. There are stepfamilies, extended families and blended families, many of whom change significantly over time. There are matrilineal and patrilineal independent households that are families. These are families, not just the results of failures of “the” family. There are a lot of them. There is a dramatic fall in first marriage rates, increasing divorce rates

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<sup>399</sup> UNDHR art 16.

<sup>400</sup> “What Others Are Saying” (2000) *Evening Post* 14 September quoted *NBR* 9 September 2000, in reference to the Attorney General’s desire to review the law on guardianship and adoption to “take account of changing social mores” and consider whether “special recognition should be given to Maori customary adoptions and whether guardianship should extend to whanau members.” *NBR* commented “Ms Wilson believes that the State can be a force for good in family law but there is little evidence to support her case. The best thing she can do is avoid introducing laws that work against the family unit.”

<sup>401</sup> Sharp C “Putting Children First” (1998) *New Zealand Law Journal* (December) 424.

and an increase in the number of reconstituted families. And in a third of marriages at least one of the partners has previously been married.<sup>402</sup>

Members of families that do not fit within the standard family model might argue that the first two “ands” in the extract from article 16 may be read disjunctively: men have the right to marry (not necessarily to marry women); women have the right to marry, but not necessarily to marry men. Men and women whether or not married, whether or not married to someone of the opposite gender, have the right to found a family, including the right to found a family using the fictions of adoption or the new birth technologies.<sup>403</sup>

(ii) The limitations of UNCROC

The language of article 16 is repeated in the Preamble to UNCROC. The two instruments, though written twenty-one years apart, thus reinforce each other. The text of the Convention states inter alia that the signatories made their agreement

... *Convinced* that the family, as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community ... and that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth[.]

“The” family is the “fundamental group” and “natural environment” and appears to be the nuclear rather than the extended family.

UNCROC gives the child, inter alia, the right, as far as possible, to know and be cared for by his or her parents, without stating whether these are biological or social.<sup>404</sup> It also states that<sup>405</sup>

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<sup>402</sup> Ministry of Women’s Affairs “Briefing to the Incoming Minister – Status of Women in New Zealand” *Panui; An Occasional Publication of the Ministry of Women’s Affairs* (2000).

<sup>403</sup> Under the Human Rights Act, discrimination on the grounds of family status is forbidden. Family status includes “having the responsibility for the part-time or full-time care of children or other dependants; having no such responsibility; being married to, or being in the nature of a marriage with, a particular person, being a relative of a particular person. Marital status includes being single; being married; being married but now separated; being party to a marriage now dissolved; being widowed; living in a relationship in the nature of marriage (Human Rights Act 1993 s 21). See Ministry of Justice (2000) *The Human Rights Act 1993; Guidelines for Government Policy Advisors* for details about the requirements for government agencies to establish non-discriminatory policies and practices. However the existence of s 4 of the New Zealand Bill of Rights Act 1990 protects many provisions otherwise contrary to human rights provisions: the cases about one lesbian family *Re an Application by T* [1998] NZFLR 769 (HC); *T v T* [1998] NZFLR 776 (FC) (see also above n 15); *A v R* [1999] NZFLR 249 (FC/HC); and *Quilter v Attorney-General* [1998] NZFLR 196 (CA), demonstrate the workings of this section; some families are still discriminated against.

<sup>404</sup> UNCROC art 7 (1).

<sup>405</sup> UNCROC art 3.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

That the best interests of the child are here “a” primary consideration rather than “the” primary consideration arguably places the child’s rights on an equal footing with the rights of the child’s parents, as fellow human beings, in contrast with the Guardianship Act’s standard.

However, UNCROC requires that States parties respect the right of the child to “maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”<sup>406</sup> This is one justification for access rights and a possible basis for understanding of the distinction between custody and access: “personal relations” and “contact” may point to a lesser commitment on the part of a parent than the “caring for” parenting responsibilities described in *E v M*.

Perhaps the most relevant article in a discussion of parental responsibility for the nurture of children is<sup>407</sup>

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child ... The best interests of the child will be their [the Parties or the parents’?] basic concern.

This seems to imply that each child’s “both” parents share their common responsibilities. But it begs the question of who exactly these “both” parents are. Do “parents” always – or only – come in a pair? Are they biological parents? What difference does it make to children who find themselves with one or both parents who have no genetic connection to them? What can they expect? Do biological and social parents always, or ever, have similar responsibilities?

Another conflict between human rights provisions and some local legislation relates to a child’s identity. Identity rights for children are somewhat compromised by societal ambivalence. To enable adults to “found a family” these are selectively addressed and enforced.

UNCROC records the right of the child “to preserve his or her identity including...family relations as recognised by law without unlawful interference”, and “where a child is illegally

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<sup>406</sup> UNCROC art 9.3.

<sup>407</sup> UNCROC art 18(1).

deprived of some or all of the elements of his or her identity,” ... [to] ... “provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”<sup>408</sup>

The SCAA provisions permit donors of genetic material to remain anonymous and to have no responsibility for children born as a result of the donation. While the Act creates “family relations as recognised by law” and the child has not been illegally deprived of elements of identity under domestic law, from the perspective of someone born through an anonymous sperm donor (or donor of other genetic material) the provisions of the Act deny them their right to know one parent and to preserve an identity and is therefore unlawful interference.

An adopted child’s family status may fall within the “alternative care” for “a child temporarily or permanently deprived of his or her family environment.”<sup>409</sup> The issue of identity for children who are denied access to their genetic, paternal identity because of the use of the birth technologies (like AID, for some of the children in the cases discussed below) is rarely discussed, in spite of the information we have on how severe the effects can be for children who were adopted within the closed adoption process.

For children who have been adopted, or born as a result of new birth technologies the adult right to found a family has arguably compromised their right to the social protection they are entitled to, “whether born in or out of wedlock.”<sup>410</sup>

However, the passing of the SCAA, the effects of assigning status to a family founded through new technology and the enthusiasm of infertile couples to “found a family” may repeat the mistakes made by the Adoption Act and its “clean break” principle.

In view of these difficulties, it may be useful to turn to UNCROC’s Preamble which recognises that the child, “for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding” and should be

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<sup>408</sup> UNCROC art 8. In New Zealand’s initial report on “where we are doing well and where we need to make more effort” in relation to UNCROC the comments on art 8 are limited to decisions about a child’s surname. Ministry of Youth Affairs *He Hui Whakatau i Te Mana o Te Tamaiti o Te Whakakotahitanga o Nga Whenua o Te Ao/ United Nations Convention on the Rights of the Child; Initial Report of New Zealand* (1995) 20.

<sup>409</sup> UNCROC art 20.

<sup>410</sup> CEDAW art 25.

“brought up in the spirit of the ideals proclaimed in the Charter of the United Nations ... in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”. These ideals refer to *a* family, not *the* family and to positive qualities rather than competing responsibilities and rights.

If this philosophy, rather than the somewhat dated detail of the articles were to become a primary reference point, it might be easier to approximate the ideal environment, especially if the wellbeing of the primary “caring for” household is prioritised. To privilege happiness, love and understanding and realise the ideals of UNCROC could offer a fresh way of analysing whether a situation best meets the welfare needs of a particular child. The alternative, of justifying ongoing conflict and privileging paternal contact by reference to articles inadequate in relation to contemporary family realities, becomes less attractive.

*(iii) The limitations of CEDAW*

CEDAW defines discrimination against women as<sup>411</sup>

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose or impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW requires States Parties to examine “social and cultural patterns” of conduct of men and women, “based on stereotyped roles for men and women.”<sup>412</sup> It also requires that family education include recognition of the “common responsibility of men and women in the upbringing and development of their children ... the interest of the children is the primordial consideration in all cases.”<sup>413</sup> This of course echoes UNCROC’s article 18(1).<sup>414</sup>

In further reference to parental responsibility, States Parties are required to take “all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”<sup>415</sup>: as parents women, irrespective of their marital status, have the same rights and responsibilities as men in matters relating to their children including guardianship and adoption of children.

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<sup>411</sup> CEDAW art 1.

<sup>412</sup> CEDAW art 5(a).

<sup>413</sup> CEDAW art 5(b).

<sup>414</sup> See above n 110 and accompanying text.

<sup>415</sup> CEDAW art 16.

However, in all cases the interests of the children shall be paramount or “primordial”. That the interests of the children should have primordial consideration raises again the problems identified in respect of establishing what the welfare of the child means in the Guardianship Act and the role of each parent’s responsibility for enhancing this.<sup>416</sup> This is also another example of the way that international law reflects and repeats the considerations which give rise to problems.

These provisions of CEDAW thus apparently intend that children’s interests, as defined by decision makers, take precedence over those of women. It is argued that it is therefore essential to understand and adopt Justice Kirby’s analysis of the rights of women who are custodial parents and primary caregivers, (whether or not their role is referred to as “shared” parenting)<sup>417</sup> and acknowledge their potential influence on the long term wellbeing of children, who need models of women and mothers whose lives are lived as freely as those of men and fathers.<sup>418</sup> Otherwise, if<sup>419</sup>

excessive weight were given to [regular face to face contact with a father], even though it was very important, the price to the child’s mother (and in the long term to the child herself) would be too high.

The most recent report on New Zealand’s progress on implementing CEDAW<sup>420</sup> does not address potential conflicts between women’s and children’s rights, although as will be shown, in Part II, these conflicts are endemic within family practices and family law decision making.<sup>421</sup>

Censorship issues are given precedence in the report’s discussion of progress on the requirements “to modify social and cultural patterns in family life,”<sup>422</sup> where it refers only to the *New Zealand Time Use Survey*<sup>423</sup> as a measure to modify social and cultural patterns. This survey confirms that 70 per cent of women’s work and only 40 per cent of men’s work is unpaid and that women spend much more time on caregiving than men do.

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<sup>416</sup> See above nn 7-26, 29-62; and accompanying text

<sup>417</sup> See above n 101 and accompanying text.

<sup>418</sup> A good example of this influence is the effect on daughters of their mothers being employed, Chapter 2 n 71.

<sup>419</sup> *U v U* [2002] 29 Fam LR 74, 110 (HCA).

<sup>420</sup> Ministry of Women’s Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand’s Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002).

<sup>421</sup> See below Chapters 5-8.

<sup>422</sup> CEDAW art 5.

<sup>423</sup> Ministry of Women’s Affairs, above, 44.

However, appropriate measures like those put in place in the Domestic Violence Act<sup>424</sup> to modify social and cultural patterns of violence are a prerequisite to ensure that recognition of common responsibilities leads to their being carried out in a way that does not exploit women. If, as has been shown,<sup>425</sup> the social and cultural patterns of parental responsibility have not been significantly modified, the recognition of common responsibility for day to day care of children, buttressed by a wide interpretation of the provisions of section 23(1)(A) of the Guardianship Act, will result in entrenchment of women's primary responsibility for the care of children without any change in patterns of responsibility.<sup>426</sup>

It is difficult not to infer avoidance in the report of the thorny issue around the reality that parental responsibility after separation may be best managed only by a stereotypical traditional gender role-based agreement, which cannot be successfully imposed;<sup>427</sup> and that in conjunction with article 16, article 5 can support a paradox.

This paradox is that if there is conflict about parental roles after separation, these provisions, intended to improve the lives of women, more readily support the argument of a man who wants more involvement with his children than that of a woman who challenges the gender-based bargain by refusing to facilitate contact or by demanding more of her child's father than he offers. However, the Ministry's report does not address the possibility that articles 5 and 16 are arguably more useful for men who want to entrench their rights than for women who are caring for their children.<sup>428</sup>

The report refers to the then forthcoming review of the Guardianship Act.<sup>429</sup> It states without comment that "The international community, New Zealand society and legislation have ... placed

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<sup>424</sup> Domestic Violence Act ss 29-44.

<sup>425</sup> See discussion above Chapter 2 II. 3. *Conditions that affect women as parents.*

<sup>426</sup> Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002), 40.

<sup>427</sup> See above Chapter 1 n 35 and accompanying text.

<sup>428</sup> This makes it important to bear in mind that CEDAW's provisions are to advance women's interests, not those of men. See, for instance: art 3: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

<sup>429</sup> See below Chapter 4 III. Family Court Response to *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access.*



greater emphasis ... on a more child-focused approach in such legislation” and that “a key element of the review has been to assess the effectiveness of existing enforcement processes, including those available for access orders.”<sup>430</sup> It notes that enforcement options will be increased and the role of the Family Court expanded and that this will “inevitably involve Family Courts in facilitating access arrangements for the benefit of the parents and children involved.”<sup>431</sup> The report also refers to grandparents’ groups and a proposed change giving grandparents standing to seek leave for orders concerning access, and to the proposal that the Court will be able to strike out or prohibit proceedings that are vexatious, frivolous or not in the best interests of the child.

There is no connection made between the *New Zealand Time Use Survey*, the review of the Guardianship Act and paternal relationship issues. On the evidence available, it seems that enforcement of access (responsibility for an auxiliary relationship) is enforcement when men ask for it rather than when women do and that the proposed new legislation may make women’s lives more difficult.<sup>432</sup> Nevertheless any custodial mother who has difficulty enforcing access by her child’s father could read the Ministry’s report and infer, erroneously, that the new legislation will help her. The Ministry’s report is ambiguous on this point.

It is submitted that there is a role for gender equity in this context.<sup>433</sup> “Equality” will not work. Instead it is necessary to take into consideration the contemporary differences in women’s and men’s lives and recognise that different approaches may be needed to produce outcomes that are equitable.

#### IV. Concluding Remarks

Relevant provisions of the Guardianship Act, Adoption Act, the SCAA and the Child Support Act that affect the cases in Part II have been considered.

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<sup>430</sup> Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002), 135.

<sup>431</sup> Ministry of Women’s Affairs, above, 136.

<sup>432</sup> See below Chapter 4 on judicial ideology, and the cases in Part II.

<sup>433</sup> See above nn 61-62 and accompanying text.

It has been noted that use of the custody and access provisions of the Guardianship Act may reflect the realities of the hierarchy of care. However some provisions of the Guardianship Act , including the “willingness” provision of section 10(2), and the provisions of section 23(1)(A) and section 13 have been interpreted in a way that tends not to take into account the imperatives of the hierarchy and gender inequities. This interpretation, it is submitted, may result in prioritising support men’s rights to parent over women’s responsibilities for primary parenting.

The extinguishing of genetic ties within the Adoption Act and the SCAA have been identified both as creating a potential identity problem for children and as provisions that breach UNCROC’s commitment to preserving a child’s identity. These Acts serve also to illustrate societal ambivalence about the role of biological parents who do not care for their child and undermine the assumption that a relationship with a second parent is vital for a child’s wellbeing. Section 5 of the SCAA was shown to provide differently for mothers who are heterosexual and married or living in a relationship in the nature of marriage than for those who are lesbian or single.

The Child Support Act’s provisions for shared parenting and the consideration of equity issues were also described, with reference to one equity-relevant Court of Appeal decision.

Local restrictions on use of international instruments and the inherent limitations of the international instruments themselves were considered. It argued that since UNCROC articles reflect and repeat the problems in contemporary family law the overarching principles enunciated in the Preamble to UNCROC may be more useful than its articles when allocating parental responsibility. These advocate *a* family environment and “an atmosphere of happiness, love and understanding” and an upbringing “in the spirit of peace, dignity, tolerance, freedom, equality and solidarity” rather than to refer to specific articles that are conceptually outdated in their reference to *the* family.

Although CEDAW could be useful filling lacunae and resolving ambiguity, its current minor usefulness is underlined by the restricted parameters of programmes that advance women’s interests. It was concluded that the principles of CEDAW that advocate equal parental responsibility are unhelpful since equal parental responsibility appears to be neither a present practice nor, on the evidence from the Ministry of Women’s Affairs, one that is actively being

pursued for the benefit of women. Concern for gender equity issues was considered to be a more appropriate goal.

## Chapter 4. Judicial Ideology: Family Court Judges Outside the Court

“... reason cannot control the subconscious influence of feelings of which it is unaware.”  
- Frankfurter J<sup>434</sup>

“... unconscious values get in the way. Judges are not very good at keeping abreast of changing social values. They are out of the mainstream. That will not matter greatly if legislation is prescriptive and regularly updated. Where wide discretion is conferred, as in the requirement to act “in the best interests of the child,” there is danger. That is why strategies to assist judges to experience the different values through the community and to discover and confront their unconscious preferences are an important support ... In New Zealand, our principal Family Law statutes were enacted in the first drive to achieve formal equality between men and women. They are now widely thought to have emphasized such formal equality at the expense of the majority of women who shoulder a disproportionate burden in unpaid family care. - Elias C J<sup>435</sup>

### I. Introductory Remarks

It is submitted that it is possible to identify factors that currently affect judicial decision-making from judicial contributions to reports and conferences, as well as from cases. This chapter refers to an analysis made by Henaghan, Family Court judges’ contributions to *Responsibilities for Children Especially when Parents Part: The Laws about Guardianship, Custody and Access* and to *Making Contact Work*; as well as individual judges’ contributions to an session on access during the New Zealand Law Society Conference in 2001.

In 1996,<sup>436</sup> the Judicial Working Group on Gender Equity reported that Family Court judges – some of whom are women - believed that their understanding of the power dynamics of the relationships between men and women reduced the opportunities for gender bias in their court. However, although half of all male members of the judiciary<sup>437</sup>

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<sup>434</sup> *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451,466; cited in *D v S* (no 7) *D v S* [2002] NZFLR 116, 129.

<sup>435</sup> Elias S "Family Courts - 20 years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001" (2002) *Family Court Review* 40(3) 297, 302.

<sup>436</sup> Barwick H, Burns J and Gray A *Gender Equity In the New Zealand Judicial System: Judges' Perceptions of Gender Issues* (1996) Judicial Working Group on Gender Equity.

<sup>437</sup> Barwick et al, above, 12.

indicated their belief that there is little gender bias against women in New Zealand courts and a small number thought there was none ... 85% of women judges indicated that gender bias against women is widespread but subtle in the judicial system.

This chapter explores the possibility that Family Court judges, affected by subconscious or unconscious values, may have constructed a subtle belief system, based on the assumptions questioned in this thesis, that can lead to abuse of women and may not be in the best interests of some children.. This belief system may result, when the hierarchy of care is not working and the parties ask the Family Court to resolve their differences, in male rights to father being privileged above women's work in fulfilling responsibilities to their children.

## II. Factors That Affect Judicial Decision Making

In a recent survey of influences on what is best for children and how these affect parenting responsibilities, Henaghan identifies four factors that have in the past affected judicial decision making about care for children:<sup>438</sup>

- the “mother” principle which dominated thinking until 20 years ago that privileged the role of women in caring for children [the demise of which is reflected in s23(1)(A)];
- allegations of sexual abuse where the [Family] Court “errs on the side of possible risk and restricts access”;
- the presumption that the parent who has used [physical or sexual] violence<sup>439</sup> against the other parent is unsafe as a parent and must be supervised unless he or she can persuade the Court otherwise; and
- the importance of the happiness of the custodial parent for the wellbeing of the child, so that if the custodial parent, generally the mother, wanted to move elsewhere, the Court generally gave permission for this.

While these factors, apart from the “mother” principle are couched in gender-neutral language, they all have gender implications. Since the Domestic Violence Act was passed, allegations of sexual abuse and violence have usually been made by women against men;<sup>440</sup> mothers are usually those prevented from relocating.<sup>441</sup>

Henaghan also describes three current changes:<sup>442</sup>

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<sup>438</sup> Henaghan M “Shared Parenting: Where From? Where To? Children's Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation 55, 55-56. One reader has suggested that the philosophy of the Family Court (adopted by the profession as “emotionally easy” and saving time) is that the past is irrelevant and parties must focus on arrangements for the future. This has prevented a primary carer being able to articulate her concerns about contact arrangements and support these with evidence of his past lack of ‘caring for’. At the same time, the very narrow future-focused briefs given to s29A reporters may have prevented evidence of the psychological effects of contact for the primary carer, with flow on effects for her parenting, affecting her ability to feel free to “move on” and (re)establish her autonomy.

<sup>439</sup> Guardianship Act s 16B.

<sup>440</sup> See above Chapter 2 n 68.

<sup>441</sup> See n 14 below.

<sup>442</sup> Henaghan M “Shared Parenting: Where From? Where To? Children's Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation 55, 56-58.

- the recognition of the importance of the relationship with the access parent (mostly the father);
  - shared custody has become the “fundamental position”;
- and as a consequence of both these changes,
- fewer custodial parents are given permission to relocate.<sup>443</sup>

These changes can be understood both as a response to increased awareness of and reference to UNCROC, to overseas experience,<sup>444</sup> to pressure from fathers’ groups<sup>445</sup> and to changing family structures and practices including increased involvement by fathers in the lives of their children. They can also be understood as exemplifying a father’s right to choose the extent of his involvement with a child. This understanding may be reinforced by the unchallenged right to relocate of a father whose exercise of shared responsibility (however defined legally) may change in the same way as is, or would be, necessary following relocation of a primary carer.<sup>446</sup> To date, there appears to be only two cases where a father who shares custody or exercises access and wishes to relocate within New Zealand has been successfully challenged by the children’s

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<sup>443</sup> From 1988-1998 63 per cent of applications to relocate were allowed; from 1999-2000 only 48 per cent: Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 1.

<sup>444</sup> Henaghan names these as “the legislative changes in Australia and the United Kingdom that emphasise joint parental responsibility.” Henaghan M “Shared Parenting: Where From? Where To? Children’s Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation 55, 59.

<sup>445</sup> The fathers rights movement in New Zealand is strong, on the evidence of their active websites and submissions. The websites provide information about meetings, lawyers, the Family Court and parenting and indicate that there are fathers actively seeking a referendum on shared parenting. The Men for Equal Rights Association/New Zealand Equality Education Foundation can be found at <http://nzmera.orcon.net.nz/policies.html> (Peter Zohrab); the New Zealand Father and Child Society at <http://www.fatherandchild.org.nz/contactus.htm> (this group includes Stuart Birks, author of Birks S *The Family Court: A View from the Outside* (1998) (Issues Paper No 3) Centre for Public Policy Evaluation, Massey University and Birks S *Submission to the Law Commission on Preliminary Paper 47: Family Court Dispute Resolution* (2002) <http://econmasseyacnz/cppe/issues/LCPP47subhtm>. Another site is: [www.menz.org.nz](http://www.menz.org.nz); [www.fathers.org.nz](http://www.fathers.org.nz). These were found on Google by entering + “fathers rights”+ “New Zealand”. A similar search replacing “fathers” with “mothers” found no analogous political sites organised by mothers though there are some mothers sites that address adoption and Children, Young Persons, and Their Families Act issues. The Chief Justice has recently referred to the fathers rights movement and Family Court judges’ responses in the following terms: “In New Zealand we have a continuing media and political campaign against ‘secrecy’ in the Family Court and discrimination by it against men. That is certainly causing the judges of our court to feel beleaguered and defensive ... In January a spokesman for a men’s group released the names of six Family Court judges who were said to be anti-men. It called for their resignation. The release claimed that due to the closed nature of the Court, ‘judges can get away with major transgressions of the law’. The attacks on judges continued in a later press release which claimed that a newly appointed judge, as a feminist, was ‘anti-father’ and could not treat cases in an even-handed manner.” Elias S “Family Courts - 20 years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001” (2002) *Family Court Review* 40(3) 297, 298-299. The judges named in the press release were Judges Blaikie, Doogue, Ellis, Green, Kean and Twaddle: “The Six Most Anti-Family” (2001) *Northland Age* 25 January 7; Carlin D “New Family Court Judge Has History of Anti-Father Bias” (2001) *Christchurch Star* 15 June (not viewed); Carlin D and Cheriton B “Anti-Father Family Court Judges Exposed” (2001) *Christchurch Star* 23 January (not viewed).

<sup>446</sup> See above Chapter 2 II. 5. *The response of the legal system: The “bad” mother.*

mother.<sup>447</sup>

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<sup>447</sup> *Gledhill v Gledhill* (28 March 2002) Family Court Waipukurau FP 081/53/00 and *Maaka v Field* [1996] NZFLR 172 (FC), discussed below Chapter 7 nn 3 and 140; and accompanying text.

### III. Family Court Response to *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access*

In 2000, the Ministry of Justice issued a discussion paper, in preparation for legislative changes, *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access (Responsibilities for Children)*.<sup>448</sup> The Principal Family Court Judge, Judge Mahony's first written response to it is comparatively brief. It says:<sup>449</sup>

I am pleased to note that the review of the Guardianship Act has now been initiated with an invitation to the public to make submissions. A factor which is sometimes forgotten when issues of custody and access are under discussion with emphasis on the competing rights of mothers and fathers is the underlying concept of guardianship and the ongoing rights and responsibilities of each parent arising from it.

I take the opportunity to enclose a copy of *W v C*,<sup>450</sup> a Judgment of His Honour Judge Inglis QC who deals comprehensively from paragraph seven with the ongoing status and responsibilities of both parents as guardians of the child.

From the outset, then, it seems that the Principal Family Court Judge is concerned to establish *W v C* as the leading case in relation to status and responsibilities for parents.

*W v C* is arguably a case where a father uses Trinder et al's third discourse. This gives parental (or, more realistically, fathers') needs - unrelated to the child's needs - equal weight to those of the child.<sup>451</sup> It also establishes as a "first principle" that, as guardians, mothers and fathers share an ongoing status and responsibilities for the upbringing of children.<sup>452</sup> In practice, this principle depends on shared care being exercised within the gendered hierarchy of care. It also depends on the assumptions that a relationship with an auxiliary carer (usually a father) benefits a child and that a "good" primary carer (usually a mother) will take responsibility for facilitating this regardless of the cost to the wellbeing of her household and individuals within it.

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<sup>448</sup> Ministry of Justice *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship Custody and Access; Discussion Paper* (2000) was part of a review of the laws of custody and access. It called for response from the public to a number of questions. In an appendix the paper addresses some of the differences between New Zealand law and the laws of Australia, the United Kingdom and Canada.

<sup>449</sup> 11 September 2000.

<sup>450</sup> *W v C* [2000] NZFLR 1057 (FC), now (2003) being appealed. See Chapter 6 for a full analysis. The applicant in this case was active in the men's rights movement.

<sup>451</sup> Above Chapter 2 nn 165-169 and accompanying text.

<sup>452</sup> See Chapter 9 nn 8-20 for discussion of Henaghan's similar formulation and reference to the Children (Scotland) Act 1995.



The principle makes it possible to give fathers more decision making power or authority without the same level of commitment to day to day child care responsibilities and without similar consequences.<sup>453</sup> It results in a generally unacknowledged divergence between the maintenance of status and the exercise of responsibilities. The use of “shared” or “joint” in this context may or may not imply equally shared parenting, with a slippage of meaning in the term “shared responsibility” concealing the reality that “shared” is not equally shared and “responsibility” does not import equal commitment to “caring for”. This slippage may disguise the presence of the hierarchy of care and the social and economic consequences of it for the primary carer.

Henaghan<sup>454</sup> gives examples that show the variation in substance of arrangements as well as the variation of judicial views.

There are two main issues in these examples. The first, affecting the legal structure of their arrangements, regardless of the time a child spends with each parent, is whether the parents, as guardians or custodians, can “manage” shared authority. The second is whether a child will benefit from a specific arrangement within the legal structure chosen. Some judges dislike shared

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<sup>453</sup> See above Chapter 1. V. Terminology: The Language of Shared Parenting, Chapter 3 nn 45, 80 and below Chapter 8 nn 219-226 and associated text for further discussion.

<sup>454</sup> Henaghan M “Shared Parenting: Where From? Where To? Children’s Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 58-59: “There are a range of judicial views on shared custody, and whether it is good for children. Gault J says: ‘Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns. To reconcile these for the purpose of providing the child with stable and consistent support necessarily must involve substantial agreement and co-operation between the parents. These problems of course remain where children spend substantial periods of time with non-custodial parents exercising access rights. I think that difficulties are likely to be less when primary responsibility for the care of the child rests with one parent rather than with both.’ [B v VE (1988) 5 NZFLR 65, 70] Judge McCormack says: ‘I do not support the concept of a week-about, shared care arrangement in principle, because I believe that the nomadic lifestyle it necessitates is ultimately disorientating, and destabilising for children.’ [Partlow v Garrett and Garrett (2 May 1997) District Court North Shore FP 22/96] Principal Family Court Judge Mahony says: ‘Shared parenting is an expression which occurs frequently in case law in modern family law systems, to emphasise the joint parental responsibility for the care of the children which continues following separation. It is given expression in a wide variety of ways in individual cases. Viewed in that way, it is often the best option for the child involving the child spending significant time in the care of each parent on a regular basis. In relatively few cases, does it involve an arrangement based on moving the child from one household to another as part of a regular pattern, so that each parent can have equal time with the child. Such arrangements are often promoted in order to satisfy the aspirations of well intentioned parents rather than the needs of children. The constant movement from one household to another in the way which has been suggested in this case, can be disorientating and destabilising for growing children. Generally having one predominant home base as part of a secure and stable environment is an essential ingredient of welfare.’ [Mills v Mills (13 April 2000) Family Court Taupo FP 059/115/99] Judge Bisphan says: ‘The nature and effect of conflict between the disputing adults will need to be assessed. Outright war would probably rule out joint custody. Minor disagreements (such as occur in the best regulated two parent families) might not. Conflict between parents which has little or no effect on a child may not preclude the making of a joint custody order. [Douglas v Beyese (3 July 1998) Family Court

care involving frequent movement between households because it compromises stability, and is they believe, disorienting and harmful for the child as a replacement for other kinds of regular contact. More of these judges than not dislike the concept of giving children “equal time” with each parent. Some see shared custody (in contrast to a custody/access arrangement) as an option only where parents are not significantly in conflict, others that it can work when there is conflict between parents.<sup>455</sup>

Henaghan himself, who refers both to the fact that children are “tremendously resilient” and to research that concludes that shared parenting with “equal time” is likely to be difficult for all family members to manage “prefers the principle of minimal disruption, together with the child’s views.”<sup>456</sup> He does not appear, since this is about “shared” care, to consider that “minimal disruption” might best be achieved by an arrangement where a second parent’s “care” is best expressed by leaving the primary carer to get on with family life without him or her. He does not explore the effects on a primary carer of the principle of shared care and how it may reinforce the hierarchy of care, with a range of consequences for her and her children.

In the Family Court Judges’ collective submission<sup>457</sup> Their Honours do not refer directly to *W v C*.<sup>458</sup> They define the basic goals of the laws as being: to protect children and to advance their

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Christchurch FP 009/754/96] Judge Bremner says ‘you don’t have to like each other but you have to work together.’ [*Richardson v Simpson* (19 April 1991) District Court, Wanganui FP 083/185/86].”

<sup>455</sup> Diversity of opinion among the judges is not of course new or surprising. Eighteen of 28 Family Court Judges responded to a Justice Department survey in 1988, published as: Department of Justice Policy and Research Division *A Survey of Family Court Judges* (1993), Wellington. At that time, 13 stated (68-69) that “shared custody”, “joint custody” and “shared parenting” all meant the same or did so “sort of”. Four said they did not and one stated that they were “meaningless terms.” Of the nine who commented one each stated that: all terms describe system of shared parenting; all terms were undefined and attacked mystique of “custody” erroneously interpreted as giving custodial parent power which other must obey; the terms had more or less the same meaning but depended on how order framed “I use s 13”; shared parenting same but has no legal sanction; don’t use “shared parenting in custody cases”; shared parenting not the same meaning; more appropriate to s 13 order; shared parenting does not mean equal time; “Don’t use these terms: meaningless. I make detailed orders under s 13 where ‘shared custody’ would be appropriate.” Two found the terms “custody” and “access” very useful, two useful, two of some use, seven no very useful and five not at all useful. For discussion of s 13 orders see above Chapter 3 nn 29-38 and accompanying text. The concepts are further discussed below Chapter 8 nn 118-136 and 219-226; and accompanying text.

<sup>456</sup> Henaghan M “Legally Rearranging Families; Parents and Children After Break-up” in M Hengahan and B Atkin (eds) *Family Law Policy In New Zealand* (2002) LexisNexis Butterworths, 301; see also Chapter 9 nn 8-20 and accompanying text.

<sup>457</sup> Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000). The Committee included Judges Doogue, Brown, Walsh, Johnston and Callaghan.

<sup>458</sup> Judges Adams and von Dadelszen entered individual submissions without referring to *W v C*. Judge Inglis QC appears not to have made a submission.

interests; to remedy the consequences for children of having parents who live apart;<sup>459</sup> to regulate disputes to protect them from conflict; and to advance the co-operative exercise of parental responsibilities.

The judges start from the premises that the children have rights as articulated in UNCROC and that children should have full participatory rights in areas of decision making that concern them.<sup>460</sup> They endorse the Law Commission's definition of parental responsibility. Headed "Parental responsibilities and rights" this states that:<sup>461</sup>

A parent has in relation to his or her child the responsibility to safeguard and promote the child's health, development and welfare and provide, in a manner appropriate to the stage of development of the child, direction and guidance to the child; if the parent does not have custody of the child, to maintain personal relations and direct contact with the child on a regular basis.

It is very similar to the Children (Scotland) Act 1995<sup>462</sup> and gives parents the kinds of responsibilities detailed in *E v M* from the time they become parents.

There is no suggested mechanism for enforcing these responsibilities (unless, presumably, physical or sexual abuse or significant neglect by a parent falls within legislation designed to remedy its consequences) before or after separation. This may be because it is envisaged that the system will remain the same: a parent concerned about rights and responsibilities will initiate legal proceedings. As already noted, pre-separation conflict about parenting responsibilities is endemic, but remains private.<sup>463</sup> Although headed "Responsibilities and *rights*" the definition does not describe the parameters of the rights. These appear to be implicit: if a parent has these responsibilities, these responsibilities belong to her or him and cannot be arbitrarily removed.

However, because the gendered hierarchy of care is so deeply entrenched (and arguably the most satisfactory way of caring for children when their parents are separated) where it does not "work" the doctrine of shared responsibility may merely create new opportunities for fathers to exercise

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<sup>459</sup> This implies that the consequences of having parents who live apart are always negative, which may not be true.

<sup>460</sup> Family Court Judges Committee, above, 2.

<sup>461</sup> Family Court Judges Committee, 11: here slightly compressed. See also Law Commission/ Te Aka Matua o Te Ture *Adoption and Its Alternatives: A Different Approach and a New Framework* (2000) 42-55. The Commission recommended a continuum of care arrangements, from the temporary to the permanent including an "enduring guardian" role to recognise the social status of a guardian who acts as a parent. It also recommended a section in a Care of Children Act to describe those who in law should be a child's parents, but did not attempt a definition.

<sup>462</sup> Reproduced in *Adoption and Its Alternatives*, above, 315-316. The Law Commission acknowledges that Henaghan drew their attention to this Act in his article, Hengahan R M "Custody Decisions - Discretion Gone Too Far?" (2000) *Otago Law Review* 9(4) 731: *Adoption and Its Alternatives*, above, 45. See also below, Chapter 9 n 11 for the Scotland (Children) Act 1995.

<sup>463</sup> See above Chapter 2 II. 1. *Willingness before separation*.

ambivalent or debilitating power. The difficulties of enforcing auxiliary responsibility could remain unless monetary or status sanctions were introduced.

Their Honours describe how arrangements for the care of children when their parents separate are worked out as having regard for<sup>464</sup>

[T]he parents' prior caregiver roles, their availability and commitments (particularly employment), the geographical distance between homes, the degree of emotional tension, ability to co-operate, and, in many cases, by the child's wishes and sometimes, need, to 'have a home'.

These criteria reflect (but do not acknowledge) the hierarchy of care and its gender-based components (where a father's current employment - for instance - is sometimes seen as more important than a primary caregiver mother's loss of opportunity and potential loss of opportunity in the work place) without also reflecting post-separation gender realities that may disadvantage women and probably the children they care for.

To acknowledge the effects of the hierarchy on women and its possible impact on their children before and after separation a formulation might include "with regard for the social and economic consequences for each parent and their children of their pre- and post-separation caregiver roles." This would make it possible to consider each parent's past and present employment or educational opportunities and social situation (including a support network), as well as how these affect their availability.

The judges emphasise that the paramount consideration for the Court is the "welfare of the child"; and refer (in their only reference to a decided case) to the well-known statement in *VP v PM* to explain the basis of how this is established:<sup>465</sup>

No two families fit the same mould or pattern. As one New Zealand Judge has observed, the Court must look at the circumstances of "this child with this father, this mother ... and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child."<sup>466</sup>

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<sup>464</sup> Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000) 8.

<sup>465</sup> *VP v PM* (1998) 16 FRNZ 621, 626. A fuller version, referred to in *D v S* (no 7) *D v S* [2002] NZFLR 116, 128 (CA) is: "The expression 'welfare of the child' embodies the most central and pervading principle in family law concerning children. It is not defined in the statute because case by case the elements of welfare to be taken into account will vary, depending on the circumstances of particular children within their families and of families themselves, circumstances which vary enormously across a very wide range of factors which Family Courts are asked to take into account ... In the end, however, the Court must deal with the questions raised in a particular case. No two families fit the same mould or pattern...the Court must look at the circumstances of 'this child with the father, this mother ... and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child'."

<sup>466</sup> *C v E* (11 May 1987) Family Court Palmerston North FP 050/53/83.

There is no acknowledgement of “unconscious values” that may get in the way as judges exercise their wide discretion. The “particular surrounding circumstances” are inevitably only those that the Court is alerted to or infers from the facts; within a context where Family Court judges are working from a list that arguably expresses, although indirectly, gender bias, it is easy for unconscious values about the role of mothers to predominate.

Their Honours note that the Guardianship Act “already provides for parents who are recognised by the Guardianship Act as parents to have equal rights, regardless of gender.”<sup>467</sup> They also discuss the need for clarification of who parents are, in view of “the diversity of family forms which have developed ...”<sup>468</sup> and refer to men (but not to women) whose responsibility and commitment for the care of children does not necessarily coincide with biological parenthood. They advocate extending parental rights and responsibilities to these men, who may be fulfilling a parenting role without having status under the law; and to extended family members, with the possibility of their always having to apply for leave to apply for these.

The Judges also point out that fewer than 5 per cent of families require resolution of custody and access by judicial determination, although a substantial number “require the active intervention of the judicial system at mediation.”<sup>469</sup>

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<sup>467</sup> Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000) 13.

<sup>468</sup> Family Court Judges Committee above, 10.

<sup>469</sup> Family Court Judges Committee above, 2. There is no explanation of the basis for these figures, and whether they refer only to couples who have been married. In Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, of 69 mothers and 42 fathers from the 73 families in their research, 86 per cent of the mothers and 79 per cent of the fathers reported some involvement with the Family Court. 70 per cent of mothers and 55 per cent of the fathers received counselling through the Court; 41 per cent of the mothers and 24 per cent of the fathers had attended mediation; and 15 per cent of the mothers, 14 per cent of the fathers had been involved in a defended hearing. Lack of information about the criteria for selecting participants in this research makes it impossible to compare effectively the figures given. Mediation is provided for in the Family Proceedings Act 1980 s 13. A Family Court Judge or either person in an application for custody or access may ask the Registrar for a mediation conference, chaired by a Family Court Judge. The purpose of a mediation conference is to identify the matters in issue and try to obtain agreement between the parties (Family Proceedings Act s 14(2)). Section 16 of the Act allows for the Chair to make separation, custody, access, maintenance and matrimonial property orders, which have the same effect as consent orders made in Court. Mediation “occupies an intermediate position between counselling and the adversary court hearing [and] no exception can be taken to the Chair’s assuming a positive directional approach at the conference. The Chair may usefully make comments about the likelihood of success of a proposed submission ... In the forum of the conference these comments would not be judgments.” Webb P R H et al *Family Law In New Zealand* (10<sup>th</sup> edn, 2001) Butterworths v1, 150. See also below nn 43-48 and accompanying text.

Their Honours advocate “neutral” terminology but acknowledge that a change in language will not necessarily bring the results they seek. They refer to concerns in the United Kingdom (without providing references) that an emphasis on joint parental rights and responsibilities have led to “not examining sufficiently the reasons why access may be opposed, and the needs and views of the children involved.”<sup>470</sup> They also show concern about their orders being flouted and for developing effective enforcement provisions procedures: “the Court must have a simple and clear power to punish disobedience of its orders.”<sup>471</sup>

In summary then, within the overall context of advancing the welfare of children, this submission advocates entrenching the equal status of men and women who are guardians; using “neutral” language; extending the class of those - especially men - who can assume parental rights and responsibilities; and enforcing their orders through a right to “punish”.

It also seems to advocate retaining established criteria for allocating responsibility, which emphasises, firstly, “parents’ prior caregiver roles, their availability and commitments (particularly employment).” To date, this means that shared responsibility is often structured hierarchically and gendered.<sup>472</sup> However, the issues around the hierarchy (including the imperative that each parent accept its parameters), gender inequities and the effects of all these on the children are here unidentified and not addressed. Ignoring these issues allows men to gatekeep their choice to have their economic and social needs prioritised, even when their children’s mothers are also working and need the social support of families (or partners) who may live elsewhere. In contrast, while women gatekeep their caregiving role (or appear to do so when facilitating involvement with their children by their children’s fathers) they may not be able, because of their responsibilities, to take advantage of social and economic opportunities. Shared responsibility on the basis outlined by the judges is more likely to benefit men.

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<sup>470</sup> Family Court Judges Committee, above, 9.

<sup>471</sup> Family Court Judges Committee, above, 35. According to the Ministry of Women’s Affairs “the role of Family Courts will be expanded to include options for intervention that focus on prevention, facilitation and enforcement. This will inevitably involve Family Courts in facilitating access arrangements for the benefit of the parents and children involved” (Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002) 135-6).

<sup>472</sup> See reference to women who wanted help when they or their children were ill, below Chapter 5 102-108.

If “availability and commitments (particularly employment)” remains an issue in allocating shared responsibility, any unwillingness by a father to engage with an appropriate role in the hierarchy of care, or to support mothers’ autonomous development could be given equal attention, if only because of the gender inequities faced by women who are primary carers. Women’s unwillingness to support men whose fathering is characterised by “contact” rather than “caring for”, or by the exercise of debilitating or ambivalent power could also be supported.

There is notably no discussion in this response of how extending the class of those who assume parental rights will affect the entrenchment of equal status, whether this might mean, for instance, that mothers who wanted to relocate might in future be challenged by more than one guardian. Nor is there discussion of how it might affect those presenting reasons for restricting or refusing to facilitate a relationship with an “original” guardian. It is not clear whether those who disobey orders are primary parents (usually mothers) who refuse access to their children, or auxiliary parents (usually fathers) who refuse to exercise access as arranged. However, the next year, the Family Court judges made another submission, in response to *Making Contact Work*.<sup>473</sup> This submission seems to clarify that the disobedience referred to is that of the primary caregiver, usually the mother.

#### IV. Making Contact Work Submission<sup>474</sup>

The New Zealand submission is structured to meet the questions posed in the consultation paper. These include questions about the principles to be considered, from the paper by Sturge and Glaser;<sup>475</sup> how best to inform parents and children; mediation; contact centres; lawyer negotiated contact; the Court process; involvement of children; and enforcement. The paper includes no definition of “contact” or “access”. It is not clear whether “contact” has been understood as the maintenance of a relationship between a child and a parent who is not the primary caregiver regardless of whether it is legally described as access, shared custody, or guardianship. However, “contact” has been read broadly for the purposes of this analysis, to include all formal arrangements made with an auxiliary parent. Of particular relevance to this discussion of gender

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<sup>473</sup> Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department. See also above Chapter 1 n 12.

<sup>474</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts.

issues are the submission's comments on the role of mediation and domestic violence, and enforcement.

The submission states that the Family Court believes that "mediation still ought to be the primary mechanism for the resolution of contact disputes."<sup>476</sup> However, there are two provisos. The first is that delay should be avoided.<sup>477</sup> The second exists when there has been a history of alleged violence and "concern about the existence of power imbalances and the possible inability of redressing such imbalances in a mediated setting (together with physical risks)."<sup>478</sup> It is here that the lack of provision for considering psychological abuse in the context of allocation of responsibility becomes significant. If the use of debilitating or ambivalent power<sup>479</sup> is creating power imbalances and affecting responsibility issues, there appears to be no place for them to be considered explicitly in mediation. From the submission's description of the use of mediation, any woman who identifies the presence of power imbalance created by the exercise of debilitating or ambivalent power may be "persuaded" not to pursue the matter.

According to the submission, the Court at mediation gives "an indication of the likely outcome, if the matter went to hearing" if resolution is not reached at and "the parties ... strongly influenced, by such an indication, to rethink their positions."<sup>480</sup> This active intervention at mediation, if based on the assumptions identified at the outset,<sup>481</sup> may then be a part of the institutionalising of the gendered hierarchy of care under the ethic of shared parenting and potentially damaging for women and children.

The response to the questions about enforcement is couched in gender neutral language but the enforcement referred to is clearly gendered, to target those having the primary responsibility for children. Suggestions for enforcement include (while "recognising that family circumstances are

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<sup>475</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615.

<sup>476</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 8.

<sup>477</sup> "A resistant [to access] parent can pretend co-operation for a significant length of time before it becomes clear to all that whatever arrangements are put in place are likely to be sabotaged:" Clarkson, above, 17.

<sup>478</sup> Clarkson, above, 9. See above n 36 for details of provisions for mediation.

<sup>479</sup> See above Chapter 2 II. 4. Control, Power and Powerlessness, especially nn 86-107 and accompanying text.

<sup>480</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 8.

<sup>481</sup> See Chapter 1 nn 25-41 and accompanying text.



necessarily dynamic and what may have been in the best interests of the child at one stage may no longer be in the best interests of the child”<sup>482</sup>):<sup>483</sup>

- (ii) use of s 19 of the Guardianship Act which “[i]n some cases ... has been successful in moving an uncooperative parent [mother] from an entrenched position ... social workers have advised ... that the degree of upset to the child is dependent on the ‘scene’ which the parent [mother] wishes to create”;
- (c) Wardship or Guardianship of the Court: “We sense an increasing use of this strategy in ‘intractable’ contact cases ... [it sends] a clear message to the difficult party [the mother] that the Court is in charge ... [and] may be effective to begin a new contact regime under the strict oversight of the Court [and] a means of enforcing some other intervention for the child such as counselling. It has the advantage of flexibility and immediate effectiveness”;
- (c) An actual or threatened custody change or a “trigger” provision [if] the other parent [the father] is a viable primary care-giver and is prepared to assume such a role. ... This may be the sort of order which needs to be reviewed and may have a limited life because of children’s changing needs. (The judges explain that because “the party of concern” [the mother] is anxious to indicate good faith about future proposed contact arrangements they can often achieve an automatic custody change as an enforcement provision by consent);
- (j) A declaration by the Court that a child is in need of care and protection, seen as part of the judge’s “threatening armoury,” with the advantage of bringing into play the family group conference process;<sup>484</sup>
- (j) The requirement that a parent [the mother, since non-compliance with access orders by fathers appears not to be an issue] enter into a bond against non-compliance with access orders;
- (j) Costs awarded against an unsuccessful party [usually the mother] in access cases and orders of contribution to the costs of the Court appointed expert witnesses and counsel for the children have been means used by Judges to express disapproval of approach taken by an unjustifiably oppositional parent [mother];
- Where the Court is satisfied that the party entitled to contact [usually the father] or the child has suffered emotional harm as a consequence of non-compliance ... payment of a sum of money to the party entitled to the contact and/or to the child as the Court thinks fit ... by way of reparation;
- ... [I]t would be appropriate for the Court to require a litigant [mother], who has opposed contact, to attend a programme of education and counselling to address their [her] attitude.

Some of these processes<sup>485</sup> could be generated within mediation as well as in a defended hearing. They offer, collectively, a threatening armoury of *in terrorem* provisions for disciplining women

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<sup>482</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 23.

<sup>483</sup> Clarkson, above, 23-26. Henaghan endorses the sanctions proposed by the Family Court Judges: “It can also make a difference ... where the child will clearly benefit from maximum contact from both parents ... for there to be sanctions which change negative parental attitudes and behaviours. Where a parent who has the child in their care makes it difficult for a contact parent there are sanctions such as a fine or even changes of care from the parent who is making life difficult for the other parent. This lat[t]er sanction has been used by the Family Court and maybe should be used more often. The same can be said of enforcement of access orders by warrant. None of this is ideal and it is always best that matters be resolved by agreement. But if they are not, and one parent decides to subvert the contact of another, the law must be seen to come down hard on such behaviour. The argument that this will affect the welfare of the child do[e]s not stand up to scrutiny. The child’s welfare is already suffering if access is denied to a capable parent. Provided that parent is an adequate parent, to change custody to them may actually alleviate suffering.” Henaghan M “Shared Parenting: Where From? Where To? Children's Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 61. Henaghan does not suggest sanctions that might change contact parents’ negative behaviours.

<sup>484</sup> Children, Young Persons, and Their Families Act s 14(1)(h).

with the attendant opportunity for privileging the parental right of auxiliary parents over the work of primary carers.

In view of the findings of Trinder et al that the commitment to contact and parents' role bargains in the "working" contact arrangements were in place early in the decision-making process, and that where contact was "not working" repeated attempts to impose a solution resulted in little improvement, the Court's emphasis on enforcement of shared parenting may not be helpful.<sup>486</sup>

For women who live in fear or anxiety about irresponsible fathers and for children who consequently suffer both from the lack of a stable, consistent, relationship with their fathers and from living with anxious, preoccupied mothers who therefore cannot mother them as well, there may be a legitimate additional fear, of the Family Court's belief system about parenting.

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<sup>485</sup> The *Making Contact Work* papers emphasise that the "contact" problem is universal. Various websites also offer a range of sanctions for parents, for instance. Other judges and jurisdictions have addressed issues around responsibilities in a variety of ways. "Parental alienation" websites include details on some of them.

On 13 May 1999 the Canadian province of Alberta passed a bill to enforce access (Family Law Statutes Amendment Act) to provide for orders enforcing access, fines and imprisonment for parents who deny access and to force a parent who fails to exercise access to reimburse the other parent. Enforcement of access orders provide for compensatory access, financial security for access, a requirement to attend a parenting course, appointment of a mediator, reimbursement of expenses incurred by denial of access, appointment of an enforcement officer and anything which the Court thinks will induce compliance. If an access compliance order is not complied with the Court may impose a fine of up to \$100 per day (to a maximum of \$5000) or imprisonment in default of payment or compliance. If an access parent fails to exercise access "without reasonable notice to the custodial parent" the Court may make an order requiring the non-custodial parent to reimburse the custodial parent for any necessary expenses actually incurred as a result of the failure to exercise access. There are no other enforcement mechanisms.

Several examples are given in Anna (1999) "Judge Nakahara on PAS and the Role of the Court in Family Law" *Parental Alienation Newsletter* <http://www.vevch/en/pas/bw199901.htm> (accessed 30 March 2001). One California judge has found that "holding parents accountable" is a successful strategy. He offers parents choices and applies a range of sanctions. In one case the choices were 1) take the child for therapy sessions; 2) spend a day in gaol for each session missed; or, 3) if a mother refused to co-operate, switch custody to the father. This range of choices appears not take into account a father who does not want custody, and the best interests of the child.

In another case a parent with "a pattern of visitation interference" was consistently late and the judge required the parent to pay a financial penalty of \$1 for each minute past the appointed time. He also applied penalties for those who refused to produce income and expenditure information, failure to participate in court-ordered alcohol treatment and failure to attend the requisite number of anger management classes.

If these sanctions did not produce results, this judge did not hesitate to order that a non-compliant parent be taken into custody. In his experience 5 days in gaol was the optimum period of time to make a significant impression on a parent who persisted in violating and resisting court orders. He seems, from the information available, to have been equally firm with primary carers and second parents.

<sup>486</sup> Trinder L Beek M and Connolly J *Children's and Parents' Experience of Contact after Divorce* (2002) <http://www.jrforguk/knowledge/findings/socialpolicy/092asp> (accessed 9 March 2003), 5. Trinder et al suggest that resources should be directed towards more creative work to improve parental and parent-child relationships and

If mothers have primary care of their children, whether or not with notional rather than actual “shared” or “joint” custody, the Court is likely to demand more of them than once was the case, without any compensatory support. They will be less able to move elsewhere for economic, social or respite reasons. If judges have their way, there will be more severe consequences for women who as primary parents try to protect themselves and their children from the negative effects of facilitating relationships with their fathers, unless they allege physical or sexual violence. Other reasons will not be heard or appropriately responded to; and as individuals these mothers will be given negative labels by the Court.

This situation arguably parallels the ways men control women as described in MANALIVE’s categories:<sup>487</sup> defining reality and motivation (by not accepting reasonable motivations for refusing to facilitate a relationship with a father); making mothers rather than fathers responsible for making access work and blaming them when access does not work; assigning status (by use of negative epithets for women who do not want their children’s relationships with their fathers); controlling movement and space (by preventing women from relocating with their children); controlling material resources (by limiting their ability to leave town to search for or take up employment); controlling space (by making threats about what will happen if mothers do not agree to facilitate paternal relationships for their children). It is arguably a result of mothers’ wellbeing becoming of lesser importance and institutionalisation of gender inequity

## V. New Zealand Law Society Conference 2001

Family Court Judges presented several individual papers at the New Zealand Law Society Conference and 4<sup>th</sup> New Zealand Family Law Conference in 2001. These enlarge on aspects of their joint submissions.

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advocate greater access to counselling services for children and making available advice on how to make access work.

<sup>487</sup> See above Chapter 2 nn 78-80 and accompanying text.

Family Court Judge von Dadelszen names as influences changes made in Australia and England and “men’s groups who have campaigned for greater equality and recognition of what they describe as their rights as fathers.”<sup>488</sup>

Judge von Dadelszen states that he and other judges now try to avoid using the custody/access formula and to replace it by speaking in terms of day to day care. He presents as examples two 1988 cases<sup>489</sup> and notes that “[n]otwithstanding some criticism of this approach, Family Court Judges have continued to avoid making the kind of custody and access orders contemplated by ss 11 and 15 of the Act respectively wherever possible and particularly if the parties agree.”<sup>490</sup>

His Honour does not state whether the orders in substance are any different in substance than they would have been under the custody/access formula. He also refers to a paper he wrote in 1995<sup>491</sup> which:<sup>492</sup>

...espoused the abolition of the current terminology in the Guardianship Act. This had been prompted by my experience as a Judge which persuaded me that, if it became possible to speak in terms of parental responsibility rather than use such words as custody and access, then perhaps parents might move away from thinking, even unconsciously, in such terms as owning, lending, borrowing.

Later in his paper,<sup>493</sup> the Judge refers to forthcoming amendments of the Guardianship Act. He states that in his view it will be easier for parents to focus on their rights and obligations if the language in the legislation is neutral. And he refers to the Judges’ submission on the changes to the Act where they state that “Terminology should be child focussed, neutral, more flexible but sufficiently clear to be enforceable.”<sup>494</sup>

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<sup>488</sup> von Dadelszen P *Rights or Obligations? - Review of the Guardianship Act 1968* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts, 1.

<sup>489</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC) (see above Chapter 3 n 33-35 and below Chapter 5 nn 133, 137, 142, Chapter 6 nn 3-4 and Chapter 7 n 234; and accompanying text); and *B v P* (1988) 5 NZFLR 462 (FC).

<sup>490</sup> von Dadelszen, above, 1.

<sup>491</sup> von Dadelszen, P “The Case for Change: ‘Parental Responsibilities’ not ‘Custody and Access’” (1994) 1 *Butterworths Family Law Journal* 263. This article was not viewed, but the title itself indicates the direction of His Honour’s concerns.

<sup>492</sup> von Dadelszen, P *Rights or Obligations? - Review of the Guardianship Act 1968* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts, 1.

<sup>493</sup> von Dadelszen, above, 2.

<sup>494</sup> The judges thought it was important that “terms and concepts do not derive from the ownership of children; ... that recognise wider family/whanau involvement and diversity; ... that focus better on the child rather than the parents/family (but not to the exclusion of the latter).” Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000), 3 - 4.

While wanting parents to move away from thinking of children as possessions Judge von Dadelszen was also concerned to recognise the parents' equal and shared guardianship responsibilities and obligations and the equal and shared right to exercise them. He names the "high point" of this development as *W v C*.<sup>495</sup> He goes on to say:<sup>496</sup>

I think that it is difficult to speak in terms of that equality and sharing if the language in the Guardianship Act remains unchanged. Although they might not express it in quite that way, I believe that this would be the view of the Men's Groups who have campaigned for greater equality and recognition of what they describe as their rights as fathers.<sup>497</sup>

His Honour does not explore what "equality" and "sharing" might mean in relation to the hierarchy of care and the effects on mothers of a neutral language that obscures their commitment to the primary care of their children.

Family Court Judges Doogue and Blaikie also presented relevant papers.

Judge Doogue's paper on psychological abuse discusses allegations of psychological abuse under the Domestic Violence Act, the Guardianship Act and the Children, Young Persons, and Their Families Act. She begins by noting McDowell's definition of psychological abuse: "an act of omission or commission that is judged by a mixture of community values and professional expertise to be inappropriate or damaging;"<sup>498</sup> and that although there is a legislative definition of this kind of abuse in the Domestic Violence Act, the other two Acts do not include definitions. She then lists "common presentations" of psychological abuse:<sup>499</sup>

- inter-parental conflict witnessed by a child;
- derogatory information about the other parent;
- engendering secrets in an attempt to undermine the other parent;
- placing a child in a conflicted loyalty situation with a step-parent;
- withholding by custodial parent of reasonable contact with the non-custodial parent;
- the undermining of a child's predictability and stability by a non-custodial parent's unreliability in exercising contact;
- premeditated relocations to achieve an inappropriate diminution in contact with the non-custodial parent;
- successive and excessive re-applications to the Court.

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<sup>495</sup> *W v C* [2000] NZFLR 1057 (FC); see also above nn 17 and 25 and accompanying text.

<sup>496</sup> von Dadelszen, above, 1

<sup>497</sup> For examples of writing from this campaign see material referred to above n 12.

<sup>498</sup> McDowell H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study* (1995) Unpublished Doctoral Thesis University of Auckland, 88.

<sup>499</sup> Doogue J *Psychological Abuse: The Family Court Response 2001 and Beyond - A Personal View* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts, 1.

Since, in her view, very often these situations are caused by underlying grief and unresolved personal issues, Her Honour proposes the establishment of a multi-disciplinary service offering “conciliation, mediation, therapy, assessment and education. This would provide more effective resolution than is available in the Family Court which would then focus on cases that require “a determination of fact and enforcement.”<sup>500</sup> Her Honour is explicitly aligning herself with the point of view identified by Fineman as “appropriation of authority by the helping professions who see divorce as an emotional crisis.”<sup>501</sup>

From her comprehensive list of psychological abuses, including a non-custodial parent’s unreliability, Her Honour pays special attention to the concerns of fathers about<sup>502</sup>

the Court’s lack of power to restrict repeat applications for cessation, suspension, or diminution of contact and the Court’s seeming inability to deal with custodial mothers who set about a deliberate course to dismiss the father’s role in the child’s life either by these strategies or by unilateral relocation.

She does not refer to the Court’s seeming inability to protect mothers from the effects of gender inequities, including the inappropriate exercise of debilitating power, although her list of presentations of psychological abuse includes reference to the exercise of ambivalent power, named as unreliability in exercising access. Later, in summarising research initiatives and public views, her Honour refers to the “potential for systemic psychological abuse of the child and litigants”<sup>503</sup> where there are repeat applications; and<sup>504</sup>

the apparent ineffectiveness of the Court when dealing with custodial parents who deliberately flout the Court’s orders in an attempt to diminish the child’s relationship with the other parent which is a form of psychological abuse.

While Her Honour does not go into detail about this (because it was being discussed in another conference session on access) this privileging of fathers rights concerns echoes the emphases in the other judicial material considered. Some of the language is pejorative and reinforces the visibility of the “bad” mother: “premeditated” which is associated with criminal activity (since relocation tends to be “premeditated” by people who move for whatever reason this adjective seems to have been included with a particular intention); custodial parents who “deliberately flout ... in an attempt to diminish ....” This leaves no room for those custodial parents (mothers)

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<sup>500</sup> Doogue, above, 1.

<sup>501</sup> See below Chapter 9 n 22.

<sup>502</sup> Doogue, above, 3.

<sup>503</sup> Doogue, above, 3.

<sup>504</sup> Doogue, above, 3.

to have good reasons for protecting their children from their fathers, for instance the unreliability already referred to in her initial list. As throughout this material “bad” practices associated with fathers are not examined as closely as those that are associated with mothers.

Judge Blaikie<sup>505</sup> whose paper is subtitled “It’s my party and I’ll go if I want to” also highlights “cases where the custodial parent is totally uncooperative.”<sup>506</sup> His philosophy in all mediations, regardless of the issues that present themselves, is to “enhance the welfare of children by using skills to ensure that effective communication, cooperation and consultation takes place and continues.”<sup>507</sup> It seems that “I’ll go if I want to” refers to making orders to enforce access where necessary. He refers to the use of wardship orders - which he sees as dependent on the “skill and availability of third parties” to ensure they are enforced - and presents an example of his successful use of “draconian” measures to ensure that access resumed and continued.

His Honour also refers to cases where fathers of young babies seek “unrealistic” access time with the baby. These fathers had only a fleeting relationship with the mothers, may have requested termination of the pregnancy, and were uninterested and unsupportive during the pregnancy. In many cases, he states, the father’s mother has some background influence on the desire for access. He advocates that mediation be directive in these circumstances “with the reasonable fears of the mother being properly recognised alongside the efforts being made for the father to understand the situation.”<sup>508</sup>

This is the only example I have seen of mothers’ concerns about access – where some kind of violence is not named as a cause - being treated with empathy. It is arguable that a father’s seeking access in these circumstances is at the least intrusive. However, it appears that even though these fathers are not guardians, they have not been refused access. His Honour expects that legislation will be introduced “providing effective provisions in relation to access orders” which is “well overdue.”<sup>509</sup>

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<sup>505</sup> Blaikie E O K *Keep the Mediation Process Simple: It’s My Party and I’ll Go if I Want To (Access Issues)* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts.

<sup>506</sup> Blaikie, above, 5.

<sup>507</sup> Blaikie, above, 6.

<sup>508</sup> Blaikie, above, 5-6

<sup>509</sup> Blaikie, above, 6

## VI. Concluding Remarks

Family Court judges' decisions have over the last few years been complemented by submissions and papers that show that the Judges have a collective agenda on parental responsibility to some extent reflecting the changes in other jurisdictions and by fathers rights organisations and recorded by Henaghan. This agenda, apparently affirming the rights of fathers to choose to parent after separation and the power of the Court to enforce their chosen involvement appears to contradict the judges' own belief as it displays some gender bias. The submissions and papers do not recognise the hierarchy of care; and although they acknowledge children's rights to protection from ongoing conflict they do not explicitly recognise conflict generated by men's exercise of debilitating or ambivalent power. Nor do they relate both these things to the gendered conditions (in addition to the hierarchy itself) under which women parent. This chapter has reviewed a group of judicial papers and submissions and related commentary by Henaghan, concluding that collectively, they provide evidence of a jurisprudence that undervalues women's contributions to parenting. This philosophy, although justified as being underpinned by a focus on the central role of the child, seems concerned to impose shared parental rights, sought mostly by fathers, rather than with support for the exercise of day to day responsibility for children, mostly undertaken by mothers. It ignores the gendered hierarchy of care and appears to be based on an unquestioned assumption that unless a second parent is physically or sexually abusive it is good for a child to have a relationship with that parent. The gendered economic and social consequences of this are unacknowledged although these may have negative effects on children. As well, although one piece of extra-judicial writing discusses emotional abuse, and power imbalance where one parent has been physically violent is referred to in another, the significant role of the gendered exercise of debilitating power or ambivalent power after parental separation is not addressed.

The considered papers and submissions arguably indicate that the judiciary is more concerned with regulating the behaviour of custodial parents, generally mothers, who resist the imperatives of post-*W v C* shared parenting than with those, generally fathers, who disrupt the lives of their children's mothers through the use of debilitating or ambivalent power, do not take their responsibilities seriously and undermine their children's wellbeing. They appear to privilege auxiliary parents' experience of situational powerlessness, in a desire to perform "a disciplining



function in relation to maternal behaviour,”<sup>510</sup> justified by the rhetoric of the paramountcy of the welfare of the child.

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<sup>510</sup> Boyd S "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) *Social & Legal Studies* 5(4) 495, 502.

## Part I: Summary

*Chapter 2 presented research evidence about the assumptions being questioned in this thesis. This evidence indicates that it is valid to assume that generally a woman who has had primary responsibility for a child before separation will retain this after separation regardless of the conditions under which she is required to do so. However, the research also shows that these conditions and the gender inequities inherent in them may be damaging to a mother and their child. The assumption that an auxiliary parent's relationship is essential for the wellbeing of a child absent sexual or physical abuse is not supported by research, whatever that parent's gender.*

*It was argued that when parents are in conflict after separation and the hierarchy of care is not working, decision makers should investigate the conditions under which a mother is caring for her child as well as the actual rather than assumed benefits of the child's relationship with his or her auxiliary parent, the father.*

*It was also submitted that it is necessary for the Court to consider gender equity rather than gender equality, when a woman is a primary carer (often in social and economic circumstances tending to be problematic because she is a woman) so she can establish as nurturant a family life as possible in the circumstances. As part of this process it may be necessary to identify the presence of situational powerlessness in the post-separation lives of each family member and to distinguish between situational powerlessness and the exercise by a father of ambivalent or debilitating power leading to health risks for a mother and child. A mother who challenges the assumption that she will continue to act as primary carer regardless of the conditions under which she does this should not be described as a "bad" mother for seeking to improve those conditions for herself, or her children.*

*A survey of the Guardianship Act, undertaken in Chapter 3, found that it provides appropriately for parenting arrangements responding to the exigencies of the hierarchy of care, through custody and access arrangements. It is submitted that it is however necessary to interpret narrowly the provision outlawing the mother principle and require the Court to investigate rigorously parents' "willingness" before and after separation. The Adoption Act and the SCAA were also examined, and found to support the proposition that an auxiliary or biological parent*

*is not an absolute requirement. The role of the Child Support Act's provisions for shared parenting and for the consideration of equity was also briefly considered. It was submitted that UNCROC and CEDAW are internally contradictory and reflect the difficult issues the Court faces where parents cannot agree. However, by formulating principles that support peaceful family lives for children, these instruments arguably support excluding or limiting direct involvement of an auxiliary parent when there is conflict between parents, including conflict about relocation.*

*Consideration in Chapter 4 of recent Family Court jurisprudence, as stated outside the Court, found that the current judicial commitment to joint or shared parenting appears to be based on misunderstanding of contemporary parental practices, before and after separation. This ignores the imperatives of the hierarchy of care and involves a rhetoric misrepresenting parenting realities. It arguably supports perpetuation of the identified assumptions, advocating methods to enforce paternal rights by disciplining mothers with responsibility for primary care, without corresponding sanctions to enforce paternal responsibility and recognise gender inequities. Further institutionalisation and entrenchment of this jurisprudence it is argued, may damage women and their children in the same way that emotional abuse damages them in a domestic environment.*

*The cases in Part II will be examined for their place in this context and the tensions it illustrates, between the realities addressed in the social science narrative, the legislation, its past interpretation, and contemporary Family Court jurisprudence.*

## Part II: The Cases

*The three elements of the context outlined in Part I provide reference points for analysis of the cases selected for inclusion in Part II. Part I considered current legislation, international instruments and Family Court jurisprudence (as expressed outside the Court) in relation to a social science narrative. This narrative addressed the realities of the hierarchy of care, explored the basis of the assumption that women who are primary carers will continue to parent regardless of the conditions under which they are required to do so and detailed gender inequities that affect those conditions, including the exercise by fathers of ambivalent and debilitating power. It also questioned the validity of assuming that a second parent is necessary absent sexual or physical abuse.*

*In four chapters, Part II considers eight cases in an attempt to establish whether the tensions between the social science narrative, the legislation and Family Court jurisprudence are evident, and if so how the Court identifies and articulates them. The analysis aims to highlight any problems with a jurisprudence endorsing imposition of shared parental responsibility in circumstances incompatible with the social science narrative, as well as the restrictions inherent in the legislation and, where appropriate, the international instruments.*

*The cases are of two kinds. In Chapter 5, three cases that arguably illustrate the exercise by fathers of ambivalent power are contrasted with a fourth, where the Court recognised, and awarded a mother financial compensation for, the exercise of a form of emotional abuse within a larger pattern of abuse. Chapters 6, 7 and 8 analyse cases where fathers insisted on - and to a significant extent achieved - equality of status with the mothers of their children. Chapter 6 is about the imposition of equal, shared responsibility following a comparatively brief relationship between the parents. A leading relocation case is discussed in Chapter 7. Chapter 8 surveys two cases involving parents who were not married or living together at the time their children were born.*

*It is acknowledged that there are risks inherent in inferring the personalities and motives of parties, whether by judges from the information before them, or by a reader dependent on what a judge chooses to refer to in a decision. It is also acknowledged that not all mothers are “good” and not all fathers are “bad”. This Part, primarily, attempts to understand how a court attempts*

*to mediate the disjuncture between the law about parenting and a range of conflicts relating to contemporary shared parenting practices that may affect mothers' abilities to provide primary care for their children.*

## Chapter 5. Paternal Ambivalence

### I. Introductory Remarks

Three cases analysed in this chapter tested the parameters of the Guardianship Act as “An Act to define and regulate the authority of parents as guardians of their children ... and the powers of the Courts in relation to the custody and guardianship of children.” In *Cunliffe v Cunliffe*<sup>511</sup> and *Collins v Sawtell*<sup>512</sup> it was found that the Act appeared not to give the Family Court the power to consider or enforce an auxiliary parent’s responsibility to care for a child for whom he or she is a guardian, with an access agreement in place. In *Bramley v Macdonald*<sup>513</sup> it was found that the Act did not give the Court the power to make a father available at times which did not suit him, although this meant that the mother “by default” had to care for their children when the father chose not to. These cases thus illustrate Trinder et al’s finding that the legal system may not be helpful when parents will not operate according to the imperatives of the hierarchy of care.<sup>514</sup> Mediation will not work and hearings are not successful. The fourth case, *W v W*,<sup>515</sup> in contrast to the other three, illustrates the potential width of the Court’s discretion under the Act to enforce aspects of auxiliary responsibility, once it decides it has jurisdiction. This decision relates to protection orders, custody and access and records patterns of behaviour that are more easily recognised as violent than arbitrary or unequal exercise of parenting responsibilities.

Each case concerns an apparently unpartnered mother with primary responsibility for her children. Three of the fathers have refused to play an appropriate role in the hierarchy of care, by resisting attempts by their children’s mother to facilitate access. Each father appears to have undertaken his responsibilities in a way that controlled the resources - of time or money - available to the new family group of mother and child or children; each seems to have exercised debilitating power that is likely to have inhibited the effective functioning of the group. In

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<sup>511</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC).

<sup>512</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC).

<sup>513</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96.

<sup>514</sup> The parents’ engagement with the legal system may have exacerbated the situation: Trinder et al state unequivocally (Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation (*Making Contact*), 46) “Where conflict between parents is intense ... prolonged court engagement was not only failing to provide a solution but was also exacerbating the conflict and the distress of both children and parents.” *Bramley v MacDonald* was still being litigated in early 2003.

<sup>515</sup> *W v W* (16 January 1998) Family Court Palmerston North FP 0544 427979.

*Cunliffe v Cunliffe* the father was unwilling to exercise access reliably and in *Collins v Sawtell* he was unwilling to exercise access at all. In *Bramley v MacDonald* where neither parent was initially the custodian, Mr MacDonald was unwilling to share parental responsibilities in the way that Ms Bramley wanted to facilitate them, equitably. The father in *W v W* used multiple strategies including organising his affairs to avoid paying child support. These situations probably exposed children to aspects of ongoing conflict and the ill-effects from this, if only by experiencing their primary parent's emotions being engaged with the conflict while also dealing with the challenges of caring for them on her own.<sup>516</sup> Where the father was unwilling to exercise access reliably the children were also exposed to the specific risks from this kind of violence, identified by a number of writers.<sup>517</sup> This may also have exposed the mothers to long term health risk.<sup>518</sup>

The facts of, the judicial responses to and the outcomes of each case will be individually described. The decisions will then be critically analysed, compared and contrasted as a group, within the context presented in Part I: the gendered and hierarchical structure of care and gender equity issues; including willingness to carry out guardianship responsibilities before and after separation; sections 10(2) and 13 of the Guardianship Act, the benefits and disadvantages of access; and the role of power and control.

These cases show, it will be argued, how the legislation as interpreted by Family Court judges may reinforce both a father's right to choose his involvement with his children and a mother's situational powerlessness as she exercises her responsibilities, while ignoring the mechanisms of ambivalent and debilitating power.<sup>519</sup> Underlying this situation are the assumptions that a mother with primary care will continue to parent regardless of the conditions under which she does this, and that unless sexual or physical violence is involved children will benefit from contact with their fathers. The facts, the judicial response and the outcome of each case will be outlined first, followed by a discussion of relevant issues raised by each.

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<sup>516</sup> See above Chapter 1 n 47 and Chapter 2 II.4. *Control, power and powerlessness*.

<sup>517</sup> See above Chapter 2 nn 104-107; and accompanying text.

<sup>518</sup> See above Chapter 2 nn 65-69 and 82-85; and accompanying text.

<sup>519</sup> Only one case was found that challenges this conclusion: *Hes v Hes* (12 November 1997) Family Court Palmerston North, FP 054/072/95 Judge Inglis QC. The father was described as seeing access as his right, "to be exercised on his own terms, according to his own standards and rules, and according to his own convenience." The mother was given the permission she sought to relocate with the children from Palmerston North to Tauranga.

## II. The Cases

### 1. *Cunliffe v Cunliffe*

#### (i) The Facts

The Cunliffes were married for over seventeen years. Both parents were teachers, and taught at the same school. They had two children, aged nine and seven at their separation, when they entered into “a comprehensive agreement” about guardianship and parenting.

The agreement included a section about “Guardianship” outlining specific procedures and behaviours relating to their respective roles. It included the statement that “each recognises that the other has an important role as parent and guardian of the children and will support the other in that role.”<sup>520</sup>

Under “Parenting” the agreement gave Ms Cunliffe custody. The limited access arrangements were spelt out in some detail:<sup>521</sup>

(5) The husband shall have reasonable access to the children on the following basis:

(i) The husband will have overnight access to both children each week from 5.00pm Friday until 5.00pm on the immediately following Saturday; and

(ii) The husband will have access to the children on Tuesday evenings from 4.30pm to 6.30pm.

(6) ... Equally provided the parties mutually agree if the husband does not wish to exercise access at any times as stated in paragraphs 5(i) and or 5(ii) then he will use his best endeavours to provide the wife with three (3) days’ clear notice of his intention not to do so.

(7) The above access periods will be applicable during the school term. The parties record that the school holidays are to be shared between the husband and wife.

Three years later Ms Cunliffe applied for definition of access, having become<sup>522</sup>

frustrated by, as she saw it, the respondent's failure to comply with the agreement. The regime arranged had not, she said, been regularly followed. There had been occasions when arrangements had been cancelled without warning, causing stress and creating difficulties for herself and the children. She considered that the children had become unsettled because they did not know how they were to spend their weekends. She believed that she and the children were entitled to certainty, and that a firm definition of access was required. ... [S]he considered that she had borne the brunt of caring for the children and that the respondent had contributed to their care spasmodically and inadequately. By means of her application she sought a more equitable sharing of care.

In particular, she sought orders obliging the father to care for the children during school holidays and illness, hers or the children’s. Ms Cunliffe’s original application went to counseling and

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<sup>520</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 538.

<sup>521</sup> *Cunliffe v Cunliffe*, above, 539.

<sup>522</sup> *Cunliffe v Cunliffe*, above, 539.



another, temporary, arrangement was reached re care if she were ill, but not if the children were; and to share the holiday care. There was further counselling which “did not advance the position materially.”<sup>523</sup> Then Mr Cunliffe raised the question of jurisdiction and asked to be excused from mediation. He concluded by saying "I will not be, and the children will not be, subject to the inflexible demands of the applicant." <sup>524</sup>

Ms Cunliffe was tenacious. She filed two more applications applying for directions as to guardianship, relating to the same issues. She submitted that the Court could make further orders to oblige the respondent to care for their children and reinforce these orders by punishment for contempt. She referred to their agreement and contended that the sentence “provided the parties mutually agree” in Paragraph 6 gave Mr Cunliffe a duty to exercise the access.<sup>525</sup> It is not clear if she also contended that the mandatory “shall” of paragraph 5 also imported a duty; since paragraph 6 gave Mr Cunliffe the choice of not exercising access perhaps she did not.

The hearing before Judge Keane resulted from Ms Cunliffe’s last application.

(ii) Judicial response

*(a) The parameters of judicial authority under the Guardianship Act*

Judge Keane defined the Ms Cunliffe’s application as “unusual” in that Ms Cunliffe sought orders to ensure that the father exercise access “to a minimum level in order to increase his contribution to the care of the children.”<sup>526</sup> He describes the father as wishing to retain the ability to decide “when and in what circumstances he will exercise access.”<sup>527</sup>

His Honour begins by acknowledging that sections 11 and 15 of the Guardianship Act allow for custody and access orders to be made subject to conditions. These conditions are however usually imposed to regulate rights that parents are “anxious to acquire and exercise.”<sup>528</sup> They are not coercive. However there is nothing in the Act that prevents the Court from making the orders sought by Ms Cunliffe. The provisions of sections 11, 15 and 13 confer wide powers on the Court, and section 18 provides for agreements to be enforced if they serve the welfare of the

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<sup>523</sup> *Cunliffe v Cunliffe*, above, 539.

<sup>524</sup> *Cunliffe v Cunliffe*, above, 540.

<sup>525</sup> *Cunliffe v Cunliffe*, above, 539.

<sup>526</sup> *Cunliffe v Cunliffe*, above, 538.

<sup>527</sup> *Cunliffe v Cunliffe*, above, 538.

<sup>528</sup> *Cunliffe v Cunliffe*, above, 540.

child. But although His Honour notes that “there is nothing expressly said in the Act to deny the Court the ability to make the orders sought ... powers are never unfettered.”<sup>529</sup> He refers to, a statement of general principle made by Lord Reid, speaking of a seemingly unfettered discretion:<sup>530</sup>

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter for the Court.

The Judge then construed the Act. He believed that its policy and objects were to be inferred from the definition of guardianship and custody in section 3 and from section 23(1). In reference to the long title and its definition of guardianship<sup>531</sup> he noted that it emphasises rights and powers rather than duties, with custody and guardianship itself being the principal attributes of guardianship expressed as rights. The duties and powers involved were undefined and not placed in an order of priority.

He went on to say:<sup>532</sup>

It is material, therefore, that though parental rights and duties cannot be separated, and parental rights may exist only to serve the interests of the child, the main function of the law appears always to have been to govern the authority claimed, or exercised, by guardians, natural or otherwise, not to promote directly or to enforce the duties of parents or guardians who may have abdicated their responsibility wholly or partly.

He then refers to two English authorities, *Hewer v Bryant* and *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>533</sup> These stress that “authority” governs the issue. He concludes that<sup>534</sup>

[w]hile parental rights or powers derive from parental duty the only duty of daily care, which the law relating to families appears affirmatively to impose on parents is the duty to maintain children ... governed by the Child Support Act 1991.

He goes on to observe<sup>535</sup> that the law’s response to parental neglect is to impose sanctions on the parent concerned and to reduce or eliminate a parent’s role in the life of the child in order to protect the child.

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<sup>529</sup> *Cunliffe v Cunliffe*, above, 541.

<sup>530</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL), 1030.

<sup>531</sup> See above Chapter 3, nn 2-9 and accompanying text.

<sup>532</sup> *Cunliffe v Cunliffe*, above, 541.

<sup>533</sup> *Hewer v Bryant* [1969] 3 All ER 578 (CA); *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL), 420.

<sup>534</sup> *Cunliffe v Cunliffe*, above, 542.

<sup>535</sup> *Cunliffe v Cunliffe*, above, 542.

The other parent, or another caregiver, ultimately the Director-General of Social Welfare, might assume responsibility either informally, or under the Guardianship Act or the Children, Young Persons, and Their Families Act.

(b) *Section 10(2)*

His Honour then states that<sup>536</sup>

A parent may, **in the extreme and unusual case**,<sup>537</sup> be deprived of his or her rights of guardianship... if “the parent is for some grave reason unfit to be a guardian of the child, or is unwilling to exercise the responsibility of a guardian.”<sup>538</sup> No express power is given ... to coerce a parent to assume his or her responsibilities and this omission seems unlikely to be accidental.

His Honour does not here distinguish between “being for some grave reason unfit” and being “unwilling”, nor express an opinion about circumstances a guardian being unwilling to assume responsibility becomes “extreme and unusual case” and will be deprived of his guardianship rights.<sup>539</sup>

(c) *Section 23*

In considering section 23 His Honour again referred to *Gillick* as authority for parental rights existing to serve the interests of the child and to section 23(1) as enshrining this principle in the Act. He stated how difficult it can be to serve this paramount interest<sup>540</sup> and then that that although “a child placed in the care of a reluctant caregiver may be well treated and may benefit ... the child may become the victim of neglect, or abuse, or simply made unhappy.”<sup>541</sup> The Court was obliged<sup>542</sup>

to search for what is now called “the least detrimental option.” The question that the statute poses is: what will best serve this child’s interests? The question that too often has to be answered is: what is likely to be most sustainable and least harmful for this child?

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<sup>536</sup> *Cunliffe v Cunliffe*, above, 542.

<sup>537</sup> Emphasis added.

<sup>538</sup> Guardianship Act s 10(2).

<sup>539</sup> See discussion above Chapter 3 nn 10-26 and accompanying text; and below nn 59-60, 124-130; and accompanying text.

<sup>540</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 543.

<sup>541</sup> *Cunliffe v Cunliffe*, above, 543.

<sup>542</sup> *Cunliffe v Cunliffe*, above, 543.

*(d) Sections 11, 13, 15,18*

His Honour then considered sections 11 and 15. In his view, it followed that the powers of the Court were most likely intended to enable the Court “to confer upon, or to define, or to enforce, rights to care for or have contact with children which parents wish to exercise.”<sup>543</sup>

He applied the same constraint to disputes between guardians under section 13. He doubted that it would “begin to apply” in this case, citing *W v W*,<sup>544</sup> against a group of decisions involving custody and access where “there was no lack of willingness on the part of the parents to care for or have greater contact with their children.”<sup>545</sup> Section 13, he ruled<sup>546</sup>

cannot be invoked in disputes that involve in truth custody and access ... The dispute is fundamental. It concerns in a novel guise how the parties are to share the care of their children, not some subsidiary issue.

In relation to section 18 His Honour held that it “follows that section 18 is unlikely to give specific performance in the sense that Ms Cunliffe suggested,”<sup>547</sup> while conceding that “providing the parties mutually agree” in paragraph 6 of the agreement might have the effect of conferring on Mr Cunliffe a duty to exercise access.

*(iii) Outcome*

On this construction of the statute as a whole, Judge Keane found that it was unlikely that the Court had jurisdiction to make orders in the terms applied for by Ms Cunliffe.

He acknowledged that because he could not state categorically that no jurisdiction existed since the Court’s powers were widely expressed in the statute and he had identified the constraints by inference, Ms Cunliffe was therefore entitled to pursue her application. However, His Honour found it hard to imagine circumstances where<sup>548</sup>

a child’s welfare would be served by orders obliging a reluctant parent to assume more responsibility no matter how sensible or fair that might seem from the perspective of the other parent.”

Ms Cunliffe did not appeal this decision although the questions it raises for mothers and children are significant. What is the point of having an agreement if it cannot be enforced? Is it possible to

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<sup>543</sup> *Cunliffe v Cunliffe*, above, 543.

<sup>544</sup> *W v W* [1984] 2 NZFLR 335 (CA). See also above Chapter 3 nn 32-35 and below n 136; and accompanying text.

<sup>545</sup> *Cunliffe v Cunliffe*, above, 544.

<sup>546</sup> *Cunliffe v Cunliffe*, above, 544.

<sup>547</sup> *Cunliffe v Cunliffe*, above, 544.

<sup>548</sup> *Cunliffe v Cunliffe*, above, 544.

word an agreement to make it more effective? Is it possible to attach default conditions and financial penalties to an agreement as a way of to enforce access or to compensate for its loss? How is the paramount principle served by denying jurisdiction? How else can a mother in similar circumstances find a remedy for her child's distress? When an access agreement cannot be enforced but a guardian can be removed only "in extreme and unusual circumstances" how can a mother make a clean break from a situation that debilitates her child and herself? It might be argued that facilitating communication between father and child might be positive for the child concerned, regardless of the cost to a mother in Ms Cunliffe's position. However, since Mr Cunliffe resisted Ms Cunliffe's attempts to facilitate access, in a "classic" example of a father who is not prepared to follow the requirements necessary if a gendered hierarchy of care is to succeed, this argument is unrealistic.

## 2. *Collins v Sawtell*

### (i) The Facts

Ms Collins and Mr Sawtell were also married. They separated when their child was about four years old. Not long after their separation Ms Collins filed an application for an order directing that Mr Sawtell exercise access to the child. As a result consent orders were made at a mediation conference giving him the right to reasonable access providing prior arrangements had been made. After some time Ms Collins made a second application for an order directing that Mr Sawtell exercise access, to which he filed no notice of defence. No mediation conference was sought. At the pre-trial conference Mr Sawtell confirmed that nothing had changed for him. The hearing, in 1995, preceding Judge Inglis QC's decision, was concerned only with the question of jurisdiction.

Originally, Ms Collins had stated<sup>549</sup>

I have had an on-going battle getting the respondent to exercise proper access to our daughter. I have always wanted him to exercise access. It is good for Lisa to have access with him and it is also helpful for me to know that on regular occasions I can have a break while he and she enjoy each other ... Our daughter deserves to have someone who is a father on a proper basis. It is her life that is mucked about. I do not want to have that continue. I want him to be a proper father. I have tried on numerous occasions to tell him exactly that kind of thing. I have made no progress at all.

In her second application Ms Collins said further<sup>550</sup>

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<sup>549</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC), 881.

<sup>550</sup> *Collins v Sawtell*, above, 881.

He tries to punish me (because of the level of child support he has to pay) by not seeing her. He appears not to care that it is her (not me) who suffers.

Unlike *Cunliffe v Cunliffe* the facts of this case seem to show that access may not have happened at all and that this may have a possible relationship to child support. Ms Collins has shifted over time from claiming that access is useful to her to implying that it makes no difference to her. Her approach has become more child oriented.

(ii) Judicial response

(a) Parameters of judicial authority under the Guardianship Act

Judge Inglis agreed with Judge Keane's reasoning in *Cunliffe v Cunliffe*. At a pre-trial conference His Honour declined to discuss the reasons for Mr Sawtell's unwillingness to exercise access, for which there could be "any number of explanations,"<sup>551</sup> adding, apparently to supplement Judge Keane's reasoning, that<sup>552</sup>

If Parliament had intended the provisions of the [Act] to be used for the unusual purpose of compelling a reluctant parent to have access to a child, presumably enforceable only by contempt proceedings it could have been expected to have said so expressly.

As it was the basis of the mother's application that the father was not exercising guardianship this placed her application outside section 13 of the Act.<sup>553</sup> The issue was whether the Court had jurisdiction to require a non-custodial parent to exercise access he did not wish to have.

His Honour added<sup>554</sup>

It is one thing for a parent to exercise his or her legal rights in a way that can be questioned, so that it may be appropriate in the welfare and interests of the child to limit or restrict their exercise. It is quite another thing when a parent declines to exercise those rights in any way. ... A dispute between guardians which may be referred to the Court ... must be a dispute over the way guardianship rights are exercised.

Furthermore<sup>555</sup>

there must be caution in using the paramount principle of the welfare of the child as justification for straining the statutory words ... the welfare of the child can only come into play where jurisdiction exists.

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<sup>551</sup> *Collins v Sawtell*, above, 881.

<sup>552</sup> *Collins v Sawtell*, above, 881.

<sup>553</sup> This is a different reason from those offered by Judge Keane in *Cunliffe v Cunliffe*.

<sup>554</sup> *Collins v Sawtell*, above, 883.

<sup>555</sup> *Collins v Sawtell*, above, 884.

His Honour did not consider whether the making and retaining of an access agreement was itself an exercise of a guardianship right. Nor did he view the agreement between the parents as imposing on Mr Sawtell a legal and enforceable obligation to exercise access under section 18.

(iii) Outcome

His Honour decided that there was no jurisdiction to entertain the application. Ms Collins, like Ms Cunliffe was therefore left with no remedy and an ongoing problem.

### 3. *Bramley v MacDonald*

(i) The Facts

These parents, who appear not to have been married, separated when their children were six-and-a-half and one-and a-half, without making a formal agreement or order in relation to custody and access. They were “both intelligent, well qualified and hard-working people who [had] created careers for themselves independent of their responsibilities as parents.”<sup>556</sup> By the time of the hearing, in 1998, Ms Bramley had had six years of primary responsibility for the children. The agreed arrangements had originally provided (according to Ms Bramley) in addition to set hours, for the care of the children to be transferred to their father at any time that it was mutually convenient and in the interests of the children and when the children so wanted it.

At first the children had regular and flexible contact with their father. Then, in August 1996, their father wanted to reduce his responsibility. He applied for “definition of access” and sought access orders on defined terms. These involved a reduction of the children’s contact time with him and a lengthening of the periods without contact. At that time, the principal issues were the children’s contact with their father during the week; parental responsibility for the care of the children during school holiday times (especially outside public holidays); and parental responsibility for the children at other irregular and unscheduled times such as during the illness of a child or parent. Ms Bramley’s initial affidavit states her conceptual position. It said in part<sup>557</sup>

I find concepts of custody and access distasteful and unhelpful as they tend to categorise issues in a confrontational way. I believe that the children have an inalienable right to both parents. I feel that parenting is a responsibility of both parents and that it should be share equally to provide the children with the best possible childhood.

Currently I am the primary caregiver but [Mr MacDonald] is able to see the children whenever he wishes. However, to give the children the expectation that they will see [Mr MacDonald] regularly and frequently some times were set to achieve this.

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<sup>556</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 1-2.

<sup>557</sup> *Bramley v MacDonald*, above, 7.

On 25 November the Court made the orders the father had applied for. As a result, the mother “moved to put the children in his care.”<sup>558</sup>

The father had also made changes to maintenance agreements. The Judge referred to this issue in these terms:<sup>559</sup>

I am, of course, aware that there have been parallel proceedings between the parties under the Child Support Act in which the mother has sought a review of the child support assessment against the parent, having regard to the same concerns which she has expressed in these proceedings as to the inequitable burden of care and control which she is expected to exercise for the children on behalf of both parties.

When Ms Bramley took the children to him, Mr Macdonald applied for an interim custody order, opposed by Ms Bramley. She did not seek custody herself. The Court and counsel for the child intervened and ordered the return of the children to Ms Bramley. There was a return to the Court-ordered access arrangements, with no custody order in place.

Continuing negotiations broke down again. Access stopped. In November 1997 Mr MacDonald sought to enforce access. Ms Bramley opposed this. She submitted that because there was no custody order in force, access could not stand. The [Principal Family Court] Judge accepted that, but made a custody order in her favour – even though she had not applied for one. He then adjourned proceedings for further discussion on access arrangements, and noted the mother’s concerns as relating<sup>560</sup>

... not to denying access to [Mr MacDonald] but to a more equitable sharing of the burden of parenthood, and she went to some length to refer me to the heavy burden that custodial parents bear and the need for the non-custodial parent to share some of that burden. That is what she is seeking in the present case.

Ms Bramley then sought orders defining Mr MacDonald’s access more widely than he wanted, couched in terms “reflecting her views of the parents’ mutual responsibilities.”<sup>561</sup> On 9 December 1997 Judge Ellis confirmed the custody order of 25 November, defined access in the short term and ordered issue of warrants to enforce Mr MacDonald’s access in those terms.

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<sup>558</sup> *Bramley v MacDonald*, above, 4.

<sup>559</sup> *Bramley v MacDonald*, above, 12. Only a summary of the report (*Bramley v Commissioner of Inland Revenue* (22 October 1998) Family Court Wellington CS 2/98) of the parallel proceedings has been viewed.

<sup>560</sup> *Bramley v MacDonald*, above, 5.

<sup>561</sup> *Bramley v MacDonald*, above, 5.



Ms Bramley requested issue of a warrant to require the father to take care of children at times outside the orders but in line with her proposals, to enforce access when Mr MacDonald resisted any responsibility outside the defined times. The judge declined to do this, for lack of jurisdiction.

Once again, Ms Bramley took the children to be cared for by Mr MacDonald. He then applied for custody. The Court then tried to break the deadlock by making a ruling for shared custody with directions for psychological assessment and report on the children. This was made available in March 1998. Three months later the parties brought respective proposals to court for mediation, again without success. When the formal proposals were presented, the father withdrew his application for custody. For the first time Ms Bramley applied for custody and for reservation of specific access.

Mr MacDonald's position was the same now as earlier. His latest affidavit claimed that:<sup>562</sup>

The applicant has complained of being "forced" to be the custodial parent and has alleged disinterest on my part. The fact is that I have the children already for most of my non-work time, and I believe any changes to access must be accommodated within my work and other commitments ... [I am] willing to vary current access arrangements to best suit the needs of [the children] consistent with my own work and other family commitments.

He added later<sup>563</sup>

I am willing to vary current access arrangements to best suit the needs of [the children] consistent with my own work and family commitments.

Ms Bramley, now represented by senior counsel, returned to the Court seeking a custody order in her own favour and a definition of access for Mr MacDonald. The specific access proposal included less than equal responsibility for after school care; less than half the school holidays (3 weeks of term holidays and 10 days in the summer), alternate weekend care from 5.45 Friday to Sunday at 5pm, specified time on Christmas Day and the children's birthdays and parent contact conditions requiring the father to stay away from her property and the immediate surroundings; make no direct telephone or written contact; and direct any written contact to someone nominated by her.

A submission made on behalf of Ms Bramley stated that any refusal by the father to share the care of the children at times such as between the finish of school and their going to him for

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<sup>562</sup> *Bramley v MacDonald*, above, 8.

access necessarily involved a cost for her whether in the limitation of her own work hours or in the provision of baby-sitting or day care. Care during illness was no longer part of her proposal.

Mr MacDonald did not want to have any responsibility for after school care and wanted the two hours on the Friday evenings when he did not have the children for the weekend to be “flexible” with the option of having the children on Thursdays, perhaps for the night. He wanted two not three weeks of care during the term holidays and no access on Christmas or birthdays except by phone, unless they fell on scheduled access days.

The psychologist’s report stated that the children both positively and strongly attached to both their parents, while clear that their primary base was with their mother. The girl wanted fewer extended weekends with her father, the boy, younger, wanted more time with him. They were happy with the Friday access as it was.

(ii) Judicial response

In his decision Judge Ellis summarised the mother’s viewpoint throughout the litigation in this way:<sup>564</sup>

[T]he mother did not accept the implied premise that the father’s responsibility for the care of the children would be defined in terms of what he wanted and at times when he was able to make himself available, having regard to work and other commitments, whereas she would be required by default to accept responsibility for the children at all other times irrespective of her own commitments.

According to His Honour, “It is clear that the mother was then resisting, on grounds of principle, a resolution of the matter along traditional custody/access lines.”<sup>565</sup> He summarised the fundamental difference in approach between the parties as being well-illustrated by the approach taken by the Court in this passage from an earlier hearing<sup>566</sup>:

[Mr MacDonald] wants to have a total of 3 weeks over the course of a year, while [Ms Bramley] says that it should be more. While her wish to have the children spend more time with their parent is to be commended, [Mr MacDonald] says that his work commitments prevent this. It is therefore not possible to order more.

Judge Ellis did not refer to *Cunliffe v Cunliffe* or *Collins v Sawtell*. However he defined the issues raised by the parties as requiring “a revisiting of fundamental notions of guardianship, custody

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<sup>563</sup> *Bramley v MacDonald*, above, 8.

<sup>564</sup> *Bramley v MacDonald*, above, 4.

<sup>565</sup> *Bramley v MacDonald*, above, 3.

<sup>566</sup> *Bramley v MacDonald*, above, 3.

and access”<sup>567</sup>. He traversed the Guardianship Act, starting with the meaning of guardianship: “the custody of a child ... and the right to control of the upbringing of a child” and custody: “the right to have possession of a child.” He noted that the Act does not define “access” but read from the context of the Act that access for a person who is also a guardian is<sup>568</sup>

a defined opportunity for the parent who does not for whatever reason, have the child in their possession and care to exercise the general rights of guardianship [which necessarily involves having the child in their possession and care from time to time i.e. sharing care with the primary parent}.

Like Judge Keane in *Cunliffe v Cunliffe*, he quoted from the title to the Act; and pointed out that while the Act provides rules for determining disputes between those who context rights to possess, care for and control children, it did not provide a framework to enforce these responsibilities against those unwilling to recognise them. Also like Judge Keane, he referred to section 10(2) of the Act providing that a guardian:<sup>569</sup>

cannot be deprived of guardianship rights unless “for some grave reason unfit...or is unwilling to exercise the responsibilities of guardian”. There is no definition of these responsibilities in the Act and the history of case law indicates that they are more easily identified by their absence.

Then he stated<sup>570</sup>

Certainly the maintaining of regular contact with the children to provide opportunities for exercising rights of care and control would be a minimum, but there is no statutory requirement, neither in the letter of the Act nor in its interpretation through several decades of case law which requires the responsibilities of guardianship to be equally shared.

He emphasised “the fundamental principle” of the paramountcy of the children’s welfare before referring to his “noticeably unsuccessful” attempt to “modify the attitudes of the parties when he underlined their rights and responsibilities as guardians of the children making orders that gave “each of them custody in defined terms or shares.”<sup>571</sup>

Judge Ellis then noted that this did not reflect the reality of the children’s experience that their home was with their mother and observed that it was agreed that the children would live primarily in the home of the mother. The parents initially were unaffected by any Court intervention as “[each] of them as a natural guardian had an equal entitlement to the custody of the children, but without a correspondingly equal responsibility to exercise that right.”<sup>572</sup>

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<sup>567</sup> *Bramley v MacDonald*, above, 1.

<sup>568</sup> *Bramley v MacDonald*, above, 9.

<sup>569</sup> *Bramley v MacDonald*, above, 10.

<sup>570</sup> *Bramley v MacDonald*, above, 10. Emphasis added.

<sup>571</sup> *Bramley v MacDonald*, above, 12.

<sup>572</sup> *Bramley v MacDonald*, above, 11.

The “access” originally applied for by the father seemed to have relied on s 15(2) of the Act that provided for a parent without custody of his child to apply to the Court for an order granting him access, with the Court able to make such order as it saw fit.

The Court applied that provision to a parent with the guardianship right of custody (meaning actual possession and care) who is not exercising it or to a parent who is not a guardian, without legal right to or the actuality of possession and care.<sup>573</sup>

His Honour went on to refer to the parallel proceedings under the Child Support Act where the mother<sup>574</sup>

has sought a review of the child support against the father [with] the same concerns [about] the inequitable burden of care and control which she is expected to exercise for the children on behalf of both parties.

He compared the Guardianship Act’s principles with the Child Support Act principle in s4(h) which provides for the Act “To ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children.”<sup>575</sup> He seriously considered importing “some effective financial sanction ... to compel a parent to exercise a right and/or responsibility of custody or access that that parent did not wish to exercise,”<sup>576</sup> since his discretion to attach conditions to a custody or access order was unfettered. His Honour went on to say<sup>577</sup>

It seemed, and it still seems to me, entirely reasonable for the mother to protest that her ability to order her own work and personal commitments should not be arbitrarily limited “by default”, simply because the father will not make himself available to share the care of the children at times which do not suit him. If there is a cost why should that not be shared in a real and not just a token sense. I have considered seriously therefore the making of access orders which require the father to accept responsibility for the care of children during those occasional after school hours, and to add the condition that if he failed to exercise access at those times, that he pay a financial penalty to the mother sufficient to assist her to fund the necessary day care.

The absence of precedent for this did not deter His Honour. But after long consideration, he concluded that :<sup>578</sup>

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<sup>573</sup> *Bramley v MacDonald*, above, 11-12. These points relate to the one made earlier by the mother when she said (November 1997) that the father could not be granted access since there was no custody agreement or order in place; at this time the Court made a custody order in favour of the mother. Judge Ellis referred to s 13(2) of the Guardianship Act as justification for the Judge having made this order even though the mother had not requested it.

<sup>574</sup> *Bramley v MacDonald*, above, 12.

<sup>575</sup> See Chapter 3 nn 79-85 accompanying text re equity in the Child Support Act.

<sup>576</sup> *Bramley v MacDonald*, above, 13.

<sup>577</sup> *Bramley v MacDonald*, above, 13.

<sup>578</sup> *Bramley v MacDonald*, above, 14.

[I]t would be inappropriate so to confuse the issues under the Guardianship Act with those which have been and are being separately addressed under the Child Support Act. Until Parliament has adequately reviewed the Guardianship legislation in the light of these other principles I could not be satisfied that it was appropriate for the Court to initiate such a change of direction.

As a result he determined the dispute “on the traditional principles applicable under the [Act], guided always by consideration of the welfare of the children, not in an abstract sense but as reflecting their own views and wishes.”<sup>579</sup> That focus helped him “put the individual attitudes and wishes of the parents in a different perspective.”<sup>580</sup>

(iii) Outcome

Because the children enjoyed the Friday night access and wanted it to continue, at the beginning of weekend access and just for the evening on alternate weekends, it would continue. As a consistent arrangement, starting at 5.45pm on a Friday, since the parents separated and confirmed in the first court order, it was something the children were used to and by inference had routines associated with it. There was no change justified by the needs or wishes of the children and the Court was not persuaded that either of the parents’ wishes should override that.

If the mother had additional cost in after-school care on a Friday she could take that up in the context of child support proceedings. If the father needed or wanted to leave town when the children were in his care he would have to make alternative arrangements for their care.

In relation to holidays, the minimum period of ten days in the summer was agreed to by the parents. Access during term holidays was to be for one week in July which the mother wanted, rather than a week in April which the father wanted and which would have conflicted with Easter arrangements traditionally made by the mother for herself and the children. The parents’ differences in relation to the September holidays was resolved by the father having the lesser time he suggested, during the period the mother suggested. The Court did not require Mr MacDonald to “take the extra step of [accepting] responsibility for periods of holiday access outside his availability.”<sup>581</sup> However “again this is an area where the mother is and should be entitled to consideration in the context of child support.”<sup>582</sup>

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<sup>579</sup> *Bramley v MacDonald*, above, 14.

<sup>580</sup> *Bramley v MacDonald*, above, 14.

<sup>581</sup> *Bramley v MacDonald*, above, 17.

<sup>582</sup> *Bramley v MacDonald*, above, 17.

Access for the father at Christmas and birthdays (as requested by the mother) required that he give the children “at least two weeks notice of his intention whether or not to exercise that access so that they, and their mother, know where they stand.”<sup>583</sup>

The conditions that Ms Bramley asked to attach to any access order were refused, because the Court was not satisfied “that the needs of the children, let alone their safety, required that such conditions be added”<sup>584</sup>. The Court was not required to determine Domestic Violence Act issues because no evidence about the allegations of physical violence against each other had been heard.

Although Mr MacDonald was required to continue with his Friday nights, against his will, because there was no penalty if he did not keep to the arrangement, there was nothing Ms Bramley could do to enforce it. By default, she still had to care for the children whenever Mr MacDonald was unwilling to do so.

#### 4. *W v W*

The year before *Bramley v MacDonald* was decided, Judge Inglis QC made access conditional on extra child support payments, in *W v W*. He did not refer in this decision to his agreement, in *Collins v Sawtell*, with Judge Keane’s statement that the welfare of a child is more likely to be prejudiced than promoted by forcing or at least persuading a parent to exercise his or her responsibilities, perhaps because financial responsibility does not involve direct contact with a child.

##### (i) The Facts

In *W v W* the parents had been married and separated at the end of 1994 when their daughters were 5. Ms W had sole custody of the children. Mr W’s access was “precisely defined”. Nearly three years later, a temporary a Domestic Violence Act protection order was made against Mr W that required that his access to the children be supervised and that he attend an anger management programme. Mr W opposed these orders and directions and made a cross-application for a protection order.

He had also arranged his affairs so that he paid the statutory minimum of child support, \$10 a week, had established a trust for the children with capital of \$400,000 and had his own trust, with

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<sup>583</sup> *Bramley v MacDonald*, above, 18.

<sup>584</sup> *Bramley v MacDonald*, above, 19.

access to the trust funds. Counsel for the child sought a direction for a psychological assessment of the children and each parent.

At the hearing, in December 1997, where “a very clear picture of the problem, but a less clear picture of the possible solutions emerged”<sup>585</sup> the Court made orders about Christmas access and the children’s school for 1998 and reserved its decision on the other issues. The decision being considered is the reserved, interim, decision, making a final protection order, as well as custody and access orders.

*(ii) Judicial response*

The Court found that Mr W’s “need for power, and his need for his power to be recognised by others ... is destructive to family relations.”<sup>586</sup> There was clear evidence of physical abuse by Mr W against Ms W, and evidence of his psychological abuse of her [which]:<sup>587</sup>

lies in his unduly controlling behaviour towards her and his belittling and denigrating attitude in regard to her ... Particularly when he has been drinking he has frightened the wife and the children by his anger and actions...The psychologist is quite right in drawing attention to what she described as a ‘cluster of behaviours’ exhibited by the husband which are characteristic of violent abusers.”

His Honour judged Ms W to be a talented and busy person who<sup>588</sup>

... does not appear to have confidence in her own judgment of what is acceptable or unacceptable behaviour on her husband’s part ... [and]tends to rely on others to define her identity. In that state of powerlessness ... her decision to separate on more than one occasion must have required much courage and support ... the separation has not been easy because, among other things, the husband has not hesitated to use his greatly superior financial position as leverage.

[This] in itself it reveals a certain state of mind. I understood him to say in evidence that financially he was in no stronger position than the wife, who appears to be chronically short of money. One suspects that it will not be long before the husband is professionally advised that the statutory child support minimum could in his case be an unsafe refuge and that trusts are not necessarily inviolable. In any event I suggested at the end of the hearing that consideration might be given to the husband providing a fixed income to the children’s principal home which would assist in providing them with the standard of living they are entitled to expect. The Court will await with interest the husband’s response to that suggestion.

Judge Inglis referred to the opinion of the psychologist, who believed that Mr and Ms W could not resolve the conflict while each wanted to punish the other. He then gave a firm directive:<sup>589</sup>

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<sup>585</sup> *W v W* (16 January 1998) Family Court Palmerston North FP 0544 427979, 2.

<sup>586</sup> *W v W*, above, 4.

<sup>587</sup> *W v W*, above, 7-8.

<sup>588</sup> *W v W*, above, 5.

<sup>589</sup> *W v W*, above, 6-7.

The time has come to put a firm end to all the game-playing that has been so destructive during the parents' relationship and since their separation. The children are entitled to learn from their parents' example how responsible parents are expected to behave.

*(iii) Outcome*

The Court made a final protection order in the Ms W's favour, dismissed Mr W's applications and ruled further that he would have access<sup>590</sup>

conditional upon attending regularly the counseling sessions directed ... in the protection order; not consum[ing] alcohol or visit[ing] the City Club at any time during such access occasions, and [making] adequate financial provision for the support of the two children by a non-revocable weekly automatic bank transfer to his wife, the amount of such payments to be agreed between the parties, or, in the absence of such agreement, by the Court.

His Honour also gave a direction in relation to the children's schooling, to be at a private school until further notice at Mr W's cost because this provided "the least disruption to the children's stability."<sup>591</sup>

### III. Discussion

This discussion will analyse and compare these cases under headings generated by the contextual material: how they exemplify research findings on the hierarchy of care, willingness to carry out guardianship responsibilities before and after separation, the benefits and disadvantages of access and the role of power and control; and the issues they raise in relation to the Guardianship Act's overall scheme and sections 10(2), 13 and 23 within it, with some reference to what judges have said outside the Court. Finally, it will be discussed how the cases might have been resolved under current legislation, if there had been a belief system in place that valued more highly the work of the primary carer or if the changes to the Guardianship Act, suggested in Chapter 3, had occurred.

It is impossible to analyse some elements of these cases without access to all the documentation, including affidavits and evidence. For example, there is no information about the operation of the hierarchy of care and the willingness of any of the fathers involved to care for their children before separation. In addition, because *Cunliffe v Cunliffe* and *Collins v Sawtell* are about jurisdiction only, there is no exploration of the children's wellbeing in those cases. However it is possible to discuss how the cases fit within the context identified in Part 1.

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<sup>590</sup> *W v W*, above, 10.



## 1. Issues related to the research context

### *(i) The hierarchical structure of care*

Trinder et al found that parenting arrangements after separation work best where there is shared agreement about and commitment to parental roles, grounded in a hierarchy, with a primary and secondary parent. Each parent accepts this and supports the other's role.<sup>592</sup> Their agreement may be explicit or tacit; it acknowledges that parenting roles are usually different for men and women.

In the first three cases one parent, or both, was unwilling to accept the hierarchy of care. At the outset, these cases present the Court with parental conflicts where the parents are without, and seem unlikely to reach, a shared understanding about responsibility for care of their children. These cases also exemplify a range of "willingness" on the part of fathers after separation and common fact situations where a father is ambivalent or unreliable about the exercise of his "caring for" responsibilities after separation.<sup>593</sup> In *Cunliffe v Cunliffe* access was irregular. In *Collins v Sawtell*, access seems never to have happened and child support may have been a related issue. In *Bramley v MacDonald*, the father wanted to reduce his commitment to the extent that he did not see his children on their birthdays or Christmas Day unless these days fell on a day when he normally had access. Child support was also an issue. The fourth case, *W v W*, is different from the others because the father was seeing his children regularly, under "precisely defined" arrangements, but he had restricted the child support available for them.

Three of the four mothers were unconditionally willing to continue as the custodial mother. In *Cunliffe v Cunliffe* and *Collins v Sawtell* the mothers' willingness to continue to be the primary parent was not an issue. They were however unwilling to endorse the behaviour of their children's fathers. In asking the Court to enforce the fathers' parenting responsibilities they were arguably trying to fulfil their side of an implicit gender-based bargain by attempting to facilitate

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<sup>591</sup> *W v W*, above, 6.

<sup>592</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) (*Making Contact*); and Trinder L Beek M and Connolly J *Children's and Parents' Experience of Contact after Divorce (Children's and Parents' Experience)* (2002) <http://www.jrf.org.uk/knowledge/findings/socialpolicy/092asp> (accessed 9 March 2003).

<sup>593</sup> See above Chapter 2 II. 1. *Willingness before Separation*; 2. *Willingness after Separation* and 4. *Control, power and powerlessness*.

contact.<sup>594</sup> This facilitation was being resisted by the fathers who appeared to want to take a “slacker” role.<sup>595</sup> At least one of the fathers appeared to perceive the mother’s attempts to facilitate access as an attempt to control him. “I will not be, and the children should not be, subject to the inflexible demands of the applicant,” said Mr Cunliffe in his notice of defence. (Mr Sawtell did not file a notice of defence.)

Ms W, too, was willing to continue as primary parent. In *W v W*, Mr and Mrs W each appear to have accepted a standard, gender-based, agreement about care. Ms W wanted the Court to acknowledge the harm her husband had caused and to protect her. Mr W’s present ambivalence or unreliability was about child support rather than access.<sup>596</sup> This was acknowledged by the Court as a mechanism he used to control Ms W. His secondary, “helper”, contribution is thus characterised both by his lack of support for Mrs W in her role and by his need to control her. Together, these militate against a successful outcome.

Ms Bramley however, although secure in her role as a primary parent, wanted Mr MacDonald to share parenting responsibility more equitably and equally. She was unwilling to continue as de facto custodian “by default”. She too wanted the Court to enforce or impose conditions on the parenting responsibilities of her children’s father, but based her argument on a principle, that she and Mr MacDonald were equally guardians and she suffered specific losses through being the only primary parent. Arguably, her strategy was more sophisticated than that of Ms Cunliffe and Ms Collins and demanded more from the Court as a response.

Ms Bramley was in one sense taking appropriate responsibility for her role, by attempting to facilitate contact between her children and their father. However, she was also resisting the conditions for an agreement that worked, by arguing for two primary parents instead of one, for

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<sup>594</sup> Trinder et al list describe facilitation of contact as: encouraging contact; encouraging a sense of ongoing parenthood; enabling contact to occur; promoting a positive image of the other parent and high quality relationships; peace-keeping or mediating between children and the contact parent (Trinder et al *Making Contact*, above, 26-27).

<sup>595</sup> See above Chapter 2 n 20 and accompanying text.

<sup>596</sup> Judge Inglis QC’s statement at the outset that Mr W’s access was “precisely defined” may imply that the Court had had occasion to rule on this with some rigour, because of his unreliability or inappropriate exercise of access. An episode referred to in the judgment describes an occasion when the children were not returned to Mrs W and it was “difficult to understand why the husband insisted on retaining the children when he knew the wife wanted them returned ... I consider that incident to be no more than yet another example of the husband’s insensitive controlling and dominating behaviour, placing his own needs and wishes ahead of those and others.” (*W v W* (16 January 1998) Family Court Palmerston North FP0544 427979, 8-9).

shared parenting responsibility<sup>597</sup> the view reflected in the Law Commission's definition of parental responsibility, endorsed by the Family Court.<sup>598</sup>

Mr MacDonald acknowledged that Ms Bramley had greater but not total responsibility for day to day care and decision making; he was an auxiliary parent. He also sought a change to arrangements so he had less responsibility. He appears to have chosen a "helper" role initially that he would like to change to one where he could be a "slacker" from time to time. It is hard to identify why he also twice sought custody. Perhaps this was a strategy to persuade Ms Bramley to modify her views.

(ii) Power and powerlessness

*When I became ill, I asked my ex to allow our then-13-year-old son to stay with him for one summer month until I could figure out what was wrong with me. He said "No, it wasn't convenient." The only thing left to fight for, both for myself and my son, was money. There was nothing left to lose.*

*I was wrong ...[W]hen I turned to the Courts, my ex stopped seeing our son almost entirely. He made dates, then cancelled them at the last minute; sometimes he simply stood him up. He saw our son for an hour or two at most and, according to our son, spent most of that time haranguing him about the child-support lawsuit.<sup>599</sup>*

In *W v W* Mr W's maltreatment of Ms W was easy to locate. Judge Inglis refers to Mr W's "... need for power, and his need for his power to be recognised by others [which is] destructive to family relations" and his "insensitive, controlling and dominating behaviours, placing his own needs and wishes ahead of those of others."<sup>600</sup> This may also be a good description for the behaviour of the other three fathers.

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<sup>597</sup> See above Chapter 2 II. 1. *Willingness before Separation* for discussion of the difficulties involved in shared parenting before separation; and Chapter 1 nn 25-28 and Chapter 2 n 26 for Trinder et al's views of shared responsibilities. Trinder et al found no examples of successful "equal rights" sharing of responsibility in their sample: the most active proponents of shared care were fathers in two groups (in total 20 per cent of the sample) where contact was not working.

<sup>598</sup> See above Chapter 4 nn 28-29.

<sup>599</sup> Chesler P "Is Every Woman One Divorce Away from Financial Disaster?" *On the Issues* (1997) Winter 17, 59.

<sup>600</sup> *W v W* (16 January 1998) Family Court Palmerston North FP0544 427979, 4.

On the facts, each mother was emotionally abused by a pattern of behaviour that can be conceptualised as the exercise of ambivalent and debilitating power by their children's fathers in circumstances where they themselves, like the mothers, may be experiencing situational powerlessness. The cases also illustrate how difficult it is to find language for emotional maltreatment.<sup>601</sup>

The women who applied for relief knew that they and the children were suffering from the auxiliary parents' patterns of behaviour. But, because they were not applying for protection orders (and because *Cunliffe v Cunliffe* and *Collins v Sawtell* were decided before the Domestic Violence Act came into force, with provisions for addressing psychological violence) only the decision in *W v W* articulated or analysed the issues relating to emotional maltreatment (although Mr Cunliffe claimed that Ms Cunliffe sought to control him while facilitating care from him for their children).<sup>602</sup> The Court's refusal to accept jurisdiction arguably reinforced Ms Cunliffe's and Ms Collins' powerlessness and the power exercised by Mr Collins and Mr Sawtell in relation to their children.

Although in *Bramley v MacDonald* there was affidavit evidence of physical violence "each against the other"<sup>603</sup> no evidence was heard in relation to these allegations. Ms Bramley's request that conditions be attached to any access order (refused by the Court) may indicate that she felt herself at risk from the father and feared for her wellbeing if he intruded in any way into her life. She appeared to recognise that Mr MacDonald's behaviour debilitated rather than supported her and Judge Ellis acknowledged that Mr MacDonald's behaviour had negative effects on her.<sup>604</sup>

From the facts as given, it is possible to infer a continuum of emotional maltreatment through these cases. Knowing that the language around emotional abuse is undeveloped, and without full

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<sup>601</sup> See above Chapter 2 n 120 and accompanying text.

<sup>602</sup> "I will not be, and the children should not be, subject to the inflexible demands of the applicant:" *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 540.

<sup>603</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 18.

<sup>604</sup> See for instance *Bramley v MacDonald*, above, 13: "It seemed, and it still seems to me, entirely reasonable for the mother to protest that her ability to order her own work and personal commitments should not be arbitrarily limited "by default", simply because the father will not make himself available to care for the children at times which do not suit him. If there is a cost should that not be shared in a real and not just a token sense." Judge Ellis was one of the six judges named as being "anti-father" in "The Six Most Anti-Family" (2001) *Northland Age* 25 January 7. See above Chapter 4 n 12.

evidence of the facts, this can only be speculative. However, some of the explicit language of the affidavits quoted and the statements of the judges do supply enough information to make some tentative conclusions. The emotional violence may have affected the mothers directly as well as the children and compounded the effects of any other gender inequities experienced by the mothers and any risks to the children from continuing relationships with their fathers. It may have affected the family's wellbeing economically and psychologically, especially if the children saw their fathers ignoring or belittling their mother's concerns.

Using the MANALIVE analysis, the men in the three cases where access time was contested were arguably emotionally maltreating the mothers by controlling their time for work or respite and by making them responsible as well as controlling their actual or potential material resources. They did this either by defining the role which the mother had to take by default in addition to what had been agreed, or her access to money (through reduced child support, increased liabilities for child care costs or inability to work because of child care commitments) or both. In *Cunliffe v Cunliffe* there was a detailed agreement with precise formula for access by Mr Cunliffe. But "there had been occasions when arrangements had been cancelled without warning causing stress and creating difficulties for [the mother] and the children."<sup>605</sup> In spite of the agreement, Ms Cunliffe believed "she had borne the brunt of caring for the children and [Mr Cunliffe] had contributed to their care spasmodically and inadequately."<sup>606</sup> Ms Cunliffe's time was being controlled by Mr Cunliffe. As Judge Keane put it Mr Cunliffe was clear that he would decide "when and in what circumstances he will exercise access."<sup>607</sup> Mr Cunliffe did not acknowledge that he had not kept to his side of a formal agreement and that he in effect demanded that Ms Cunliffe take responsibility for something he had agreed to do himself, causing stress and difficulties for her. Since they taught at the same school, it is likely he understood the implications of his unreliability for her work commitments unlikely to have been limited to the hours she was at school.

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<sup>605</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 539.

<sup>606</sup> *Cunliffe v Cunliffe*, above, 539.

<sup>607</sup> *Cunliffe v Cunliffe*, above, 538.

Mr Cunliffe's response that "I will not be and the children should not be, subject to the inflexible demands of Ms Cunliffe,"<sup>608</sup> can be seen as an attempt to control her by defining her reality and motivations as well.

Ms Collins' position is not as fully described. She refers to a "battle" getting Mr Sawtell to "exercise proper access" to their daughter; that it is "helpful for me to know that on regular occasions I can have a break ... He tries to punish me (because of the level of child support he has to pay) by not seeing her."<sup>609</sup> Mr Sawtell's passivity and his refusal to discuss his plans or negotiate were also arguably abusive. He filed no notice of defence, and confirmed his attitude at the pre-trial conference had not changed. From this it is possible to infer that he saw his position as a justifiable, strong one that both corresponded to Ms Collins description and did not require defending. He felt free to choose the extent to which he exercised his responsibility without concern for the effects of this.

Mr MacDonald stated that his work commitments prevented him spending more time with the children. He also wanted more free time at the weekends. He believed that any changes to access "must be able to be accommodated within my work and other family commitments."<sup>610</sup> He did not address the issue of Ms Bramley's work and family commitments. As Judge Ellis put it there was an implied premise that<sup>611</sup>

The father's responsibility for the children would be defined in terms of what he wanted and at times when he was able to make himself available, having regard to work and other commitments, whereas she [Ms Bramley] would be required by default to accept responsibility for the children at all other times irrespective of her own commitments.

Mr MacDonald also arguably threatened Ms Bramley by applying for custody. Since he desired to reduce his responsibility, this may have been done to make Ms Bramley frightened to lose custody so that she would therefore accept more responsibility. This is what appears to have happened.

Mr MacDonald's claim that he had the children most of his non-working hours (although the longest time he had the children outside holidays was forty-eight hours every second weekend)

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<sup>608</sup> *Cunliffe v Cunliffe*, above, 540.

<sup>609</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC), 881.

<sup>610</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 8.

<sup>611</sup> *Bramley v MacDonald*, above, 4.

ignored the fact that Ms Bramley had the children the rest of the time, not only for all of her time outside work during the week, and that she also had to organise care for when she was at work, after school, when the children were sick, when she was ill. As His Honour said, it seemed<sup>612</sup>

entirely reasonable for the mother to protest that her ability to order her own work and personal commitments should not be arbitrarily limited “by default”, simply because the father will not make himself available to share the care of the children at times which do not suit him.

“Arbitrarily” is a word that implies use of privilege, or power; in this situation control over Ms Bramley, and therefore potential abuse, can be inferred.

The presence of this control may have affected her ability to nurture the children on her own; and her ability to make plans for her own recreation or development, particularly development of her marketable skills or career.

Paternal control, and use of debilitating and ambivalent power, and unwillingness in relation to “caring for” responsibilities may be connected to child support issues. The shadow of child support responsibility affects, explicitly, both *Collins v Sawtell*, *Bramley v MacDonald* and *W v W*.

Before separation, fathers are more likely to be involved in direct childcare responsibilities if the mother is in paid employment only “if their wives, compared to other women, [earn] relatively more of the family income [or works] more hours a week in the paid workforce.”<sup>613</sup>

This fits with the “reciprocity” hypothesis,<sup>614</sup> that if mothers have significant resources to offer men in return for childcare, paternal involvement is higher than if they have not. Fathers participate more in childcare if their partners make as much money or more money than they do but do not if they or the mothers have few benefits to exchange.

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<sup>612</sup> *Bramley v MacDonald*, above, 13.

<sup>613</sup> Deutsch F M *Halving It All; How Equally Shared Parenting Works* (1999) Harvard University Press, 4.

<sup>614</sup> See above Chapter 2 n 14.

Men might also engage more in domestic work “if they or their wives [have] relatively liberal ideas about gender.”<sup>615</sup> However even in the households where men “[do] more than their male peers, they usually [do] a lot less than their wives.”<sup>616</sup>

There seems to be no research directly about reciprocity after separation but it is possible that the enforcement of child support responsibilities “the one duty that requires no contact between parent and child and [which] can only serve the interests of the child”<sup>617</sup> can create resistance to assuming other responsibilities, as was Chesler’s experience, described in the quotation that heads this section. Alternatively, “caring for” responsibilities may be taken on if a parent sees a possible benefit in reduction of child support.<sup>618</sup>

The fathers exhibited a range of behaviours in relation to child support, where the comparatively rigid assessment process may have caused them to experience situational powerlessness. Mr W’s maltreatment of Ms W in relation to financial resources was perhaps the most sophisticated in that he had formed a trust to avoid paying more than the minimum child support. In contrast, in *Collins v Sawtell*, Mr Sawtell allegedly maltreated Ms Collins in relation to her time because of the child support he had to pay. In *Cunliffe v Cunliffe* and *Bramley v MacDonald*, payment – or responsibility - for care during illness (the children’s or the mothers’) was in issue and in *Bramley v MacDonald* Ms Bramley explicitly addressed this through Child Support Act mechanisms.

In summary, the hierarchy of care was not working in three of the cases, and was arguably problematic in *W v W* because although access was tightly defined and appeared to be being exercised, the other conditions under which Ms W was required to parent were unacceptable. Ms Bramley was the only mother to challenge the assumption that she would continue as primary parent regardless of the conditions under which she was required to do so. The benefits to their children of a relationship with a second parent were unquestioned by the mothers. Issues of power and powerlessness existed in all the cases.

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<sup>615</sup> Deutsch, above, 4.

<sup>616</sup> Deutsch, above, 4.

<sup>617</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 543.

<sup>618</sup> If parenting is shared according to the Child Support Act definition financial obligations under the Act may be less onerous: see above Chapter 3 n 83 and accompanying text. See also above Chapter 2 nn 14 and 62 for information about child support liability and reciprocity.



The mothers' choices of action and the judges' analysis of the law in relation to the facts precluded some of these issues being addressed. Power and powerlessness, for instance, though pervading all four cases, was addressed and to some extent ameliorated only in two of them, *Bramley v MacDonald* and *W v W*. Of all the mothers, only Ms W received the outcome she sought (and more), arguably because the judge was concerned not only about the welfare of her children but also about the conditions under which she was required to parent; and was prepared to use his wide discretion to effect a change. However, although the judges' interpretation of the law will be questioned, it will be acknowledged that it may have been very difficult to ensure that Ms Cunliffe, Ms Collins or Ms Bramley received the results they sought.

*(iii) The benefits and disadvantages of a relationship with an auxiliary parent*

*[A]s the psychologist has perceptively pointed out, if the husband wants to see his daughters grow up as strong women, the last thing he wants to do is to allow them to see him intimidating a woman.*<sup>619</sup>

Many writers question - as Family Court judges sometimes do<sup>620</sup> - whether contact with an auxiliary parent is always beneficial and identify unpredictable access as a behaviour which adversely affects children.<sup>621</sup> Certainly the preconditions for access that "works" described by Trinder et al do not exist in the first three cases. However, the precise benefits and disadvantages of access for the children concerned are not analysed by any of the judges in these cases.

In *Cunliffe v Cunliffe* (where, as in *Collins v Sawtell* the jurisdictional decision precluded the children's welfare being considered) Ms Cunliffe claimed that her children were unsettled and experienced "stress and difficulties"<sup>622</sup> because they did not know how they were to spend their weekends, and arrangements were cancelled without warning. Ms Collins, perhaps because she believed that a father was essential for her child's wellbeing claimed that her seven year old

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<sup>619</sup> *W v W* (16 January 1998) Family Court Palmerston North FP0544 427979, 6.

<sup>620</sup> See for instance Chapter 4 n 75 above.

<sup>621</sup> These include, referred to in Chapter 2 above: Kelly and Ward n 158 (conditionally); Lee n 25; McDowell n 191; Maclean and Eekelaar n 160; Rhoades n 106; Smart n 192; Smith et al nn 153, 188; Sturge and Glaser n 190; Trinder et al nn 164, 193-195; and Wolchik n 47; and accompanying text.

<sup>622</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 539.

daughter suffered from not seeing her father apparently for the three years since the couple separated.<sup>623</sup>

In *Bramley v MacDonald* it was found that the children enjoyed the access they had and were bonded to their father. The benefits of access in the circumstances appear to have been assumed, by the section 29A reporter and by the Court. In *W v W* His Honour did not address the issue directly; access was “precisely defined” and the only change to the consent order was the addition of conditions.

Although the intrinsic benefits of a relationship with an auxiliary parent appear to have been taken for granted in these cases continuing access arrangements, whether or not the access was exercised, may have placed the children at risk because of their fathers’ ambivalence towards caring for them<sup>624</sup> and high levels of parental conflict.<sup>625</sup>

The unique benefits any parent offers are those relating to identity and (usually gender-related) role modeling. Role modeling by the auxiliary parent was problematic in these cases because of the different parental standards of care and the ways that the fathers appeared to treat the mothers, as acknowledged by Judge Inglis QC in the statement from one of the cases, *W v W*, that heads this section.<sup>626</sup>

Other relevant potential risks include the escalation of the climate of conflict around the child, direct experiences of neglect by the children’s fathers (in the three access cases by unwillingness to take responsibility and in *W v W* by the withholding of child support and failure to model good parenting); and by continuation of unhealthy relationships including situations where the child is

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<sup>623</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC), 881.

<sup>624</sup> Sturge and Glaser believe that legal processes tend to underestimate the impact on the child and the child’s situation of a father’s unreliability. Sturge C and Glaser D “Contact and Domestic Violence - The Experts’ Court Report” (2000) *Family Law* (September) 615, 618.

<sup>625</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 1. Sturge and Glaser also note that legal proceedings often mean a standstill in the child’s overall life and development while his or her carer’s emotional energies are taken up with the case: Sturge C and Glaser D “Contact and Domestic Violence - The Experts’ Court Report” (2000) *Family Law* (September) 615, 619.

<sup>626</sup> Sturge and Glaser claim that when parents deliberately or inadvertently set different moral standards this undermines a child’s sense of stability and continuity; this is particularly likely to occur when parents unable to communicate well or at all. Sturge C and Glaser D “Contact and Domestic Violence - The Experts’ Court Report” (2000) *Family Law* (September) 615, 618.

aware of continuing fear about the contact parent on the part of the custodial parent.<sup>627</sup> (at least in *W v W* and possibly in the other cases).

However much the children wanted to see their fathers, in these circumstances the benefits to them arguably may not have outweighed the detriments.

## 2. Legal issues

It was held in each of the three cases where the primary carer wanted the auxiliary parent to take more responsibility, having considered both the general framework of the Guardianship Act and individual provisions, that it was not possible to compel an unwilling father to assume specific responsibilities. As Judge Ellis put it in *Bramley v MacDonald*:<sup>628</sup>

While the Act provides some rules by which to determine disputes between persons who are contesting the rights to possess, care for and control children, the Act does not in fact spell out the responsibilities of parents and/or guardians, nor does it provide any framework within which one might enforce the responsibilities of guardianship against a parent or guardian unwilling to recognise them.

In *Cunliffe v Cunliffe*, Judge Keane stated that the main function of the law was “to govern the authority claimed or exercised by guardians ... not to promote directly or enforce the duties of guardians”<sup>629</sup> and that the only duty that parents had was to maintain children regulated by the Child Support Act. His Honour found that although he could not state categorically that no jurisdiction existed because the Court’s powers were widely expressed in the statute and he had identified the constraints by inference, “no express power to coerce a parent to assume his or her responsibilities” existed and “this omission seems to me unlikely to be accidental.”<sup>630</sup> The other parent, or the Director-General of Social Welfare assumed responsibility “informally” where “one parent is derelict ... and the child’s welfare suffers.”<sup>631</sup>

In *Collins v Sawtell*, Judge Inglis QC decided that<sup>632</sup>

[i]f Parliament had intended the provisions of the Guardianship Act to be used for the unusual purpose of compelling a reluctant parent to have access to a child, presumably enforceable only by contempt

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<sup>627</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 620.

<sup>628</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 10.

<sup>629</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 541.

<sup>630</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 542.

<sup>631</sup> *Cunliffe v Cunliffe*, above, 542.

<sup>632</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC), 881.

proceedings, it would have been expected to have said so expressly rather than to have left jurisdiction to be inferred on the basis of indications which point in the other direction.

Although there is no explicit framework in the Act to “enforce” access there is a framework for resolution of custody and access issues. Within these there is a wide discretion and a number of mechanisms that could have been used to resolve these cases.

To give one example, Judge Ellis in *Bramley v MacDonald* to some extent enforced access by ruling that Mr MacDonald’s Friday nights with the children were to continue.<sup>633</sup> He reached this decision by, he stated, focusing on the welfare of the children, who enjoyed their Friday nights with their father. Judge Ellis’ attempt to compel a reluctant parent was not necessarily successful, but his focus on the welfare of the children was one way to respond to a legislative scheme designed to resolve conflict between parents.

The range of remedies suggested by the judiciary for resolving access issues when a custodial parent is unwilling to facilitate access also demonstrate that it need not necessarily be impotent in relation to parental unwillingness to exercise access.

However, within the Act, 10(2) is perhaps the most obvious possibility for use in these circumstances.

(i) Section 10(2)

Although it is acknowledged that an element of practicality entered into the decisions, it is arguable that the “no jurisdiction” decision reached in *Cunliffe v Cunliffe and Collins v Sawtell* was possible only through use of the assumptions being questioned within this thesis, that Ms Cunliffe and Ms Collins (unlike Ms Bramley) would continue to take full responsibility “informally” regardless of the conditions under which they were required to do this; and that the children needed a relationship with their fathers. Alternatively, the decisions were based on the belief that the fathers had an absolute right to retain their guardianship status, unless “for some grave reason unfit” to do so. This reason, it has been argued, is due to a narrow (mis)reading of section 10(2) where the legislative scheme recognises that some auxiliary parents are unwilling to

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<sup>633</sup> Defining access arrangements precisely is one strategy used frequently where there is conflict between parents. While it is likely to be successful sometimes, if an auxiliary parent chooses to ignore the arrangements there is little the custodial parent or the Court can do because there is no sanction in place if this happens. This may be one reason why *Bramley v MacDonald* was still being litigated in 2003.

exercise their guardianship and provides for a replacement auxiliary parent in these circumstances. It has also been argued that a failure to read the two parts of section 10(2) disjunctively and to explore the meaning of “willingness” does not serve children well.<sup>634</sup> This is particularly so since the section refers explicitly to “responsibilities” rather than “rights”.

Judge Keane in *Cunliffe v Cunliffe* states however that a guardian’s rights would be removed only in “the extreme and unusual case,”<sup>635</sup> having read the Act as about rights rather than enforcing responsibilities. But in *Bramley v MacDonald*, Judge Ellis’ wider view was that the “maintaining of regular contact with the children to provide opportunities for exercising rights of care and control would be a minimum” necessary to stay below the threshold.<sup>636</sup> This more recent, obiter, view, could point to a change in judicial attitudes, to consider removing as guardian a parent who does not maintain regular contact. (There is no reference to section 10(2) by Judge Inglis QC in *Collins v Sawtell*, nor in *W v W*.) However, Mr MacDonald was maintaining enough contact with his children to retain their strong attachment to him.<sup>637</sup> The Court may have recognised that on these facts, since she was seeking more rather than less involvement by Mr MacDonald, it was unlikely that Ms Bramley would consider applying under s 10(2) to terminate his guardianship. In both cases, the threshold was placed beyond the facts being considered.

There appears to be no case where someone has applied for a parent to be removed as guardian on the basis that he or she has not exercised the minimum of regular contact with a child. Judge Keane does not state what “an extreme and unusual case” might be, although *A v D-GSW*<sup>638</sup> (decided in 1995, after *Cunliffe v Cunliffe*) limited the circumstances where guardianship rights could be removed because the guardian is “for some grave reason unfit.” Because the meaning of “willingness” in section 10(2) has never been fully argued and being “willing” may be subjective on the part of a parent whose willingness has been considered,<sup>639</sup> the more objective test of the minimum regular contact necessary suggested by Judge Ellis could be an unacceptable standard. For instance, if Ms Collins or Ms Bramley sought to have Mr Sawtell or Mr MacDonald removed as guardian, these fathers could argue that they were willing but other circumstances (for instance

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<sup>634</sup> See above Chapter 3 nn 10-26 and accompanying text.

<sup>635</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 542.

<sup>636</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 10.

<sup>637</sup> According to the s 29A report: *Bramley v MacDonald*, above, 8-9.

<sup>638</sup> See above Chapter 3 nn 12-13 and accompanying text.

<sup>639</sup> See above Chapter 3 nn 10-26 and accompanying text.

the family commitments that Mr MacDonald claimed might prevent him from having the children on Fridays, or work) made it impossible for them. However, as has been submitted<sup>640</sup> the combination of the second part of section 10(2) and the provision of section 16 for an alternative access parent offers an opportunity that is worth considering when auxiliary parents are unwilling to exercise their guardianship right to contact with their children. The words of section 10(2) do not include “extreme and unusual case.”

(ii) Section 13

In *Cunliffe v Cunliffe* and *Collins v Sawtell* the Court considered the provisions of section 13 of the Act. Section 13 is about the regulation of parental authority, “on any matter concerning the exercise of their guardianship” and allows for guardians<sup>641</sup> and custodians<sup>642</sup> to ask the Court for direction. Joint custodians may seek directions if they are unable to agree “on any matter affecting the welfare of the child.”

Within their overarching reasoning that the Act legislates for rights rather than responsibilities, each Judge has different reasons for placing enforcement of access outside the provisions of section 13 and thus limiting the ambit of the Act by refusing to act on a matter, the exercise of access, which arguably may affect the welfare of the child. Partly because these cases followed *Makiri v Roxburgh*<sup>643</sup> and other cases using the section to resolve the exercise of guardianship in relation to responsibility for children, their reasoning, with respect, is not convincing.

In *Cunliffe v Cunliffe* Mr Cunliffe’s authority as a guardian was established. He had a right to access as a consequence. However, His Honour doubted whether section 13 “could begin to apply”<sup>644</sup> in *Cunliffe v Cunliffe* because it could not be invoked “in disputes which involve in truth custody and access.”<sup>645</sup> He cited *W v W*<sup>646</sup> as authority for this and distinguished cases cited by the applicant, including *Makiri v Roxburgh*,<sup>647</sup> on the grounds that the parents in these cases

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<sup>640</sup> See above Chapter 3 nn 20-22 and accompanying text.

<sup>641</sup> Section 13(1).

<sup>642</sup> Section 13(2).

<sup>643</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC); see above Chapter 3 nn 33-35, Chapter 4 n 56, and below Chapter 6 nn 3-4; and Chapter 7 n 234 and accompanying text.

<sup>644</sup> *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC), 544.

<sup>645</sup> *Cunliffe v Cunliffe*, above, 544.

<sup>646</sup> *W v W* [1984] 2 NZFLR 335 (CA). See above Chapter 3 nn 32-35 and accompanying text, and above n 34.

<sup>647</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC).

were willing to care for or have greater contact with their children. However section 13 was arguably appropriate *because* Mr and Ms Cunliffe had a custody/access regime in place. There was no argument about who was the primary carer and the arrangements for access. It was simply that the exercise of guardianship was not working and this might affect the welfare of the children.

Judge Keane's reasoning, in summary that although the issue could not be considered because the Act regulated only rights, including those of custody and access, it was nevertheless enough about custody and access not to be a dispute about matters concerning the exercise of guardianship (under section 13) seems with respect, a little weak. It appears to rely on the assumption that if a mother has custody she will therefore be (informally) available to assume responsibility at all times. It may also rely on the assumption that an auxiliary parent's relationship with his children is at his discretion and will benefit his children however unreliably he exercises it. Although there was a possibility that Mr Cunliffe was neglecting his children, because the Court doubted that it had jurisdiction - and apparently Ms Cunliffe did not test this further - this possibility and any solution were unexplored. The welfare of the children remained unaddressed.

Judge Inglis QC's reasoning in *Collins v Sawtell* was a little different. The facts were different: Mr Sawtell did not exercise access at all. His Honour distinguished between a parent who exercises his or her legal rights "in a way that can be questioned" and a parent who declined to exercise those rights "in any way". Section 13 did not authorise the Court to make an order to make the latter kind of parent exercise access.

This reasoning too, with respect, is a little deficient. Although Mr Sawtell may not have been exercising his rights to access he had not declined to exercise his rights to guardianship in any way. He was exercising his rights to guardianship when he agreed to a consent order for access; and he was controlling his child's reasonable access to her father. He was also paying child support as one of his responsibilities as a parent. The exercise of access was arguably best

described as a neglected part of his guardianship function.<sup>648</sup> He was therefore exercising his rights in a way that could be questioned.

Judge Inglis QC has said elsewhere that "the focus must be not so much on the parental right in the abstract but rather on how and whether that right is to be exercised and the impact of its exercise or non-exercise on the child."<sup>649</sup> But here he refused to focus on how and whether Mr Sawtell's guardianship-generated right was to be exercised and the impact of its non-exercise on the child.

One result of this, and these two cases, is that "compelling a reluctant parent to have access" seems more "unusual"<sup>650</sup> than compelling a primary parent to continue to facilitate access for a reluctant, unwilling, ambivalent or unreliable secondary parent. Again, this appears to depend on the assumption referred to, that mothers will continue to care for their children and facilitate access regardless of the conditions under which they are required to do so. Because of the assumption that absent physical or emotional violence access rights should be upheld, it is not asked whether, when a custodial parent is reluctant or unwilling to facilitate access, is it good for children to continue access in these circumstances, nor whether the reluctance has valid reasons.

In *Bramley v MacDonald* where neither parent was initially a custodian, section 13(2)<sup>651</sup> may more easily have been brought into play following *Makiri v Roxburgh*.<sup>652</sup> However, in the single decision under consideration the application, initiated by Mr MacDonald, was to define access.<sup>653</sup>

### (iii) Section 23(1)

In their unwillingness to accept jurisdiction, the judges in *Cunliffe v Cunliffe* and *Collins v Sawtell* failed to prioritise the welfare of the children although for the reasons given they could have heard the mothers and attempted to find a resolution. By stating in *Cunliffe* that the child

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<sup>648</sup> The failure of each judge to find jurisdiction may relate to the difficulty of finding language that describes some kinds of neglect and their effects in a way that recognises its seriousness.

<sup>649</sup> *Neho v Duncan* [1994] NZFLR 157 (FC), 160.

<sup>650</sup> *Collins v Sawtell* [1995] NZFLR 880 (FC), 881.

<sup>651</sup> "Where more than one person has custody of a child and they are unable to agree on any matter affecting the welfare of the child ..."

<sup>652</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC). See above Chapter 3 nn 33-35, 38, above nn 133, 137, and below Chapter 6 nn 2-3; and accompanying text.

<sup>653</sup> There have been many hearings in this case. The latest, in 2003, terminated access to the younger child (personal communication, Ms Bramley) I have been unable to obtain a copy of this decision.



“may *become*<sup>654</sup> the victim of neglect, or abuse, or simply made unhappy” His Honour implies, without having made any investigation at all, that these children are currently experiencing none of these things; he neglects to prioritise the children’s welfare as the statute requires. One of Judge Inglis QC’s own decisions, *McClelland v McClelland*<sup>655</sup> has been cited by the Full Court of the High Court in *P v K* in support of the proposition that because Family Court proceedings are “non-adversarial and investigative”<sup>656</sup> (rather than adversarial) “it may sometimes be the duty of the Court to look beyond the submissions of the parties in its endeavour to do what it judges to be necessary,”<sup>657</sup> because the Court’s first duty is to the child. Judge Inglis QC did this in *W v W* when he required Mr W to make a regular payment to Ms W. But in *Collins v Sawtell* he did not look beyond the submissions of the parties in its endeavour to do what the Court judges to be necessary, in spite of Ms Collins saying that her daughter “suffers” as a result of Mr Sawtell’s neglect.

This could have been done by a fairly straightforward investigation, by accepting jurisdiction and asking for a section 29A report to discover more about how the children’s welfare needs were being met, including the effects on the children of their fathers unreliability, then considering how the children’s needs might be enhanced. In contrast, in *Bramley*, because Ms Bramley’s strategy was different, the children’s welfare was placed centrally where it belonged. As Judge Ellis there pointed out:<sup>658</sup>

The discretion of the Court as to the conditions which may attach to a custody or access order is after all unfettered, allowing the Court to make any order “*subject to such conditions as the Court thinks fit*”.

The mothers’ strategy for being heard seems to be crucial. If Ms Cunliffe and Ms Sawtell had applied for a variation of custody or access that might have enabled the Court more easily to consider the issues for the children.

#### *(iv) The Guardianship Act and child support*

The relationship between child support and the Guardianship Act was considered in two of the four cases, *W v W* and *Bramley v MacDonald*.

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<sup>654</sup> Emphasis added.

<sup>655</sup> *McClelland v McClelland* (17 December 1998) Family Court Wanganui FP 083/205/97.

<sup>656</sup> *P v K* [2003] 2 NZLR 787 (HC) 816 Priestley J citing *Re L* [1997] AC 16 (HL), 28 Lord Jauncey of Tullichettle, as cited by Judge Inglis QC in *McClelland*. See below Chapter 8 nn 141-142.

<sup>657</sup> *P v K*, above, 816, citing *Re E* [1984] 1 WLR 156, 158-9 (HL) Lord Scarman also cited in *McClelland v McClelland*.

<sup>658</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 13. Italics in decision.

In *W v W* the Court referred to the possibility that Inland Revenue might pursue Mr W over the trust he had set up to avoid paying child support.<sup>659</sup> It made it a condition of access that Mr W pay a sum weekly by irrevocable automatic payment to the children's mother "who seems chronically short of money."<sup>660</sup> The imposition of this condition appears to be unique among the cases surveyed. The condition acknowledges, at least in this case, the inequitable economic conditions under which a custodial mother cares for her children. Here one cause of these conditions is the action taken by Mr W.

There is no indication that Child Support proceedings had been initiated by Ms W or were being addressed by her in relation to access issues. The financial condition imposed in *W v W* is related to a failure to provide financial support, rather than failure to contribute adequately to the "caring for" responsibilities for the couple's children. It is arguable that this failure should therefore have been addressed through the appropriate legislation, the Child Support Act.

Judge Inglis QC's almost casual importation of child support issues into an access decision without discussing the different roles of the two acts is at odds with Judge Ellis' decision in *Bramley v MacDonald*.

Judge Ellis considered importing "some effective financial sanction"<sup>661</sup> to the Guardianship Act so that if Mr MacDonald failed to take a specific after school responsibility he would "pay a financial penalty to the mother sufficient to assist her to fund the necessary day care."<sup>662</sup> His Honour considered the objects of the Child Support Act, and noted that the objects of the Act could not be reconciled with the Guardianship Act particularly in relation to equity between custodial and non-custodial parents. He then decided that it was inappropriate to confuse the issues under the Guardianship Act with those "which have been and are being separately addressed under the Child Support Act."<sup>663</sup> His Honour suggested that Ms Bramley pursue child care and holiday costs in the context of child support.

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<sup>659</sup> *W v W* (16 January 1998) Family Court Palmerston North FP0544 427979, 9.

<sup>660</sup> *W v W*, above, 9.

<sup>661</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 13.

<sup>662</sup> *Bramley v MacDonald*, above, 13.

<sup>663</sup> *Bramley v MacDonald*, above, 14.

In *Bramley v MacDonald*, Judge Ellis was thus scrupulous in keeping financial responsibility separate from access responsibilities. He appears not have been aware of *W v W*, decided a year earlier and unreported, when referring to the lack of precedent for attaching a financial penalty to an access order, a position completely opposed to that of Judge Inglis QC in *W v W*.<sup>664</sup> If he had been aware of *W v W* he could perhaps have argued that since a financial condition directly related to child support liability could be attached to an access order a financial penalty closely related to the exercise of access could also be attached if appropriate.

*Bramley v MacDonald* and *W v W* demonstrate that the Guardianship Act can be flexible in dealing with the economic inequity generated by the “caring for” day-to-day responsibilities, that is largely a women’s experience. In this situation, at the moment, a parent may have to pursue financial equity between parents through Child Support Act processes.<sup>665</sup> However, it is argued that it is important to distinguish this issue from the imposition of costs incurred by mothers because of unreliable exercise of access; and the potential to impose penalties for failing to exercise access as agreed, under the discretion given to the Court in the Guardianship Act. There seems no reason why these issues could not be resolved under the Guardianship Act by an access condition involving a monetary penalty if access is not exercised reliably or at all. If the kind of condition imposed by Judge Inglis QC on Mr W’s access is possible it seems a particularly useful mechanism if the custodial parent does not otherwise receive any child support directly (because she is in receipt of a Domestic Purposes Benefit). *W v W* appears to have gone unchallenged.

*Bramley v MacDonald* and *W v W* are remarkable as being the closest Family Court judges have come to acknowledging and importing gender equity principles into Guardianship Act proceedings and to challenging the assumption that mothers who provide primary care will continue to do so regardless of the costs to them. Together these two cases appear to leave it open for a mother to argue for financial penalties if access is unreliable or unexercised.

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<sup>664</sup> *Bramley v MacDonald*, above, 12-14.

<sup>665</sup> In Ms Bramley’s action under the Child Support Act the Court increased the amount that Mr MacDonald had to pay from the current assessment of \$10,000 per annum to \$18,000 per annum, while rejecting Ms Bramley’s argument that her own commitments and saving for the children’s university education were special circumstances justifying a departure order. It accepted however that inequitable income (Mr MacDonald earned six times the amount that Ms Bramley did) and resources made the formula assessment unjust: *Bramley v Commissioner of Inland Revenue* unreported Family Court Wellington, 22 October 1998, CS 2/98, Judge Johnston. See also Chapter 3 n 84-85 and accompanying text for one problem under the Child Support Act in relation to equity: A father’s commitment to day to day care for children may be seen as compromising his career in a way that a mother’s commitment will not be seen as compromising hers.

#### IV. Concluding Remarks

This chapter has considered four cases in relation to the issues explored in the contextual material, with reference to the hierarchy of care, power and powerlessness, the benefits and disadvantages of a relationship with an auxiliary parent and issues raised in the Guardianship Act and in relation to child support.

*Cunliffe v Cunliffe*, *Collins v Sawtell* and *Bramley v MacDonald* have been found to exemplify how the hierarchy of care cannot work when an auxiliary parent, after separation, refuses to have his relationship with, and responsibility for, his child facilitated by the primary parent. In these cases the auxiliary parents appear to have inappropriately exercised ambivalent power over the primary parents and their children, through the kinds of mechanisms discussed in Chapter 2. However, in *Cunliffe v Cunliffe* and *Collins v Sawtell* where it refused jurisdiction, or in *Bramley v MacDonald* where it accepted jurisdiction, the Family Court was unable or unwilling to impose responsibility on an unwilling auxiliary parent and did not impose a penalty on the auxiliary parent.

It is argued that although in *Bramley v MacDonald* the Court acknowledged the difficult conditions under which Ms Bramley was required to parent, by default, in all three “ambivalence” cases, the assumptions being investigated in this thesis underlay both the actions taken by the primary carers, except for Ms Bramley in her initial refusal to be the custodial parent, and the justifications made by the Court. *Bramley v MacDonald* also demonstrates that where a father shares some responsibility, regularly, a mother must collude with the assumption that arrangements after separation work well if established with regard for “[T]he parents’ prior caregiver roles [and] their [the auxiliary parents’] availability and commitments (particularly employment).”<sup>666</sup>

The fathers in these cases were therefore included in the parenting process on terms that further institutionalised and privileged their rights and social and economic advantages. At the same time, the mothers’ parental responsibilities and social and economic disadvantages were also institutionalised. In effect each mother was required to compensate for a father’s neglect of his

child and to protect the child if possible from the effects of this neglect at the same time as supporting whatever relationship the auxiliary parent chose to have with the child. The children involved were also arguably disadvantaged by these decisions through exposure to continuing neglect from their auxiliary parents, as well as the effects of ongoing parental conflict.

These cases, it is submitted, therefore support an argument that assuming that any relationship with an auxiliary parent is better than none (absent physical or sexual abuse) the Court will not impose responsibility on a father or a penalty taking into account the conditions under which the primary parent has to care for their children.

A mother who refuses to fulfil her expected role as primary carer by facilitating auxiliary care without expectations that her availability and commitments are treated equally may expect the Court to make decisions that take for granted her commitment to primary care, regardless of the consequences of it for her and the children.

In contrast, in *W v W*, where the auxiliary parent's behaviour was conceptualised as abusive by the Court, as part of a comprehensive strategy of control, the Court attached financial conditions to a care arrangement, even though the auxiliary parent was also paying child support. As well as remedying financial inequity in *W v W*, Judge Inglis QC made a statement about the effects on the children of their father's behaviour to their mother.<sup>667</sup> He was aware of the effects of gender inequity - including the withholding of resources - manifest in expressions of domestic violence but it seems that this awareness is contingent on the presence of physical violence.

These decisions reflect the emphasis of the jurisprudence surveyed in Chapter 4.

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<sup>666</sup> Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000), 8. See above Chapter 4 n 31 and accompanying text.

<sup>667</sup> See above n 109 and accompanying text.

## Chapter 6. Paternal Insistence on Equality - *W v C*

### I. Introductory Remarks

This chapter analyses *W v C*,<sup>668</sup> a consistent reference point in papers and submissions<sup>669</sup> addressing the allocation of shared parental responsibility. Decided, at its second hearing, by Judge Inglis QC, it can be read as a development of His Honour's philosophy on the entrenched status of guardianship rights developed in *Makiri v Roxburgh*.<sup>670</sup> In *Makiri v Roxburgh*, reasoning that custody and access arrangements often leave the access parent with only the "shell" of guardianship, His Honour used section 13 of the Guardianship Act to change an established de facto custody and access regime where a child's mother had been primary carer of the child for eight years. The regime established by His Honour in effect changed custody to the child's father (who lived in another city); he and his wife became the primary carers during term-time and the mother during the holidays, a very similar arrangement to many where one parent has custody and the other access.<sup>671</sup>

In *W v C*<sup>672</sup> His Honour could not use section 13 to allocate responsibility because there was already a joint custody order in place. However, although he conceded that a custody and access regime is sometimes appropriate, in his response to these facts he sought other ways to entrench the concept of shared parental responsibility, without acknowledging the realities of the hierarchy of care or questioning the assumptions under investigation in this thesis.

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<sup>668</sup> *W v C* (20 October 1999) Family Court Tauranga FP 070/213/96 Judge Carruthers; *W v C* [2000] NZFLR 1057 Judge Inglis QC.

<sup>669</sup> See above Chapter 4 nn 17, 25, 62 and accompanying text and below Chapter 7 (especially Chapter 7 III. 3. *W v C* is overruled).

<sup>670</sup> *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC); see above Chapter 3 nn 33-35, Chapter 4 n 56 and Chapter 5 nn 133, 137, 142; and accompanying text

<sup>671</sup> The father and his partner were unable to have children and had never cared for children and the father's commitment to the child during the early years seems to have been limited although he and the child shared a "remarkably strong emotional bond" (*Makiri v Roxburgh*, above, 674). However by *Makiri v Roxburgh* (no 2) [1990] NZFLR 182 (FC) the "friendly, happy well adjusted child" of 1988 was defined as "an abused child" by the psychologist reporting to the Court. The emphasis placed by the psychologist and then the judge on the mother's past abuse of the child and her recent "emotional pressure" of him (although the psychologist had not interviewed the mother) meant that the mother lost access. The responsibility for the change in the child since he left his mother's care was placed on the mother's failings. There was no apparent investigation as to whether a change in household after eight years, away from his two half-sisters, to a childless family where both carers were inexperienced and worked outside the home might have had something to do with the child's transformation.

<sup>672</sup> In November 2002 there was an appeal pending.

The facts and judicial response to the issues, including the law on guardianship, guardianship after separation and the effects of social change are discussed. The judicial response to the facts of the case is then considered in the context of the hierarchical structure of care, “willingness” and parental responsibilities before after separation, the actual benefits and disadvantages of access including the unique contribution of fathers; and power and powerlessness and the role of control. Finally the language of the judicial response is closely examined.

## II. The Facts

Ms W and Mr C married in 1993 and their son “J” was born in November 1995. They separated in March 1996, reconciled for two and a half months and separated again. There are no details about how the parenting was shared before separation, though Ms W said that Mr C was “a good father to this child whilst he was involved in his life,”<sup>673</sup> for a total of six and a half months.

Mr C, who “has involved himself extensively in Men’s Rights Groups in this country” believed that the Family Court had always operated “adversely to fathers’ interests and therefore...to children’s interests as well.”<sup>674</sup> He applied for joint custody in November 1997, with specified amounts of time with each parent subject to a “default arrangement:” if his time with J did not gradually increase the child’s time would be equally divided between Mr C and Ms W. Ms W cross-applied for custody in January 1998.

For nearly two years before the first hearing, before Judge Carruthers in October 1999 Mr C had no contact with J because Ms W would not accept the “principle of equal sharing.”<sup>675</sup> This principle is not defined in the decision, but may be an equal sharing of time since:<sup>676</sup>

It is because he sees a shorter amount of time or an abrogation of this principle as creating a ‘toxic’ (his words) situation for J that he has refused to have any lesser contact over these two years apart from one fleeting occasion by accident ... There is no basis on which a joint custody order could be considered as being in the best interests of this young boy if it involved equal sharing in the way that Mr C presently desires.

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<sup>673</sup> *W v C* (20 October 1999) District Court Tauranga FP 07770/216/96.

<sup>674</sup> *W v C*, above, 3.

<sup>675</sup> *W v C*, above, 2.

<sup>676</sup> *W v C*, above, 3, 5.

Mr C had removed himself from his own extended family because he perceived that family members had supported Ms W rather than himself. Ms W, on the other hand had good relationships with Mr C's parents and "in a sensible way was promoting that for J."<sup>677</sup>

Judge Carruthers stated that a joint custody order works well "only when there is a significant measure of respect between each parent for each other's parenting and cooperation between parents."<sup>678</sup> However, he also acknowledged that "it might be of use" even though the parents were in conflict if the times when each parent would care for the child were specified. He therefore directed that there be a joint custody order.

Because Mr C had seen J only occasionally, his contact was limited to two hours twice a week for two months. After this the order would be reviewed and if all had gone well Mr C's time with J would then be "considerably" increased. The two months became eight months. During this time there was a dispute about whether all was going well, a psychological assessment of Mr C was ordered by another Judge and Mr C obtained a critique of this from another psychologist.

### III. Judicial Response

#### 1. The issues

In his decision after the second hearing, in June 2000, Judge Inglis QC began by identifying the issues. These were that<sup>679</sup>

... the father, a highly intelligent and able young man, wanted to continue to share in the parenting of their only child on equal terms with the mother, an equally intelligent and able young woman. His work commitments were of a kind that enabled him realistically to advance that position. The mother would not agree to equal sharing.

Mr C believed that J was entitled to Mr C's "input into his life and upbringing to a degree equal to that of [Ms W's]" and wanted to share the parenting of J on "equal terms" with Ms W.

His Honour found that these issues reflected "a perception among separated fathers that the Court system was failing them and their children [and] that in itself was an issue of public importance."<sup>680</sup> Mr C was not represented, so counsel of "seniority and experience" were

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<sup>677</sup> *W v C*, above, 5.

<sup>678</sup> *W v C*, above, 5; he refers to *R v R* (1994) 12 FRNZ 211 (HC).

<sup>679</sup> *W v C* [2000] NZFLR 1057 (FC).

<sup>680</sup> *W v C*, above, 1059.



appointed to assist the Court with evidence related to the child and to present comprehensive submissions on the law.

## 2. The law on guardianship

Having declined to address Mr C's argument about alleged gender bias, His Honour traversed the relevant sections of the Guardianship Act,<sup>681</sup> starting with the definitions of "guardian" "guardianship" and "upbringing."<sup>682</sup> In relation to section 10(2) he emphasised that no parent is to be deprived of guardianship unless the Court is satisfied that he or she is for some grave reason is unfit to be a guardian or is unwilling to exercise the responsibilities of a guardian. It was not necessary to consider the position of a child who is made a ward of Court, thus suspending the parents' rights; nor the operation of the Domestic Violence Act and the effect of a protection order on the exercise of guardianship responsibilities.<sup>683</sup>

The Judge then refers to the mechanism for resolving disagreements and how this may affect the legal equality of the parents' guardianship rights by making orders including a custody order in favour of one parent.<sup>684</sup> He notes that "custody" is defined<sup>685</sup> as "the right to possession and care of a child" which does not "detract from the other parent's remaining guardianship rights."<sup>686</sup>

He then explores the "overarching principles" of section 23 that the welfare of the child is the first and paramount consideration, that the Court shall have regard to parental conduct only to the extent that it is relevant to the welfare of the child, that there is no presumption that placing a child in the custody of a particular person will best serve the child's welfare because of the sex of that person, that the wishes of the child are to be taken into account having regard to the child's ability to express them, age and maturity. His Honour then accepted and adopted the well-known synthesis of the "welfare of the child" principle offered by the Principal Family Court Judge in *VP v PM*<sup>687</sup> and included in the Family Court judges' submission to *Responsibility for Children*.<sup>688</sup>

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<sup>681</sup> Guardianship Act ss 6, 3, 2(1), 9B, 10, 10B, 13, 11, 12, 23. See above Chapter 3 II. 1. The Guardianship Act.

<sup>682</sup> Guardianship Act ss (3) and 2(1).

<sup>683</sup> Guardianship Act s 16B.

<sup>684</sup> Guardianship Act ss 13, 11, 12.

<sup>685</sup> Guardianship Act s 3.

<sup>686</sup> *W v C* [2000] NZFLR 1057 (FC), 1061.

<sup>687</sup> "No two families fit the same mould or pattern. As one New Zealand Judge has observed, the Court must look at the circumstances of 'this child with this father, this mother ... and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child':" *VP v PM* (1998) 16 FRNZ

He then added two points about guardianship, that there has to be<sup>689</sup>

someone with full legal capacity to make decisions regarding the child, which the child, who has no legal capacity, cannot make for himself ... [and] by providing the parents with an entrenched status as guardians, the family unit of parents and child is protected from gratuitous or unjustified outside interference.

Thirdly, “and of much greater importance for the present purposes” he referred to the responsibility for nurturing a child, as defined by Judge Jeffries in *E v M* and cited with approval by the Court of Appeal in *Director-General of Social Welfare v L*.<sup>690</sup>

His Honour notes that from the child’s viewpoint this nurturing is an “essential feature” of guardianship responsibilities, not guardianship rights. The child<sup>691</sup>

... is entitled to expect that his ... guardians will exercise their guardianship powers in a way that recognises their obligation and responsibility to nurture him to the best of their ability, adjusting their own lives and activities so as to give the child’s welfare priority... They are given ... rights by the law so they can carry out ... obligations. The statutory status of guardian provides the framework ...

### 3. Guardianship after separation: the principles

His Honour refers to the “standard pattern of thought in the great majority of disputes”<sup>692</sup> as being focused on custody and access, a primary and a secondary caregiver. He asks whether anything in the existing law justifies this or “requires it to be maintained.”<sup>693</sup> He then turns to<sup>694</sup>

a more precise question ... how the fact of the parents’ separation can in itself justify departure from the framework of equal and shared responsibility for the child’s nurturing which is inherent in the legal status of guardianship.

He concludes that parents who plan to separate have the responsibility, as “a primary obligation to their child”<sup>695</sup> to consider how they can “*continue*”<sup>696</sup> to preserve for their child the advantages of their joint parenting and nurturing.<sup>697</sup> He adds that “the parents’ choices for themselves

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621 (FC) 625-626; and see above Chapter 4 nn 32-33 and accompanying text. Judge Inglis QC himself is the “one New Zealand Judge” cited, from *C v E* (11 May 1987) Family Court Palmerston North FP 050/53/83.

<sup>688</sup> Ministry of Justice *Responsibilities for Children Especially when Parents Part: The Laws about Guardianship Custody and Access; Discussion Paper* (2000). See above Chapter 4 III. Family Court Response... .

<sup>689</sup> *W v C*, above, 1062.

<sup>690</sup> *E v M* (13 September 1979) High Court Wellington M361/779, approved by Court of Appeal; in *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 324-5. See above Chapter 1 n 1.

<sup>691</sup> *W v C*, above, 1063.

<sup>692</sup> *W v C*, above, 1063.

<sup>693</sup> *W v C*, above, 1063.

<sup>694</sup> *W v C*, above, 1063.

<sup>695</sup> *W v C*, above, 1064.

<sup>696</sup> Emphasis added.

<sup>697</sup> *W v C*, above, 1064.

remain controlled to a very significant degree by their duties and obligations as parents and guardians.”<sup>698</sup>

He then turns to the way parents exercise their equal responsibility and states that<sup>699</sup>

It is of the greatest importance to understand that this reasoning assumes that each parent is equally (though no doubt from time to time in different ways) able and willing to exercise the duties and obligations of a parent and guardian in an appropriate and responsible manner, with the welfare of the child as the first and paramount consideration.

After referring to *Director-General of Social Welfare v L*<sup>700</sup> His Honour goes on to state that<sup>701</sup>

The ability or willingness of a parent to act responsibly or appropriately in sharing the nurturing of the child is therefore one of the variables that will inevitably need to be considered.

He defines the “starting point of any inquiry into a child’s future” as being that the parents are<sup>702</sup>

... equally responsible for all aspects of the child’s nurturing and that the child, unless for some good reason related to the child’s welfare, has a right to the *continued*<sup>703</sup> provision by his parents of the advantage of their equal and shared nurturing obligations.

This starting point disregards and therefore does not have to honour the hierarchy of shared care that is likely to exist before and after parental separation. Since the existence of the hierarchy is not honoured, some assumptions and expectations remain unarticulated. The effects on her of a mother’s commitment to the hierarchy are extinguished within rhetoric of sharing that does not acknowledge the unequal nature of the sharing. It then becomes less likely that a mother’s reasons for wanting to disengage from will be heard. The “starting point” focus on an ideal rather than the actualities of parental commitment arguably does a disservice to mothers and to their children, particularly in this context where there is apparently bitter conflict.

#### 4. The effects of social changes

His Honour then goes on to discuss “past notions of the division of functions within the traditional nuclear family with a working father and a home-bound mother”<sup>704</sup> and that the

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<sup>698</sup> *W v C*, above, 1064.

<sup>699</sup> *W v C*, above, 1064.

<sup>700</sup> *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 326 (CA) “It is on the proper exercise of these responsibilities that the welfare of the child depends” and that the child’s birth status and natural family relationship are of relevance only so far as they are of benefit to the child and that “their importance to the child usually lies in the willingness or the ability of the parent to give them practical expression.”

<sup>701</sup> *W v C*, above, 1065.

<sup>702</sup> *W v C*, above, 1065.

<sup>703</sup> Emphasis added.

<sup>704</sup> *W v C*, above, 1065.

“stereotype ... has become noticeably and significantly eroded.”<sup>705</sup> He also refers to the “relatively large number of impermanent de facto relationships, the children of which have required the Court’s attention”<sup>706</sup> and concludes that<sup>707</sup>

In these markedly changed social conditions it is impossible to accept the validity of any mind-set which assumes that the acceptable solution to separated parents’ parenting problems is ... a custody and access division. If any such mind-set remains, it is dangerous, for it perpetuates the public expectation of a solution which may have been appropriate in many cases under past social conditions and which may remain appropriate in some cases now, is appropriate in all cases.

It is arguable that His Honour here makes an untenable assumption about social change that is not reflected in parenting practice. This assumption is if both parents work outside the home, a father’s parenting practice inevitably becomes more similar to that of a mother. His Honour does not explore the possibility that the parental hierarchy of care persists alongside major societal changes and that the commitment that a father offers and will continue to offer may mean that the “custody and access” solution is appropriate not just in “some” cases, but in many cases.

His Honour then distinguishes between parents who understand their joint parenting responsibilities and then consider how these will be best “maintained and managed for the benefit of the child”<sup>708</sup> and those who assume that a custody and access regime is the only option and the only thing to be negotiated and settled. Then he considers variables, with at one extreme parents who divide the child’s time between them<sup>709</sup>

... with the appropriate flexibility made necessary by ... the child’s routines ... [and]changing needs ... and the inescapable work commitments of each of the parents.

At the other extreme he places the situation where one of the parents is “unable or unwilling to exercise *any*”<sup>710</sup> of his or her guardianship functions or obligations”<sup>711</sup> where the solution may often be to give one parent custody “with the child having such contact with the other parent as may be helpful or desirable for the child.”<sup>712</sup>

His Honour goes on to give two examples of cases from the “endless variations in circumstances” that fall between the two extremes. The first is where a parent wishes to retain guardianship functions and responsibilities apart from day-to-day care but has limited time available due to

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<sup>705</sup> *W v C*, above, 1065.

<sup>706</sup> *W v C*, above, 1065.

<sup>707</sup> *W v C*, above, 1065-1066.

<sup>708</sup> *W v C*, above, 1066.

<sup>709</sup> *W v C*, above, 1067.

<sup>710</sup> Emphasis added.

<sup>711</sup> *W v C*, above, 1067.

<sup>712</sup> *W v C*, above, 1067.

work commitments; the second is where one parent's behaviour exposes a child to an unacceptable degree of risk from harm, where it is necessary to protect the child and ensure that the child's need for a continuing relationship with the violent parent is met. He states that it is appropriate "to use the present case as a further example of a case falling between the two extremes."<sup>713</sup>

## 5. The present case

His Honour then moves on to the facts of *W v C*, prefaced by "the starting point" which is<sup>714</sup>

whether there is any valid reason relevant to the welfare of the child why [Mr C's] legal right – identical to the legal right of [Ms W] to exercise guardianship responsibilities and obligations jointly and equally with [Ms W] should be restricted [since] the fact of their separation does not in itself require that any restrictions be imposed beyond recognition that the parents are living in two different homes.

While traversing the background, His Honour addresses the meaning of "equal parenting" in this case. Ms W understood that equal parenting meant that each parent would care for J exactly half of the time. His Honour was not sure whether this was Mr C's understanding, but thought he defined equal parenting as having equal input, not equal contact time.

When he turns his attention to the parents and their relationship he finds that their initial separation had been a "very traumatic time for them and particularly for [Mr C],"<sup>715</sup> for reasons which "do not necessarily reflect badly on either parent."<sup>716</sup> From this it can be inferred that there was no violence involved.

His Honour had already noted Mr C's "aggressively vocal political stance"<sup>717</sup> and he now addresses issues relating to Mr C in a little more detail. He found the psychological report and the critique of it helpful for providing insight into Mr C's motivation and "extreme sensitivity about parenting":<sup>718</sup>

It needs to be understood that the [Mr C] has another older child, a daughter, who lives in Western Australia. I do not believe that [Mr C] has ever really got over being parted from her. Watching [Mr C] closely as he gave his oral evidence, I noticed particularly [his] intense grief, which [he] was desperately anxious to conceal, at the thought of once more not being able to parent in the full sense.

His Honour was satisfied that although it had been suggested that Mr C suffered from personality disorder that was not so.

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<sup>713</sup> *W v C*, above, 1067.

<sup>714</sup> *W v C*, above, 1068.

<sup>715</sup> *W v C*, above, 1069.

<sup>716</sup> *W v C*, above, 1069.

<sup>717</sup> *W v C*, above, 1059.

<sup>718</sup> *W v C*, above, 1069.

Unlike Judge Carruthers he does not seem overly concerned that Mr C's approach to J's well-being "shows an alarming lack of empathy for this little boy and a lack of insight as to how that must affect J, which is worrying."<sup>719</sup>

Later, in a "Footnote" he added that he was not influenced by Mr C's statement that "if joint and equal guardianship were not possible he would simply walk away from J":<sup>720</sup>

I thought it necessary to question the father closely on this, so that his exact position might be fully understood and recorded. [He] maintained his position in the face of the obvious consequence that, having introduced himself into J's life as an important figure, he would be letting J down seriously if he later cut him off. I consider, however, from having closely observed the father during this exchange that although he appeared to be stating a negotiating position, what he really meant was that he did not trust himself to cope emotionally with contact with his son unless he was able to play a full part in J's life, that he did not feel that he could express his love for his son adequately as a 'weekend' or occasional father, and if that were to be the regime it would be better for J in the end for there to be no contact. I did not detect in the father any sense of obsessive possessiveness. As I have said, what it was possible to detect in the father was a deep vein of grief, hurt and feeling which he wished to keep hidden. The best way of putting it is that the father feels incomplete without his son whom he has an imperative need to help nurture. That is a feeling which anyone who has suffered a bereavement will readily understand. If the father has the opportunity to help with the nurturing of his son, he is likely to find himself.

His Honour had<sup>721</sup>

no difficulty in accepting that [Mr C] is a naturally dedicated parent, with superior parenting skills, who sees it as his duty to offer J unconditional love and support in life, and that he is well able to do that.

He noted that the Court-appointed psychologist had observed J in "spontaneous, unguarded communication and interaction with [Mr C] who in turn was responsive and loving toward J and related to J in a warm effective manner."<sup>722</sup> There was no reason to doubt J's physical safety or his emotional safety unless he became caught up in his parents' conflict.

When His Honour turned to consider Ms W, he found that there was "no criticism of [her] parenting skills ... [She] has been resourceful in setting up a good home for J and establishing good routines."<sup>723</sup> However she had "seriously underestimated - or has preferred not to acknowledge - the potential importance of [Mr C] in J's life."<sup>724</sup> His Honour had "some doubts

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<sup>719</sup> *W v C* (20 October 1999) Family Court Tauranga FP 070/213/96, 5.

<sup>720</sup> *W v C*, above, 1072-1073.

<sup>721</sup> *W v C*, above, 1069.

<sup>722</sup> *W v C*, above, 1069.

<sup>723</sup> *W v C*, above, 1069.

<sup>724</sup> *W v C*, above, 1069.

about her real willingness to put J's welfare and interests ahead of her own."<sup>725</sup> For example, she had taken J on a pre-arranged holiday which disrupted the regular contact periods between J and Mr C. Probably because "she took as her starting point that on separation the only issues that needed to be considered were custody and access."<sup>726</sup>

[I]t had never occurred to her that their separation had not altered their joint and basic parenting responsibilities. She simply assumed that she was the one to have J's primary care, at the same time knowing that [Mr C] saw himself as unjustifiably excluded...[if not] she might seriously have reflected on whether there were any valid reasons relating to J's welfare why the balance of parenting responsibility needed to be so drastically altered.

His Honour also referred to the couple's views of each other and the dynamics between them. He had watched Mr C "in full flight", noted that "tactfulness does not come as second nature to him" so that the way he put his proposal to share the care of J was likely to have "promoted instant opposition rather than careful reflection."<sup>727</sup> His behaviour could sometimes be "overbearing, inevitably attracting a negative response."<sup>728</sup> It was however necessary to recognise that<sup>729</sup>

features of his behaviour which some might find overbearing are to be interpreted ... as his way of expressing quite acute and real fear and grief at the thought that attempts are being made to cut his son off from him [though] that view does not...make it any easier to put up with it.

It was also suggested in evidence that Mr C's "ideals are not always matched by performance."<sup>730</sup>

On the other hand there were "indications in [Ms W's] demeanour and evidence of a reluctance to depart from her own agenda."<sup>731</sup> His Honour found that Mr C's description of her "passive aggression" was accurate.<sup>732</sup>

Finally, His Honour stated that joint guardianship for J was not "justification for obstruction, inconsiderate behaviour, subtle sabotage, unacceptable harassment, bullying, political grandstanding."<sup>733</sup> (He repeats this towards the end of his judgment and adds "insistence on matters of principle regardless of the effect on J's welfare."<sup>734</sup>) This language implies that he believes that one or both of the parents might behave in these ways.

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<sup>725</sup> *W v C*, above, 1069.

<sup>726</sup> *W v C*, above, 1070.

<sup>727</sup> *W v C*, above, 1070.

<sup>728</sup> *W v C*, above, 1070.

<sup>729</sup> *W v C*, above, 1070.

<sup>730</sup> *W v C*, above, 1075.

<sup>731</sup> *W v C*, above, 1070.

<sup>732</sup> A more detailed analysis is made below nn131-132 and accompanying text.

<sup>733</sup> *W v C*, above, 1072.

<sup>734</sup> *W v C*, above, 1075.

His Honour then returns to “the starting point,” whether there was any valid reason relevant to J’s welfare why Mr C’s legal right to exercise guardianship responsibilities and obligations jointly and equally with Ms W should be restricted.

He refers to two cases on the requirements for successful shared care. In *B v VE*<sup>735</sup> Gault J found that “substantial agreement and cooperation between the parents”<sup>736</sup> was necessary. In *R v R*<sup>737</sup> Williamson J named as minimum conditions for sharing of custody as being that each parent was individually suitable, both parents were committed to the idea of sharing and that the parents were able to cooperate with each other in a ‘mature and amicable’ way. His Honour notes a third decision *Haslett v Thornton*<sup>738</sup> by the Full Court of the High Court, in which the Judges<sup>739</sup>

were critical of any approach that involved ‘calculations as to exact times the child spends with each parent with a view to achieving parity or equality’, saying that it is the right of the child to have healthy, beneficial contact with each parent, and that ‘what is necessary for the child’s welfare cannot be measured in arithmetical or mathematical terms’.

The Court-appointed psychologist had also presented criteria for successful shared parenting, these being cooperation, mutual support and a joint commitment, already present in an existing situation. His Honour then comments that the psychologist<sup>740</sup>

did not extend his discussion to cover the more fundamental issue that it is the responsibility and obligation of parents, as guardians, to adjust their thinking so as to ensure that those criteria are met.

He goes on to state that the cases he has referred to have to be considered on their own facts and in their own context and that<sup>741</sup>

In general ... it is by no means clear why shared and equal guardianship, taken for granted during a marriage, in which the responsibilities are shared and adjusted as the occasion demands, should suddenly be regarded as ceasing to be attractive or viable once there is a separation. I see nothing in the Guardianship Act to require any such change of approach, which is tantamount to saying that a separation in itself justifies drastic modification and reassignment of entrenched parental responsibilities, in particular the important if not central responsibility to *continue* to cooperate as guardians in the child’s welfare and upbringing...In the absence of any factors compellingly requiring a different regime, it continues to be the

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<sup>735</sup> *B v VE* (1988) 5 NZFLR 65 (CA).

<sup>736</sup> *B v VE*, above, 70.

<sup>737</sup> *R v R* (1994) 12 FRNZ 211, 215.

<sup>738</sup> *Haslett v Thornton* [2000] NZFLR 200 (HC), 211. This was an appeal concerning a 12 year old child who had been the subject of litigation for nine years. His mother had custody and his father exercised regular access which he saw as not giving him enough involvement in ‘guardianship issues’. Like Mr C he saw his options in quite a black and white way, for instance, at 207: “The two choices I have been given are litigate or leave [my son] without a father. I am afraid you are all going to kill me first...I’m not really part of his life...I’m not part of his day to day life.”

<sup>739</sup> *W v C* [2000] NZFLR 1057 (FC), 1071.

<sup>740</sup> *W v C*, above, 1071.

<sup>741</sup> *W v C*, above, 1071.



legal responsibility of each parent on separation to recognise his and her *continuing* responsibility and obligation as guardian to cooperate with the other over all parenting issues in a mature and sensible way.

In this case, it was “as a matter of principle, prima facie in J’s best interests that he *retain*<sup>742</sup> the full guardianship input of both his parents, appropriately managed.”<sup>743</sup>

#### IV. Outcome

Ms W’s application for sole custody was dismissed. His Honour retained the joint custody order made by Judge Carruthers and varied it to reflect “firm and managed progression towards a situation in which J comes to appreciate that the responsibility for his parenting and welfare is shared equally between his mother and his father.”<sup>744</sup> Mr C’s contact with J was to increase gradually over two months to become weekend-long. By the time he started school, two months after that “[i]t is anticipated...that the parents will have graduated to a position from which they will be able to make their own arrangements about J’s...care,”<sup>745</sup> these to include J having extra time with his father and occasions when both parents were present with him. This outcome<sup>746</sup>

does not necessarily involve equal time with each parent ... but does involve a partnership on equal between terms ... neither partner having the right to dominate the other ... regulated by recognition that J’s needs will change ... [and] by the clear understanding that J is not to become involved or expected to take sides in any differences.

The Judge had noted that Mr C had moved his business base from Auckland to Tauranga, where Ms W had chosen to live, to be near J but that Ms W was not prepared to commit herself to staying in Tauranga in the long term. He pointed out that<sup>747</sup>

[i]t needed to be understood that a parent’s desire to relocate is not always a matter of that parent’s free choice. The parent’s freedom of choice, in this as in other areas, is limited and controlled by his or her responsibilities and obligations as a parent, and in the end by the welfare of the child. A series of cases ... shows that a relocation by one parent which has the effect of disrupting the child’s relationship with the other parent may not, in the welfare and interests of the child, be allowed to happen.

Ms W was being warned that she had to stay in Tauranga. The counsel for J’s appointment was extended, with instructions to report regularly and given the sole leave to apply for further directions from the Court if difficulties arose and could not otherwise be resolved. No further psychological assessment of J was to occur without her application to the Court and the Court’s

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<sup>742</sup> Emphasis added.

<sup>743</sup> *W v C*, above, 1072.

<sup>744</sup> *W v C*, above, 1073.

<sup>745</sup> *W v C*, above, 1075.

<sup>746</sup> *W v C*, above, 1074.

<sup>747</sup> *W v C*, above, 1073.

leave being given. Various costs to date were to be paid from the consolidated fund without the parties' contribution, but this was "not ... an indication that the Court will for the future allow a similar concession."<sup>748</sup>

When listing the kinds of behaviour that he did not find acceptable earlier in his decision, the Judge stated that if they were to occur<sup>749</sup>

J's welfare might well demand a different solution, for [his] welfare must in the end have first and paramount priority over either parent's guardianship 'rights'. Unless both parents are prepared to accept the behavioural limits which their responsibilities ... require, neither of them can feel secure in the face of any future application to the Court for its assistance in ensuring J's stability, security and emotional welfare.

Now, at the end of the decision after repeating the list of proscribed behaviours, His Honour adds<sup>750</sup>

If any of these things were to happen, J's welfare might well demand a different solution. It is expected that the parties will adhere to the above orders regardless of their other arrangements of commitments. The orders are not suggestions which the parties are free to disregard if they prove inconvenient. They are orders, and to be complied with.

The arrangements imposed by Judge Inglis QC in *W v C* did not work. In his decision in *TVNZ v W*<sup>751</sup> given 7 November 2000, about the time J was about to start school Judge Inglis QC he noted that Ms W had applied for variation of the shared parenting orders and the variation was opposed by Mr C. In a paper given the same year, Henaghan stated<sup>752</sup>

I am told on good authority ... that the arrangements did fall through, and the patterns of care as set out by Judge Inglis QC are not occurring. The problem may well be enforcement of court orders.

In November 2002 there was an appeal pending.

## V. Discussion

### 1. Issues related to the research context

#### *(i) The hierarchical structure of care*

This case fits easily into the category of one where contact is not working because one parent or both is unprepared to accept an appropriate role in Trinder et al's hierarchy of care. Ms W is

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<sup>748</sup> *W v C*, above, 1075.

<sup>749</sup> *W v C*, above, 1072.

<sup>750</sup> *W v C*, above, 1075-1076.

<sup>751</sup> *TVNZ v W* [2001] NZFLR 337 (an application by TVNZ to publish the *W v C* proceedings).

<sup>752</sup> Henaghan M "Shared Parenting: Where From? Where To? Children's Rights and Families" (2001) S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 58.

resisting her role as primary carer to facilitate access. Mr C is resisting his role as auxiliary parent. Because of this, their case may not be one that can be resolved within the legal system. In Trinder's paradigm they were probably in the "ongoing battling" category,<sup>753</sup> where the mother was not prepared to facilitate contact.

(ii) Power and powerlessness

Here both Ms W and Mr C appear likely to have experienced situational powerlessness, "an inability to control others and a denial of rights," in contrast to debilitating power which is experienced as "an effacement of self."<sup>754</sup> Ms W, who could not move on with her life may also have experienced debilitating power. J himself, having had so little contact with Mr C, could probably not be described as experiencing situational powerlessness, although he may have, if he were aware of the conflict and his own place in it.

Mr C saw "a shorter amount of time or an abrogation of this principle [of equal sharing] as creating a 'toxic' (his words) situation for J ... [refusing] any lesser contact over these two years apart from one fleeting occasion by accident."<sup>755</sup> This insistence on a certain kind of relationship may be an example of the exercise both of ambivalent power as identified in Rhoades' files, suggesting "... that there remains a wide divergence between contact and parenting, and that some men continue to opt for the former,"<sup>756</sup> and of narcissistic behaviour similar to that described by Cohen.<sup>757</sup>

(iii) The benefits and disadvantages of access

Ms W's good relationships with Mr C's parents that she was also "in a sensible way was promoting ... for J"<sup>758</sup> was ensuring that J's needs in relation to paternal identity and genetic connection were being met to some extent, as one of the two father-unique access benefits.<sup>759</sup>

As far as J is otherwise concerned, as in all cases where there is conflict about parenting responsibility "it is unlikely that the best contact situation for the child can be established – one

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<sup>753</sup> See Chapter 1 n 46.

<sup>754</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press, 146.

<sup>755</sup> *W v C* (20 October 1999) District Court Tauranga FP 07770/216/96, 3, 5.

<sup>756</sup> Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71, 79.

<sup>757</sup> Cohen O "Parental Narcissism and the Disengagement of the Non-Custodial Father After Divorce" (1998) *Clinical Social Work Journal* 26(2) 195. See above Chapter 2 nn 101-103 and below n 116.

<sup>758</sup> *W v C*, above, 5.

which both parents support and in which the child's needs are consistently met.”<sup>760</sup> This situation requires careful consideration of the actual benefits and disadvantages of access including the unique contribution of fathers. This arguably involves a balancing act between the potential benefit versus the detriment of contact with his father rather than an attempt to impose shared parental responsibilities where they have not been successfully shared since separation, and possibly not before.

The stress of ongoing proceedings is a risk to J because of the “standstill in the child's overall life and development while his or her carer's emotional energies are taken up with the case.”<sup>761</sup> and the child's awareness of being at the centre of the dispute, and in some way responsible for it and the distress it generates. J was young, but that does not preclude his awareness of the conflict over parenting and his own role in the conflict.

## 2. Legal issues

### (i) A template for parenting?

Judge Inglis QC's concern in this case was “to emphasise the need for a more exact focus, in now markedly changed social conditions, on parenting issues which arise on separation.”<sup>762</sup> In focusing on these issues his intention seems to have been to create a template for use in a wide range of fact situations. In summary, the basis of this template seem to be:

(a). There has to be someone with full legal capacity to make decisions about a child;

(b) A guardian will always be a guardian, unless the Court is satisfied that guardian is “for some grave reason is unfit” to continue or is unwilling to exercise the responsibilities of a guardian;<sup>763</sup>

(c) The “essential feature” of guardianship responsibilities from the child's point of view is nurturing to independence and “close and attentive physical and emotional involvement;”<sup>764</sup>

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<sup>759</sup> See above Chapter 2 III. 4. *Exclusively father-related benefits.*

<sup>760</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 619.

<sup>761</sup> Sturge and Glaser, above, 623.

<sup>762</sup> *W v C* [2000] NZFLR 1057 (FC), 1073.

<sup>763</sup> Guardianship Act s 10(2). See above Chapter 3 nn 10-26 and accompanying text.

(d) Each parent's position is entrenched to protect "the family unit" from gratuitous or unjustified outside interference;

(e) Guardianship is shared, equal and taken for granted during a marriage, in which the responsibilities are "shared and adjusted as the occasion demands;"<sup>765</sup>

(f) That on separation the important if not central responsibility of each guardian is to *continue* to share the responsibilities equally and to cooperate in the child's welfare and upbringing: their "primary obligation to their child is to "consider the means by which they can *continue* to preserve for their child the advantages of their joint parenting and nurturing;"<sup>766</sup>

(g) It is a fundamental issue that parents as guardians must adjust their thinking to ensure that the criteria for successful joint parenting (cooperation, mutual support and a joint commitment) are met;

(h) Parents "have an *inescapable* responsibility ... to ensure that their powers and duties as guardians are used constructively and cooperatively for [their child's]'s benefit;"<sup>767</sup>

(i) There are variables that may affect these propositions;

(j) Equality is qualified; it is not equity;

(k) The parents' choices for themselves remain controlled to a very significant degree by their duties and obligations as parents and guardians.

These elements will now be discussed in turn.

(a) There has to be someone with full legal capacity to make decisions about a child.

This is self-evident. It is necessary to note only that "someone" is singular, not plural.

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<sup>764</sup> *E v M* (13 September 1979) High Court Wellington M361/779, approved by Court of Appeal in *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 324-5.

<sup>765</sup> *W v C*, above, 1071.

<sup>766</sup> *W v C*, above, 1065. Emphasis added.

<sup>767</sup> *W v C*, above, 1074. Emphasis added.

*(b) A guardian will always be a guardian, unless the Court is satisfied that guardian is “for some grave reason is unfit” to continue or is unwilling to exercise the responsibilities of a guardian*

The discussion here is limited to the second reason for terminating guardianship. It has two important parts, the “willingness” of a guardian and the “responsibilities” which are discussed under the next heading. In this case, His Honour discussed willingness in relation to parents’ shared and equal responsibility. It was of “the greatest importance” that each parent was “... equally (though no doubt from time to time in different ways) able and willing to exercise the duties and obligations of a parent and guardian in an appropriate and responsible manner.”<sup>768</sup> A child’s birth status and natural family relationship were of relevance only so far as they were of benefit to the child; their ‘importance for the child lies in the willingness or ability ... to give them practical expression.’<sup>769</sup>

In exploring issues around parenting in order to allocate future responsibility, this issue of willingness is crucial. There is provision to have regard to the conduct of the parent if it is relevant to the welfare of the child<sup>770</sup> that is not used in relation to willingness but could be. His Honour adds ability to willingness when he states that<sup>771</sup>

Someone having the status of a parent or guardian does not guarantee that that person will be able or willing to act appropriately in sharing in the nurture.

However he does not discuss the degree of ability or willingness required to reintroduce a parent to a child in a situation where that parent’s needs or wishes – particularly emotional needs as here or related to attachment to a work identity - are in conflict with those of the parent with the larger share of responsibility.

This may be because His Honour’s starting point is that the parents as guardians are equally responsible. His view that guardianship is “shared, equal and taken for granted during a marriage” does not leave room for close examination of past conduct and “willingness”. The exercise, as he sees it, is to create a window of opportunity for fathers to be involved with their children, rather than to look closely at what that involvement might mean, particularly to the new family unit.

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<sup>768</sup> *W v C*, above, 1064.

<sup>769</sup> *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 326 (CA).

<sup>770</sup> Guardianship Act s 23(1).

When His Honour explores the “variables” that have an impact on responsibilities after separation he discusses at one “extreme” the cases where one parent is unable or unwilling to exercise any guardianship functions, with the solution then being to vest custody in the “available parent with the child having such contact with the other parent as may be helpful or desirable for the child.” This gives the false impression that the child has some choice in this situation.

In practice, if a parent is unwilling (or unable) contact is unlikely to be possible and if it is possible then entirely on the unavailable parent’s terms. If that parent is unwilling or unable to exercise *any* guardianship functions, bearing in mind the centrality to children’s welfare of close and attentive emotional and physical involvement, the contact must have a high risk factor. It leaves the door open for a generally unwilling parent to choose to come and go in a way that may be hurtful for the child, disruptive to the new family unit and debilitating for the mother. It also gives an opportunity for an unwilling and irresponsible parent to argue that any contact is “helpful or desirable for the child” rather than something arbitrary that that parent chose and which is arguably in no way an exercise of parental responsibility.

His Honour does not raise the issue of Mr C’s willingness to parent in the past, other than to imply that all was well before he separated from Ms W, without giving details of the evidence about this. We do not know whether the shared parenting before separation had been carefully negotiated with a willingness on the part of Mr C to take responsibility rather than to ‘help’.

We do learn that he was willing only to have occasional contact with J (after initial resistance to contact from Ms W); and that he was *unwilling* to exercise any guardianship responsibilities if he did not have joint and equal guardianship (as he defined it). His willingness seems to have been closely related to having his needs met, rather than J’s. Given this, His Honour’s comments that<sup>772</sup>

[Mr C] is a naturally dedicated parent, with superior parenting skills, who sees it as his duty to offer J unconditional love and support in life, and that he is well able to do that

have, with respect, little credibility. While Mr C’s behaviour may have been due to his particular views about what “responsibility” involved and capable of being seen as an act of passive resistance on the part of all fathers in a similar situation it did not offer J “unconditional love and support.”

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<sup>771</sup> *W v C*, above, 1064.

<sup>772</sup> *W v C*, above, 1069.

*(c) The “essential feature” of guardianship responsibilities from the child’s point of view is nurturing to independence and “close and attentive physical and emotional involvement” as described by Jeffries J*

Conditional willingness, as Mr C’s appears to have been after separation at least, must compromise the ability to give a child consistent close and attentive physical and emotional involvement for the long haul of nurturing that child to independence. While Mr C was observed to interact warmly with J, without consistency and unconditional willingness this arguably means no more than interactions between any friendly adult and J. For the larger part of J’s life Mr C had not exercised the “essential feature” of guardianship responsibilities, partly from choice. However His Honour no doubt glossed over this because he believed that positive change was possible and in J’s best interests. He may also have been attracted by the potential for preserving this “family unit.”

*(d) Each parent’s position is entrenched to protect “the family unit” from gratuitous or unjustified outside interference*

“The family” and “the family unit” are endorsed in both the Declaration of Human Rights and in UNCROC. UNCROC further requires that<sup>773</sup>

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. ...The best interests of the child will be their basic concern.

This Article offers support for Judge Inglis’ QC’s views: “both” parents or legal guardians share their common responsibilities towards their child, as defined by the Guardianship Act and their status is entrenched.

But contemporary parenting practices, influenced by the social changes His Honour is attempting to address, mean that in other circumstances one of these “both” parents may be a social parent only and not a legal guardian.<sup>774</sup>

Furthermore, in many families – and again, there are no details about this family - the “family unit” is arguably not a “unit” before separation if a mother has effectively managed alone in a household where the other parent’s input, especially into the lives of their children, has been minimal. She may have decided to separate because that input has been so minimal; and debilitating.

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<sup>773</sup> UNCROC Article 18(1). See above Chapter 3 nn 109 and 116; and accompanying text.

<sup>774</sup> See above Chapter 3 II. 2. *Laws that preclude the involvement of biological parents.*



Once parents have separated, the intention behind separating is to terminate the nuclear family unit that existed, to make a “clean break”. From this break, a mother may make a new and autonomous family unit where she has – or continues to have - primary responsibility not only for the emotional and practical demands of day to day care for her children but also for managing all material resources. Alternatively, she creates a new family unit with another adult.

These new family units also need to be protected from gratuitous or unjustified outside interference if children are to thrive. Unfortunately, the belief system that sociologist Lesley Paterson calls “maternal illegitimacy”<sup>775</sup> comes into play here: a “family unit” headed by a mother alone does not attract the same level of protection from outside interference as *the* family unit.

At the moment the safety of these units may be compromised by a guardian who exploits his entrenched status as a member of a former family unit. He can exercise all kinds of gratuitous or unjustified interference in debilitating ways if he is unwilling or unable to exercise his responsibilities in a way that enhances the wellbeing of a child and his or her current family unit.

While Judge Inglis QC acknowledges that a “custody and access” solution is appropriate when a parent’s behaviour “exposes a child to an unacceptable degree of risk from harm,”<sup>776</sup> unless the Court also acknowledges explicitly and equally the unacceptable degree of risk to the family’s safety from inappropriate exercise of debilitating and ambivalent power, that does not involve direct physical violence, the safety of too many family units will be compromised.

Given the submission of the Family Court Judges to *Responsibility for Children*<sup>777</sup> about extending guardianship rights to those who actually “parent”, this policy of entrenchment of original guardianship and the original family unit may not be successful if it places at risk a new family unit, or results in gratuitous or unjustified interference in it.<sup>778</sup>

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<sup>775</sup> Paterson L *Making Up Mums: Changing Discourses of Single Motherhood in New Zealand 1975-1995* (2002) Paper delivered at Conference on Mothering Law Politics and Public Policy 26-28 October 2002 Center for Research of Motherhood, York University. See above Chapter 2 n 66 and accompanying text.

<sup>776</sup> *W v C* [2000] NZFLR 1057 (FC), 1067.

<sup>777</sup> Ministry of Justice *Responsibilities for Children Especially when Parents Part: The Laws about Guardianship Custody and Access; Discussion Paper* (2000). See above Chapter 4 III. Family Court Response... .

<sup>778</sup> See below nn 134-136, 146 and Chapter 8 nn 183-191, 198, 207; and accompanying text.

In this case, His Honour did not address the new family unit's needs other than to criticise Ms W's decision not to cancel her holiday plans to fit in with the regime of reintroducing J to his father. This holiday included J; it was the new unit's family holiday, probably carefully planned and anticipated by both Ms W and J, for the benefit of each; and possibly involving arrangements with others. It may also have involved arrangements with Ms W's employer. It seems to be an unfortunate example of perfectly reasonable family plans being compromised by demands relating to a family unit that no longer exists. Mr C had chosen to see J only occasionally and Ms W developed a new life; and then things changed and that life became restricted by J's father's needs, rather than by J's.

*(e) Guardianship is shared, equal and taken for granted during a marriage, in which the responsibilities are "shared and adjusted as the occasion demands"*

This is a somewhat optimistic view. "Shared and adjusted as the occasion demands" may happen in many families before separation but the underlying principles on which this happens may have exploited the mother and presented poor role models to the child. The legal concept of guardianship is unlikely to be considered by many people during a marriage or relationship as they negotiate or enter conflict about their equal responsibilities, or do not. "Shared and adjusted as the occasion demands" may in fact have been "shared and adjusted" as the father demanded and extremely difficult for the mother, especially if her own employment was important for her.

*(f) That on separation the important if not central responsibility of each guardian is to continue to share the responsibilities equally and to cooperate in the child's welfare and upbringing: their "primary obligation to their child is to "consider the means by which they can continue to preserve for their child the advantages of their joint parenting and nurturing"*

This assumes that the responsibilities were shared equally before separation and advantaged the child. If this template were to be used in other cases, it would seem crucial to establish what regime had existed in the former family unit and the degree of willingness and abilities in exercising the "essential feature" of guardianship responsibilities, the close and attentive physical and emotional involvement with the child.

What actually existed and could continue? Were these responsibilities equally shared? Were their exercise an issue in ending the marriage or partnership because one partner did not contribute appropriately and would not negotiate? What were the advantages for the child if any of the joint parenting and nurturing, if any? Are there good reasons to continue to protect the protected relationships of the former family unit? How can this best be done? Are there other adults who

offer as good or better nurturing for the child? Are there members of the family who will offer him those aspects of parenting that are unique to fathers?<sup>779</sup> Are there others who nurture the child more effectively than the access parent?

In view of the consequences to the new family unit of continuing commitment to the old, especially the limitations on movement of mothers with primary responsibility for care of children, the assumption of continuity is dangerous without close examination of the parenting practices that already existed, again through use of the provisions in section 23(1).

There are no details about the pre-separation apportionment of responsibility between Ms W and Mr C apart from Ms W's acknowledgement that Mr C had been "a good father" – however that was defined - when they were together. That good fathering did not *continue* with what Judge Carruthers described as "an alarming lack of empathy for...and a lack of insight as to how that must affect J."<sup>780</sup> However Mr C had certainly considered the means whereby he could continue to offer J the advantages of joint nurturing.

Ms W, through her connections to Mr C's family had laid the groundwork for ensuring that J had access to at least some of the uniquely paternal contribution to parenting: information and knowledge about his genetic ties.

*(g) It is a fundamental issue that parents as guardians must adjust their thinking to ensure that the criteria for successful joint parenting (cooperation, mutual support and a joint commitment) are met*

His Honour stated that if a parent declines this responsibility that parent is "effectively making the child a victim of his or her failure in parental responsibility"; it is his or her responsibility and obligation "to cooperate with the other over all parenting issues in a mature and sensible way."<sup>781</sup> In this case, since His Honour makes no substantive change in the orders made by His Honour Judge Carruthers, it is possibly this section of the judgment that is most significant.

As shown above, the Family Court judiciary is concerned to change the language around responsibility for children, to enforce access where the custodial parent resists it and to support

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<sup>779</sup> See above Chapter 2 III. 4. *Exclusively father-related benefits: identity and role-modelling.*

<sup>780</sup> *W v C* (20 October 1999) Family Court Tauranga FP 070/213/96, 5.

<sup>781</sup> *W v C* [2000] NZFLR 1057 (FC), 1071.

fathers who want to be more involved with their children, including those who had brief relationships with their child's mother and tried to persuade her to terminate her pregnancy. It wants to "adjust the thinking" of mothers who wish to limit or terminate their children's contact with their fathers, or have their ongoing work as primary caregivers acknowledged for what it actually involves rather than the rhetorical "sharing" which often characterises discussion about shared parenting.

Judge Inglis QC here offers Family Court judges the language to express shared responsibility without legislative change, to encourage changed thinking among parents generally but especially that of mothers who resist fathers' exercise of access. If these mothers "adjust their thinking" appropriately enforcement will be unnecessary. Cooperation, mutual support and joint commitment may still however be jettisoned at any time by a father who decides to do that, without any enforcement procedures being available.

Here, Mr C shows all the signs of an "implacable" non-resident father as described by Sturge and Glaser;<sup>782</sup> and of the "black and white" thinking described by Cohen,<sup>783</sup> in relation to his extended family as well as his parenting. He had been granted joint custody by Judge Carruthers and there is a sense that whatever he was granted might not be enough. But no overt encouragement is given in this decision for him to adjust his thinking to consider ways he can be supportive of Ms W's parenting, other than, perhaps, the repeated list of proscribed behaviours. *(h) Parents "have an inescapable responsibility ... to ensure that their powers and duties as guardians are used constructively and cooperatively for [their child's]'s benefit"*

Parents do not have an inescapable responsibility. Many fathers and some mothers disappear from their children's lives with no procedures available to enforce any aspect of their responsibilities other than Child Support. This sentence seems, with respect, to be rhetoric to support the view that mothers who have primary care of their children have an inescapable responsibility to support their children's fathers' relationships with their children regardless of its quality and disruptive nature (except when physical or sexual violence issues are raised).

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<sup>782</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623; see above Chapter 2 n 139 and accompanying text.

<sup>783</sup> Cohen O "Parental Narcissism and the Disengagement of the Non-Custodial Father After Divorce" (1998) *Clinical Social Work Journal* 26(2) 195, 205; see above Chapter 2 n 101-103 and accompanying text.

*(i) There are variables that may affect these propositions*

His Honour offers a continuum of variables that affect the exercise of joint parental responsibility on separation. At one end are the parents who are able and willing to divide the child's time between them with "appropriate flexibility" taking into consideration the child's routines, changing needs and the inescapable work commitments of each parent. The child's views of how the time should be divided are not mentioned but would no doubt be an additional factor. At the other end of the continuum is the situation where one parent is "unable or unwilling" to exercise any guardianship functions or obligations, perhaps because of having left the area or the country, or taken on responsibility for another family.

One example of cases "falling within the limits of these ... extremes" are those where the work commitments of a parent imposes time limitations so that parent cannot be involved in day-to-day care but wants to retain other guardianship responsibilities. In other words, that parent is not available for the "sweat" of parenting but wants to retain some control over important decisions for the child.

Another kind of case is where a parent's abusive behaviour exposes a child to an unacceptable degree of risk of harm, where it is necessary to protect the child and to "preserve the child's need for an ongoing relationship with that parent."<sup>784</sup>

This case also falls somewhere in the middle of the continuum. Mr C "with no significant practical impediment to his doing so"<sup>785</sup> wants to exercise his full share of responsibilities; Ms W who is "in possession" of J "does not agree."

The two variable examples appear to be chosen carefully. Although couched in gender neutral language the first supports a view that the division between the "working father and home-bound mother" remains an appropriate way to share guardianship responsibilities equally after separation; ability and willingness do not preclude a primary commitment to paid employment rather than to nurturing a child. One huge societal change is that the homebound mother has become a mother who also works outside the home. As noted in Part 1, she often enjoys this. But as also noted she may also retain all the responsibilities previously undertaken by a homebound

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<sup>784</sup> *W v C*, above, 1067.

mother, as well as working. Many fathers have become “helpers” but not all; and those who have not necessarily taken on responsibility for nurturing tasks.

The second example distinguishes between this case and a case where harm is an issue: it reinforces the finding that Mr C has not and is not likely to behave harmfully.<sup>786</sup>

*(j) Equality is qualified; it is not equity*

His Honour makes it clear that what is necessary for the child is not equal time with each parent; shared and equal parenting, following *Haslett v Thornton*<sup>787</sup> does not involve 50:50 involvement. Again, the “a working father and a home-bound [and working hard caring for the children] mother” dyad, the ongoing hierarchy of care, is perfectly acceptable after separation.<sup>788</sup> Fathers’ choices are supported; that the mother may be compromised in pursuing employment options - and an improved economic base - by her need to care for a child or children is not addressed as an issue.

However, not every mother wants equity in parenting, not always because of she perceives the quality of parenting offered by a father as inferior to her own. Equity in respect of time spent parenting might also mean economic loss: a DPB might be compromised or child support might be reduced.<sup>789</sup>

However it is arguably necessary to consider equity issues. From a child’s perspective, if parenting skills are indeed gender free, this would not compromise his or her welfare. It would arguably benefit a child to be parented equally by each parent, to learn that women as well as men have lives beyond mothering.

But in a societal structure where women anyway have limited economic expectations and where day to day childcare limits the range of activities available to a mother, if parents have a joint and shared equal responsibility for children, ideally the Court should inquire about the factors that affect their exercise of it.

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<sup>785</sup> *W v C*, above, 1067.

<sup>786</sup> *W v C*, above, 1069: “On the whole of the evidence there is no reason to fear for J’s physical safety, or, unless he happens to get caught in the cross-fire between his parents, his emotional safety.”

<sup>787</sup> *Haslett v Thornton* [2000] NZFLR 200 (HC). See above n 71 and accompanying text.

<sup>788</sup> See above Chapter 4 n 31.

If employment for one is an issue, is it also an issue for the other? If both are busy, how will care of sick children be allocated? If the parent who has the children at weekends is promoted and decides to relocate, how will the shared responsibility be reallocated so that it is shared equitably? Should that parent be permitted to relocate? What difference does it make when the non-residential parent starts a new family? Does there need to be a careful, formal, renegotiation in the same way as when the mother establishes a new family unit with her and the child, so that the child has an opportunity to express his or her views about a modification of parental responsibility?

The rhetoric of equal and shared responsibility masks the latitude and choice given to fathers, and in this case, entrenched beliefs about the role of mothers.

Ms W understood that Mr C wanted to share the care of J 50:50; Mr C's views were not clear to His Honour and he appeared not to have attempted to clarify them. The outcome was that the shared care was allocated almost exactly as though Mr C had originally been the breadwinner and Ms W the housebound mother. Perhaps this was the case. Perhaps this was something Ms W wanted. However there is no discussion of the reasoning behind this, although it is stated at the outset that Mr C's "work commitments were of a kind that enabled him realistically to advance" the proposition that he share the care of J "on equal terms."

This seems to imply that because he has flexible work commitments he could share the care more equitably than if he had regular weekday fulltime employment. This could have had real implications for Ms W's future, as well as for J who had the opportunity to be cared for equally by each parent, with the consequence that equal care would have been a 'normal' model for him. However His Honour's plan for developing J's relationship with Mr C showed no sign of considering anything other than a conventional breadwinner/primary caring mother model.

*(k) The parents' choices for themselves remain controlled to a very significant degree by their duties and obligations as parents and guardians*

This kind of subtle shift masks the real burden of "caring for" responsibility. It is predominantly women's choices for themselves that "remain controlled to a very significant degree by their

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<sup>789</sup> See discussion above Chapter 2 n 14.

duties and obligations as parents and guardians.”<sup>790</sup> In an earlier case, Judge Inglis QC explicitly defined parents’ choices in terms of the custodial parent (mother) rather than the access parent and this affects relocation at least:<sup>791</sup>

Like all custodial parents, her life is in fact controlled by the children’s own welfare and needs and the need to make decisions which are responsive to the children’s welfare and interests.

The “mother principle” may be dead from the point of view of the Court. But some parents - in practice usually fathers - often act on their right to parent when, how and if they choose. They continue to choose the extent of their involvement, depending on their work commitments, their decision to live nearby or not, or in a new family unit or not. Their choices are not controlled by their parental obligations and they may choose to exercise their parental responsibilities in a way that is debilitating for women and quietly abusive of children.

This choice may be affirmed by a judge’s expressed perceptions of the parties, as seems to happen in *W v C* where Judge Inglis QC goes to some lengths to explain and excuse Mr C’s behaviour and downplays Ms W’s merits as a mother and status in the hierarchy of care.

(ii) The Judges’ views of the parents

(a) *Ms W*

Judge Carruthers’ assessment of Ms W is much less critical than Judge Inglis QC’s. He refers to her evidence about Mr C as being “generous”<sup>792</sup> about his capacity to be a good father, who could become a good father again, “in spite of [his] certain rigidity of views.”<sup>793</sup> He notes that she has a good relationship with Mr C’s family and “in a sensible way” was “promoting”<sup>794</sup> that for J.

In contrast, after his initial assessment of both parents as being “highly intelligent and able.”<sup>795</sup> Judge Inglis QC was lukewarm about Ms W’s parenting skills and critical of her “agenda.”<sup>796</sup> He had “doubts about her real willingness to put J’s welfare and interests ahead of her own.”<sup>797</sup> Furthermore he found that Mr C’s (whose qualifications as an expert are not mentioned)

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<sup>790</sup> *W v C*, above, 1064.

<sup>791</sup> *Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94, 4.

<sup>792</sup> *W v C* (20 October 1999) Family Court Tauranga FP 070/213/96, 4.

<sup>793</sup> *W v C*, above, 4.

<sup>794</sup> *W v C*, above, 5.

<sup>795</sup> *W v C* [2000] NZFLR 1057 (FC), 1059.

<sup>796</sup> *W v C*, above, 1070.

<sup>797</sup> *W v C*, above, 1069.



description of her “passive aggression”<sup>798</sup> was accurate. He appears to go out of his way to affirm Mr C and play down Ms W’s parenting capacities.

Although His Honour also acknowledges the difficulties Ms W must have had in communicating with Mr C, and urges both parents to develop a more effective relationship, the way that this is done appears to place an inappropriate degree of responsibility on Ms W to improve communications. It was her fault things had not worked out as Mr C wanted. This responsibility is detailed after His Honour’s comment about passive aggression:<sup>799</sup>

It never occurred to her that ... it was not for her to make unilateral decisions about J’s future care ... She simply assumed that she was the one to have J’s primary care knowing that [Mr C] saw himself as being unjustifiably excluded ... If her starting point had been that ... [they] had equal and shared rights and responsibilities as J’s guardians she might have seriously reflected on whether there were any valid reasons why the balance of parenting responsibility needed to be so drastically altered.

Again, while Mr C had been a “good father” during the short period that he lived with J, there is no evidence that he shared the responsibility for nurturing him rather than “helped”. Nor is there evidence that Ms W was not expected to make “unilateral decisions” about J’s care on a daily basis ever since he was born, because it was she who had primary responsibility for him. There may have been no alteration at all to the “balance of parental responsibility”: Mr C may have been a good father at the weekends, when he felt like it.

While it may be that in order to control the situation and to embed the order for joint custody, His Honour believed it was necessary to define her reality, there is a sense that he is here employing rhetoric to warn Ms W (and other mothers) about “unsuitable” behaviour. She becomes in some ways a “bad” mother and Mr C becomes a “sad” father. Her needs are therefore not addressed.

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<sup>798</sup> *W v C*, above, 1070.

<sup>799</sup> *W v C*, above, 1070.

Arguably His Honour describes Ms W negatively to “make” her act in a particular way or refrain from an action she wants to take. He also belittles her beliefs and capacity by not giving them equal empathetic attention with those of Mr C. His Honour attempts to control Ms W’s time in future by restraining her from using her time as she chooses: she must plan around Mr C’s access. He attempts to control her space by controlling her future movement, by a thinly disguised threat about what might happen if she decides to relocate.<sup>800</sup> He also controls her future material resources by preventing her from considering relocation for work purposes. His Honour further controls Ms W by defining her reality and motivations, viewing negatively her “agenda” without attempting to see how this fits in with the larger picture of her nurture of J, including her ongoing positive relationship with Mr C’s family. The control extends to making her responsible for sharing parenting with Mr C who for most of J’s life has refused to parent him.

*(b) Mr C*

From the outset, Judges Inglis QC defined the issues in terms of what Mr C wanted, in a work situation that made what he wanted possible.

His response to Mr C’s desire, if compared to his response a decade or so earlier to Mr K in *K v B* vividly illustrates the changes that have occurred over that time. Then, His Honour recognised that the appointment of Mr K as a guardian<sup>801</sup>

would ... invite problems over [the child’s] care and upbringing and ... seriously undermine the quality of her home environment...the mother would be forced into the position of having to co-operate with a man she does not wish to deal with and with whom her brief relationship ended even before she knew she was pregnant. I cannot see how the mother could regard that, in the circumstances, as anything other than an unacceptable intrusion into her life. There was no marriage and no domestic or family relationship between them and no factor other than their joint parentage of the child to justify that intrusion.

Here, the father’s need to parent is considered far more sympathetically. The facts of the cases are quite different, but each is concerned with the parameters of guardianship responsibility. Mr K and Ms B had a brief relationship and she became pregnant. Ms B was a single mother who already had a child and she decided that she wanted to place the new baby in an open adoption. Mr K sought to become a guardian and to have custody if Ms B did not want custody herself. His application did not succeed because not only would his appointment as a guardian not in the circumstances enhance the welfare of the child, it would be contrary to it; and his dedication to the welfare of the child was in doubt.

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<sup>800</sup> See above n 80 and accompanying text.

<sup>801</sup> *K v B* [1991] NZFLR 168 (FC), 185. See also below Chapter 8 nn 184 and 199; and accompanying text.

The father was “earnest and intense” and it was not disputed that he was<sup>802</sup>

perfectly capable of providing the child with a good quality of care and certainly an abundance of love [though there was] some doubt ... about whether he had the staying power to be a successful solo parent and whether a later attachment ... might distract his attention from the needs of the child ... he fully understands what it is like in practice to have the care of a young child, including the unpleasant and tedious aspects.

However, His Honour was<sup>803</sup>

driven to the view that the father’s application is based, not on a demonstrated need to provide the child with additional and demonstrable advantages which would flow or could reasonably flow from his input into her upbringing, but rather on his own compulsion to offer the child his input into her life as his father...there is a difference between the child needing the father as a guardian and the father needing to be a guardian of the child. On the whole of the evidence no need for the child to have the father as a guardian has been demonstrated.

This response to the father’s needs, even allowing for the fact that Mr C and Ms B had been married and therefore attracted the policy support available to ‘*the family*’ is almost the response to very similar needs in this case, Mr C’s compulsion to parent is viewed with great sympathy:<sup>804</sup>

I noticed particularly [his] intense grief, which [he] was desperately anxious to conceal, at the thought of once more not being able to parent in the full sense...The best way of putting it is that the father feels incomplete without his son whom he has an imperative need to help nurture. That is a feeling which anyone who has suffered a bereavement will readily understand. If the father has the opportunity to help with the nurturing of his son, he is likely to find himself.

The father has become central, rather than the child. In view of the history to date, there was arguably “some doubt” about Mr C’s dedication to the welfare of the child and his staying power. The difference between “the child needing the father as a guardian and the father needing to be a guardian of the child” appears no longer to be as significant as<sup>805</sup>

the more fundamental issue that it is the responsibility and obligation of parents, as guardians, to adjust their thinking so as to ensure that [the criteria for shared parenting] are met.

Some parents however are acknowledged as being unable to adjust their thinking enough to reach the required standard for shared parenting. The limits on the extent to which His Honour was prepared to impose shared parenting are illustrated in *Murray v Carver*,<sup>806</sup> decided in June 2001, almost exactly a year after *W v C*. The father, Mr Murray, like Mr C self-represented, wanted to reverse a custody and access regime so that his son was in his primary care or at least so that he

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<sup>802</sup> *K v B*, above, 178.

<sup>803</sup> *K v B*, above, 185.

<sup>804</sup> *W v C* [2000] NZFLR 1057 (FC), 1069, 1073.

<sup>805</sup> *W v C*, above, 1071.

<sup>806</sup> *Murray v Carver* (27 June 2001) Family Court Wellington FP 085 554 96.

shared his care equally. There had already been extended litigation including an appeal to the High Court.

In referring to *W v C*, and to the criteria for successful shared parenting, His Honour makes it clear that in this case, shared parenting is not appropriate because of Mr Murray's behaviour.

In finding that there was no evidence that the arrangements for the child (established by a High Court judgment) needed to be varied, His Honour emphasised that the situations that face separated parents and their children are "infinitely variable". The variables here seemed to be that the research studies on absent fathers Mr Murray cited did not apply to him, that he was "critical and mean-spirited" about his child's mother (while claiming he had no antagonism towards her); and that he did not demonstrate "a full understanding of the importance of the contribution the mother has made and is making to the child's life."<sup>807</sup> He also (although he sought shared custody as well as a change of custody)<sup>808</sup>

tended to undervalue and trivialise his own important contribution on access occasions, apparently assuming that a proper contribution could be achieved by him only if he became J's custodial parent.

While His Honour understood the father's frustration at "feeling himself disenfranchised as a parent ... he has not been disenfranchised in any true sense ... There is a lack of perspective and balance in his attitude."<sup>809</sup>

This case demonstrates that a year after *W v C* His Honour's commitment to the concepts he articulated is not absolute. It may be limited if access is already occurring on a regular basis and where another factor exists, like criticism of the mother.

The case also reinforces that criticism of the other parent is unacceptable, or "bad". This position is likely to continue to make it problematic for women who seek to restrict access to express their reasons for this and have them accepted rather than be themselves labelled as "bad" mothers who do not support their children's fathers.

Alternatively, by this time, His Honour may have been aware that the regime of shared parenting he imposed in *W v C* was not working and might not be "made" to work.

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<sup>807</sup> *Murray v Carver*, above, 6.

<sup>808</sup> *Murray v Carver*, above, 7.

## VI. Concluding Remarks

This chapter has analysed *W v C* in relation to the contextual material in Chapter 2, as well as addressing in detail the “template” for parenting responsibility proposed by Judge Inglis QC and supported by some judges in some of the submissions and papers discussed in Chapter 4.

In conclusion, it is submitted that the parameters and principles His Honour described in relation to shared custody were flawed: *W v C* is a good example of an imposed solution that cannot work. Since the Court failed to recognise the realities of the gendered hierarchy of care and their consequences for Ms W and her son and that Mr C was unwilling to accept his role in the hierarchy, the preconditions for successful shared parenting, described by Trinder et al,<sup>810</sup> did not exist. The case is also a good example of the use of Trinder et al’s third discourse, giving parental - in this case paternal - needs equal prominence with the child’s needs, often used by fathers in their “consistently battling”<sup>811</sup> group.

The case illustrates vividly some of the issues at stake for mothers who challenge the unconditional right of fathers to whom they were married or with whom they were living when the child was born to be involved in their children’s lives. Paternal status appears to have become paramount, rather than the best interests of the child. The responsibilities of primary carers and their surrounding conditions are seen as less important unless they are exercised in a way that does not support the exercise of a paternal right.

Policies that provide some parents “with an entrenched status as guardians [to protect] the family unit of parents and child from gratuitous or unjustified outside interference”<sup>812</sup> precluded His Honour’s consideration of J’s and Ms W’s wellbeing in the way same way that he considered, for instance, R (the child in *K v B*) and Ms B herself.<sup>813</sup>

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<sup>809</sup> *Murray v Carver*, above, 7.

<sup>810</sup> See above Chapter 1 nn 23-28 and accompanying text.

<sup>811</sup> See above Chapter 2 nn 165-169 and accompanying text.

<sup>812</sup> *W v C* [2000] NZFLR 1057 (FC), 1062.

<sup>813</sup> See above nn 134-136. It is also conceptually at odds with Judge Ellis’ view in *Re the guardianship of ACL* [2002] NZFLR 165 (FC). See above Chapter 2 n 151, Chapter 3 nn 24-27, Chapter 6 n 146 and below Chapter 8 nn 199-200, 204-205, 209; and accompanying text.

Here, the ongoing involvement of Mr C, given the history of his “black and white” thinking and his refusal to see J at all if not on his (Mr C’s) terms, may not be justifiable. He demonstrated that he was unwilling to be a father, over a period of some time, and was more or less unknown to J who did however have a compensatory relationship with other members of Mr C’s family.

*W v C* ultimately seems to be about “fairness” between the parents without addressing fairness towards all the parties. It seems to have been heavily influenced by the welfare of Mr C. Ms W made a mistake in marrying Mr C. Their minimal marriage was being made to justify an enormous and continuing intrusion. She may well feel that it was unfair, that because Mr C lived with her and J for six and a half months that the Court will force her into a position where she has to “deal” with him, the quality of her home environment will be compromised, and she has to accept his intrusion, because of his needs, rather than J’s. Her autonomy was at risk and her commitment to nurturing J was arguably not being properly recognised by the Court in a decision that appeared to undermine rather than support her.

*W v C* appears to show how a mother with good reasons for not wanting to share responsibility according to the wishes of a father becomes unfairly labelled over time, as a “disciplining” strategy, though not named as such. The case illustrates the parameters of the power of judges to force mothers to co-operate with unsatisfactory fathers, without any “overt” enforcement procedures. If a mother is already unhappy and anxious, if not fearful, about the role that her child’s father plays in her family, those feelings will be compounded by the Court’s judgments made about her mothering and the restrictions placed on her by the requirements of shared parental responsibility. This is arguably an institutionalised form of debilitating power with the attendant potential consequences for Ms C’s wellbeing and consequently the wellbeing of J.

## Chapter 7. Relocation – D v S

### I. Introductory Remarks

Relocation of either parent with or without the children, like separation itself, irrevocably alters the status quo and usually forecloses any possibility of returning to it. But there is no research that shows that distance necessarily precludes regular contact with a second parent (though its frequency and duration may be affected) or erodes its value. Maclean and Eekelaar, for instance, concluded that<sup>814</sup>

distance need be no real barrier to the exercise of contact if that is desired ... parents [in their study] who live more than ten miles from the child and do not exercise contact are inhibited from exercising contact not by distance but by other factors.

Arguably Trinder et al's hierarchy of care can continue to function well when separated parents no longer share a locality.<sup>815</sup> If a primary carer sees the facilitation of contact as part of her responsibility, she will continue to exercise that responsibility wherever she lives with the children. Sometimes this will be primarily through ensuring that letters or emails are written, school reports are sent, money is saved for visits, phone calls are made. If an auxiliary parent is equally committed to carrying out his share of the responsibility, the arrangements can work well, allowing for him to develop and maintain other aspects of his life while retaining a relationship with his children during extended holiday visits, for example.

Inevitably relocation cases are highly gendered because only a custodial parent's relocation with the children is challenged in the Family Court.<sup>816</sup> In relation to "shared responsibility" relocation cases illustrate the way the language used obscures reality. Relocation of auxiliary parents (although it will have the same result for children in relation to access as their own relocation with their primary parent) usually "involve[s] a practical assessment of re-jigging access and ...

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<sup>814</sup> Maclean M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households* (1997) Hart 122.

<sup>815</sup> The "hierarchy of care" is defined above Chapter 1 nn 25-28 and accompanying text.

<sup>816</sup> I have found no case where a parent who had left a locality objected to the relocation of the parent and children who remained; nor any case where a primary parent who shared responsibility with an auxiliary parent, whether in a custody/access or shared guardianship or shared custody arrangement objected to the relocation of the auxiliary parent. *Gledhill v Gledhill* (28 March 2002) Family Court Waipukurau FP 081/53/00 and *Maaka v Field* [1996] NZFLR 172 (FC) are the only cases found where a father as a primary caregiver sought and was refused permission to relocate.

doesn't involve the hard decisions that relocation cases involve."<sup>817</sup> It is not, as this statement shows, considered to be relocation at all, even where parenting is a "joint" or "shared" exercise because the children are not moving. What is seen as the "primary" home of the children remains fixed. However it has exactly the same effect on access arrangements as a move by the primary parent with the children. The "hard" decisions are arguably hard only because an auxiliary parent wants to prevent a primary parent making a decision that in any other context is unremarkable when made by a family in a mobile society. Relocation where there is equal, joint, primary parenting is more problematic, but if parents can manage this probably they are also likely to be able to manage relocation issues.

Henaghan et al summarise this situation in relation to a group of cases where permission for relocation was refused by the Court solely to give recognition to the fathers' rights of access. They suggest an alternative:<sup>818</sup>

There was only one fact that mattered "the loss of a relationship with the father." The talk about an inquisitorial investigation into welfare, looking at each case on its merits, weighing up all the factors, is just that[,] talk. In reality the judge's value of what is important for children, namely a close relationship with both parents determines the outcome. As that is the determining factor then it would be more productive to make it clear from the offset so that evidence can be directed specifically to it, and cross examination can be carried out to test the closeness of the relationship and to test whether holiday access can replace weekly access.

This statement seems to confirm, in conjunction with the paucity of cases suggesting otherwise<sup>819</sup> the (hidden) gendered nature of relocation cases. However the history of relocation cases, the development of complex decision making in those cases, and the contemporary jurisprudence of joint parenting with the imposition of shared parental responsibility when fathers feel like "second class" parents, all militate against the suggested solution.

In New Zealand a smaller proportion of relocation cases were decided in favour of the custodial parent (usually the mother) in the years 1999-2000 than during the years 1988-1998.<sup>820</sup>

According to Hengahan et al this change was due to a change in the predominant judicial value, from one that assumed that the wellbeing of the custodial parent would ensure the wellbeing of the child to one that stressed the importance of the relationship between the non-custodial parent

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<sup>817</sup> David Burns, counsel for the Family Law Section of the New Zealand Law Society (as Intervener), in *D v S* (no 7) (personal communication 18 December 2002). See also above Chapter 2 nn 23, 131 and below nn 95, 265 and accompanying text.

<sup>818</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 27.

<sup>819</sup> See above n 3.



and the child.<sup>821</sup> After *W v C*<sup>822</sup> was decided, in another context, Henaghan cited the values a little differently under a heading “Changes in the Wind.” These changes were: recognition of the importance of the relationship [of the child] with the access parent, recognition of shared custody as the fundamental position and overseas experience, and the legislative changes in Australia and the United Kingdom that emphasise joint parental responsibility.<sup>823</sup> These changes help obscure the hierarchy of care and its consequences, particularly for women.

Within this context, *D v S*<sup>824</sup> first reached the Family Court a few months after *W v C*<sup>825</sup> was decided. In brief, after separation, a mother wanted to bring up her children in Ireland rather than New Zealand. The children’s father believed that they would be better off staying in New Zealand.

There are at least 11 decisions, under various titles, which for ease of reference and because of restriction on publication of identifying details are here numbered *D v S* (no 1) - *D v S* (no 11). Two of the Court of Appeal decisions, *D v S* (no 7) and *D v S* (no 11) are significant because of the principles addressed. *D v S* (no 7) establishes principles relating to relocation proceedings. *D v S* (no 11) has significance for guardianship principles in general, because of the Court’s ruling on *W v C*. However the Family Court and High Court decisions have their own interest. The Family Court decisions were made in a context where changes in the wind were arguably at their most intense and reflect this while the High Court’s decisions perhaps show the decision makers’ distance from these changes. But at both levels, the judges struggled with a situation where they

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<sup>820</sup> Henaghan et al, above, 1. See also above Chapter 4 n 10 and accompanying text.

<sup>821</sup> Henaghan et al, above, 1. The writers could have included *close parental geographical proximity* as a precondition for a close relationship with both parents.

<sup>822</sup> *W v C* [2000] NZFLR 1057 (FC). See above Chapter 6.

<sup>823</sup> Henaghan M “Shared Parenting: Where From? Where To? Children’s Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation 56-58. In this chapter Henaghan quotes at length from *W v C*, above, and notes that judges have a diversity of views on shared parenting, that the counselling/mediation professions believe that education in how to achieve the ideal of shared parenting will create more shared parenting situations; see also Chapter 4 nn 10-14 above and accompanying text.

<sup>824</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99 Judge Callaghan; *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 3) (11 May 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 4) (5 July 2001) High Court Christchurch AP 39/00 Panckhurst J; *D v S* (no 5) (10 July 2001) Court of Appeal CA 159/01 Gault, Keith and Blanchard JJ; *D v S* (no 6) (24 September 2001) Court of Appeal CA 159/01 Richardson P, Tipping and Anderson JJ; *D v S* (no 7) *D v S* [2002] NZFLR 116 Richardson P, Keith, Tipping and Anderson JJ; *D v S* (no 8) *D v S* (18 December 2001) Court of Appeal CA 159/01 Richardson P, Keith, Blanchard, Tipping, Anderson JJ; *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99 Judge Somerville; *D v S* (no 10) *S v D* [2002] NZFLR 865 Chisolm and Fraser JJ; *D v S* (no 11) *D v S* [2003] NZFLR 81 Gault P, Blanchard and Glazebrook JJ.

<sup>825</sup> *W v C* [2000] NZFLR 1057; see Chapter 6 above.

found decision making difficult. This chapter will focus on the Family Court and Court of Appeal decisions with some reference to those of the High Court.

The case is remarkable because a devoted, Roman Catholic, mother whose life revolved around motherhood appears to have decided that as her children's father would not give permission for her to relocate with their children and was capable of caring for them, and the Family Court refused her application, she would relocate alone. It challenges the assumption that a good mother will continue to be the primary carer and facilitate her children's relationship with their father in the way that he chooses and a court endorses, regardless of the conditions under which she is required to do this.<sup>826</sup>

After a summary of the facts, including the outcomes of each hearing, the context will be discussed, including the current Family Court environment and relating the facts to the social science research. The first Court of Appeal decision, *D v S* (no 7) will then be analysed. This will be followed by analysis of the two Family Court decisions *D v S* (no 1) and *D v S* (no 9) with a view to understanding how underlying the values affected how the Court justified its decisions, whether made under the *Stadniczenko* principles by Judge Callaghan in *D v S* (no 1) or those of *D v S* (no 7) by Judge Somerville in *D v S* (no 9). The use of *W v C*'s principles by Judge Somerville in *D v S* (no 9) to justify this decision and to "discipline" Ms S will be discussed following the High Court's and the Court of Appeal's responses in *D v S* (no 10) and *D v S* (no 11). The role of *W v C* in *D v S* (no 9), *D v S* (no 10) and *D v S* (no 11) will then be analysed.

## II. The Facts

From the facts, Ms S was a very good mother. She did nothing wrong at all. She came from a family where "family" was important in a traditional way, very much *the* family, reinforced by the practices of Roman Catholicism, including daily mass, for her parents at least. And she continued traditionally:<sup>827</sup>

Upon leaving school she followed her mother, and several siblings, into hairdressing but she is not career oriented. Throughout her life, her focus has instead been on her family.

She went to New Zealand, fell in love with Mr D, returned to Ireland, and then married him there. The couple returned to New Zealand and had three children: Y born June 1991, E born February

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<sup>826</sup> See Chapter 2 II. 5. *The response of the legal system: The "bad" mother* for discussion of the construction of "bad" motherhood generally and in relation to relocation.

1993 and T born October 1995. It can be inferred that Ms S was the homemaker, while Mr D pursued his business career. It seems that Mr D's contribution to the parenting process was originally that of a "helper" at best. His belief was that<sup>828</sup>

[the boys'] need for nurturing is met primarily by their mother and is most important in their early years ... from the age of 7, their father becomes increasingly more important, before being overshadowed by the influence of the children's peers.

In 1997 Ms S took the children to visit her parents in Ireland. While she was there Mr D visited briefly to tell her that he no longer loved her and that their marriage was over. Ms S decided not to return to New Zealand. In Ireland there was family support for her and the children, a place to move forward from. In New Zealand there was no permanent home, no work, no husband, to return to. However, Mr D's threat to come and get the children, and information about the Hague Convention, convinced her to return.

Back in New Zealand in September after five months away, Ms S learned that Mr D had met someone else, who became the mother of his fourth child, M,<sup>829</sup> born in May 1998. The separation process was "long and drawn out ... the mother [was] very much wounded by the process ... had 'loved the father to pieces'."<sup>830</sup> For two years, during which she twice returned to Ireland (on trips paid for by her parents) access was not fixed. There was "some dispute as to the precise amount of time [Mr D] spent with the children"<sup>831</sup> though it was reasonably regular. Ms S was the full time caregiver, in receipt of a DPB.<sup>832</sup> She remained supportive of Mr D and kept the conflict from the children, who flourished. She went to counselling and remained open to reconciling with Mr D in spite of his new relationship and new child and the visit to New Zealand (when they met only socially) of an Irishman met during her trip to Ireland in July 1998, during a temporary reconciliation between her and Mr D. (Ms S also visited Ireland in August 1999 and her friend returned to New Zealand in January/February 2000.)

It seems that Mr D may have been one of those fathers who become more involved with their children after separation, perhaps even more so once it seemed possible that the children's

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<sup>827</sup> *D v S* (no 9) *S v D* (20 March 2002) Family Court Christchurch FP 009/1607/99, 10.

<sup>828</sup> *D v S* (no 9), above, 7.

<sup>829</sup> There was "no evidence to suggest that M would be so detrimentally affected by the children moving to Ireland" *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 25.

<sup>830</sup> *D v S* (no 1), above, 6.

<sup>831</sup> *D v S* (no 1), above, 7-8.

<sup>832</sup> *D v S* (no 1), above, 8.

mother might want to develop her own life elsewhere. For whatever reason, in October 1999 Mr D applied for a shared custody order (interim and final) and an order preventing the removal of the children from New Zealand. From this time, his access became regular: the children spent every alternate weekend and each Wednesday night with him. As well, with his brother, who also coached E's rugby team, he coached Y's rugby team. At the time of the first hearing, beginning almost exactly a year later, on 18 October 2000, Mr D sought an [equally] "shared parenting" regime but then decided to seek only as extra night's access each fortnight.<sup>833</sup>

By November 1999, when Ms S filed an application for custody and an order permitting the removal of the children from New Zealand to Ireland, she appears to have been desperate to return to Ireland. By now she had been the primary carer of their children for eight and a half years although Mr D had moved into her home and cared for the children while she was in Ireland.

#### 1. *D v S (no 1)*<sup>834</sup>

At the first hearing, Mr D was insolvent, unemployed and in debt, which included owing \$40,000 for unpaid child support. He was in the process of setting up an investment company. He appeared to be "a competent and intelligent businessman who has suffered from one business enterprise that went wrong."<sup>835</sup>

Because Mr D believed that "renting properties is an appropriate way of housing ... because there is a cost regardless"<sup>836</sup> he and Ms S had never owned their own home. Ms S therefore had no money from her share of matrimonial property to buy a home and moved house with the children at least four times between September 1997 and 2001 "because of the landlords selling the properties."<sup>837</sup>

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<sup>833</sup> This took his share of the parenting to approximately 40 per cent, the amount required to be defined as sharing custody under the Child Support Act s 13(1). The role of child support obligations is not discussed anywhere in *D v S* but it is perhaps there as a subtext, in the amount Mr D owed Inland Revenue at the outset, the increase in time he spent with his children from October 1999, his obligations to his youngest child, M, and Ms D's offer to forgo child support if she went to Ireland.

<sup>834</sup> *D v S (no 1)* (2 November 2000) Family Court Christchurch FP 009/1607/99.

<sup>835</sup> *D v S (no 1)*, above, 9.

<sup>836</sup> *D v S (no 1)*, above, 10.

<sup>837</sup> *D v S (no 1)*, above, 10.

Ms S supplemented her DPB with a job as a part-time waitress; Mr D cared for the children while she worked. In general Ms S lived “a relatively isolated existence and [was] emotionally dependent on her family in Ireland.”<sup>838</sup> She had friends but did not have much to do with them at weekends when they were involved with their families.<sup>839</sup> She was “lonely when the children are away, particularly at weekends.”<sup>840</sup>

In contrast, her family in Ireland offered help with accommodation, a car (since at the time of the first hearing in October 2000, Mr D lived “within biking distance”<sup>841</sup> it is possible to infer not only did she not have a car in New Zealand but also that Mr D may have been exercising a kind of debilitating power through his proximity) and with work as well as emotional support. Her Irishman friend also supplied an affidavit saying that he would want Ms S and the children to live with him and he would support them. But he was not her “prime reason for wishing to live in Ireland.”<sup>842</sup> If the relationship worked out it would be a “bonus.”<sup>843</sup> The kind of life she could lead with the children in Ireland must truly have seemed like the difference of being in and out of prison.

As an incentive to Mr D to give permission for the relocation, Ms S offered to forego claiming child maintenance because Mr D would have to pay some costs for travelling to Ireland for access. With support from her family, she also offered to pay car and accommodation costs, half the return airfare of Mr D’s travel to Ireland and half the children’s fares to New Zealand as well as the fare of an adult to accompany them.

According to the Family Court, Ms S would be “desperately unhappy”<sup>844</sup> if the Court did not allow her to take the children to Ireland but would not abandon the children and would remain living with them in New Zealand. She did not know if she could remain in the same city and might want to move elsewhere.<sup>845</sup> The only way she could cope with staying in New Zealand at was because “she has held the desire that she will be able to return to Ireland. It is too painful for

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<sup>838</sup> *D v S* (no 1), above, 13.

<sup>839</sup> In my research on single mothers this kind of isolation was often referred to; when marriages or partnerships end, the separated mother is no longer invited to spend times with friends at weekends if they have families.

<sup>840</sup> *D v S* (no 1), above, 38.

<sup>841</sup> *D v S* (no 1), above, 38.

<sup>842</sup> *D v S* (no 1), above, 12.

<sup>843</sup> *D v S* (no 1), above, 12.

<sup>844</sup> *D v S* (no 1), above, 3.

her ... to consider having to stay here ... [it is] like a sentence.”<sup>846</sup> There was no evidence that Ms S’s unhappiness had impaired the children’s development; nor that she was psychologically or psychiatrically impaired by the unhappiness herself.

If the children were to go to Ireland, Mr D hoped that, in spite of current financial difficulties, he might himself relocate to or near Ireland after 3-5 years, to be able to have ongoing involvement with them. He also held the view that there “may come a time when the children will choose to live in Ireland when they have a greater degree of self-determination.”<sup>847</sup> There are no facts about how he proposed sustaining his relationship with M and her mother if he relocated.

There were two section 29A reports on the children, who had “close and affectionate” relationships with each parent and were “stable and secure” in their current situation.<sup>848</sup> At the first report, each child wanted to go to Ireland with Ms S. By the second, obtained during the hearing, Y wanted to be cared for by both parents. E said he would “miss his paternal grandparents but not [Mr D’s new partner] or M.”<sup>849</sup> However the section 29A report writer was of the view that “the children all expressed a slight preference about going to Ireland but were also very quick to talk about how much they would miss their father.”<sup>850</sup>

The parents had tried to minimise the effect of conflict between them on the children but by this time they were so distrustful of each other that they used a book which passed between them via the children to communicate. This had led to some miscommunication about health and recreation issues for the children. The section 29A assessment showed that the children were doing very well, socially, academically, culturally and in sports, which were “all matters that would auger well for a successful relocation.”<sup>851</sup>

The outcome of this hearing was that custody was to be shared between the parents. The children were to live with Ms S and Mr D was to have access for approximately 40 per cent of the time.

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<sup>845</sup> *D v S* (no 1), above, 3.

<sup>846</sup> *D v S* (no 1), above, 3.

<sup>847</sup> *D v S* (no 1), above, 16.

<sup>848</sup> *D v S* (no 1), above, 17.

<sup>849</sup> *D v S* (no 1), above, 20. This is the only direct mention of the children’s relationship to Mr D’s new partner, in any of the decisions.

<sup>850</sup> *D v S* (no 1), above, 19.

<sup>851</sup> *D v S* (no 1), above, 18.

Ms S was to receive counselling and if both parents were willing they could have counselling on parenting issues. The children were to live in Christchurch and were not to leave New Zealand without leave of the Court or written agreement of both parents.

## 2. *D v S (no 2)*<sup>852</sup>

Ms S appealed the Family Court decision in February 2001 after a two month trip to Ireland on her own, when Mr D cared for the children with part-time help. This may have been unplanned trip, a choice reminiscent of Ms Bramley's to "move to put the children into his care."<sup>853</sup> While away, she "made a decision that for my own wellbeing and sanity I will return to Ireland whatever the outcome of my present appeal."<sup>854</sup> She had had a cathartic moment on the air journey home, when the plane went into free fall for 15 seconds and she thought she was about to die.<sup>855</sup> Her relationship with her Irishman friend had grown stronger and he had proposed marriage to her.

By this time, Mr D had significantly reduced his indebtedness, was confident that better times were ahead and held the view that in future he would not have to work so hard because he was no longer struggling to meet past liabilities.<sup>856</sup>

The High Court had the benefit of affidavits from Ms S, her counsellor,<sup>857</sup> Mr D, Ms S's Irishman<sup>858</sup> and an updated section 29A report. The report maker was cross-examined. The Court found the new evidence<sup>859</sup>

compelling of the point that [Ms S] has made a firm decision concerning her future. ... the very premise upon which the Family Court decision was reached, namely that the boys could have "the best of both worlds" through the presence of two parents in Christchurch, no longer obtains. Whether the Judge was correct on the basis of the evidence before him in concluding that [Ms S] would remain in New Zealand is

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<sup>852</sup> *D v S (no 2)* (2 April 2001) High Court Christchurch AP 39/00.

<sup>853</sup> "It is evident that, at short notice, he stepped into the breach, employed part-time domestic help, curtailed his work hours and provided an excellent environment for the boys from late November to early February. He also took an extended holiday break (five weeks) so that the boys were able to enjoy a range of outdoor activities with him:" *D v S (no 2)*, above, 20. For Ms Bramley's similar action see for instance Chapter 5 above n 48.)

<sup>854</sup> *D v S (no 2)*, above, 11.

<sup>855</sup> *D v S (no 9) S v D* (20 March 2002) Family Court Christchurch FP 009/1607/99, 11. Judge Somerville added: "S may also have been influenced by a proposal of marriage."

<sup>856</sup> *D v S (no 2)*, above, 18-19.

<sup>857</sup> He had stated *inter alia* that Ms S's need to return to Ireland had become "deep-seated and predominant", that "the decision disallowing her to live in Ireland with her children was psychologically devastating to her": *D v S (no 2)*, above, 12.

<sup>858</sup> He perceived Ms S to be "more content and stronger in herself now that she has decided that she will definitely be returning to Ireland with her sons": *D v S (no 2)*, above, 12.

<sup>859</sup> *D v S (no 2)*, above, 13.

no longer of such consequence. Events have moved on. In my view it is therefore necessary for me to revisit the discretionary question of removal in the light of the present situation.

Since the hearing, the Court's attention had been drawn to *Payne v Payne*.<sup>860</sup> This concerned the child of a New Zealand woman who was desperately unhappy living in London. Because it came to His Honour's attention after the hearing, no submissions relating to it were made by counsel. However Panckhurst J "derived some assistance" from reading the case, noting that it seemed that<sup>861</sup>

a rather more prescriptive approach to cases such as the present is followed in England as compared to here ... [T]he case does contain a number of observations which I think are helpful provided they are not applied in a mechanical fashion. I also derive some small comfort from the fact that the Courts in England find cases of this nature every much as difficult as we do.

His Honour did not refer to any New Zealand law on relocation. He decided that it was in the best interests of the boys if they were to accompany their mother to Ireland,<sup>862</sup> with the terms of formal orders and directions reserved.

### 3. *D v S (no 3)*<sup>863</sup>

Ms S, who had planned to leave for Ireland in July wanted to leave in late May, partly because the tension since the last decision was detrimental to the children. Mr D opposed this, wanted quality time with the children before they left and decided to seek leave to appeal the decision in *D v S (no 2)* to the Court of Appeal. He was still contemplating moving to Ireland in the next few years and also sought a shared custody decision if he did so. The Court made a section 11 permanent custody order and access arrangements, with the July departure time to remain and no condition for shared custody in future if Mr D were to move to Ireland.

### 4. *D v S (no 4)*<sup>864</sup>

Mr D sought a stay of removal for the children pending his application for leave to appeal to the Court of Appeal. The stay was refused on the basis that the appeal right was limited, the departure of the children would not render the right to appeal effectively nugatory and further delay would be undesirable.

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<sup>860</sup> *Payne v Payne* [2001] 2 WLR 1826 (CA).

<sup>861</sup> *D v S (no 2)*, above, 10.

<sup>862</sup> *D v S (no 2)*, above, 20.

<sup>863</sup> *D v S (no 3)* (11 May 2001) High Court Christchurch AP 39/00.

<sup>864</sup> *D v S (no 4)* (5 July 2001) High Court Christchurch AP 39/00.



### 5. *D v S (no 5)*<sup>865</sup>

Mr D sought a stay of execution of orders made in *D v S* (no 3) in relation to his oldest son Y only. The Court of Appeal declined to make the order for the same reason that the High Court refused the stay in *D v S* (no 4) and because<sup>866</sup>

the limited ground upon which leave to appeal can be obtained means that it will be necessary to establish a question of law of sufficient general or public importance and we were not persuaded that the prospects of securing leave can be rated as high.

The day after this decision Ms S and the children left for Ireland.

### 6. *D v S (no 6)*<sup>867</sup>

Mr D sought leave to appeal on a question of law: Panckhurst J erred by placing some reliance on *Payne v Payne*<sup>868</sup> which conflicted with *Stadniczenko v Stadniczenko*.<sup>869</sup> His application was granted on the basis that “the correct approach to matters of the present kind which are difficult and may be of increasing frequency, raises an issue of general importance.”<sup>870</sup> A condition of leave was that Mr D (here representing himself) prosecute the appeal with all due diligence.

### 7. *D v S (no 7)*<sup>871</sup>

The appeal was allowed. Panckhurst J materially and wrongly influenced by *Payne v Payne*, gave too much weight to impact of mother’s decision to return and her need to be a mother in Ireland; *Payne* was inconsistent with wider all-factor child-centred approach required under New Zealand law. Blanchard J dissented: Panckhurst J had taken all factors into account including updating evidence. The case was remitted to the Family Court for rehearing of original applications or hearing of fresh applications. The Court reserved its decision about consequential orders

### 8. *D v S (no 8)*<sup>872</sup>

The orders made in the Family Court and the High Court were discharged. Mr D and Ms S were given joint custody pending further order of the Family Court. The children were to travel from Ireland to New Zealand at the end of December; with a hearing in the Family Court in the week beginning 4 March 2002. Counsel for the children were reappointed. There was to be a section 29A update from the psychologist and further affidavits from both parents. The children were to

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<sup>865</sup> *D v S* (no 5) (10 July 2001) Court of Appeal CA 159/01.

<sup>866</sup> *D v S* (no 5), above, 2.

<sup>867</sup> *D v S* (no 6) (24 September 2001) Court of Appeal CA 159/01.

<sup>868</sup> *Payne v Payne* [2001] 2 WLR 1826 (CA).

<sup>869</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA).

<sup>870</sup> *D v S* (no 6), above, 2.

<sup>871</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116.

<sup>872</sup> *D v S* (no 8) *D v S* (18 December 2001) Court of Appeal CA 159/01.

be with Mr D from end December to 20 January, then with Ms S for a week; then with Mr D until they left New Zealand or an order was made by the Family Court. During that time the children were interviewed for a further section 29A report.

### 9. *D v S (no 9)*<sup>873</sup>

The children had been in joint custody of their parents since the Court of Appeal's decision in *D v S* (no 8), but by now, March 2002, Ms S and the children had been in Ireland for eight months, with a visit back to New Zealand over the summer, at the end of which, in late January, it appears Mr D initiated proceedings to prevent the return of the children to Ireland.<sup>874</sup>

At this time, Ms S was seeking a sole custody order and the Court's approval for the removal of the children from New Zealand. Mr D sought a joint custody order "in his favour" under which the children would live in New Zealand with access to their mother in Ireland. He was<sup>875</sup>

frustrated by [Ms] S's declared intention of remaining in Ireland ... [found] it difficult to accept she would remain there if awarded custody ... [and he had] to advocate that the children would be better living with him as a sole parent ... when his primary position is that they would benefit most from co-parenting in new Zealand.

As was to be expected, given that from the beginning their stability and accomplishments had "auger[ed] well for a successful relocation,"<sup>876</sup> by this time the children were doing well in Ireland.<sup>877</sup> Of the children, who had been interviewed while on holiday in January, and who wanted to remain together, Y would prefer to remain living in New Zealand, but was not able to articulate his reasons clearly. E had a 70/30 preference for living with his mother in Ireland. T, the youngest, who until now had wanted to be with his mother, said that his preference was to spend an equal amount of time with each parent, year by year. The section 29A report writer still felt that the alternatives were finely balanced and unable to which one would best benefit the children. Counsel for the child's position is not recorded. Except for Ms S's failure to set up and maintain email contact, because of a computer fault,<sup>878</sup> a requirement of the High Court's order in *D v S* (no 2), she had facilitated access as required.

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<sup>873</sup> *D v S* (no 9) *S v D* (20 March 2002) Family Court Christchurch FP 009/1607/99.

<sup>874</sup> This is referred to in *D v S* (no 7), 6 but there appears to be no extant decision in the file.

<sup>875</sup> *D v S* (no 9), above, 7.

<sup>876</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 18.

<sup>877</sup> The children had "coped well" with the relocation: *D v S* (no 9), above, 4.

<sup>878</sup> *D v S* (no 9), above, 16. It can be argued, however, that the judgment equally supports an implication, given Y's views, that Ms S was obstructing contact in the hope that less contact would allow Y to get over his wish to return to

His Honour noted that although the children were “relatively unscathed, the same cannot be said of the parents.”<sup>879</sup> Mr D was now “angry, frustrated, and bitter” and “firmly of the view that the children’s interests would best be served by having input from both parents in New Zealand.”<sup>880</sup> Ms S was still “deeply affected by the end of the marriage [and] upset at the deterioration in their relationship as parents and would like to see it improve.”<sup>881</sup>

Mr D was granted joint custody “in his favour” apparently on the basis of the principles enunciated in *W v C*.<sup>882</sup>

#### 10. *D v S (no 10)*<sup>883</sup>

Ms S appealed the Family Court decision, alleging that Judge Somerville erred by being improperly influenced by the Court’s perception of fairness between the parties, adopting the starting point of the rights and obligations of the parents rather than the best interests of the children, placing undue weight on Y’s preference for living in New Zealand. Ms S alleged that the Court had also erred failing to consider properly whether the children’s relationship with Ms S would be sustained if they lived with Mr D in New Zealand, to consider adequately the need of T to live with Ms S and to take adequately into account that Ms S had been the primary carer since separation and the extent to which Ms S had encouraged the children to retain a positive view of Mr D; and that it was wrong to reach a decision that exposed the children to significant risk by removing them from Ms S’s care. Both Ms S’s counsel and counsel for the children wanted the High Court to determine the matter rather than remitting it to the Family Court for a third hearing while Mr D wanted it remitted. The Court decided that taking into account<sup>884</sup>

the history of the matter, the obvious importance to the children of achieving finality at the earliest possible time, the fact that no new factual information would be before the Court, and the limited extent to which factual findings and issues of credibility are involved, we believe that it would be irresponsible of us to refer the matter back for yet another Family Court hearing. We will have to determine the matter

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New Zealand; or that having contact only through school email facilities, kept the relationship with his father away from the family home.

<sup>879</sup> *D v S* (no 9), above, 6.

<sup>880</sup> *D v S* (no 9), above, 6.

<sup>881</sup> *D v S* (no 9), above, 10.

<sup>882</sup> *W v C* [2000] NZFLR 1057 (FC); see above Chapter 6.

<sup>883</sup> *D v S* (no 10) *S v D* [2002] NZFLR 865.

<sup>884</sup> *D v S* (no 10), above, 885.

The appeal was allowed and Ms S was granted sole custody subject to access (including assistance with accommodation and transport) by Mr D. Ms S's application to relocate was also granted.

### 11. *D v S (no 11)*<sup>885</sup>

Mr D sought leave to appeal the High Court decision. Leave to appeal was refused.

## III. Judicial Response

Analysis of judicial responses in *D v S* will focus on three main issues: the law relating to relocation in New Zealand (as enunciated by the Court of Appeal in *D v S* (no 7)), the role of belief systems in the Family Court in *D v S* (no 1) and *D v S* (no 9) and the role of *W v C* in relocation cases and ultimately in family law generally in *D v S* (no 9), *D v S* (no 10) and *D v S* (no 11).

### 1. The law on relocation: *D v S (no 7)*

#### (i) Judicial response

The primary issue was whether Panckhurst J in the High Court in *D v S* (no 2) had erred in law by basing his decision on principles from a recent English Court of Appeal case, *Payne v Payne*<sup>886</sup> which had not been argued before him. The Court decided that *Payne v Payne* was not good law in New Zealand; and the majority held that Panckhurst J had based his decision on *Payne* and had therefore erred. Richardson P delivered the majority decision on behalf of himself and Keith, Tipping and Anderson JJ. He gave the parents, Ms S now in Ireland with the children and Mr D in New Zealand, joint custody, remitting the case to the Family Court for a rehearing. Blanchard J, although in "entire agreement with the[ir] statement of New Zealand law"<sup>887</sup> concluded that the appeal should be dismissed because Panckhurst J had not erred.

The Court provided seven principles for consideration in relocation cases, without referring (in this part of the judgment) to *Stadniczenko*. The first is the meaning of the welfare of the child in this context where "the child's welfare is not the only consideration and ... freedom of movement

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<sup>885</sup> *D v S* (no 11) *D v S* [2003] NZFLR 81.

<sup>886</sup> *Payne v Payne* [2001] 2 WLR 1826 (CA).

<sup>887</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116, 135.

is an important value in a mobile community.”<sup>888</sup> It cited *J v C*<sup>889</sup> to show how to engage with the paramountcy principle of section 23 of the Guardianship Act. It means<sup>890</sup>

more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question ... [it is] a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the ... paramount consideration because it rules upon or determines the course to be followed.

Secondly, they state that “the approach mandated by section 23 and the emphasis on the parents’ responsibilities for the wellbeing of the child are wholly consistent with the relevant provisions of the United Nations Convention on the Rights of the Child.”<sup>891</sup>

Thirdly, they cite *G v G* as authority for all aspects of welfare having to be taken into account:<sup>892</sup>

An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter to any other factor. All aspects of welfare must be taken into account and that will include consideration of the child’s physical and mental and emotional wellbeing and the development in the child of standards and expectations of behaviour within our society.

On this basis, the Court must:<sup>893</sup>

... weigh all relevant factors in the balance in determining what will be in the best interests of the child. It is necessarily a predictive assessment. It is a decision about the future. It is not a reward for past behaviour. There is no room for a priori assumptions.

The Court goes on to cite Judge Mahony’s well known statement (including his approval of Judge Inglis QC’s summary of the need to look at “this child with this father, this mother”) in *VP v PM*.<sup>894</sup>

The fourth point is that an overall assessment must be made, without any preconceptions or presumptions: section 23 (1)(A) of the Guardianship Act “was designed to dispel any gender based assumptions as to whose parental care will best serve the welfare of the child.”<sup>895</sup> It is

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<sup>888</sup> *D v S* (no 7), above, 127.

<sup>889</sup> *D v S* (no 7), above, 127.

<sup>890</sup> *J v C* [1970] AC 668 (HL), 710-711 Lord MacDermott.

<sup>891</sup> *D v S* (no 7), above, 127: Articles 3.1; 9.3; 12.1; 18.1. See above Chapter 3 III. 2. (ii) *The limitations of UNCROC*.

<sup>892</sup> *G v G* [1978] 2 NZLR 444 (CA), 447.

<sup>893</sup> *D v S* (no 7), above, 128.

<sup>894</sup> *VP v PM* (1998) 16 FRNZ 621, 625-626, see also above Chapter 3 n 57 and Chapter 4 n 32; and accompanying text.

<sup>895</sup> *D v S* (no 7), above, 128.

necessary to balance “the advantages and disadvantages of the custodial alternatives available.”<sup>896</sup>

The effect of the nature and duration of the existing custodial arrangements is the fifth point: “... in some cases the duration of the existing arrangements and the greater degree of change may require greater weight to be accorded the status quo.”<sup>897</sup>

Sixthly, “decisions of Courts outside New Zealand are likely to be of limited assistance.”<sup>898</sup> The Court gave two examples of relevant features of the New Zealand scene emphasised by the intervener for the Family Law Section of the New Zealand Law Society: the growth and degree of involvement of both parents in family care, and the move in the Family Court to orders for shared care.

Finally, Their Honours refer to the material they have read that “brings home how difficult relocation disputes are and the anxious consideration which the Judges have given them.”<sup>899</sup> It also “brings home” that even where there is a personalised assessment “we are all influenced to some extent by our own perspectives and experience.”<sup>900</sup> They then refer to Frankfurter J’s statement that “... reason cannot control the subconscious feelings of which it is unaware.”<sup>901</sup> Their Honours then declined to provide guidelines on the basis that these should come from the legislature, if necessary.

The Court then proceeded to distinguish their reading of the decision in *Payne v Payne* from New Zealand law. In New Zealand, the welfare of the child is the governing requirement rather than “a proposition to be weighed alongside” a single isolated factor that “the primary carer’s reasonable proposals for the relocation of her family life ... will be granted unless ... incompatible with the

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<sup>896</sup> *D v S* (no 7), above, 128, citing *In the guardianship of J* (1983) 2 NZFLR 314 (CA), 320.

<sup>897</sup> *D v S* (no 7), above, 128. There may be argument about the relationship of this point to *Stadniczenko*, where the “important factor in favour of the custodial parent is that the award of custody shows that from the day to day point of view the best interests of the child lie with its being with the custodial parent and an incident of custody is the decision where to live. The wellbeing of the new family unit bears on the best interests of the child. The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent the child is on it for his or her emotional development and wellbeing the more likely an injury from the proposed move will be.” *Stadniczenko v Stadniczenko* [1995] NZFLR 493, 500.

<sup>898</sup> *D v S* (no 7), above, 128.

<sup>899</sup> *D v S* (no 7), above, 128.

<sup>900</sup> *D v S* (no 7), above, 129.

<sup>901</sup> *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451, 466.

welfare of the children,” and given a presumptive effect.<sup>902</sup> The Court compared the judgment of Thorpe LJ with that of Dame Elizabeth Butler-Sloss P who adopted a “somewhat broader approach”<sup>903</sup> and summarised their judgments as being marked by<sup>904</sup>

... the emphasis on guidelines, by the prescribing of an approach to relocation cases where there is a primary carer who wishes to remove the child from the jurisdiction; and by the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer. It is not a long step to the assumption that the happiness of the relocating parent will meet the best interests of the child’s welfare.

This was inconsistent with<sup>905</sup>

the wider all-factor child centred approach required under New Zealand law ... There will be no error of law if the decision as to residence is based on the welfare of the children looking at all relevant factors, including the need of the particular children for a continuing relationship with their father and with their mother.

### (ii) Discussion

The points made by the Court of Appeal in *D v S* (no 7) attempt to ensure that balanced assessments are made when deciding relocation cases. They affirm the centrality of the child to decision-making, and that the child’s welfare determines the course to be followed. Everything relevant to a particular child must be taken into account without a priori assumptions, particularly any that are gender-based. All aspects of the child’s welfare must be considered, the child’s physical, mental and emotional wellbeing, how the child will be cared “for”, as well as the development of the child of “standards and expectations of behaviour within our society.”<sup>906</sup>

Significantly, because of its signal to subsequent decision makers, one of these expectations (given as a reason for the limited relevance of overseas decisions) may be “two relevant features of the New Zealand scene”<sup>907</sup> as expressed by the intervener, Mr Burns: the growth and involvement of both parents in family care and the move in the Family Court towards orders for shared care.<sup>908</sup> This potential is reinforced by the view that “the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood”<sup>909</sup>

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<sup>902</sup> *D v S* (no 7), above, 130.

<sup>903</sup> *D v S* (no 7), above, 131.

<sup>904</sup> *D v S* (no 7), above, 131-132.

<sup>905</sup> *D v S* (no 7), above, 132.

<sup>906</sup> *D v S* (no 7), above, 127.

<sup>907</sup> *D v S* (no 7), above, 128.

<sup>908</sup> Mr Burns’ subsequent response to *D v S* (no 9)’s decision that the children should return to New Zealand and the custody of Mr D was that “the Family Court ... delivered a lengthy and extremely well-reasoned decision and has directed that the children come back to live in New Zealand”: Burns D “Relocation – ‘Solomon’s Choice’” in *Child Relocation and Abduction Cases* (2002) Auckland District Law Society, 8. See also above Chapter 2 n 23 and below nn 95 and 365.

<sup>909</sup> *J v C* [1970] AC 668 (HL), 710-711 Lord MacDermott.

because at this time the interests of the child's welfare was understood by those making decisions to be best served by auxiliary parents not feeling themselves to be "second class" parents.<sup>910</sup>

Their status in their children's life might then require that their children - and the primary parent - remain in close geographical proximity. Even if in fact an auxiliary parent's contribution was that of a "helper" to the primary parent, it was therefore likely that a decision maker might hold that the interests of the child or children spoke against relocation. The Court of Appeal's decision to give joint custody to two parents on opposite sides of the world may also have encouraged this view.

Henaghan et al, in a study described by the Court of Appeal majority as "a valuable review"<sup>911</sup> may have influenced its reasoning. The authors identify "two conflicting schools of thought"<sup>912</sup> on what is best for children post-divorce.<sup>913</sup> One is that children need continuing and frequent contact with two parents to overcome the damage suffered by children in divorced families. The other is that the crucial factor for the children's wellbeing is the well-functioning custodial parent. Henaghan et al support the need for continuing and frequent contact with both parents, which also argues against relocation.

If this was so, it is unfortunate that Henaghan et al refer, among other studies, to a single New Zealand study, a qualitative study Henaghan undertook with Children's Issues Centre authors<sup>914</sup> where "Apart from one family all the children in the study wanted to see even more of the access parent."<sup>915</sup> For this study, The Centre had difficulty recruiting families and difficulty getting the required consents. The sample was reduced from the 16 families originally planned to 12 families of whom 25 per cent had joint custody. The authors noted that there was little evidence of diminishing contact in their sample and were unsurprised by this "since the fact that we had to contact both parents for permission to interview the child meant that the access parent had to be

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<sup>910</sup> *P v K* [2003] 2 NZLR 787 (HC), 810. Although this case was decided almost exactly a year after *D v S* (no 7), during 2001 fathers' rights activists had been vigorously pursuing their goals and the Family Court judicial ideology of joint parenting discussed in Chapter 4 had been further developed following *W v C* in 2000. *Anderson v Paterson* [2002] NZFLR 641, decided the next month, extended "rights of custody" to a non-guardian father. See below Appendix 2 for the interrelationship of these events.

<sup>911</sup> *D v S* (no 7), above, 128.

<sup>912</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department 38-39.

<sup>913</sup> Henaghan et al, above, 43.

<sup>914</sup> Smith, A, Taylor, N, Gollop, M, Gaffney, M Gold, M and Henaghan, M *Access and Other Post-Separation Issues: A Qualitative Study of Children's, Parents' and Lawyers' Views* (1997) Children's Issues Centre.

<sup>915</sup> Smith et al, above, 40.



accessible.”<sup>916</sup> The study found that “children had much more to say about what they enjoyed about access than what they did not enjoy,”<sup>917</sup> again not surprising given the numbers with joint custody and the likelihood that those who eventually all gave permission were on good terms.

The results of this study conflict significantly with a second one also produced at the Children’s Issues Centre.<sup>918</sup> In this one, although 45.9 per cent of the children would have liked to see the access parent more often, 52 per cent, some of whom must have been among the children with unsatisfactory relationships with their access parent whom they saw infrequently, thought the contact time was “just right”, while only two children wanted less contact.<sup>919</sup> Part of the theoretical basis on which the Court of Appeal depended was therefore flawed; the Court had information that almost all children want more access, rather than children from eleven out of twelve families in an unrepresentative sample. It did not have the up-to-date information from a larger sample.

On the other hand, the Court does not necessarily endorse either of the “two conflicting schools of thought”. It emphasises that “the child’s welfare is not the only consideration and ... freedom of movement is an important value in a mobile community.”<sup>920</sup> It also states that decision makers must “weigh all relevant factors in the balance in determining what will be in the best interests of the child. It is necessarily a predictive assessment. It is a decision about the future. It is not a reward for past behaviour. There is no room for a priori assumptions.”<sup>921</sup>

In sum, the Court arguably rejected the false dichotomy represented by relocation decisions that take an “either or” approach: two fully functioning parents (in close geographical proximity) versus the wellbeing of the primary parent, in favour of an approach that in having no a priori assumptions can be truly flexible, in favour of an open-minded investigation. It was also arguably rejecting another approach, identified by Henaghan et al. This characterised decision making

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<sup>916</sup> Smith et al, above, 39.

<sup>917</sup> Smith et al, above, 40.

<sup>918</sup> Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre. For full details see Chapter 2 above nn 25, 30, 153-155, 176, 179-188, 196-202, 204-205; and accompanying text, particularly n180, in reference to the Pryor and Rodgers conclusions which are in line with Smith et al (1997).

<sup>919</sup> Smith, A, Taylor, N, Gollop, M, Gaffney, M Gold, M and Henaghan, M *Access and Other Post-Separation Issues; A Qualitative Study of Children's, Parents' and Lawyers' Views* (1997) Children's Issues Centre, 17-23.

<sup>920</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 127.

<sup>921</sup> *D v S* (no 7), above, 128.

under *Stadniczenko* as requiring the decision maker to state that the welfare of the child has been considered as well as the importance of the relationship with the access parent and the importance of the relationship with the custodial parent, then gives weight to the position of either the custodial or the access parent.<sup>922</sup>

Nor, in spite of its reference to “standards and expectations of behaviour within our society”<sup>923</sup> and “two relevant features of the New Zealand scene”<sup>924</sup> did the Court necessarily endorse the possible heart of current judicial philosophy that “There [is] only one fact that matter[s] ‘the loss of a relationship with the father’ ... [and this is the] determining factor,”<sup>925</sup> requiring decision makers to address this factor directly to see how the relationship could best be sustained as well as establishing exactly what the relationship to be sustained consists of. (This is perhaps unfortunate given the way that present philosophy on joint parenting obscures to some extent the realities of the hierarchical structure of care that might be exposed and considered by this kind of investigation.) It seems possible that decision makers were being instructed to look not only at this child, with these parents, but this child in this society, where parenting practices and attitudes to them are in flux. None of these ideologies is *the* approach, but perhaps aspects of any of them may be from time to time a useful and appropriate reference point. In referring to section 23(1)(A) of the Guardianship Act the Court may also have been suggesting that arguments that a child needs an auxiliary parent in close proximity because that auxiliary parent is a father will be no more successful than arguing that a child needs a mother. Arguments may have to be made around gender neutral *E v M*-style day to day needs.

Finally, in stating that any decision will not be “a reward for past behaviour”<sup>926</sup> the Court may have rejected any suggestion that willingness to provide full *E v M*-style parenting before and after separation is an issue. Arguably, in conjunction with the Court’s wide interpretation of the gender provisions of section 23(1)(A) this implies both an affirmation of the “behaviour” part of the section and a specific instruction to avoid “giving credit” for past primary or auxiliary parenting. This is however qualified by the Court’s fifth point that “in some cases the duration of

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<sup>922</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 5.

<sup>923</sup> *D v S* (no 7), above, 127.

<sup>924</sup> *D v S* (no 7), above, 128.

<sup>925</sup> Henaghan et al, above, 27.

<sup>926</sup> *D v S* (no 7), above, 128.

the existing arrangements and the greater degree of change may require greater weight to be accorded the status quo.”<sup>927</sup>

As the Court acknowledges, we are all influenced to some extent by our own perspectives and experience. At this time, with “joint responsibility” being the parenting philosophy of their choice, Family Court judges, characterised by the Chief Justice as having “unconscious values that get in the way,”<sup>928</sup> will continue to assess factors relevant to children’s according to how they believe joint parenting can best be achieved. As a result, they may reinforce standards and expectations of behaviour that damage mothers, who do most of the parenting of children, often in difficult circumstances. Although following *D v S* (no 7), on the reading given, decisions doing this not always be justifiable, given the Court’s wide interpretation of the gender provisions of section 23(1)(A) and the effect of its concern not to reward past behaviour on consideration of “willingness”, optimism about improved conditions for primary parents as a result of this decision is not warranted.

## 2. The Family Court decisions

This section will describe and discuss the decisions in the Family Court *D v S* (no 1) and *D v S* (no 9) under three headings: “Issues related to the research context”; “Judicial response” and “Discussion”.

### (i) Issues related to the research context

#### *(a) The Family Court environment*

The Family Court environment at this time supported a belief system that viewed joint responsibility as a starting point and, perhaps, saw a primary carer’s wish to relocate essentially (though possibly sub-consciously) as an attempt by the primary carer to frustrate access.<sup>929</sup> Henaghan et al’s paper on relocation had been presented a few months before *D v S* (no 1), described research that showed that all children but one surveyed wanted to see even more of their access parents.<sup>930</sup> *W v C* had been decided and a copy of it sent by the Principal Family Court Judge with his initial response to *Responsibilities for Children Especially when Parents*

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<sup>927</sup> *D v S* (no 7), above, 128.

<sup>928</sup> Elias S "Family Courts - 20 Years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001" (2002) *Family Court Review* 40(3) 297, 302.

<sup>929</sup> A chronology of the following factors and the *D v S* decisions are shown in Appendix 2.

<sup>930</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department. See also above nn 98-106 and accompanying text.

Part.<sup>931</sup> Judge Callaghan, who decided *D v S* (no 1) was on the committee that was writing the Family Court submission to *Responsibilities for Children Especially when Parents Part*<sup>932</sup> while making his decision. It is possible that he was influenced by all this as well as bound by the principles in *Stadniczenko v Stadniczenko*, then the leading case on relocation.

In contrast, when Judge Somerville decided *D v S* (no 9) he had to make his decision according to the principles in *D v S* (no 7).<sup>933</sup> These required him to make an overall assessment, without any preconceptions or presumptions. Although the Court of Appeal had pointed out that the growth and degree of involvement of both parents in family care, and the move in the Family Court to orders for shared care made overseas decisions less relevant than they might otherwise have been, this did not imply that any assumption about the value of shared care could be made, although this can be inferred from some of the Court of Appeal observations and its decision to make an order for shared custody.

By now, the Family Court had presented its submission on *Responsibilities for Children Especially when Parents Part* to the Secretary for Justice. It had also made its *Making Contact Work* submission<sup>934</sup> advocating a range of disciplinary measures, including and actual or threatened custody change for custodial parents who resisted access arrangements; it is possible that custodial parents who sought to relocate were by now included, by implication, in this class of parent. Controversy about Family Court decisions and their discrimination against men had been highlighted in the media (including, during 2001 two articles in a Christchurch paper and one in a Northland paper<sup>935</sup> where six judges were named as being anti-men.<sup>936</sup>)

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<sup>931</sup> Ministry of Justice *Responsibilities for Children Especially when Parents Part: The Laws about Guardianship Custody and Access; Discussion Paper* (2000). See above Chapter 4 n 16.

<sup>932</sup> See above Chapter 4 III. Family Court Response to *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access*.

<sup>933</sup> See below III. 1. *The law on relocation: D v S* (no 7).

<sup>934</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts. See above Chapter 4 IV. *Making Contact Work* Submission.

<sup>935</sup> Carlin D "New Family Court Judge Has History of Anti-Father Bias" (2001) *Christchurch Star* 15 June (not viewed); and Carlin D and Cheriton B "Anti-Father Family Court Judges Exposed" (2001) *Christchurch Star* 23 January (not viewed); and "The Six Most Anti-Family" (2001) *Northland Age* 25 January 7.

<sup>936</sup> Elias S "Family Courts - 20 Years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001" (2002) *Family Court Review* 40(3) 297, 299.

Various judges had presented papers on access issues at the 4<sup>th</sup> New Zealand Family Law Conference: these referred to the concerns of men's rights groups and also advocated stern measures against custodial parents who compromised access arrangements.<sup>937</sup> *Re the guardianship of ACL*<sup>938</sup> had established that a father applying for guardianship had merely to demonstrate that it was in the child's best interests that he be appointed a guardian, on the balance of reasonable probabilities. He did not have to demonstrate that such a change was of positive benefit to the child and would outweigh any potential disadvantages. *Anderson v Paterson*<sup>939</sup> had been decided (in the same city as *D v S*) giving a non-guardian father who had never sought guardianship or access "custodial rights": this meant that his child's mother had to return from the United States where she had relocated with their child. These external events seem likely to have affected the Family Court decisions in *D v S*. The development of an ideology of joint parenting may by *D v S* (no 9) have reached an apparently logical conclusion, that joint parenting required parents to remain in close geographical proximity and that a primary parent who sought to relocate was a "bad" one. That parent was free to relocate but the children, if there were a "viable" auxiliary parent, would remain.

As a result of all this it is arguably possible to identify, apart from the direct influence of *W v C*, two main influences that support the ideology of joint parenting and the assumptions that a good mother will continue as a primary regardless of the conditions under which she is required to do so and that father's involvement must be supported. These are the use of the language of joint and shared responsibility and an emphasis on the unique contribution made by fathers as fathers rather than as parents to mask an arguably inappropriate inversion of the hierarchy, on the grounds of gender.

*(b) The hierarchy of care*

The starting point was a conventional, gendered, hierarchy of care. Ms S was the primary carer. It can be inferred that before separation Mr D's position was at most that of a "helper."<sup>940</sup> The extent of his involvement after Ms S returned to New Zealand, before he applied for a shared custody order, was disputed. Access was not fixed but was "reasonably regular."<sup>941</sup> Then Mr D

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<sup>937</sup> See above Chapter 4 V. New Zealand Law Society Conference 2001.

<sup>938</sup> *Re the guardianship of ACL* [2002] NZFLR 165.

<sup>939</sup> *Anderson v Paterson* [2002] NZFLR 641. See below Chapter 8.

<sup>940</sup> For a definition of "helper" see above Chapter 2 n 20 and accompanying text.

<sup>941</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 7-8.

applied for shared custody. Access became regular. Mr D became a “sharer”<sup>942</sup> who did not contemplate however an equal sharing regime.<sup>943</sup> Until the first hearing, both parents were prepared to maintain this amended hierarchy (reflected in the children’s views). Ms S, as continuing primary carer, seems to have facilitated access according to the dictates of the hierarchy, with one small exception, in not being “overly receptive to increasing the children’s time with their father.”<sup>944</sup> She also offered various incentives for Mr D to persuade him to renegotiate the way the hierarchy functioned so that physical access would be during holidays rather than on a weekly basis.

Mr D cared well for his children when Ms S was in Ireland on her own, on several occasions; he took responsibility. It therefore became arguable that the hierarchy of care no longer existed or could be inverted; and that he was a viable sole custodian.<sup>945</sup> Ms S could thus be described either as a primary parent who, by seeking to relocate with the children, or alone, was hindering access or as a joint custodian who was undermining the other custodian. As a consequence she immediately reached, in both Family Court decisions, the necessary threshold to be defined as a bad mother within the current ideology of parenthood. However, she remained throughout the process the parent who provided comprehensive *E v M*-type care, especially the emotional elements. Mr D, although described by the Court as “narcissistic” was a very good access parent.

*(c) Willingness*

In this case, the willingness of either parent was not sufficiently in issue to suggest that their guardianship should be removed.<sup>946</sup> Each was willing to care for the children, but how this was to be managed was in issue. However, “willingness” was a complex factor. Parental willingness shifted throughout the process.

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<sup>942</sup> For a definition of “sharer” see above Chapter 2 nn 20 and accompanying text. When Mr D applied for shared custody and spoke of co-parenting all he wanted was one further night per fortnight. This would also take his care to five nights out of fourteen, and within the “substantially equally” definition of the Child Support Act s 13(1), reducing his formal child support obligations: *D v S* (no 1), above, 10; and Child Support Act s 13. See above Chapter 3 nn 80-85 and accompanying text.

<sup>943</sup> *D v S* (no 1), above, 13.

<sup>944</sup> *D v S* (no 1), above, 27.

<sup>945</sup> See above Chapter 4 n 50 and accompanying text re change of custody in this kind of situation.

<sup>946</sup> For a discussion of “willingness” and the Guardianship Act see above Chapter 3 nn 10-27.

At the end of *D v S* (no 1) Ms S “moved to put the children in [D’s] care”<sup>947</sup> for two months while she went to Ireland, “at short notice.”<sup>948</sup> When she returned to New Zealand following that trip, Ms S had resolved to return to Ireland to live with or without the children. Her sudden trip and her resolve mark a change in Ms S’s willingness to continue as primary parent regardless of the conditions under which she was required to do so. The hierarchy of care enjoyed by the children no longer existed.

By *D v S* (no 9), after the Court of Appeal had ordered joint custody, Ms S still sought sole custody and to remain in Ireland where she now was with the children, while Mr D was asking for joint custody in his favour. He was frustrated that Ms S’s choice had meant that he had to argue that the children would be better with him as the primary parent, in New Zealand and unable to accept that Ms S would remain in Ireland if the Court agreed to his having primary care; and apparently unwilling to be a primary parent. He also sought a fallback provision that if Ms S should return to New Zealand there should be an equal sharing arrangement. Ms S however was unwilling to be a primary parent who facilitated access in the way that Mr D wanted. The cumulative outcome, in *D v S* (no 7) and *D v S* (no 9) was that in deciding for Mr D, the Family Court each time implied that where care is shared a guardian’s “ability” and “willingness” is decided according to different standards for primary and auxiliary parents. According to this ideology, a primary parent must embrace close geographical proximity to the auxiliary parent regardless of the conditions attached and cost to her, even though that parent’s ability to provide the full range of *E v M*-style care and willingness to provide it on an equal basis is questionable. Adherence to this uneven standard is made possible by the overarching jurisprudence of joint and shared responsibility.

*(d) The conditions under which Ms S was required to parent in New Zealand*

In New Zealand, Ms S had the responsibilities of any single parent and the concomitant risks to her health<sup>949</sup> but no autonomy and little support. The risks for her and the children included, as a direct consequence of Mr D’s policy on housing, the instability generated by their need to move

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<sup>947</sup> *Bramley v MacDonald* (24 February 1999) Family Court Wellington FP 085/492/96, 4. The effects on decision makers of Ms Bramley’s and Ms S’s decisions to reject the assumption that they would continue to provide primary parenting regardless of conditions is to some extent similar. However, arguably, in *Bramley v MacDonald* Judge Ellis (although advantaged by having both parents living in geographical proximity) was slightly more successful in finding a (partial and possibly temporary) solution by focusing more sharply on the children’s needs than the behaviours of the parents.

<sup>948</sup> *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 20.

<sup>949</sup> See above Chapter 2 II. 4. (ii) *The effects of psychological abuse*.

house as each landlord decided to sell. As a beneficiary Ms S was probably often short of money although her family helped pay for her trips to Ireland and may have subsidised her in other ways.<sup>950</sup>

It is not known if Ms S had looked for the hairdressing work for which she was qualified, before taking work as a waitress. In *D v S* (no 1) His Honour, without any reference to a factual basis for his comments says “There must be prospects for employment in New Zealand ... There is no reason why she could no find employment in New Zealand if she were to remain.”<sup>951</sup> The city where Ms S was based at the time of the hearing had in fact high unemployment. Furthermore, after years of motherhood, and the undermining of confidence that goes with that,<sup>952</sup> Ms S may well have found it difficult to look for and find work without family and friends in support.<sup>953</sup> Mr D was not living with his new partner though his focus must have to some extent shifted to her and to their child;<sup>954</sup> he looked after the children while Ms S worked, in her home;<sup>955</sup> Ms S supported his career by caring for his children most of the time; she had more limited employment options than she would have had in Ireland; and was tied to the city where Mr D lived because he would not permit her to go. Ongoing litigation was likely to take its toll on her

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<sup>950</sup> Mr D’s application for leave to appeal had as one of its eight grounds that “The Learned Judge failed to address whether the mother was capable of providing adequately for the children, both while in receipt of state assistance and in the event of her undertaking employment in Ireland.” *D v S* (no 4) (5 July 2001) High Court Christchurch AP 39/00, 4. We do not know whether Ms S’s offer to forego child maintenance if she went to Ireland was accepted by Mr D. Nor do we know whether the “assistance from [Mr D]” referred to in *D v S* (no 2), 18 was the help with child care while Ms S worked, or financial assistance.

<sup>951</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 15.

<sup>952</sup> See Ritchie J “Women and the Family in New Zealand” in H Margolis and A Else (eds) *Hui Raranga Wahine/Women’s Studies Association (New Zealand) Conference 1999: Papers* (2000) for a New Zealand perspective on this phenomenon.

<sup>953</sup> In *Gledhill v Gledhill* (28 March 2002) Family Court Waipukurau FP 081/53/00, one of two cases found where a man was refused permission to relocate (see above n 3), Mr Gledhill wanted to relocate to Whangarei where he had after years of unemployment been offered work by members of his family. Judge von Dadelszen’s response was very similar to Judge Callaghan’s, in suggesting that he search for work closer to his children’s second guardian, suggesting that the realities of life for primary caregivers, in relation to work opportunities and confidence are factors that are not well understood by judges: “I have considerable sympathy for this father in his desire to obtain regular gainful employment in order to provide a secure future not only for himself but also for his children, ... Ms Naughton [psychologist] expressed surprise at the father’s intention to move to Whangarei himself even if he is not permitted to relocate with Matthew and Liam. That surprise stems from what she sees as the strength of the bond between the father and the two boys and, as she put it ... that may be a reflection of the desperation he feels in the sense that he feels trapped by his present circumstances.” *Gledhill v Gledhill*, above, 13-14. The judge urged the father to reconsider his decision.

<sup>954</sup> The role of new partners in the parties “own” lives was also not discussed fully, in spite of the Irish man’s affidavit made for this hearing and referred to (*D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 12 )in which he offered substantial support to Ms S and the children if they were in Ireland. There is no mention of M’s mother’s potential role, nor the effect on Mr D’s commitment to the children of his responsibility for a fourth child. This may have been to avoid addressing Ms S’s “bonus” relationship as a reason for removing the children and thus raising the issue of the Irish man coming to live in New Zealand.



as the parent who spent most of her time caring for the children, as well as on the children themselves.<sup>956</sup>

*(e) Power and powerlessness*

By requiring Ms S to return with the children after he ended the marriage (to conditions in New Zealand that, if proposed by someone who wanted to relocate, would arguably be excellent reasons for refusing the application) Mr D may have exercised debilitating power. This may have been experienced by Ms S as a kind of emotional abuse, named by her as a “sentence”. It is therefore possible to read Ms S’s decision to leave for Ireland with or without the children as a refusal to accept her situational powerlessness and the exercise of debilitating power by Mr D.

In New Zealand on her return from Ireland, after the marriage ended, Ms S had been isolated from family support and excluded from weekend activities with friends who had “intact” families, did not have the work she was trained to do, had continually to move because Mr D had decided that the family’s material resources should not be used for a permanent home. She had to exercise her custodial responsibilities at times to suit Mr D’s availability to exercise access. Once Mr D filed his application for custody the positive aspects of his sharing of child care were probably compromised by ongoing court proceedings and difficult day to day negotiations, as well as Mr D’s presence in her home, caring for the children when she worked. She had to contend alone with the grief at the end of her marriage and constant reminders that Mr D had both moved on himself and would not allow her to do the same.<sup>957</sup>

If Ms S felt abused, this may have been compounded by the Family Court acknowledging that although she provided *E v M*-style parenting and was de facto the custodial parent and Mr D did not and was not, nevertheless his status as a parent was of equal importance. Ms S’s choice to return to Ireland, alone if necessary, can thus be analysed as a wise response to situational powerlessness and an act of resistance to debilitating power. The factors that supported the children’s staying in New Zealand, that they were in a familiar school, had contact with Mr D’s family once he was having regular access; and appeared to be unaffected by the parental conflict should not mean that this factor is irrelevant.

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<sup>955</sup> See above Chapter 2 II. 4. (iii) *Debilitative power*.

<sup>956</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623.

<sup>957</sup> See above Chapter 2 II. 4. (iii) *Debilitative power*.

(ii) Judicial response

(a) *D v S* (no 1)

His Honour referred first to section 23(1) of the Guardianship Act. He emphasised that the approach of the Court must be child focused. He then turned to *Stadniczenko* the leading case on relocation. This defined the preferable approach as being<sup>958</sup>

[T]o weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. In most cases, an important factor in favour of the custodial parent is that the award of custody shows that from the day to day point of view the best interests of the child lie with its being with the custodial parent and an incident of custody is the decision where to live. The wellbeing of the new family unit bears on the best interests of the child. The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent on it for his or her emotional wellbeing and development the more likely an injury resulting from the proposed move will be. The reason for the move is important, and also the distance of the move. The child's views are relevant. The foregoing factors are far from representing a complete list of what may be relevant.

The governing principle of the welfare of the child applies also ... Subject to that consideration, the rights of the custodial parent to pursue his or her own life or career and the rights of the non-custodial parent to access can be taken into account. Choice of residence and rights of access are not solely a matter of the rights of the parents, however ... they may also be important considerations in their impact on the welfare of the child.

His Honour then stated that the Court must deal “with these children and these parents.”<sup>959</sup> An exhaustive set of factors could not be established, the reasonableness of the move, the reasons for it, the effect on the children's welfare and best interests in respect of their relationship with both parents needed to be considered. The children's development and the financial and emotional security of the relocating parent were all to be taken into account. He also referred to Cooke P's dicta when he referred to assessment in *M v Y*. Assessment involves.<sup>960</sup>

careful and anxious scrutiny of the particular facts of each case, often it will be a difficult decision: but Judges are required to judge and cannot expect human issues of this kind to be resolved by formulae.

His Honour then referred to Gendall J in *S v M*, including the comments that<sup>961</sup>

The ultimate question has to be obviously what is best for the children in all of the circumstances, old as well as new, and naturally what has happened in the past has to be given its proper weight ... In many cases

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<sup>958</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 500.

<sup>959</sup> *VP v PM* (1998) 16 FRNZ 621 (FC), 626 citing *C v E* (11 May 1987) Family Court Palmerston North FP 050/53/83.

<sup>960</sup> *M v Y* [1994] NZFLR 1(CA), 4.

<sup>961</sup> *S v M* [1997] 15 FRNZ 589 (HC), 599. His Honour could have cited, from the second sentence on, other similar statements including *Wright v Wright* [1984] 1 NZLR 366 (CA), 371, where Cooke J, as he then was, delivered a joint judgment with Richardson J, as he then was, cited in the Court of Appeal in *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 498 McKay J: “Restrictions ... are common ... a custody order may be made subject to such conditions as the Court thinks fit. Consequently there can be a condition as to the place of residence ... A similar condition could be agreed upon. Access rights ordered or agreed may be infringed by significant changes of the child's residence without consent of the Court's approval.”

an important factor in favour of the custodial parent is that, from a day to day point of view, the best interests of the children rely on their being with that parent, and an incident of custody is where to live. Naturally, such a concept is not without qualification and any decision as to residence made by a custodial parent, in order to be upheld, is dependent on it being necessarily in conformity generally to the best interests of the children.

His Honour then considered the “Background” with the facts as summarised.<sup>962</sup> He went on to describe Ms S’s position: “The Mother’s Connection to Ireland”; “Mother’s Emotional State”; “Financial Considerations” before turning to “Father’s Position”; “The Children”; “The Children’s Views”; “Comparison between [Ireland] and [New Zealand]”; “[M]”; “Access by the Father – Children in Ireland”; “the Mother as Custodian”.

Judge Callaghan inferred from the facts, that “on the basis of the psychological evidence of the children’s attachment to their father,”<sup>963</sup> the man their mother had been seeing would not supplant him in their affections, though relocation to Ireland would affect the quality of their relationship. He also referred to Ms S’s “relatively isolated existence”<sup>964</sup> in Christchurch and in more detail under “Mother’s Emotional State” to her pain at having to stay in Christchurch and her feeling that it was “like a sentence”.<sup>965</sup> His Honour added that “As mother of these children, of course, she has, and I am sure she will acknowledge this, responsibilities which go beyond herself.”<sup>966</sup> While her emotional health and safety were factors, and because Mr D did not propose an equal sharing regime, she would be the primary parent, there was no evidence that the children’s development had been impaired by her state of mind, nor evidence that she herself was impaired psychologically or psychiatrically. Support at a distance from family in Ireland was available. When discussing financial considerations and the family support and assistance available to Ms S in Ireland, His Honour stated that while<sup>967</sup>

no evidence has been given of any qualifications ... which would enable her to ... obtain skilled employment ... there must be prospects for employment in New Zealand ... there is no reason why she could not find employment in New Zealand if she were to remain.

There might be financial security if Ms S were to live with or marry the man she was seeing but that was however not the position.

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<sup>962</sup> See above, nn 14-38 and accompanying text.

<sup>963</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 12. Mr D himself did not think that this would happen.

<sup>964</sup> *D v S* (no 1), above, 13.

<sup>965</sup> *D v S* (no 1), above, 13.

<sup>966</sup> *D v S* (no 1), above, 13.

<sup>967</sup> *D v S* (no 1), above, 15.

Under “Father’s Position” His Honour stated that Mr D’s opposition was based on “the fact that it has not and cannot be shown that it is in the best interests of the children to move to Ireland.”<sup>968</sup> He thought that there might come a time when the children had “a greater degree of self-determination”<sup>969</sup> and would choose to live in Ireland. He would then organise his life around them; he envisaged that after three to five years might be in a financial position to move to Ireland himself. From what His Honour had seen of the parties Mr D was likely to cope better with a decision against him than Ms S.<sup>970</sup> However, both he, counsel for the children and the section 29A report writer thought Ms S would be able to cope if her application was not allowed.<sup>971</sup>

Under “The Children” His Honour gave credit to both parents for ensuring that their children’s lives had been “affected to the minimum extent possible, particularly in light of the difficulties between them.” He quoted from the report writer’s evidence at length, emphasising the children’s “close and affectionate relationships with each of their parents ... they are demonstrative and loving and this is fully reciprocated ... The children saw each of their parents as having a vital role to play in their lives and this was confirmed by my own observations.”<sup>972</sup> They emphasised their enjoyment of the home environment Ms S created and the activities and outings with Mr D. In the months between June (when all children expressed a slight preference for going to Ireland) and October, Y, the oldest had come to express a preference for staying in Christchurch rather than going to Ireland. There was “no suggestion, of course, that the children will not remain in their mother’s care.”<sup>973</sup>

In making a comparison between the two locations, His Honour canvassed issues in relation to schooling, tertiary education, religion health and sport, without any clear disadvantages in either country. Extended family was available in both countries. As far as M, the children’s half-sister, was concerned the evidence did not show such a strong attachment as to make a difference for the children or for her.

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<sup>968</sup> *D v S* (no 1), above, 15.

<sup>969</sup> *D v S* (no 1), above, 16.

<sup>970</sup> *D v S* (no 1), above, 16.

<sup>971</sup> *D v S* (no 1), above, 14, 28.

<sup>972</sup> *D v S* (no 1), above, 17

<sup>973</sup> *D v S* (no 1), above, 21.

His Honour considered in some detail access by Mr D if the children were to be in Ireland. There were ways to ensure that the children could maintain contact with Mr D if he had summer in Ireland and part of the New Zealand summer as well as ongoing contact by telephone, email and perhaps video. Ms S undertook to forego claiming child maintenance because Mr D would have to pay some costs in visiting Ireland. She also agreed to pay car and accommodation costs, half Mr D's return airfare and half the children's fares to New Zealand, as well as the fare of an accompanying adult. Mr D said that if the children stayed in New Zealand he would set up a fund so they could travel to Ireland regularly. However "whichever way it is looked at, if the children moved they would necessarily lose the close, regular and meaningful relationship they currently have with their father, which, on the evidence, is of considerable value and importance to them."<sup>974</sup>

Under the heading "The Mother as Custodian", His Honour acknowledged that the Court must have regard to her right to regulate her life in the way that she wished and that she provided a stable and supportive environment for the children. However she had <sup>975</sup>

through a misguided sense of pursuing her own interests, not been overly receptive to increasing the children's time with their father ... she had been reluctant to allow the father more time with the children because of her wish to relocate to Ireland and the fact that increased access would make the relocation even more problematic.

Judge Callaghan observed that over only four days a fortnight and holidays, however, the children had maintained a strong attachment to their father.

Under the heading "Submissions" His Honour then considered the submissions of counsel for each party and for the children. Counsel for the child "took ... an unabashed stance in ignoring parental aspirations ... submitted that the best outcome for the children was to remain in Christchurch."<sup>976</sup> This would accord with Y's wishes and maintain the close relationship between Mr D and the children. The children had not suffered at all from Ms S's distress; he submitted that she was "a very able and committed parent"<sup>977</sup> and "gave her credit for the fact that she had not swayed or turned the children against their father."<sup>978</sup> There were many changes and

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<sup>974</sup> *D v S* (no 1), above, 26.

<sup>975</sup> *D v S* (no 1), above, 27.

<sup>976</sup> *D v S* (no 1), above, 28.

<sup>977</sup> *D v S* (no 1), above, 28.

<sup>978</sup> *D v S* (no 1), above, 28.

dislocation facing the children if they went to Ireland and Ms S could visit Ireland regularly, sometimes with the children.

Counsel for Ms S acknowledged the difficulties that relocation to Ireland would bring but pointed out that the bond and close relationship the children had with Mr D would not be lost, though it may become “different.”<sup>979</sup> He referred to cultural, extended family and material security in Ireland; and to the deterioration of the relationship between the parties because of the distress Ms S would feel if not being allowed to move to Ireland.

He also submitted that Mr D would be “willing, positive and able to cope”<sup>980</sup> if the Court decided that the children could go to Ireland and that the mother would try to prevent the children being sad about moving away from their father.

Counsel then referred to Ms S’s deep sense of loss at the end of her marriage and “normal” family life, and her real need to be with her family if she were to continue to be a good parent. He submitted that co-operation between the parties would improve if the mother were permitted to take the children to Ireland.

For Mr D it was submitted that the main theme of Ms S’s case was that she would be “more personally satisfied and happy”<sup>981</sup> if in Ireland with the children, but there were many unknown factors in a move there. According to His Honour counsel “seemed to suggest” that Ms S unwilling to live near Mr D because she was unhappy about the end of the marriage, and connected this to her expectation that the children should be able to “bear the burden”<sup>982</sup> of moving away from Mr D. Counsel for the father further referred to the section 29A report writer’s evidence about children in relocation cases often experiencing upset. He further submitted that the report writer’s inability to identify where the most benefit would be for the children supported his own submission that there was no benefit for the children in the move. He pointed out that there was no evidence that the children’s development had been affected by Ms

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<sup>979</sup> *D v S* (no 1), above, 29.

<sup>980</sup> *D v S* (no 1), above, 29.

<sup>981</sup> *D v S* (no 1), above, 30.

<sup>982</sup> *D v S* (no 1), above, 30.

S's state of mind and she herself was not impaired by her unhappiness. He also referred to the views of the children, especially Y.

Mr D's counsel restated that Mr D's position was that once the children were less dependant on a "continuing proximate personal relationship with [him] and a greater degree of self determination"<sup>983</sup> he would support their going to Ireland, but at the moment the needs of the children required them to remain in their familiar environment. Ms S's counsel's response to this was that if relocation was to be the eventual outcome, it would be more difficult and stressful for the children to move later.

His Honour then identified the significant factors: that Ms S was the primary caregiver and would continue to be so in the near future; that her wish to return to Ireland and family support there was quite understandable; that her distress if this were not permitted would impact on the best interests of the children; that the children were very settled and stable in New Zealand; and following on from that, that there would be a change in their relationship with Mr D if the children went to live in Ireland.<sup>984</sup>

He found that Ms S had "unfortunately, closed her mind to considering other options that are available."<sup>985</sup> He added<sup>986</sup>

She has told the Court that she would regard having to remain here with the children as a sentence. It hardly needs to be said that the incidence of parenthood requires parents to consider their children's interest, especially in their early and dependent years, as a primary consideration. This often involves making decisions which are contrary to what a parent wants for him or herself.

His Honour then ran through Ms S's recognition of the deficiencies of a move to Ireland and her concern to minimise their effects; that she was distressed by the separation and having to remain in New Zealand, isolated from her family (though this isolation had been reduced by communication and frequent travel); that her relationship with the man she was seeing was only a "bonus". He referred to the lack of evidence of her being disordered by the distress, with which she had coped in the past although her distress would rebound on the children if permission to relocate were refused.

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<sup>983</sup> *D v S* (no 1), above, 31.

<sup>984</sup> *D v S* (no 1), above, 33.

<sup>985</sup> *D v S* (no 1), above, 34. The other options are not described.

<sup>986</sup> *D v S* (no 1), above, 34.

It was His Honour's view "that she will cope, albeit with obvious difficulties."<sup>987</sup> Her evidence had said that she would "remain in New Zealand with the children if permission to relocate is refused."<sup>988</sup> Her desire to move to another New Zealand city if refused permission to move to Ireland "was a defence mechanism and could not be considered a decision which would be in the best interests of the children, at least not at this stage."<sup>989</sup>

His Honour then discussed the needs of the children and the potential risks of relocation, including new schools, though Y had had some experience with Irish schooling. New friendships would be necessary though Ms S's family would help with this and the cultural differences could also be seen as positive. The reduced quality of the children's relationship with Mr D was "the more important aspect."<sup>990</sup> His Honour considered that the evidence strongly supported the children's having an ongoing relationship with each parent of the sort they currently enjoyed and spoke of the important role of fathers in boys' development, as described by the section 29A report writer. He had said<sup>991</sup>

Research establishes that fathers have a particularly important role to play in the development of boys, and for boys active and positive paternal involvement has been found to be associated with the reduced incidence of anti social behaviours, increased educational performance and sound career choice.

Even though Mr D was "committed to fashioning his life (due to his empathy with the mother's needs) to ensure he has as much contact with the children as possible"<sup>992</sup> the relationship between him and the children would change if they went to Ireland.

On the other hand, if the children stayed in New Zealand they and Ms S would be able to return regularly to Ireland as in the past, with Mr D caring for the children if Ms S went alone.

His Honour noted that although the situation between the parents was "difficult and tense, they are, in a sense, co-parenting"<sup>993</sup> so it was appropriate to make orders for shared custody. In

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<sup>987</sup> *D v S* (no 1), above, 35.

<sup>988</sup> *D v S* (no 1), above, 35.

<sup>989</sup> *D v S* (no 1), above, 35.

<sup>990</sup> *D v S* (no 1), above, 35.

<sup>991</sup> *D v S* (no 1), above, 36.

<sup>992</sup> *D v S* (no 1), above, 36.

<sup>993</sup> *D v S* (no 1), above, 38.



addition to the “regular access” of five days a fortnight, Mr D was to have the children for half each school holiday.

(b) *D v S* (no 9)

By this time, Ms S and the children had been in Ireland for eight months, following the High Court’s decision in *D v S* (no 2), with a visit to New Zealand in the summer. The assumption that a “good” mother who had always been a primary parent would continue to remain the primary parent regardless of conditions no longer held good. While Ms S had, with one small exception,<sup>994</sup> continued always to facilitate her children’s relationship with their father as part of her primary parenting responsibilities, she had, before the High Court hearing in *D v S* (no 2) decided that she would no longer be the primary parent if these responsibilities included remaining in New Zealand.

In *D v S* (no 7) the Court of Appeal had overruled the High Court in *D v S* (no 2) and made an order for joint custody even though Ms S was in Ireland with the children and Mr D in New Zealand.

Judge Somerville began by listing the seven points established by the Court of Appeal in *D v S* (no 7), summarising their effect as requiring the Court<sup>995</sup>

to undertake a multi-faceted analysis to arrive at a conclusion that will best meet the interests of the children’s welfare, without giving any undue weight to any one factor.

Then, saying only that “it is also apposite in this case to set [it] out in full” His Honour set out a long passage from *W v C*,<sup>996</sup> before summarising the children’s positions, and then the parents’, noting that the children (most recently interviewed during their New Zealand visit two months earlier) had so far coped well. Ten-and-a-half year old Y would now prefer to live in New

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<sup>994</sup> When planning to relocate she had been “reluctant to allow [Mr D] more time with the children [because] increased access would make the relocation even more problematic.” *D v S* (no 1), above, 27.

<sup>995</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 3.

<sup>996</sup> *W v C* [2000] NZFLR 1057 (FC), 1063-1064. See above Chapter 6 nn 24-35 and accompanying text and V. 2. (i) *A template for parenting?*. This excerpt included the passages reading “As a matter of strict law therefor, the only appropriate starting point in a dispute over arrangements for the child’s care on separation is recognition of [the parents’] equal and shared guardianship responsibilities and obligations and their equal and shared legal right to exercise them” and “The ability or willingness of a parent to act responsibly or appropriately in sharing the nurturing of the child is ... one of the variable which will inevitably need to be considered. That does not, however, alter the need to take as the starting point of any inquiry into a child’s future that the parents, as guardians, are equally responsible for all aspects of the child’s nurturing and that the child, unless for some good reason related to the child’s welfare, has a right to the continued provision by his parents of the advantage of their equal and shared nurturing obligations. That is the inescapable and clear message from the statutory provisions mentioned.”

Zealand, E had a 70/30 preference for remaining in Ireland and six and a half year old T wanted to share his time equally between both places.

The parents had done their best to minimise the effects on the children of their own deep feelings. Ms S had “provided them with a loving home environment; D has been supportive of the children’s relationship with S.”<sup>997</sup> This comment seems to imply that His Honour considered that Ms S was the primary parent.

Judge Somerville then discussed each parent at some length, with special attention to Mr D’s intelligence, employment status, parenting capacity, belief systems about parenting and to Ms S’s emotions and personality. He commences by stating “Although the children have come through the past 15 months relatively unscathed, the same cannot be said of the parents. D, in particular, is now angry, frustrated, and bitter.”<sup>998</sup> Having established in the Family Court that the children’s best interests would be served by co-parenting in New Zealand, he was angered by Ms S’s announcement (which he viewed as an ultimatum) in the High Court that she was moving to Ireland with or without the children and amazed that the High Court had “succumbed to her demands.”<sup>999</sup>

Mr D was “an intelligent and highly focussed businessman ... re-establishing himself as a financier.”<sup>1000</sup> The section 29A report writer considered him to be “a committed parent well able to bring up the children on his own”<sup>1001</sup> as demonstrated by the three occasions (one of over three months) when he had been the primary carer.<sup>1002</sup> He was<sup>1003</sup>

... competent on the domestic front. The children would have, as a role model, a father who undertakes a full range of domestic duties, which is probably a more relevant role model than he presented when the parties lived together.

A nanny would be employed to supervise the children after school while he was working.

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<sup>997</sup> *D v S* (no 9), above, 5.

<sup>998</sup> *D v S* (no 9), above, 6.

<sup>999</sup> *D v S* (no 9), above, 6.

<sup>1000</sup> *D v S* (no 9), above, 7.

<sup>1001</sup> *D v S* (no 9), above, 9.

<sup>1002</sup> “On his own”, but with help, as is clear from what follows. He was not planning to give up work to give his children the kind of close physical and emotional attention that Ms S offered.

<sup>1003</sup> *D v S* (no 9), above, 19.

There were many occasions as he gave evidence when Mr D's anger and frustration became obvious. He was angry at Ms S's decision to go to Ireland with or without the children and that what he saw as a flawed High Court judgment had deprived him of many of his rights of fatherhood. He was frustrated by seeing the children established in Ireland with Ms S and by her intention of staying there and by the "failure of all to recognise the overwhelming merit of his position."<sup>1004</sup> Still firmly of the view that co-parenting in New Zealand would be best, he found it hard to accept that Ms S would stay in Ireland if he were awarded custody. "If [Ms S] were to remain in Ireland, which he does not believe will happen, then he would consider her as having abandoned their children."<sup>1005</sup> He was also frustrated that he was left having to advocate that the children would be better living with him as a sole parent in New Zealand.

In spite of his frustration and anger Mr D was described as controlled and articulate. He had "a well-developed sense of injustice and ... strong views about the upbringing of children."<sup>1006</sup> He was aware of the "relevant research,"<sup>1007</sup> influenced by Stephen Biddulph's books<sup>1008</sup> and held "balanced views" not being "in the vanguard" of the men's movement and "rather embarrassed that he might be seen in that light."<sup>1009</sup>

Mr D's beliefs about the upbringing of children were that, while both parents had a role from birth to independence, children's needs for nurturing were met primarily by their mother who was most important to the age of 7, when the father became more important, before being overshadowed by peers. He believed that it was essential for boys to have structure and discipline in their lives which fathers were best placed to provide. He saw himself as best able to meet the children's needs as they "approach and negotiate adolescence because of his university education and ... interest in outdoor activities."<sup>1010</sup> He firmly believed that the children would lose their

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<sup>1004</sup> *D v S* (no 9), above, 7.

<sup>1005</sup> *D v S* (no 9), above, 8.

<sup>1006</sup> *D v S* (no 9), above, 7.

<sup>1007</sup> *D v S* (no 9), above, 7, relevant research not specified.

<sup>1008</sup> Two of these that would have been available to Mr D are: Biddulph, *S Manhood: An Action Plan for Changing Men's Lives* (1999) Hawthorn and Biddulph, *S Raising Boys: Why Boys Are Different – And How to Help Them Become Happy and Well-Balanced Men* (1998) Celestial Arts.

<sup>1009</sup> *D v S* (no 9), above, 7. Mr D had however released a considerable amount of information, including affidavits and the s 29A reports to a journalist, following the Court of Appeal decision in *D v S* (no 7): *D v S* (no 9), above, 24.

<sup>1010</sup> *D v S* (no 9), above, 8.

relationship with him if they lived in Ireland and therefore be “at risk of the detrimental effects outlined in the absent father research.”<sup>1011</sup>

Mr D also had difficulty with evidence that contradicted his views. He tended to interpret it through his own existing belief structure, believing that his actions were always in the best interests of the children and Ms S’s served her own interests only. Thus:<sup>1012</sup>

He heavily criticises S for her decision to return to Ireland, thereby putting her interests ahead of the children’s, but ... views his decision to end the marriage because of his lack of feelings for S as having been made in the children’s best interests [although] this decision is likely to have had a huge impact on the children’s upbringing and is certainly against their wishes.

It was also clear from the evidence that Mr D had a “narcissistic outlook.”<sup>1013</sup> He looked at events from his own perspective without much insight into how they might affect others. For instance, he made a photograph album with images of the children enjoying themselves with him but could not comprehend that the children might like one as well. He also contemplated visiting Ireland and discussed this with Y without first discussing it with Ms S. He then could not go and when the section 29A report writer asked him if the boys might have been disappointed he replied that he hoped so, and yes they were.

He had also sent Y an email about his loneliness when he did not have regular contact with the children and as “an unhappy, aggrieved and narcissistic parent [was] likely to impart to the child inappropriate views of his own feelings when it would be better concealed.”<sup>1014</sup> There had been difficulties with access because Mr D had failed to pay half the costs of the last access visit as required.

In spite of all this, the report writer, having observed Mr D with the children on a number of occasions, considered that he was a committed parent well able to bring up the children on his own. This finding was reinforced by Mr D’s good care of the children on three occasions when Ms S was away in Ireland.

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<sup>1011</sup> *D v S* (no 9), above, 13.

<sup>1012</sup> *D v S* (no 9), above, 8.

<sup>1013</sup> *D v S* (no 9), above, 8.

<sup>1014</sup> *D v S* (no 9), above, 16.

Judge Somerville’s view of Ms S was that she was “a lot less complicated.”<sup>1015</sup> She had followed other family members into hairdressing but was not career minded and had always focused on her family. There was “no real evidence of a deficiency in [her] parenting in New Zealand other than the fact that she was very unhappy and this was known to the children.”<sup>1016</sup> He noted that her position at the first Family Court hearing, was that she “desperately missed the support of her family in Ireland [and] to be the effective parent she wanted to be ... needed to be close to her family.”<sup>1017</sup> Judge Somerville stated firmly that the judges in the previous Family and High Court hearings as well as himself “have all observed Ms S giving evidence as to the strength of [her] views and we have all concluded that they are deep-seated and genuine.”<sup>1018</sup>

His Honour identified three elements to her position, her wellbeing on returning to Ireland, the support of her family and the lack of support from and antagonism of, Mr D in New Zealand. Judge Somerville omitted to refer to the lack of support from elsewhere in New Zealand, discussed in the first decision. He did not refer to the possible effects of the frequent moves within Christchurch, Ms S’s job as a waitress and her dependency on Mr D for child care. Ms S’s intelligence, her views on child-rearing and her emotional state and personality are also either unaddressed or mentioned only in passing.

Ms S’s position that she was not a fully functioning parent in New Zealand was “dangerous” according to the Court, because she was admitting that her ability to meet the children’s needs was impaired. This opened the way for Mr D to submit that the proper solution was a change in custody. Once she had decided to return to Ireland with or without the children, she posed a dilemma for the Court. There was a strong possibility that the Court would infer that Ms S was putting her own interests ahead of those of the children. His Honour gave an example that<sup>1019</sup>

Where the Court has already ruled that it would be in the best interests of the children to be co-parented in New Zealand, [Ms] S in proposing sole custody in Ireland is advocating an outcome that is less beneficial. Moreover, where the issues are so finely balanced, as they are in this case, there is an even chance that the children might be required to stay in New Zealand. [Ms] S is therefore saying, by electing to remain in Ireland in that event, that her own need for residence in the land of her birth and contact with her family is more important to her than the children’s need to be remain the land of their birth and in regular contact with their father.

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<sup>1015</sup> *D v S* (no 9), above, 10.

<sup>1016</sup> *D v S* (no 9), above, 11.

<sup>1017</sup> *D v S* (no 9), above, 10.

<sup>1018</sup> *D v S* (no 9), above, 11.

<sup>1019</sup> *D v S* (no 9), above, 11-12.

His Honour's conclusion was that Ms S had<sup>1020</sup>

... done her own balancing exercise and is satisfied that D would be able to successfully parent on his own and that she could maintain her relationship as an access parent. If S had thought otherwise, particularly as family is so important to her, she would not have contemplated living on the other side of the world without them.

She had also failed to honour her undertaking to set up email contact between Mr D and the children, partly for cost reasons; this was inconsistent with her offer to pay half the costs of the children's two visits each year to New Zealand.

Before turning to "The Alternatives", His Honour discussed "The Research". There had been "considerable emphasis given by the parties and their counsel on the individual needs that each child had for a relationship with their mother or father."<sup>1021</sup> There was no mention here of the section 23(1)(A)'s gender provisions though the report writer "was at pains to stress that both mothers and fathers equally contribute to their children's emotional development and education."<sup>1022</sup> Because Mr D had "read widely on the subject of father's [sic] importance to their sons"<sup>1023</sup> the report writer had thought it important to refer the Court to the work of Michael Lamb "the foremost international authority."<sup>1024</sup> Within a long quotation cited, Lamb states<sup>1025</sup>

... students of socialisation have consistently found that parental warmth, nutrients and closeness are associated with positive child outcomes whether the parent or adult involved is a mother or a father.

This passage emphasises that parental [nurturing] characteristics are more important than gender-related characteristics and the characteristics of individual fathers are less important than the characteristics of the relationships they establish with their children. The amount of time fathers and children spend together is less important than what they do and how everyone involved perceives the relationship. The quotation ends with reference to the fact that individual relationships are less influential than the family context and that the absence of family hostility is "the most consistent correlate of child adjustment, whereas marital conflict is the most consistent and reliable correlate of child maladjustment."<sup>1026</sup>

The report writer emphasised that because the children had "benefited from a close relationship with their father through their formative years ... even if they were to live in Ireland they would

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<sup>1020</sup> *D v S* (no 9), above, 12.

<sup>1021</sup> *D v S* (no 9), above, 12.

<sup>1022</sup> *D v S* (no 9), above, 12.

<sup>1023</sup> *D v S* (no 9), above, 12.

<sup>1024</sup> *D v S* (no 9), above, 12: the latest edition is Lamb, M *The Role of the Father in Child Development* (2003) (4ed) Wiley.

<sup>1025</sup> *D v S* (no 9), above, 12.

still have an important and functional relationship with him.”<sup>1027</sup> Mr D’s fear of the consequences to the children of having an absent father was unfounded; they were not likely to occur.

In the report writer’s view, the children could live successfully with either parent and that although Ms S probably helped the children more with issues involving their feelings. This was more important for E’s emotional development than for Y’s, whose emotional needs could be met by Mr D. However, the report writer was concerned about the impact on the children in the longer term of the conflict between the parents if the relationship between them did not improve: “It was [the report writer’s] firm view that the children’s current adjustment will not protect them in the long term without a significant improvement in the parental relationship.”<sup>1028</sup>

His Honour then turned to “The Alternatives” which he described as stark, either living in Ireland with their mother or in New Zealand with their father and having a sporadic relationship with the parent they were not living with.

First, he described Ms S’s life with the children in Ireland, in positive terms.<sup>1029</sup> The children had settled well, were doing well at school, had a number of male role models. Ms S worked part-time two days a week and was able “to provide extensive parental oversight after school and during weekends.”<sup>1030</sup> Granting Ms S’s application would please E and T but Y would have “significant regrets,” although Ms S believed he would accept the outcome as he had when required to return to Ireland at the end of January 2002, after Mr D’s application for a stay was unsuccessful, “without any signs of distress or unhappiness.”<sup>1031</sup>

His Honour then turned to the probable outcomes of granting Ms S’s application, summarising them as three things that it was “reasonable to predict”, following the “predictive assessment” principle in *D v S* (no 7). First of all, Y would be unhappy. His relationship with his mother could

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<sup>1026</sup> *D v S* (no 9), above, 13.

<sup>1027</sup> *D v S* (no 9), above, 13.

<sup>1028</sup> *D v S* (no 9), above, 14.

<sup>1029</sup> *D v S* (no 9), above, 14.

<sup>1030</sup> *D v S* (no 9), above, 14.

<sup>1031</sup> *D v S* (no 9), above, 15. No record of this application could be found; it may be that the Court confused Y’s unwillingness to return to Ireland in January 2001 with an earlier (inferred) unwillingness that resulted in an application for a stay in respect of Y before Ms S and the children left for Ireland in July 2001, *D v S* (no 5) above nn 52 and 53 and accompanying text.

be affected and he would return to live with Mr D when he was 12 or 13. As well, Mr D would experience difficulty in maintaining contact with the children.

The long term effect on Y would “depend on how the matter is handled by the parties. [He] will know his father is unhappy, no matter how well D disguises it.”<sup>1032</sup> He would feel unhappy at being able to maintain his friendships in New Zealand, was aware that as he got older the Court would pay more attention to his wishes and might resolve to campaign to be allowed to live in New Zealand, or would refuse to return after a summer trip. Y might also bear resentment towards Ms S for creating the situation and she would be likely to experience increasing opposition from him. All this would lead to his returning to live in New Zealand at the age of 12 or 13.

Ms S might also have difficulty with Mr D. “Angry and embittered at the injustice of the situation”<sup>1033</sup> his relationship with her would remain dysfunctional and Ms S would be likely to view his telephone and email communications as problematic. His Honour suspected that one reason that Ms S’s computer had not been repaired<sup>1034</sup> was Ms S’s hesitation about “the effect on Y of having frequent and unsupervised email contact”<sup>1035</sup> with Mr D. “Even if such thoughts have not yet crossed her mind, I believe that it will not be long before they do.”<sup>1036</sup> D had been cross-examined about an email he sent to Y about his loneliness at living without regular contact with the children. The report writer had acknowledged that email communications could be fraught with difficulties with<sup>1037</sup>

an unhappy, aggrieved and narcissistic parent, such as D ... likely to impart to the child inappropriate views of his own feelings. ... A manipulative parent [can] play on a child’s sense of loss by focusing on the joys of life at home and the exploits of the child’s former friends.

Mr D’s email to Y about his loneliness and Y’s wish to live in New Zealand made it inevitable that email contact would “further accentuate” the likely difficulties between Y and Ms S. It would not be long before Y’s emailing to his father would be restricted and supervised at home, which was “probably as it should be.”<sup>1038</sup> Mr D “would not take kindly” to this but Y could also

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<sup>1032</sup> *D v S* (no 9), above, 15.

<sup>1033</sup> *D v S* (no 9), above, 16.

<sup>1034</sup> See above n 65.

<sup>1035</sup> *D v S* (no 9), above, 16.

<sup>1036</sup> *D v S* (no 9), above, 16.

<sup>1037</sup> *D v S* (no 9), above, 16.

<sup>1038</sup> *D v S* (no 9), above, 17.



email from school unsupervised. Any vetting of email could create even more distrust and “spill over into the access arena.”<sup>1039</sup>

Furthermore, access had already been problematic when Mr D had not paid his half of the costs for the last trip; he had been<sup>1040</sup>

unable to recognise his own breach of faith ... demonstrated ... that his word in relation to travel arrangements cannot be relied upon. That, coupled with his two applications for stay, must leave [Ms S] wondering whether, had it not been for the proximity of this hearing, he might have simply refused to return the children. [Ms] S has been disturbed by the vehemence of the views expressed by [Mr] D during the hearing...

There was a “real probability” that Ms S would find it “increasingly more difficult” to send the children to New Zealand for access. If Y did return to New Zealand to live she would become “even more reluctant” to allow the younger children to visit “for fear that they would follow [Y]’s example.”<sup>1041</sup>

His Honour then turned to the benefits and disadvantages of granting Mr D’s application. Y would be pleased, would miss his mother and might feel some responsibility for her unhappiness, but knowing the relationship was on his terms his telephone contact would be positive. He would be less of a problem in New Zealand. E would be well able to cope. It would not be so easy for T whose mother was his closest attachment. The children would have contact with their half-sister as Mr D had “as one of his top priorities the establishment of a sibling relationship between the children and [her].”<sup>1042</sup> Mr D had also stressed that it was important for the children to remain in the land of their birth which His Honour did not see as a significant factor, although he stressed Mr D’s importance as a role model, with a university education and as someone who worked hard and enjoyed outdoor activities as well as being domestically competent.

Mr D’s attitude was one of the major factors in the assessment:<sup>1043</sup>

He would feel vindicated and his bitterness, anger and frustration would abate over time. Because of the demands of his employment he would be likely to view access as beneficial for him, as well as the children. He would therefore be likely to foster, rather than frustrate, access.

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<sup>1039</sup> *D v S* (no 9), above, 17.

<sup>1040</sup> *D v S* (no 9), above, 17.

<sup>1041</sup> *D v S* (no 9), above, 17.

<sup>1042</sup> *D v S* (no 9), above, 19.

<sup>1043</sup> *D v S* (no 9), above, 19.

Possible separation of the children was also an issue. In New Zealand this was less likely, at least until T, the most likely to want to live with his mother, was able to express this view. By then, the others would be “well through” their teens and able to sustain the separation easily. Y wanted to be here and New Zealand had more than small town Ireland to offer in the way of outdoor pursuits.

The only “adverse consequences”<sup>1044</sup> of the New Zealand option were the need for an after school nanny and Mr D’s concern that Ms S had abandoned her children which would have to be offset by an affordable access regime to ensure regular and frequent contact.

In “Weighing the Alternatives” Judge Somerville concluded that<sup>1045</sup>

what might have been seen as the obvious solution ... for the children to remain with S in Ireland would be fraught with long term risk, associated particularly with ... [Y]’s preference for life in New Zealand and D’s embittered attitude ... [and] is likely to lead to [the children] being separated ... an outcome which would likely result in D playing a less significant role in the lives of E and T ... If [Ms S] finds that her need to live in Ireland is more important than a regular and beneficial relationship between her and the children ... I do not see why her decision to meet that need in that way should affect the relationship between the children and D.

His Honour then decided that he would accede to Mr D’s request for a joint custody order “in his favour”, “to reflect the equal rights and responsibilities of both parents in the upbringing of the children.”<sup>1046</sup> He added:<sup>1047</sup>

This is an important concept and the making of a joint custody order in favour of both parents emphasises to children that each of their parents is of equal importance and can help dispel the view of there being a “winner” and “loser”. This case is not about the parents; it is about the children.

Mr D also sought an order that if Ms S should return to New Zealand the division of responsibility should be on a week about basis. Although his motives were “laudable”<sup>1048</sup> there had been no discussion about whether this would be appropriate and no evidence that Ms S proposed to return to New Zealand so His Honour did not feel able to make the order. His

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<sup>1044</sup> *D v S* (no 9), above, 19-20.

<sup>1045</sup> *D v S* (no 9), above, 20.

<sup>1046</sup> *D v S* (no 9), above, 21.

<sup>1047</sup> *D v S* (no 9), above, 21. This is reminiscent of the decision in *Makiri v Roxburgh* which also had the effect of removing a child from the longstanding day to day care of a mother, where there “will be no custody order of any kind. It is the Court’s intention that both parents will remain responsible for and will participate in [the child’s] care and upbringing ... Now that these matters have been settled for [the child’s] benefit, all concerned can relax in the knowledge that [the child] will have the advantage of their shared efforts on his behalf.” *Makiri v Roxburgh* (1988) 4 NZFLR 673 (FC), 687 Judge Inglis QC. See above Chapter 3 nn 33-35, Chapter 4 n 56, Chapter 5 nn 133, 137, 142 and Chapter 6 nn 3-4; and accompanying text.

Honour then formulated the precise terms of the joint custody order, one that appears to be of the inflexible kind common where parents have found it difficult to establish a hierarchy of care acceptable to them both. Finally, Mr D's application under section 27A of the Guardianship Act for leave to publish an article on the outcome of the proceedings (without any identification of the children) was refused. Any journalist wishing to access the file or publish a report of proceedings would have to apply for leave.

(iii) Discussion

(a) *D v S* (no 1): *the Stadniczenko principles*

At the end of his decision, Judge Callaghan stated that “this has singularly been the most difficult decision that I have been asked to make.”<sup>1049</sup> However, it is submitted that if he followed *Stadniczenko*,<sup>1050</sup> on the facts available, and with a slightly different belief system, he could have come to a different conclusion, through recognising the dynamics of the hierarchy of care, the role and function of gender inequities and, in this case, the potential use of access law as a mechanism for “disciplining” women.

*Stadniczenko* prioritised six factors, while acknowledging that this could not be a comprehensive list. The best interests of the child lie with being with the custodial parent and choice of residence is an incidence of custody. The wellbeing of the new family unit is important, as well as the nature of the relationship between the access parent and the child, the views of the child, the reason for the move and the distance involved. Each of these factors will now be considered in relation to the decision in *D v S* (no 1), with an indication of how they could be interpreted according to a different belief system.

*“From the day to day point of view the best interests of the child lie with its being with the custodial parent and an incident of custody is the decision where to live”*<sup>1051</sup>

Although at this hearing neither parent had custody, Ms S had been the primary carer, the de facto custodial parent, since the children were born and for the three and a half years or so since the parties separated, except for when Ms S was in Ireland alone.

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<sup>1048</sup> *D v S* (no 9), above, 21.

<sup>1049</sup> *D v S* (no 1), above, 41.

<sup>1050</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA).

<sup>1051</sup> *Stadniczenko v Stadniczenko*, above, 500.

Her role as primary carer was never to change, even as the children became more attached to Mr D. From this first hearing, through to the Court of Appeal in *D v S* (no 7) and back to the Family Court in *D v S* (no 9) only Ms S (though often without legal sole custodian status) exercised full *E v M* -type responsibilities. Mr D did not. According to Judge Callaghan, “There is no suggestion, of course, that the children will not remain in their mother’s care.”<sup>1052</sup> In *D v S* (no 2) Panckhurst J was to contrast Ms S’s parenting with that of Mr D in the words of the report writer:<sup>1053</sup>

[Ms S] on the other hand presents as being more willing, able or skilled in anticipating and helping the boys to express emotion, and providing reassurance and comfort and creating a sense of belonging and family connection.

His Honour also quoted from the report writer’s report at the time of that hearing, when two of the children had become ambivalent about going to Ireland. Their mother had recently been away in Ireland for two months. During that time their father had cared for them in New Zealand, apparently well.<sup>1054</sup> Even so, Y “thought about Mum a lot when she was away,” E said that “it made me sad when Mum was away” and T that he “missed Mum heaps when she was away.”<sup>1055</sup> The children “had a particular emotional dependence on her. The father conceded that fact and did so again in this Court.”<sup>1056</sup> “S has provided [the children] with a loving home environment; D has been supportive of the children’s relationship with S.”<sup>1057</sup>

In considering this “important factor”, Judge Callaghan acknowledged that:<sup>1058</sup>

the Court must have regard to [Ms S’s] right to regulate her life in the way that she wishes. [She] provides a stable and supportive environment for the children.

He however qualified this view of her right to regulate her life as she chose, while providing a stable and supportive environment for the children, in various parts of his judgment, for instance: “Through a misguided sense of pursuing her own interests [Ms S has] not been overly receptive to increasing the children’s time with their father.”<sup>1059</sup> (Ms S had stated that her reluctance had been because increased access would make the relocation even more problematic. However, as His Honour observed, the four nights a fortnight the children spent with their father had “not

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<sup>1052</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 21.

<sup>1053</sup> *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 15.

<sup>1054</sup> “[H]e stepped into the breach, employed part-time domestic help, curtailed his work hours and provided an excellent environment for the boys from late November to early February. He also took an extended holiday break (five weeks) so that the boys were able to enjoy a range of outdoor activities with him.” *D v S* (no 2), above, 20.

<sup>1055</sup> *D v S* (no 2), above, 14.

<sup>1056</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 138 Blanchard J.

<sup>1057</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 5

<sup>1058</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 27.

<sup>1059</sup> *D v S* (no 1) above, 27.

hindered [their] strong attachment to him.”<sup>1060</sup> ) In one reference to Ms S’s feeling that staying in New Zealand was “like a sentence”<sup>1061</sup> His Honour stated that “As mother of these children, of course, she has, and I am sure she will acknowledge this, responsibilities which go beyond herself.”<sup>1062</sup> He noted without comment Ms S’s expectation (according to Mr D’s counsel) that the children should be able to “bear the burden”<sup>1063</sup> of moving away from Mr D. His Honour further found that Ms S had “unfortunately, closed her mind to considering other options that are available,” adding<sup>1064</sup>

She has told the Court that she would regard having to remain here with the children as a sentence. It hardly needs to be said that the incidence of parenthood requires parents to consider their children’s interest, especially in their early and dependent years, as a primary consideration. This often involves making decisions which are contrary to what a parent wants for him or herself.

Ms S’s desire to move to another New Zealand city if refused permission to move to Ireland “was a defence mechanism and could not be considered a decision which would be in the best interests of the children, at least not at this stage.”<sup>1065</sup>

Cumulatively these comments confirm that it is not an incidence of custody that the custodial parent chooses where the children should live; Ms S’s desire to move was not appropriate for a “good” mother. She should not pursue her own interests, she should accept responsibilities that went beyond herself, not expect her children to bear the burden of her desires and must consider the interests of her children, even if they do not suit what she would like for herself. She must not close her mind to other options. It was not in the children’s interests to leave Christchurch, let alone New Zealand. Collectively, these statements are arguably patronising, ill-founded and cruel, given Ms S’s undoubted devotion to her children and the conditions under which she was required to parent. There are no similar statements addressed to Mr D.

The statements also arguably fall into specific MANALIVE categories,<sup>1066</sup> in their attempt to control Ms S and reinforce an ideology of motherhood that demands a consistent, long term sacrifice of self, without a similar demand being made of the auxiliary parent. His Honour’s comments do not acknowledge that Ms S had consistently considered the interests of her children

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<sup>1060</sup> *D v S* (no 1) above, 27.

<sup>1061</sup> *D v S* (no 1), above, 13.

<sup>1062</sup> *D v S* (no 1), above, 13.

<sup>1063</sup> *D v S* (no 1), above, 30.

<sup>1064</sup> *D v S* (no 1), above, 34.

<sup>1065</sup> *D v S* (no 1), above, 35.

<sup>1066</sup> See above, Chapter 2 n 79-80 and accompanying text.

and accepted responsibilities that went beyond herself (and had done since her children were born, in increasingly difficult circumstances) and define Ms S's reality and motivations largely in disregard of the evidence. They make her responsible for facilitating the children's close geographical proximity to two parents regardless of personal cost. They assign her a status as a "bad" mother for seeking to move to Ireland with the children. The decision that she was not allowed to move to Ireland also effectively controlled her time, her space and her material resources, all of which were fewer in New Zealand.

Under section 23(1)(A) of the Guardianship Act<sup>1067</sup> the Court is of course allowed to have regard to parental conduct relevant to the welfare of a child. But here there was no comparable analysis of Mr D's behaviour although none of the Court actions would have been necessary if he had not ended the marriage, had not threatened Ms S with Hague Convention proceedings when she (arguably very sensibly) had decided to stay with the children in Ireland after he ended their marriage, had not started a new relationship and had another child, had not placed her in a position where she was dependent on him to care for the children while she worked, had to keep moving house and live in a country where she was lonely and felt as if she was serving a sentence. By awarding shared custody to the parents, His Honour effectively neutralised and marginalised Ms S's earlier commitment and status while ensuring that the power to make the "decision where to live" as an "incident of custody" became essentially Mr D's decision.<sup>1068</sup>

Ms S's unchallenged "custodial role" makes it hard to see any effective reason for giving the parents shared custody other than to share unequivocally the power for making the decision about where to live. His Honour continued to refer to Mr D as having "access."<sup>1069</sup> Mr D had never and still did not take equal responsibility and arguably the important elements of his involvement with the children could be managed from the opposite side of the world. But by not giving permission for Ms S to remove the children Mr D was now in control of her future as well as that of the children. In having access as a joint custodian (rather than being the primary caregiver as a

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<sup>1067</sup> This requires the Court to have "regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."

<sup>1068</sup> This is highlighted by the report writer's understanding that Mr D had "capitulated" and had said Ms S could go to Ireland with the children, so long as he could be involved in planning the relocation. At the hearing however Mr D stated that the report writer had misunderstood him: *D v S* (no 1), above, 16.

<sup>1069</sup> For example, *D v S* (no 1) above, 37.

joint custodian) it was also open to him to manipulate his time with the children to suit himself. This was not possible for Ms S.

Judge Callaghan also failed to recognise another potentially significant factor, that when Ms S and the children spent five months in Ireland in 1997 with only one brief visit from Mr D there was no reported damage to the children. There was also no evidence that the children were damaged during the time they had only “reasonably regular” contact with Mr D up until the end of 1999. “[W]hat has happened in the past has to be given its proper weight”<sup>1070</sup> but this aspect of the past was given no weight at all.

*“The wellbeing of the new family unit [which] bears on the best interests of the child”*<sup>1071</sup>

Henaghan et al have stated that the wellbeing of the new family unit bearing on the best interests of the child “put simply means that happy custodial parent = happy child.”<sup>1072</sup> It is submitted that this is not so. It is more than “happiness”. The complex nexus of conditions around primary parenting arguably mean that relocation may have wide ranging social, economic and health benefits for the children of primary parents as well as for their primary parent, independently of any relationship with the children’s father.<sup>1073</sup>

His Honour did not consider some possible sources of injury to the children if they stayed in Christchurch, relating to the new family unit’s wellbeing.<sup>1074</sup> This may have been because (and this is perhaps indicative of the kind of debilitating power that Mr D may have been attempting to wield) the old family unit seems in many ways to have remained intact. Its shadow intruded on the new, where the head of that household had very limited choices. The kinds of injury relating to the new family’s wellbeing included this intrusiveness of the old family structure. Within the wellbeing of the new family unit, “the rights of the custodial parent to pursue his or her own life or career”<sup>1075</sup> were also in issue here, but not fully explored.

*“The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent on it for his or her emotional*

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<sup>1070</sup> *S v M* [1997] 15 FRNZ 589 (HC), 599 cited in *D v S* (no 1), above, 5.

<sup>1071</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 500.

<sup>1072</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 5.

<sup>1073</sup> See above Chapter 2 especially II. 3. *Conditions that affect women as parents*.

<sup>1074</sup> See above III. 2. (d) *The conditions under which Ms S was required to parent in New Zealand*.

<sup>1075</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 500.

*wellbeing and development the more likely an injury resulting from the proposed move will be*”<sup>1076</sup>

Perhaps because the present quality of the children’s relationship with Mr D was unquestioned or possibly because of His Honour’s intention to impose joint custody on the parents “the dependence of the children on their relationship for their emotional wellbeing”<sup>1077</sup> was not closely examined. There was simply an acknowledgement that the relationship was a good one and an exploration of how the relationship might best be maintained. His Honour did not therefore attempt to tease out the likelihood of an injury to the children if they relocated to Ireland and saw Mr D less frequently. The section 29A report does not appear to have addressed the issue of potential injury to the children either. Its emphasis was weighing up what each parent and each location had to offer, without making a preference between parents.

However, the children did depend on Ms S, not Mr D, for their emotional wellbeing.<sup>1078</sup> Furthermore it is possible that these children, being so well balanced, would be resilient.<sup>1079</sup> Their maternal grandfather’s offer of a fund for fares and help with accommodation and transport would, by ensuring regular visits, mitigate against injury, as would regular email and telephone contact.

Ms S and her family were offering to contribute substantially to maintaining that relationship; Ms S had always taken responsibility for facilitating the children’s relationship with Mr D and this was likely to continue. It is notable too, that Ms S’s offers to Mr D were in no way reciprocated except for a general agreement that she should continue to have trips to Ireland: at no time did he offer to contribute in any other way to improved conditions of parenting for her and consequently the children.

*“The children’s wishes [views]”*<sup>1080</sup>

There was no suggestion that Ms S would no longer be the primary carer. At first, all the children had expressed a slight preference for going to Ireland with her. Then the oldest child, Y, who had

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<sup>1076</sup> *Stadniczenko v Stadniczenko*, above, 500.

<sup>1077</sup> *Stadniczenko v Stadniczenko*, above, 500.

<sup>1078</sup> See above n 243 and accompanying text.

<sup>1079</sup> There was never any suggestion that any of the children was having emotional difficulties in spite of the conflict and changes other than Y’s strongly expressed preference for staying in New Zealand.

<sup>1080</sup> *Stadniczenko v Stadniczenko*, above, 500.



been concerned with the impact of a move on his friends and on family friends decided he would rather stay in New Zealand. Everyone, children and adults, wanted the three children to stay together. The children's views were, then and later, ambivalent to a greater or lesser extent and arguably could not fully justify a decision either way.

*"The reason for the move"*<sup>1081</sup>

It is difficult to imagine better reasons for moving. If Ms S had been a widow, for instance, her move would arguably have been seen as being a wise decision. The contrast between a painful past and present and poor living conditions in New Zealand and the opportunities and support available in Ireland was considerable. The Irish option was also arguably of benefit to the children. There was no question that Ms S's pain was genuine.<sup>1082</sup> She was not proposing a move to undermine Mr D's rights to access.

It is notable that in *Stadniczenko*, as later in *D v S* (no 7) the motivations of the parent who opposes the move is not given the same attention as the motivations of the parent seeking to relocate. In general, the auxiliary parent will of course argue that it is against the best interests of the child, but here it seems possible that the auxiliary parent may also be exercising debilitating power, a desire to control a former family, in a situation where in fact access could be "re-jigged" just as it would be if Mr D relocated. As Sturge and Glaser point out it is<sup>1083</sup>

important to note that [implacable hostility] is often two-way ... the non-resident parent is as implacably hostile to the resident parent as the other way around. It is more often not directly expressed or camouflaged as the non-resident parent has 'more to lose' by its being obviously stated.

This may have been the case in *D v S* (no 1) where there was such a high level of distrust between Mr D and Ms S that they communicated only in writing (even though Mr D was visiting Ms S's home to look after the children while she worked.) The decision also ensured that Mr D met the Inland Revenue definition for sharing care so he may have had an economic motivation for keeping the children in New Zealand. But there was no place where Mr D's motives were explored and his standard of parental behaviour measured in the way that Ms S's motives and behaviour were.

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<sup>1081</sup> *Stadniczenko v Stadniczenko*, above, 500.

<sup>1082</sup> "The mother's views, I accept, are quite genuine" *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 13.

<sup>1083</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 623.

“*The distance involved*”<sup>1084</sup>

Ireland is a long way from New Zealand. The Court did consider how access could be arranged if the new family unit were in Ireland. However, although Mr D was considering relocating himself to be closer to the children in three to five years, this appears not to have been taken into account. It could have been a possible longer term solution: re-jigged access now and a closer physical relationship later.

In sum, the belief system Judge Callaghan appears to have followed is that articulated in *W v C*.<sup>1085</sup> The “starting point” was that of including both parents equally, rather than close analysis of how the responsibilities for the children have been divided and shared in the past and the nature of the parents’ relationships with their children. Relevant factors in relation to the primary carer herself and to the wellbeing of the new family unit were given less weight or unidentified as the Court is focused on trying to retain two parents in one place for children. The standard of “caring for” responsibilities that a primary carer was required to meet was raised to include remaining in close geographical proximity to her children’s other parent to facilitate their relationship with him. On the other hand, the threshold of “caring for” responsibilities that a secondary carer must reach to become a custodian reach appeared to be lowered.

Because of this, although “what has happened in the past has to be given its proper weight,”<sup>1086</sup> where fathers want to become more involved after separation, the weight of the relationship already developed between mother and children, the conditions under which the primary carer is required to maintain her role and the factors that support this continuing in a new context may be underestimated.

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<sup>1084</sup> *Stadniczenko v Stadniczenko*, above, 500.

<sup>1085</sup> The Principal Family Court Judge had recently referred to *W v C* as dealing “comprehensively with the ongoing status and responsibilities of both parents as guardians of the child.” See above Chapter 4 n 16 and accompanying text.

<sup>1086</sup> *S v M* [1997] 15 FRNZ 589 (HC), 599 cited in *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 5.

*(b) D v S (no 9): the D v S (no 7) Principles*

There are four significant factors present in the Family Court in *D v S* (no 9) that were not present in *D v S* (no 1). The first is that Judge Somerville was required to respond to the facts according to the principles enunciated by the Court of Appeal in *D v S* (no 7).<sup>1087</sup> The second, that it could no longer be assumed that Ms S, on whom the children depended emotionally, would continue to care for her children as a primary caregiver regardless of the conditions under which she was required to do so. The third was that Ms S and the children had been in Ireland seven months with a visit to New Zealand during that time.

This decision was made in the new year, following 2001's judicial submissions that endorsed joint parenting and *W v C* and various *in terrorem* suggestions for ensuring that auxiliary parents' rights to access were enforced.<sup>1088</sup> These elements, with those of the decision in *D v S* (no 1) (for instance the Court's response to Ms S's choice to relocate)<sup>1089</sup> may have had an effect on this Family Court decision. However it will be considered primarily in relation to selected aspects of the Court of Appeal's decision in *D v S* (no 7) the place of "joint parenting" in that decision and this, the Court of Appeal's reference to the gender provisions of section 23(1)(A) of the Guardianship Act and its direction that a predictive assessment was necessary. The report writer and Judge Callaghan's approach to gender issues as well as reference to them made in other *D v S* decisions, and the High Court's view of Judge Somerville's predictive assessment in *D v S* (no 8) will be examined during the discussion.<sup>1090</sup>

Judge Somerville's summary of the Court of Appeal's principles does not refer to one qualifier of its direction, that the course to be followed was that most in the interests of the child's welfare "as that term has now to be understood."<sup>1091</sup> Nor does his summary refer to "the growth and degree of involvement of both parents in family care, and the move in the Family Court to orders for shared care"<sup>1092</sup> as a reason for the limited assistance from overseas decisions. However it is understandable if Judge Somerville read the decision as supporting the Family Court's philosophy that joint parenting best meets the interests of children; and the move in the Family

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<sup>1087</sup> See above nn 75-87 and accompanying text.

<sup>1088</sup> See above Chapter 4 for details of the ideology and below Appendix 2 for the interrelationship of the ideology, *D v S* and some fathers rights activism. See above Chapter 4 n 50 for a range of suggestions for enforcing access.

<sup>1089</sup> See above n 250-257 and accompanying text.

<sup>1090</sup> The direct role of *W v C* in this decision will be discussed in the next section: III. 3. *W v C* is overruled.

<sup>1091</sup> *J v C* [1970] AC 668 (HL), 710-711 Lord MacDermott cited in *D v S* (no 7) *D v S* [2002] NZFLR 116, 127.

Court to orders for “shared” care. The Court of Appeal’s rejection of *Payne v Payne*, while giving joint custody to Ms S and Mr D (then living at opposite sides of the world) and remitting the case to the Family Court for rehearing, can be read as endorsing the Family Court’s jurisprudence of joint parenting in relocation cases. While Judge Somerville could not directly enforce joint parenting in close geographical proximity when Mr D and Ms S were on different sides of the world, he could use a strategy suggested by the Family Court judiciary for enforcing access, a change of custody.<sup>1093</sup> To do this, he had to define Ms S as a “bad” mother, endorse Mr D as a “good” parent and justify a change in custody as being in the best interests of the children. These will now be considered in turn.

*The role of joint parenting: the responsibility of the “good” mother to maintain the hierarchy’s functioning*

Like Judge Callaghan in *D v S* (no 1) Judge Somerville supported the jurisprudence of joint parenting by assigning responsibility for maintaining - or failing to maintain - joint parenting to Ms S, as did Mr D himself, frustrated that joint responsibility in New Zealand was no longer an option.

Judge Somerville (ignoring the subsequent, conflicting decision by the High Court in *D v S* no 2) summarised Ms S’s failure to maintain joint parenting as “Where the [Family] Court has already ruled that it would be in the best interests of the children to be co-parented in New Zealand, [Ms] S in proposing sole custody in Ireland is advocating an outcome that is less beneficial.”<sup>1094</sup> By choosing to stay in Ireland she was saying that her needs were more important than those of the children “to remain in the land of their birth and in regular contact with their father.”<sup>1095</sup> His Honour concluded that Ms S was satisfied that Mr D could parent alone and “she could maintain her relationship as an access parent.”<sup>1096</sup> At this point the actuality of the parenting options is

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<sup>1092</sup> *D v S* (no 7), above, 127.

<sup>1093</sup> See above Chapter 4 n 50: This strategy includes while “recognising that family circumstances are necessarily dynamic and what may have been in the best interests of the child at one stage may no longer be in the best interests of the child ... an actual or threatened custody change or a “trigger” provision [if] the other parent [the father] is a viable primary care-giver and is prepared to assume such a role. ... This may be the sort of order which needs to be reviewed and may have a limited life because of children’s changing needs.” Clarkson D F *Response to Questions Posed in “A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law”* (2001) Department for Courts, 23). (The paper explains that because “the party of concern” [the mother] is anxious to indicate good faith about future proposed contact arrangements the Court can often achieve an automatic custody change as an enforcement provision by consent).

<sup>1094</sup> *D v S* (no 9) *S v D* (20 March 2002) Family Court Christchurch FP 009/1607/99, 11-12.

<sup>1095</sup> *D v S* (no 9), above, 11-12.

<sup>1096</sup> *D v S* (no 9), above, 12.

not masked by the rhetoric of joint parenting. Ms S did not need protecting from the reality that she would become a “second class” parent.

Ms S was also at fault by failing to honour her undertaking to set up email contact between Mr D and the children, partly for cost reasons. This was inconsistent with her offer to pay half the costs of the children’s two visits each year to New Zealand. Furthermore, in a final attempt to impose a particular kind of parenting on Ms S, atypical of the “fun and treats” and “challenge and adventure” of access parenting, after outlining an access regime His Honour states<sup>1097</sup>

In addition, [Ms] S should be able to visit New Zealand at other times and have contact with the boys during her time here. I would not expect the boys to be taken out of school during that time and I would expect to see a joint caring arrangement which would see the children primarily in [Ms] S’s care but with contact with [Mr] D, say every second weekend.

Here, having denied custody to Ms S, His Honour nevertheless appears to be trying to mould her into a joint parent, in New Zealand. This was arguably the best he could do in the circumstances to impose a joint parenting regime. It is also arguable that at some level, he may have been aware that the parenting Mr D had to offer was not comparable to the sense of belonging offered by Ms S.

The Court did not acknowledge other possibilities for Ms S’s rejection of joint parenting in New Zealand than those it viewed as negative. Some of these have been discussed in relation to *D v S* (no 1).<sup>1098</sup> Ms S may have realised that her living in New Zealand would not resolve the conflict between her and Mr D and that she could protect her children from further conflict by allowing Mr D. to have what he wanted. He could probably look after them well enough, with domestic help; and was highly motivated to make it work. She may also have recognised that Mr D’s voice would dominate any Family Court hearing in the post-*W v C* environment. He was referred to as having intelligence (twice in this decision) and a university education, as well as being a businessman. Although, unlike Judge Callaghan, Judge Somerville recognised that Ms S had a marketable skill as a hairdresser, she was implicitly defined as having lesser status and arguably did not receive enough credit for her commitment and contribution to family life.<sup>1099</sup>

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<sup>1097</sup> *D v S* (no 9), above, 23.

<sup>1098</sup> See above nn 260-262 and accompanying text.

<sup>1099</sup> See above Chapter 1 n 18 and Chapter 2 n 5.

The Court could have considered that “the duration of the existing arrangements and the greater degree of change may require greater weight to be accorded the status quo”<sup>1100</sup> but did not, perhaps because the “status quo” was debatable. It seems to have viewed the status quo as being joint parenting in New Zealand, but arguably the status quo was Ms S’s established role as primary parent and, by this time, the children’s successful relocation to Ireland.<sup>1101</sup>

It is submitted that if responsibility is being allocated, the evidence of each parent’s behaviour as it affected the children should be considered, as happened here and as is permitted under section 23(1)(A),<sup>1102</sup> even when or perhaps especially when making a predictive assessment. However the consideration of the evidence was inconsistent.

His Honour could, on his findings, have as easily assigned responsibility for the situation to Mr D. Mr D initiated the end of the marriage, viewing his decision to do this because of his lack of feelings for Ms S as<sup>1103</sup>

having been made in the children’s best interests [and] is unable to see that this decision, which is likely to have had a huge negative impact on the children’s upbringing and is certainly against their wishes was based in large part on his own self interest.

He had also threatened Ms S with Hague Convention proceedings if she did not return to New Zealand with the children, who might very happily have extended their holiday to something more permanent with a continuation of their relationship with Mr D at a distance. This can be inferred from the fact that until the end of the *D v S* (no 1) hearing the children all expressed “a

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<sup>1100</sup> *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 128. There may be argument about the relationship of this point to *Stadniczenko*, where the “important factor in favour of the custodial parent is that the award of custody shows that from the day to day point of view the best interests of the child lie with its being with the custodial parent and an incident of custody is the decision where to live. The wellbeing of the new family unit bears on the best interests of the child. The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent the child is on it for his or her emotional development and wellbeing the more likely an injury from the proposed move will be.” *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 500.

<sup>1101</sup> In *D v S* (no 10) the Full Court of the High Court found that when counsel for the child was asked by Judge Somerville to declare his position he stated that the children’s seven months stay in Ireland was a new factor, Judge Somerville indicated that he would take no account of the length of the stay, although he made some references in his judgment to the fact that the children were in Ireland. (Counsel for the advocated that the children should remain in Ireland at least in the meantime, noting the report writer’s favourable comments on their stay and the disruption their being required to live in New Zealand would cause but his view is not referred to in this judgment): *D v S* (no 10) *S v D* [2002] NZFLR 865 (HC), 879.

<sup>1102</sup> See Chapter 3 nn 59-62 and accompanying text.

<sup>1103</sup> *D v S* (no 9), above, 8.

slight preference about going to Ireland [while also being] very quick to talk about how much they would miss their father.”<sup>1104</sup>

But the Court’s assessment of the negative aspects of Mr D’s personality appeared relevant only, eventually, as justification for awarding him custody.<sup>1105</sup> The Court described Mr D as angry, bitter, narcissistic (with believable examples), frustrated, unhappy and aggrieved and, by inference at one point, manipulative.<sup>1106</sup> He was unable to see anyone else’s point of view and considered that everything he had done was for the children’s best interests whereas Ms S always acted in her own interests. He found it difficult to accept that Ms S would remain in Ireland if he had custody but if she did he would consider her as having abandoned their children. (If Ms S did return to New Zealand Mr D wanted division of responsibility to be on a week about basis, for what Judge Somerville described as “laudable motives”, but this may also have been motivated by Mr D’s need to control the parenting process, given his rigidity and attachment to discipline and structure.<sup>1107</sup>) However if he had custody:<sup>1108</sup>

He would feel vindicated and his bitterness, anger and frustration would abate over time. Because of the demands of his employment he would be likely to view access as beneficial for him, as well as the children. He would therefore be likely to foster, rather than frustrate, access.

His Honour appears to be doing two things here, using Mr D’s behaviour as a justification for giving him custody and rewarding him for being the one most likely to facilitate (foster) access, to ensure that an (unacknowledged) hierarchy of care continued to function.

Reading this decision with *W v C* in mind, the litany of Mr D’s shortcomings is reminiscent of the lengthy discussion in *W v C* of Mr C’s needs.<sup>1109</sup> In both cases the judges appear to seek to placate implacable men by acknowledging their shortcomings, while playing lip service to the

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<sup>1104</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 19. The original report, dated 27 June 2000 was updated 24 October, during the hearing. At that point, Y, the oldest son preferred to visit Ireland rather than live there (*D v S* (no 1), above, 20).

<sup>1105</sup> One of Judge Somerville’s “predictions” when he made his predictive assessment, as required under *D v S* (no 7) was that Ms S would “have difficulty with [Mr] D because of the strength of his belief that the children should return to New Zealand and his view that any other outcome is contrary to the children’s interests ... he would be angry and embittered at the injustice of the situation. His relationship with {Ms} S would remain dysfunctional and his telephone/email conversations with the children could become problematic. Certainly, [Ms] S would likely view them as such.” *D v S* (no 9), above, 16.

<sup>1106</sup> *D v S* (no 9), above, 6-9; 16: “An unhappy, aggrieved, and narcissistic parent, such as [Mr] D, is likely to impart to the child inappropriate views of his own feelings when it would be better concealed. There is also an opportunity for a manipulative parent to play on a child’s sense of loss by focussing on the joys of life at home and the exploits of the child’s former friends.”

<sup>1107</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 7.

<sup>1108</sup> *D v S* (no 9), above, 19.

<sup>1109</sup> See Chapter 6 above nn 137-138.

needs of the children concerned, minimising the contributions of their mothers to their wellbeing; while giving negative weight to any evidence of their mothers resisting facilitating the shared parenting arrangements of the fathers' choice.

In doing this, the judges arguably privileged the fathers' perceived situational powerlessness and ignored their exercise of debilitating power. This is comparatively easy to do when the mothers themselves do not raise the issue of power, when the language for emotional abuse is undeveloped, emotional abuse alone is not a reason for limiting access rights and where section 23(1)(A) can be used to dismiss gender-based issues. It is difficult to avoid the conclusion that there was an element of punishment in the Family Court decisions in *D v S* and that the judges were to some extent making an "example" of Ms S in the interests of maintaining its commitment to joint parenting.

This has implications for "the development in the child of standards and expectations of behaviour within our society."<sup>1110</sup> The three boys (and one girl, M) affected by *D v S* and the boy affected by *W v C* will learn that men's wishes are dominant so long as they are not physically or sexually violent, unless their "adult" mothers<sup>1111</sup> make decisions when in a position of situational powerlessness like that of Ms S to return to Ireland with or without the children,. They may also lose the relationship that has given and promised them most.

Alternatively they may retain a relationship with a mother who is emotionally and eventually physically affected by serving her "sentence" rather than becoming all she might have been, because their father did not trust her judgment, argued that he should be a joint custodian on the basis of his gender and refused to acknowledge his auxiliary status, by being flexible about access arrangements. Mr D wanted Ms S's upbringing of the children to be on his terms, and the Court decided (as it would rarely have the opportunity to decide if she and Mr D shared a home) that the children's needs (which she has always carefully considered) can be met by Mr D who does not meet their emotional needs in the same way that Ms S does. They will learn that a father who "supports" a mother may nevertheless choose to undermine her by challenging her

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<sup>1110</sup> *G v G* [1978] 2 NZLR 444 (CA), 447 cited in *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 127.

<sup>1111</sup> An adult mother "[c]onsiders herself and stops doing everything for everyone; ensures she is taken notice of by others and takes care of herself, including making sure she has time for fun and happiness; considers her role and relationships with others and makes decisions based on choice rather than unthinking assumptions" Van Scoyoc S *The Perfect Mother: Invisible Woman* (2000) Robinson, 6.



autonomy rather than dealing with his feelings caused by his own experience of situational powerlessness.

Finally, in seeming to believe that the Family Court's joint parenting philosophy was endorsed by the Court of Appeal's decision in *D v S* (no 7) Judge Somerville supported a concept not discussed elsewhere in the decisions and possibly significant in other joint custody decisions. This is the idea of "joint custody in his favour." There is an obvious internal contradiction in Mr D's "application for joint custody in his favour"<sup>1112</sup> when the children would have only sporadic contact with their mother. His Honour however rationalised - as the Court of Appeal may have in giving the parents joint custody even though they were on opposite sides of the world -the use of "joint custody" as being something that emphasised to children that each parent is equally important and helped dispel the idea of there being a winner and a loser, showing that this case was not about the parents but about their children.<sup>1113</sup> "Joint custody" in these circumstances is however conflating "custody" with guardianship in a way that contravenes the meaning of "custody" in section 3 of the Guardianship Act. The "right to possession and care of a child" is essentially lost here to Ms S as to any access parent who lives at a distance; she is left with guardianship, which is, under section 6(1) "custody (subject to any custody order made by the Court)"<sup>1114</sup> and the opportunity to care for the children from time to time. Furthermore, if custody is in one party's "favour" the other party does not have custody.

Where any parent who has primary responsibility has "joint custody in his [or her] favour," this masks who it really is who offers a child "in preparation for independence, education in its broadest sense which involves close and attentive physical and emotional involvement,"<sup>1115</sup> obscuring the hierarchy of care. This could be a good thing, because where there is conflict about, say, relocation, the Court then has to look closely at the actual benefits each child is getting from each parent and how that benefit can be maintained or enlarged.

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<sup>1112</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 2.

<sup>1113</sup> *D v S* (no 9), above, 21.

<sup>1114</sup> The Court of Appeal also ordered "joint custody" in *D v S* (no 7), while the parents were on opposite sides of the world, but not in either parent's favour.

<sup>1115</sup> *E v M* (13 September 1979) High Court Wellington M361/779 Jeffries J, approved by the Court of Appeal in *Director-General of Social Welfare v L* [1990] NZFLR 125 (CA), 136.

But in a legal system where concepts around parenting are in flux, as they are at the moment, the leap from shared guardianship to joint custody may not help the children concerned. Here, a judge can come to a decision depending in part on a good mother who has always had primary responsibility being defined as a “bad” enough mother for a change of custody to be called for. In consequence, the attentive emotional and physical involvement that (it is agreed throughout) were supplied to the three children primarily by Ms S could have been largely lost to the children. Instead they would be cared for by a father who has been described by the Court as “narcissistic”, who breached his children’s privacy after the Court of Appeal decision, who was engaged in establishing a second family and a new and demanding business venture and would not be as available to his children as their mother. Furthermore, the children were currently well settled on the other side of the world.

The “joint custody” terminology is arguably dishonest, ambiguous, a fiction which may mislead children about what they can expect.<sup>1116</sup> T, for instance, if he were living with his father and missing his mother would not be concerned with a winner and a loser, nor be comforted to know that legally his mother in Ireland, whom he saw twice a year was in fact responsible for his day to day care. If that were so, why was she on the other side of the world? Joint custody will not make an absent parent present or an unreliable parent reliable. Nor will it make it possible for the parent who has the primary responsibility to ensure that the other person who has joint custody but is unwilling or unable to share the responsibility does their share. In obscuring the hierarchy of care, perhaps to placate an auxiliary parent, it also obscures the realities for the children. Fortunately in *D v S*, the reality was reflected eventually in the High Court’s order for sole custody to Ms S.

Most mothers, whether married, or custodial, de facto or de iure know that their lives are “controlled by the children’s welfare and needs and the need to make decisions which are responsive to the children’s welfare and needs.”<sup>1117</sup> “Activist” or “adult” primary parents make their decisions carefully and children know this. The children do not want to make the decisions. They will however learn, as here, a child’s welfare “as that term has now to be understood,”<sup>1118</sup> in the Family Court, endorsing “the growth and degree of involvement of both parents in family

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<sup>1116</sup> This is of course true whether it is a man or woman who is in fact an auxiliary parent.

<sup>1117</sup> *Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94, 4.

<sup>1118</sup> *J v C* [1970] AC 668 (HL), 710-711 Lord MacDermott cited in *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 127.

care, and the move in the Family Court to orders for shared care”<sup>1119</sup> that if their fathers do not want their mothers to live autonomous and supported lives they can prevent this. Fathers are the ones who make the decisions about who will live where and why. Furthermore,

*The gender provisions of the Guardianship Act and the “good” father: the unique contributions of fathers and the use of the report writer’s research to justify equal and shared responsibility*

It has been argued that the father-unique characteristics of parenting are few and that parenting, in the *E v M* sense, is gender-neutral. It has also been argued that presuming that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child is limited to a single situation, the point at which custody is allocated.<sup>1120</sup> It was submitted that the gender provision in section 23(1)(A) of the Guardianship Act was intended only to eliminate the “mother principle” from decision making. It is therefore possible both to take account of gendered parenting patterns and their dynamics, especially the hierarchy of care; and to address gender equity issues where they appear in the process of exercising parental authority.

However, in this case, perhaps because the parameters of section 23(1)(A) have never been fully argued, the consideration of gender issues was problematic. On the evidence of the report writer’s work and its interpretation by the Family Court judges, fathers may be able to justify joint custody, as in this case, on the basis that as fathers, rather than as parents they have something special to offer, particularly to boys. In *D v S* “fathering” was a vital issue, engaged with not only by Mr D but also by the Family Court in association with the writer of the section 29A reports. Mr D’s arguments about fathering sustained his motivation and case and arguably was one factor, contrary to the principle underlying section 23(1)(A), in his being given joint custody. However, neither Ms S’s counsel, nor the counsel for the child, nor the majority in the Court of Appeal (although it questioned the use of the term “mother” by the High Court) challenged his use of “father” arguments. But in *D v S* (no 9), the Court went to some lengths to distinguish his father role from his role as a parent.

There is evidence that a trend towards “shared” parenting responsibility represents if not an appropriation of authority by the helping professions at least a belief by members of these

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<sup>1119</sup> *D v S* (no 7), above, 127.

<sup>1120</sup> See above Chapter 3 nn 59-62 and accompanying text.

professions that the language of shared responsibility leads to important attitude changes among separated parents.<sup>1121</sup>

As a member of the helping professions, the *D v S* report writer may well have been committed to the helping profession's views. His full opus would no doubt be rewarding reading. He made many reports and never overtly took sides.<sup>1122</sup> It is however arguable that because the Family Court consistently followed his views about gender he to some extent "appropriated" the decision making.<sup>1123</sup> The gendered aspects of his reports will now be explored, to highlight the tension between the realities of the hierarchy of care in this case, the use of gender issues as presented by the report writer to support the Family Court's decisions and their relationship to section 23(1)(A) of the Guardianship Act, particularly in *D v S* (no 9) following the Court of Appeal's affirmation of its relevance in *D v S* (no 7). It will be questioned whether there was in this case, "only one fact that mattered 'the loss of a relationship with the father'" and whether it would have been appropriate not only to "test the closeness of the relationship [and] whether holiday access can replace weekly access."<sup>1124</sup> The discussion will also question whether it is necessary to do so consistently, referring to parenting, rather than fathering qualities.

From the beginning the report writer's description of the parents' responsibilities acknowledged that a hierarchy of care existed: "[the children] particularly emphasised the home environment

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<sup>1121</sup> Henaghan notes that "The counselling/mediation professions have seen the changes [to the language of shared parenting] in the most positive light. They believe the change in wording from custody/access to joint responsibility have led to important attitude changes in separated parents where they are more likely to share decision-making and work closely as parents. These professions believe more education in how to achieve this ideal will create more shared parenting situations ... Lawyers are more s[c]eptical about whether the changes have made any real difference:" Henaghan M "Shared Parenting: Where From? Where To? Children's Rights and Families" (2001) S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 59-60.

<sup>1122</sup> Panckhurst J stated: "In both Courts [the report writer] declined to express a view in favour of one proposal over the other. He made it clear that in many cases he does so" (*D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 15) but this is ambiguous. It could mean either that the report writer often declines to make a recommendation or often does make a recommendation.

<sup>1123</sup> This was not necessarily only in relation to his reporting of the children and their parents' relationships with them. It may have extended to the report writer's opinions on matters that arguably were outside his role: The report writer also talked about "the mother having been able to cope in the past" and from this the Court inferred that "she has an ability to cope, no matter how distressing the situation may be. In my view the mother's love and relationship with the children is such that she will cope, albeit with obvious difficulties." The writer's report on the children was thus used to support the Court's view of the mother's capacity to cope with living in New Zealand. This was arguably not something that the report writer had been asked to investigate and therefore an inappropriate use of his evidence (*D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/9914, 35). It is notable that by *D v S* (no 2) Ms S had her own counsellor, a clinical psychologist, to report on her state of mind (*D v S* (no 2), above, 12).

<sup>1124</sup> Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 27.

that [Ms S] created and how they enjoyed that, with their father they spoke with particular pleasure of the activities and outings that he shared with them.”<sup>1125</sup> He also acknowledged that there were many positive characteristics identified by the boys’ teachers that “auger well for a successful relocation.”<sup>1126</sup> At this point there was no question that Ms S would remain as the primary carer and that Mr D was an auxiliary carer.

The report writer’s emphasis on the important role that fathers play in the development of boys was highlighted by Judge Callaghan, in support of his finding that “the evidence is strongly supportive of the need for these children to continue ... in having a regular and ongoing qualitative relationship with both their parents in the way they currently enjoy.”<sup>1127</sup> Before noting that it was self-evident that the children’s relationship with Mr D was important to them, and that this would change at least for the initial period<sup>1128</sup> if they went to Ireland His Honour quoted from the report writer:<sup>1129</sup>

Research establishes that fathers have a particularly important role to play in the development of boys, and for boys active and positive paternal involvement has been found to be associated with the reduced incidence of anti social behaviours, increased educational performance and sound career choice.

This cannot be construed as anything other than gender specific. It does not make sense if rewritten (for example) as “the important role *parents* play in the development of boys. It also echoes Mr D’s own views, summarised but not rejected on the basis that they breached the gender provision of section 23(1)(A) of the Guardianship Act, in *D v S* (no 9):<sup>1130</sup>

[Mr] D believes that it is essential for boys’ development that they have structure and discipline in their lives which they are best able to obtain from their fathers. He considers that their need for nurturing is met primarily by their mother and is most important in their early years. He believes, however, that from the age of 7, their father becomes increasingly more important, before being overshadowed by the influence of the children’s peers. He recognises, however, that both parents have a role from birth until independence, hence his emphasis on the need for co-parenting.

There is no way of knowing how much influence the report writer had on Mr D’s views, or how much these views, expressed by the helping professions generally, have affected the Family Court’s “joint parenting” philosophy. But they are here included as part of the Court’s reasoning, without being challenged as in breach of section 23(1)(A), although Mr D is using gendered arguments to support his case for custody.

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<sup>1125</sup> *D v S* (no 1), above, 17.

<sup>1126</sup> *D v S* (no 1), above, 18.

<sup>1127</sup> *D v S* (no 1), above, 36.

<sup>1128</sup> At this time Mr D was considering relocation to Ireland himself, within three to five years: *D v S* (no 1), above, 34.

<sup>1129</sup> *D v S* (no 1), above, 36.

<sup>1130</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 7.

In his third report, made just before the hearing in *D v S* (no 2), after Ms S had been to Ireland and had the realisation on the plane that she would return to live there with or without the children, the report writer concluded that Ms S “met the affectional needs of the boys in a way that [Mr D] did not ... a reflection of the different strengths and roles of the parents.” Again, the report writer related this to gender. He wrote that:<sup>1131</sup>

Although [both parents are] fully competent to provide for the boys’ general care needs there is a gendered dimension to their relationships with the boys that is to be found in many ordinary families. Thus [Mr D] meets the boys’ needs in terms of adventure and challenge, building confidence and self-reliance joining with them in physically challenging activities and so on. [Ms S] on the other hand presents as being more willing, able or skilled in anticipating and helping the boys to express emotion, and at providing reassurance and comfort and creating a sense of belonging and family connection.

At no point in any of later the decisions was there any direct reference to this discussion of the “gendered dimension” and what it might mean. It raises the question of whether it is possible to be fully competent to provide general care on a de facto sole custodial basis - even where a relatively close relationship is established - without backup from Ms S’s willingness, ability and skill in providing the emotional component of *E v M*-type nurturing.

It also raises the question of whether either aspect could be provided for in an access situation rather than a custodial one, and during holidays. Arguably, the boys’ needs met by Mr D could be more readily provided in a less demanding holiday environment than those met by Ms S, which are essential for day to day care, an option was considered and rejected by the Family Court in *D v S* (no 1). Furthermore, Ms S could be said to be offering adventure and challenge by suggesting a change of country for the children, where there were also other men offering relationships with a male gendered dimension. Could Mr D also make a comparable offer, to increase his willingness, abilities and skills in anticipating and helping the boys express emotion, providing reassurance and comfort and creating a sense of belonging and connection, for longer than a month or two at a time? Arguably however, over time, replacing their primary carer with a parent who offers an excellent access-type relationship but does not give the children (for example) a comparable feeling of belonging to that facilitated by Ms S is not in their best interests.

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<sup>1131</sup> *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 14.

In *D v S* (no 7) the gender provisions of section 23(1)(A) designed “to dispel any gender based assumptions as to whose parental care will best serve the welfare of the child”<sup>1132</sup> were one of the Court of Appeal’s points to be considered. However, in its analysis of Panckhurst J’s decision the majority cited the report writer’s comments on the “gendered dimension” of the care Mr D and Ms S gave their children, apparently as evidence of past parenting patterns, without comment on its significance,<sup>1133</sup> focusing the “gender” issue only in relation to comments that made by Panckhurst J<sup>1134</sup> when he<sup>1135</sup>

focused on the emotional needs of the boys, which S could best meet, and the strength of the maternal bond. The references ... to S’s fulfilment of ‘her role as a mother in Ireland’ and ... to the boys’ ‘need for a mother’ and to the ‘gain which will flow from the presence of S as a mother’ were no doubt slips of language rather than gender specific comments breaching s 23(1)(A) but they may also reflect a lingering impact of the emphasis in *Payne v Payne* on mothers as relocation applicants.

The Court seems here to be saying that *any* gender specific comment breaches section 23(1)(A), but a “slip of language” will be tolerated. In an ideal world, this would ensure that parenting practices and behaviours were the focus, rather than the gender of the person who manifested them.

Arguably, however, his references to Ms S as a mother merely reflected Panckhurst J’s concerns about the children’s emotional needs being met and acknowledged that in *this* family the mother did this. Here the word “mother” can readily be replaced with “parent”. In his minority judgment, Blanchard J supported this view, while implicitly acknowledging the mechanisms of the hierarchy of care:<sup>1136</sup>

[Panckhurst J] perhaps unfortunately, spoke of her fulfilling her role as ‘a mother’[.] I do not read the judgment as intending to refer to the role of mothers generally, but to the particular role of *this* mother to these children. They had a particular emotional dependence on her. The father had conceded that fact and did so again in this Court. Panckhurst J did not make any direct reference to the role this father was able to play in providing different benefits for his children, such as fostering their confidence and self-reliance. But the Family Court Judge had referred to the important role fathers play in the development of boys, quoting [the report writer], and Panckhurst J had himself referred to [the report writer’s] analysis ... of the relationship of each of the parents with the children ... the Judge was entitled to place crucial weight on the emotional needs of the children which, on the evidence, for the time being could not be as well satisfied by the father, as the father himself seems to accept.

It seems possible that part of the justification for joint parenting generally and for giving custody to Mr D in *D v S* (no 9) is based on what a father offers as a father rather than as a parent.

Aspects of shared custody reasoning may define more widely unique characteristics of and

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<sup>1132</sup> *D v S* (no 7), above, 128.

<sup>1133</sup> *D v S* (no 7), above, 128

<sup>1134</sup> *D v S* (no 2), above, 20-21.

<sup>1135</sup> *D v S* (no 7), above, 133.

contribution to children's welfare of "fathering" or access than those identified by Sturge and Glaser.<sup>1137</sup> This may have created an unacknowledged presumption that making a joint custody order will serve the welfare of a child because of the gender attributes of one potential custodian, a *father*. However this parent is arguably an auxiliary parent, whose parenting responsibilities are limited, and characterised by "fun" and "treats" in Smith et al,<sup>1138</sup> or by the report writer in *D v S* (no 2) as "challenge and adventure."<sup>1139</sup>

These characteristics are entirely appropriate to an access relationship but arguably the close and attentive physical and *emotional* involvement of primary care requires much more. Conflating custody and access in the jurisprudence of joint parenting, here seems to presume, given the characteristics of Mr D's very good access relationship with his children that to place "a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child."<sup>1140</sup> It is submitted that taking the further step and giving "joint custody in his favour" to a parent who cannot meet children's emotional needs is unjustifiable, especially if the reason for his seeking custody is because the very good primary parent wants to relocate.

There is arguably some evidence in the Family Court decisions in *D v S* of this hidden presumption, that making a joint custody order "in a father's favour" will serve a child's interests because he is a good *father*, or auxiliary parent. Mr D originally argued that joint parenting was important because of what a *father* offers and he as a father was also able to offer. Although he was a "viable" single parent, if the children had stayed in New Zealand with him they would have lost the close physical and emotional attention of Ms S, their primary parent, in return for care from a father whose personality was described by the Court in comparatively negative terms and who had significant other work and family responsibilities. It is possible that the three boys would, in being cared for by their auxiliary parent, with their primary parent on the other side of

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<sup>1136</sup> *D v S* (no 7), above, 138.

<sup>1137</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 616-617: "the [biological] father's unique role in the creation of the child; the [biological father's] sharing of 50% of his or her genetic material; the history of his or her conception and the parental relationship; the consequent importance of the father in the child's sense of identity and value; the role modelling a father can provide of the father's and male contribution to the parenting and rearing of children which will have relevance to the child's concepts of parental role models and his or her own choices about choosing partners and the sort of family he or she aims to create." The father characteristics depended on by Mr D appear to derive from the works of Steve Biddulph, see above n 195.

<sup>1138</sup> See above Chapter 2 n 200 and accompanying text.

<sup>1139</sup> *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 14.

<sup>1140</sup> Guardianship Act s 23(1)(A).



the world, have been at some risk. *D v S* (no 10) and *D v S* (no 11) go some way to undermining this unacknowledged presumption, at least as it is expressed in *W v C*, but without fully exploring its possible gender basis and the possibility that it is in breach of section 23(1)(A).

However, perhaps because of the Court of Appeal's concern about gender based assumptions, in *D v S* (no 9) Judge Somerville shifted from Judge Callaghan's endorsement of Mr D as a custodial parent because fathers are "necessary" (especially for boys). Instead he defined him in gender-neutral terms as having joint custody in his favour, in reality the sole custodial parent. He justified this by reasoning that this father and this mother offered the children the same thing, although this was not in accord with the evidence.

"The Research" on parenting in the report writer's work, cited by Judge Somerville,<sup>1141</sup> says, quite reasonably, that parental, nurturing, characteristics are not dependent on the gender of the person who possesses them; the characteristics of individual fathers (or individual mothers) are much less important than the characteristics of the relationships they have with their children. This logically required the Court to look at which parent best offered the necessary characteristics. In this case that was Ms S. The relationships that she had with the children had all the elements necessary for them to flourish, under the *E v M* definition of parenting.

However Judge Somerville's interpretation of this as meaning that both mothers and fathers (and this father, this mother) equally contribute to the emotional development and education of children justified giving Mr D custody whether or not he actually possessed the necessary characteristics. It replaced the argument about Mr D's importance as a good *father* to his sons with an argument about his importance as a good *parent*.

His Honour stated that the report writer referred to this research because Mr D had read so widely about fathers' importance to their sons.<sup>1142</sup> The report writer had also emphasised that the benefits of the children's close relationship with Mr D through their formative years meant they were unlikely to suffer from the consequences of having an "absent father". It is not clear why, having earlier endorsed the "particularly important role"<sup>1143</sup> that fathers have to play the report

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<sup>1141</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 12.

<sup>1142</sup> *D v S* (no 9), above, 12.

<sup>1143</sup> *D v S* (no 1) (2 November 2000) Family Court Christchurch FP 009/1607/99, 36.

writer was now concerned to emphasise gender-free characteristics of parenting, *and* the fact that Mr D's children were unlikely to suffer from the consequences of an absent father if the children were to relocate to Ireland without him.

Like His Honour the report writer may have been concerned to counter the earlier reference to the gendered dimensions of the respective parents' care for this family, following the Court of Appeal's reference to section 23(1)(A).<sup>1144</sup> However, any discussion of "absent fathers" is arguably more than a slip of the tongue, implying that an argument for paternal custody, joint or sole, can be made on the basis of gender.

Taken as a whole, this aspect of the judgment reveals unsatisfactory inconsistencies, shifts of concept and language to support Mr D's qualification to become joint or sole custodian. It is perhaps indicative of the kind of inevitable conceptual tangle that results when it is no longer possible to rely on the assumption that mothers who are primary parents will maintain their commitment regardless of the consequences for themselves. If the Court wants to discipline a good mother who makes an informed decision to relocate with her children or without them and she does not accept that discipline, the Court is left, as here, having to justify the imposition of an *in terrorem* provision, a change in custody. Promoting a good auxiliary parent to sole custodian will not necessarily, in these circumstances, be easy to justify without, with respect, the somewhat specious reasoning process undertaken by Judge Somerville in this case.

Judge Somerville may, being aware of this, have turned to the report writer's concern about the negative effects on children of conflict between parents for further justification of his decision. Immediately before turning to the "stark" alternatives as he understood them, His Honour referred to the report writer's statement that "the children's current adjustment will not protect them in the long term without a significant improvement in the parental relationship."<sup>1145</sup> This arguably (though not explicitly) justified his giving Mr D joint custody in his favour on the basis

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<sup>1144</sup> The section was "was designed to dispel any gender based assumptions as to whose parental care will best serve the welfare of the child;" and it is necessary to balance "the advantages and disadvantages of the custodial alternatives available," *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA). See above nn 83-85.

<sup>1145</sup> *D v S* (no 9), above, 14.

that this decision would result in less conflict, because of Mr D's personality and concerns.<sup>1146</sup> It may also explain why he ignored some significant evidence.

*The "predictive" assessment and the children*

When *D v S* (no 9) was appealed, the Full Court of the High Court was critical of Judge Somerville's predictive assessment. Part of this criticism was that using the "*W v C*" approach, the Court had "diverted its attention from the predictive assessment of the welfare of the children *in the future* required by *D v S* (no 7)."<sup>1147</sup>

Although His Honour described the children's life in Ireland in positive terms,<sup>1148</sup> he identified two sources of conflict, Y's wishes and the relationship between Ms S and Mr D.

His Honour viewed as a probable outcome that Y would be unhappy. His relationship with his mother could be affected. He would campaign to return to New Zealand and a probable outcome would be that he would refuse to return to Ireland after a summer holiday and would live with Mr D when he was 12 or 13. This, with respect, seems to contradict his Honour's own assessment of Ms S's capacities as a parent. His Honour had noted that Ms S "had provided [the children] with a loving home environment while Mr D's has been supportive of the children's relationship with Ms S"<sup>1149</sup> (indicating that things had not changed in the past year) and did not refer to the children's emotional needs although<sup>1150</sup>

[Ms S is] more willing, able or skilled [than Mr D] in anticipating and helping the boys to express emotion, and providing reassurance and comfort and creating a sense of belonging and family connection.

Given the range of responsibilities fulfilled by Ms S it seems equally if not more reasonable to predict that she had the skills to deal with any difficulties Y had and might have.<sup>1151</sup> Mr D was less able to provide for the children's emotional needs and given his personality and behaviour as described by the Judge himself, might not be emotionally safe for the children. In this family the children were not dependent on the relationship with the auxiliary parent for their emotional wellbeing and development, so injury from the move is less likely than if they were.

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<sup>1146</sup> "He would feel vindicated and his bitterness, anger and frustration would abate over time. Because of the demands of his employment he would be likely to view access as beneficial for him, as well as the children. He would therefore be likely to foster, rather than frustrate, access." *D v S* (no 9), above, 19.

<sup>1147</sup> *D v S* (no 10) *S v D* [2002] NZFLR 865 (HC), 881. Emphasis in decision. See below 3. *W v C* is overruled: *D v S* (no 10) and *D v S* (no 11) for *W v C* issues in this decision.

<sup>1148</sup> See above nn 215-217.

<sup>1149</sup> *D v S* (no 9), above, 5.

<sup>1150</sup> *D v S* (no 2) (2 April 2001) High Court Christchurch AP 39/00, 15.

<sup>1151</sup> See above nn 218-228 and accompanying text.

In the High Court, one ground of appeal was that Judge Somerville had placed too much weight on Y's preference for living in New Zealand. The Full Court referred to part of the report writer's evidence given in early 2002 and not mentioned by Judge Somerville. Although the report writer stated that if Y were to stay in Ireland he might feel he had not been listened to and that Y feared that he might blame his mother for a "wrong" decision he qualified this by adding<sup>1152</sup>

However, the data from my interview with the principal of his school and his class teacher is that on returning from the Christmas visit to New Zealand [Y] very quickly appeared to slot back into schoolwork and his peer relationships and social activities.

When asked in the Family Court about Y's reluctance to return to Ireland, the report writer again referred to Y's "fairly ready and easy transition back," adding that this was probably not surprising because he had returned to a familiar environment and had "some of the kudos of having been away to an exciting place."<sup>1153</sup> Furthermore, the report writer had said that Y<sup>1154</sup>

seems to have coped okay with the fact that the decision didn't go the way he wanted [it] to. [It is unclear h]ow much weight he is attaching to this hearing, whether he sees that as a sort of interregnum before the main decision is [made], so it may be that he's seeing that as a sort of waiting room that he's in at the moment and that helped him to accept that.

In cross-examination the report writer had also said that while it was possible that Y could blame Ms S for an unhappy situation, children are often willing to accept a decision that goes against their wishes if they feel consulted. They trust adults to make the best decision.<sup>1155</sup> Furthermore, the report writer stated that, if he were a judge he would "feel it sensible to place a greater reliance on [Y]'s views in two or three years time" when "his thinking would be clearer and greater reliance probably should be placed on it and, perhaps, that should outweigh the need for the three brothers to remain together."<sup>1156</sup>

The Full Court of the High Court noted that although it was for Judge Somerville to decide what weight would be placed on the report writer's evidence, he had placed considerable weight on it in other respects and wondered whether he had overlooked this evidence. In making its own

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<sup>1152</sup> *D v S* (no 10), above, 888.

<sup>1153</sup> *D v S* (no 10), above, 888.

<sup>1154</sup> *D v S* (no 10), above, 888.

<sup>1155</sup> This point of view is shared by Rodgers and Pryor. See below Chapter 9 n 63 and below Appendix 1

<sup>1156</sup> *D v S* (no 10), above, 888.

assessment, it felt “obliged to part company with the Judge and place much less weight on the gloomy outcome forecast by the Judge.”<sup>1157</sup>

The High Court also gave more weight to T’s relationship with his mother, as his *closest*<sup>1158</sup> attachment. Noting that Y was easy going and independent and his preference should not tip the balance, the Court therefore gave more weight to T’s preference and less to Y’s, at least for the next two or three years.

The second source of conflict was the relationship between Mr D and Ms S. Ms S would “have difficulty” (conflict) with Mr D because of his view that the children should live in New Zealand and any other outcome would be contrary to their interests. He would be “angry and embittered at the injustice of the situation.”<sup>1159</sup> Their relationship would remain dysfunctional, and communication with the children a problem for Ms S so Mr D would experience difficulty in maintaining contact with the children. There was a “real probability”<sup>1160</sup> #In contrast, the only “adverse consequences”<sup>1161</sup> of the New Zealand option were the need for an after school nanny and Mr D’s concern that Ms S had abandoned her children. This would have to be offset by an affordable access regime to ensure regular and frequent contact. The groundwork was here laid for deciding that the New Zealand option was more likely to enhance the parents’ relationship ensure that an auxiliary parent could contribute to the children’s wellbeing and therefore benefit the children rather than offering.<sup>1162</sup>

In response to this aspect of the Family Court’s reasoning, the High Court held that “although it is obvious that the relationship between the parents is at a low ebb” and there had been problems establishing email communications at home, Ms S, not an “uncaring parent,” was comfortable with the children emailing from school.<sup>1163</sup> The report writer had not seen communications about the children as a problem, Ms S had complied with Court orders, her family had committed themselves to a travel fund and Mr D, in spite of problems with Ms S had been able to maintain

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<sup>1157</sup> *D v S* (no 10), above, 889.

<sup>1158</sup> The High Court’s emphasis: *D v S* (no 10), above, 890.

<sup>1159</sup> *D v S* (no 9) (20 March 2002) Family Court Christchurch FP 009/1607/99, 16.

<sup>1160</sup> *D v S* (no 9), above, 17.

<sup>1161</sup> *D v S* (no 9), above, 19-20.

<sup>1162</sup> The Family Court’s assessment of this conflict appears to be the basis for one of the grounds of appeal to the High Court, that “the Judge failed to take into account the extent to which the mother had encouraged the children to retain a positive image of their father:” *D v S* (no 10) *S v D* [2002] NZFLR 865 (HC), 878.

his relationship with the children. The Court's assessment was that the risk of a communications breakdown - and of access being compromised - was likely to be similar whether the children were in Ireland or New Zealand. The children had by now (July 2002) been in Ireland almost a year:<sup>1164</sup>

The reality is that the children lawfully moved to Ireland almost 12 months ago and have progressed satisfactorily since that time ... It seems to us that further disruption to their lives should be avoided ... we cannot see how it would be in their best interests to return to New Zealand.

If His Honour's predictive assessment was heavily influenced by the report writer's concern that the children were at long term risk from the conflict between their parents, that is understandable. However, his assessment of the risks to the children of going to Ireland, alongside the evidence of the positive reports about their progress in Ireland and the omission of relevant evidence can also be understood as a flawed attempt, given his assessment of each parent, to justify an unjustifiable decision. It is argued that the decision may have been motivated by adherence to the ideology of joint parenting and the need to discipline a mother who made a choice requiring access arrangements to change. It is a good example perhaps of how "reason cannot control the subconscious influence of feelings of which it is unaware,"<sup>1165</sup> and "unconscious values get in the way."<sup>1166</sup> The ideology of joint parenting was addressed in the following two hearings, in the Full Court of the High Court and the Court of Appeal.

### 3. *W v C* is overruled: *D v S (no 10)* and *D v S (no 11)*

This section will discuss the decisions of High Court in *D v S (no 10)* and the Court of Appeal in *D v S (no 11)*. These overruled both the use of *W v C* in *D v S (no 9)* and, in the High Court, the Family Court's "disciplining" of Ms S through inappropriately assigning to her responsibility for making the hierarchy of care work in a way that suited Mr D. Following the analysis of the judicial response in each court the decisions will be discussed together.

#### (i) Judicial response

Counsel in *D v S (no 9)* did not refer to *W v C*. In *D v S (no 10)* the Full Court of the High Court did not find this omission surprising because<sup>1167</sup>

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<sup>1163</sup> *D v S (no 10)*, above, 890.

<sup>1164</sup> *D v S (no 10)*, above 891-892.

<sup>1165</sup> *Public Utilities Commission of the District of Columbia v Pollak* (1952) 343 US 451,466 Frankfurter J; cited in [*D v S no 7*] *D v S* [2002] NZFLR 116, 129.

<sup>1166</sup> Elias S "Family Courts - 20 years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001" (2002) *Family Court Review* 40(3) 297, 302.

<sup>1167</sup> *D v S (no 10)* *S v D* [2002] NZFLR 865 (HC), 881.

[W]e cannot understand how the principles ... [of] *W v C* could be meaningfully applied in a relocation case where the parents are on opposite sides of the world.

Part of the argument before the High Court was that Judge Somerville had erred in law by allowing his decision to be influenced by his perception of fairness between the parents, as articulated in *W v C*. This perception, unrelated to the welfare of the children was summarised by the Full Court as being that:<sup>1168</sup>

The only appropriate starting point in a dispute over arrangements for a child's care on the parents' separation is recognition of "their equal and shared right to exercise them and the child has a right to the continued provision by his parents of the advantage of their equal and shared nurturing obligations"<sup>1169</sup> unless there is some good reason related to the child's welfare.

The Court identified two conceptual problems as well as noting that the Family Court had been selective with the evidence about the children's wellbeing:<sup>1170</sup>

If the concept of equal and shared parental obligations or nurturing rights is allowed to represent the starting point for assessment of a proposal to relocate to another country there must be a presumptive or an a priori ... weighting against the relocation application because *equal and shared* parental obligations or nurturing rights could only be achieved by preserving the status quo and declining the application. ... [O]ne factor is being isolated and given presumptive effect even though in this case that ideal is probably no more relevant or achievable than the idea of forcing parents to reconcile for the benefit of the children. ... [A]nother problem is that by looking back to an ideal ... the Court diverted its attention from the predictive assessment about the welfare of the children *in the future* required by *D v S* [(no 7)].

The *W v C* approach, it decided, could not be<sup>1171</sup>

reconciled with the *D v S* principles which emphasise an all-factor child-centred approach with no room for a priori assumptions or weightings. Ironically, if applied to a relocation case the *W v C* approach must be close to the flip side of *Payne v Payne* and it must follow for that reason alone that it is contrary to relocation principles in New Zealand.

Judge Somerville had erred by giving equal and shared parental obligations a presumptive weighting.

The Full Court also held that Judge Somerville had made Ms S "accountable for the situation that has arisen and that this counted heavily against her decision to relocate."<sup>1172</sup> That is, the Family Court had inappropriately assigned responsibility to her. Although the reasonableness of Ms S's wish to relocate had to be assessed in relation to the disadvantages of the children's reduced contact with their father, Judge Somerville did not weigh the two available alternatives. Instead he weighed the sole parenting in Ireland (less beneficial for the children) against joint parenting

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<sup>1168</sup> *D v S* (no 10), above, 881.

<sup>1169</sup> *W v C* [2000] NZFLR 1057 (FC), 1065 Judge Inglis QC.

<sup>1170</sup> *D v S* (no 10), above, 881.

<sup>1171</sup> *D v S* (no 10), above, 881.

<sup>1172</sup> *D v S* (no 10), above, 883.

in New Zealand and then held Ms S responsible for making the co-parenting option unavailable.<sup>1173</sup>

The Full Court found it important that this reasoning carried through to Judge Somerville's final assessment. It concluded that its impact was that if a competent parent was available where a child was born or brought up, regardless of the reasonableness of the need of the other parent to relocate or that parent's competence the need to relocate<sup>1174</sup>

should not be allowed to affect the relationship between the children and the parent in the country of origin ... this seems to be the very type of presumptive a priori weighting that the Court of Appeal was trying to eliminate.

In referring to the "predictive" assessment made by Judge Somerville,<sup>1175</sup> the Court could not "escape the feeling that the Judge's inferences have been influenced by the application of *W v C* principles."<sup>1176</sup> Then, unlike Judge Somerville, who does not mention in his judgment counsel for the children (who had advocated that Ms S and the children remain in Ireland), they took "a shorter term approach along the lines advocated by the counsel for children."<sup>1177</sup>

*D v S* (no 11) resulted from Mr D's application for leave to appeal the High Court decision in *D v S* (no 10), allowing Ms S's relocation and is chiefly concerned with *W v C* which<sup>1178</sup>

... had been cited by counsel in the Court of Appeal in *D v S* (no 7) but was not mentioned in the judgments ... obviously the members of this Court did not find it helpful.

The Court of Appeal noted<sup>1179</sup> Judge Somerville's reference to the lengthy passage in *W v C*<sup>1180</sup> stating that the parents were equally entitled to share in the possession and care of a child and all features of a child's upbringing and that their separation required "some practical adjustments to the child's routine, but that did not reduce the potency of [their] equal and shared nurturing responsibilities." In addition they noted Judge Inglis QC's conclusion that as a primary obligation

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<sup>1173</sup> *D v S* (no 10), above, 864.

<sup>1174</sup> *D v S* (no 10), above, 883.

<sup>1175</sup> This aspect of the High Court's judgment is discussed above nn 334-352.

<sup>1176</sup> *D v S* (no 10), above, 891.

<sup>1177</sup> *D v S* (no 10), above, 892. At the second Family Court hearing counsel for the children had "advocated that the children should remain in Ireland, at least in the meantime:" *D v S* (no 10), above, 870.

<sup>1178</sup> *D v S* (no 11) *D v S* [2003] NZFLR 81 (CA), 85. *W v C* was brought to the attention of the Court by counsel for the Family Law Section of the New Zealand Law Society (as Intervener), David Burns. See also Chapter 2 n 23 and above, nn 4 and 95.

<sup>1179</sup> *D v S* (no 11), above, 83.

<sup>1180</sup> *W v C* [2000] NZFLR 1057 (FC), 1063-1064, cited in *D v S* (no 9) *S v D* (20 March 2002) Family Court Christchurch FP 009/1607/99, 3.



parents had to consider how they could preserve for their child the advantages of their joint nurturing and that these had to be “a primary influence in any decisions about the pattern of their future separated lives.”

The Court then observed<sup>1181</sup> that the High Court had struggled and failed to reconcile this approach with the principles of *D v S* (no 7), because if the *W v C* principles were a starting point there would be a presumptive weighting against relocation. Equal and shared parental obligations or nurturing rights could be achieved only if the status quo were preserved and the application declined. Furthermore, by “looking back to an ideal which was no longer achievable or relevant”<sup>1182</sup> Judge Somerville had diverted his attention from the predictive assessment about the future welfare of the children, one of the principles established in *D v S* (no 7).

In the view of the Court of Appeal, it was<sup>1183</sup>

... not seriously arguable that the High Court was wrong to find that the particular passage from *W v C* was inconsistent with this Court’s statement of the proper approach in *D v S*.

The Court of Appeal had itself recognised in *D v S* (no 7) that each parent was a guardian but had also referred to the statement in section 23 of the Guardianship Act that the Court must regard the welfare of the child as the paramount consideration. It had seen this as consistent with parental responsibilities and the relevant provisions of UNCROC. The Court had also said that all relevant factors must be weighed to determine the best interests of the child. This process was<sup>1184</sup>

necessarily a predictive assessment, a decision about the future. There was no room for a priori assumptions. ... [I]t was necessary to deal with the matter on a “case by case personalised assessment to meet the welfare of each particular child.”<sup>1185</sup>

It therefore followed that it was<sup>1186</sup>

no longer good law to use as a starting point the “equal and shared legal right to exercise” guardianship responsibilities and obligations. It is clearly wrong to say that a deviation from that position is justified only by circumstances demonstrating that the child’s welfare and interests require it. Rather it is the child’s welfare and interests in the future which must be at the centre of the inquiry. This must be assessed in terms of available options.

In this case, shared parenting was no longer an option.

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<sup>1181</sup> *D v S* (no 11), above, 84.

<sup>1182</sup> *D v S* (no 11), above, 84. See the full passage above n 357.

<sup>1183</sup> *D v S* (no 11), above, 85.

<sup>1184</sup> *D v S* (no 11), above, 86.

<sup>1185</sup> *D v S* (no 11), above, 86.

<sup>1186</sup> *D v S* (no 11), above, 86.

(ii) Discussion

From the point of view of primary carers, however the arrangement with an auxiliary carer in described in legal terms, this appears to be a hopeful decision. *W v C* is no longer good law and “the equal and shared right to exercise” guardianship responsibilities can no longer be a starting point. In relocation cases, shared responsibilities cannot be given a presumptive weighting. There is no room for a priori assumptions, including the assumption that retaining the status quo of a relationship (of whatever kind) with a second parent is necessary. It is no longer valid to assume that a primary parent will continue to provide *E v M*-style nurture regardless of the circumstances and the cost to her. The decision makes it possible, in its focus on the “future” and a “predictive assessment” of a child’s interests to consider the overall conditions of the primary carer’s life that affect the children’s wellbeing. These conditions, which may include gender inequities per se or in relation to an auxiliary carer, may be improved by relocation. They are not merely what is sometimes referred to, arguably a little simplistically, as the “happiness”<sup>1187</sup> of the primary carer but a nexus of conditions that affect the capacity to nurture.<sup>1188</sup> This predictive analysis could arguably be extended to any kind of joint parental responsibility, however it is defined, from custody/access to “shared” custody in all its forms.

*D v S* (no 11) also, raises the issue of the meanings of those parts of the *D v S* (no 7) principles that appear to support joint parenting: “the interests of the child’s welfare as that term has now to be understood;”<sup>1189</sup> “the development in the child of standards and expectations of behaviour within our society;”<sup>1190</sup> and those relevant features in the New Zealand scene, the growth and degree of involvement of both parents in family care, and the move in the Family Court to orders for shared care.<sup>1191</sup>

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<sup>1187</sup> For example, in a discussion of *Stadniczenko*, Henaghan et al write: “The Court said that ‘the wellbeing of the new family unit bears on the best interests of the child’. Which, put simply, means that happy custodial parent = happy child”: Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, 5. See also Henaghan M “Shared Parenting: Where From? Where To? Children’s Rights and Families” (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation 56: “It was presumed for some time that the crucial fact for a child’s wellbeing was for the custodial parent to be happy.”

<sup>1188</sup> For Ms S this nexus included family support, cultural security, better housing conditions and employment prospects which in conjunction with comparable educational opportunities for her children made for a stronger primary household for them, particularly as there was provision for them to maintain their relationship with Mr D. It was also a situation where there was a possibility of change if appropriate once the children became older.

<sup>1189</sup> *J v C* [1970] AC 668 (HL), 710-711 Lord MacDermott cited in *D v S* (no 7) *D v S* [2002] NZFLR 116 (CA), 127.

<sup>1190</sup> *G v G* [1978] 2 NZLR 444 (CA), 447 cited in *D v S* (no 7), above, 127.

<sup>1191</sup> *D v S* (no 7), above, 128.

Judge Somerville, like Judge Callaghan, could arguably have justified his decision to give custody to Mr D without the support of *W v C* on the basis that shared parental responsibility, where an auxiliary parent wants to be involved, meets the interests of children as that term is currently understood in New Zealand and as a model helps to develop in children the standards and expectations of our society. Given the present Family Court jurisprudence, it would have been valid to define Ms S as a primary parent who by seeking to relocate, regardless of her motivation, was hindering access. Mr D was a “viable” parent in spite of his shortcomings so a change in custody to “joint custody in his favour” was an appropriate way to enforce access. It is submitted that if this is so, it is vital that both a primary parent’s reasons for seeking to relocate and the reasons why an auxiliary parent seeks to prevent the relocation are subjected to similar rigorous scrutiny, bearing in mind that “access” can often be “re-jigged” from weekly to holiday access, with supplementary communication to maintain the relationship between auxiliary parent and child. It is also submitted that it is important to examine the workings of the hierarchy of care and if a primary parent has been generally scrupulous in facilitating access, as was Ms S, that should be taken into account.

## V. Concluding Remarks

This chapter explored how Family Court jurisprudence was expressed in this case through analysis of *D v S* (no 1) and (no 9). It also analysed two Court of Appeal judgments, *D v S* (no 7) which provided seven principles for deciding relocation cases and (no 11), which overruled *W v C*, at least in relocation cases.

Overall, the Family Court decisions in *D v S* illustrate how difficult it can be to ensure that a mother has autonomy and support while facilitating the involvement in their lives of her children’s father, in a legal environment supporting “shared parenting” as a starting point while ignoring the realities of the hierarchy of care and the consequent gender inequities. It is a cautionary tale for “good” mothers about the extent to which they may be required to forego economic and social wellbeing to satisfy the imperatives of contemporary jurisprudence. This privileges concern for the exercise of a auxiliary parent’s rights over concern for the conditions in which a primary carer exercises her responsibilities, without undertaking close analysis of them, or the actual benefits for a child from a proximate auxiliary parent relationship.

The Family Court decisions in *D v S* provide strong evidence that the Court uses contemporary joint parenting jurisprudence to “discipline” mothers. A “good” mother will forego relocation to

remain in geographical proximity to an auxiliary parent. A “bad” mother will not and may consequently be marginalised as a custodian. It is argued that it was inappropriate in *D v S* and in other relocation cases to allocate responsibility in this way, as found by the Full Court of the High Court in *D v S* (no 10). The Family Court’s decisions may have been possible only because of a belief system that, essentially, privileged Mr D’s point of view and parenting on the basis of his status as a father rather than his exercise of full *E v M*-type parental responsibility. The Court did not, it seems, want to leave him “in the position of regarding [himself] as a second-class parent.”<sup>1192</sup>

If this mother was prepared to minimise her responsibilities as a primary parent when her the cost to her was too high, *D v S* is perhaps a signal that increasingly rigid adherence to supporting fathers’ rights may result in unexpected responses from “good” mothers. These may now decide to forego primary responsibilities for their children unless they have adequate support, or in order to end ongoing conflict with an implacable father, so that the children have some certainty. This may have long term effects on some children’s welfare if they lose daily contact with the parent from whom they have received their primary pre- and post-separation *E v M*- type nurturing and the stability that generated. They may also learn that fathers’ rights and choices are the more important ones within the legal system.

In this chapter, the High Court’s and the Court of Appeal’s decisions were largely welcomed, The Court’s rejection in *D v S* (no 7) of the false dichotomy represented by the views that two fully functioning parents (in close geographical proximity) are necessary or that it is necessary to prioritise the wellbeing of the primary parent, in favour of an approach without a priori assumptions potentially encourages flexibility, and open-minded investigation. Their reference to “subconscious feelings that get in the way” reinforces this and may leave the way open for maternal conditions to be attended to more closely. However the Court’s broad interpretation of and emphasis on the gender provision of section 23(1)(A) of the Guardianship Act if followed indiscriminately may militate against this. *D v S* (no 11) was also welcomed, as rejecting an ideology of equal and shared parental obligations as the “fundamental position,” thus overruling *W v C*.

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<sup>1192</sup> *P v K* [2003] 2 NZLR 787 (HC), 810.

Considering these Family Court, High Court and Court of Appeal responses together has highlighted tensions about the distinction between “fathering” and “parenting” at all levels, as well as the appeal courts’ greater conceptual flexibility and apparent open-mindedness. It is submitted however, that the movement to entrench a jurisprudence of equal and shared (biological) parental obligations was, by 2002, unstoppable, as the cases in the next chapter show.

## Chapter 8. Paternal Insistence When Not A Guardian

### I. Introductory Remarks

The two cases analysed in this chapter<sup>1193</sup> seem to mark a move towards lowering the threshold for qualifying for parental authority, to include fathers as children's guardians and custodians regardless of their status at the child's birth. They are perhaps the logical end point for the assumptions investigated in this thesis, that the exercise of fathers' rights, unless fathers are physically or sexually violent is good for children, and that mothers will - and must - continue to parent regardless of the conditions under which they are required to do so.

*Anderson v Paterson* was decided in Christchurch, the city where *D v S* also decided, shortly after the Court of Appeal decision in *D v S* (no 7), allowing the father's appeal against the High Court's judgment that Ms S could return to Ireland, giving the parents joint custody and remitting the case to the Family Court. The last *P v K* decision was made after *D v S* (no 11) where *W v C* was disapproved by the Court of Appeal.

Under the Guardianship Act, a mother is her child's sole guardian if she was not living with or married to her child's father when the child is born.<sup>1194</sup> This appears to acknowledge unequivocally that in these circumstances a mother has full authority and responsibility for nurturing the child to independence. It extends the protection of the two parent family from outside interference to a family headed from the outset by a mother alone without assuming that, absent physical or sexual abuse, a father has a right to be involved with the child's life and that this is a "good" thing. The mother makes all the important decisions on behalf of herself and her child, including decisions about the presence of other adults in the child's life. Paternity may be established for child support purposes<sup>1195</sup> - as it is required to be by Work and Income New Zealand if the mother is to receive a full DPB - and the child's father may apply for access, to be appointed as a guardian, and to become a custodian. But at the outset, the mother and child are protected from inappropriate intrusion by the child's father because only the mother has "the custody of a child

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<sup>1193</sup> *Anderson v Paterson* [2002] NZFLR 641 (FC); *P v K* is the collective term for three related decisions: *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02 Judge Inglis QC; *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02 Judge Doogue; *P v K* [2003] 2 NZLR 787 (HC) Priestley and Heath JJ.

<sup>1194</sup> Guardianship Act s 6(2).

... and the right of control over the upbringing of a child [including] all rights powers, and duties in respect of the person and upbringing of a child.”<sup>1196</sup> The hierarchy of care will exist only if a mother informally agrees to it or a father applies to the Court and it has been established that it is in the best interests of the child for him to have access become a custodian or, on the balance of probabilities, to become a guardian.<sup>1197</sup>

Both fathers in the cases being considered were very “willing” to take parental responsibility. In *Anderson v Paterson* the father was already seeing the child regularly and paid child support. In *P v K and M* Mr P had hardly seen the child and was paying discretionary child support under a written agreement that also provided for a custody/access-type hierarchy of care. It is understandable that they wanted to maintain and develop their connections to their children. However Mr Anderson’s and P’s lives, unlike those of the children’s *E v M*-type parents were not “in fact controlled by the children’s own welfare and needs and the need to make decisions which are responsive to the children’s welfare and interests.”<sup>1198</sup> It is equally understandable that the respective mothers ordered their lives on the basis that they had the sole authority over their own lives, with their children and to regulate their children’s contact with their fathers and with other adults. They would resist losing their autonomy. One, Ms Paterson, made a decision to move to the United States. The other, Ms M, was already committed to creating a family life with another woman and for reasons that are not given in the decisions wished to renege on her agreement with her child’s father.

The cases will be described in turn, before discussing the legal issues they raise in relation to the extension of paternal authority, the role of agreements and section 23(1)(A) of the Guardianship Act and the lesbian family.

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<sup>1195</sup> Child Support Act s 7.

<sup>1196</sup> Guardianship Act s 3.

<sup>1197</sup> See *Re the guardianship of ACL* above Chapter 2 n 151, Chapter 3 nn 24-27, Chapter 6 n 146 and below nn 199-20, 204-205, 209; and accompanying text.

<sup>1198</sup> *Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94, 4 Judge Inglis QC.

## II. The Cases

### 1. Anderson v Paterson

#### *(i) The Facts*

Mr Anderson and Ms Paterson had a relationship from 1993 to 1995. Their child was born in July 1994. They disputed whether they were living together when the child was born (and whether Mr Anderson was therefore a guardian). At some point Mr Anderson denied he was the father.<sup>1199</sup> However, after the parents' relationship ended Mr Anderson had "spasmodic communication and association"<sup>1200</sup> with the child until 1997. From 1997 until December 2000, when Ms Paterson took the child to live in the United States, he cared for his son every second weekend from either Friday evening or Saturday morning to Sunday night. He cared for him during the holidays. He paid child support.

When Ms Paterson took their child to the United States, Mr Anderson issued Hague Convention Proceedings. The Central Authority of the United States of America requested a declaration under section 18 of the Guardianship Amendment Act 1981 as to whether the removal of the child to the United States was wrongful within the meaning of article 3 of the Hague Convention.

#### *(ii) Judicial response*

Judge Bisphan found that the relationship between the parents, before and after the child was born was "fragmented and inconstant"<sup>1201</sup> and that they were not living together when the child was born. Mr Anderson was therefore not a guardian of the child.

His Honour saw the issues as being whether his finding that Mr Anderson was not a guardian was fatal to the application, and if not whether the rights he had were being effectively exercised when Ms Paterson took the child to the United States. He found that as the child's father Mr Anderson had rights of custody and was exercising them at the relevant time: "a non-guardian father need not have an enforceable agreement or a custody or access order in his favour to establish 'rights of custody'."<sup>1202</sup>

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<sup>1199</sup> *Anderson v Paterson* [2002] NZFLR 641 (FC), 644.

<sup>1200</sup> *Anderson v Paterson*, above, 643.

<sup>1201</sup> *Anderson v Paterson*, above, 644.

<sup>1202</sup> *Anderson v Paterson*, above, 646.



Judge Bisphan held the view that what was important was “the relationship between the non-custodial parent and the child after birth and as the child is growing up.”<sup>1203</sup> “Apart from the statute,” the current significance of which His Honour “fail[ed] to understand”<sup>1204</sup> the importance of living together when the child was born did not necessarily enhance the welfare of the child and was a nicety with which he doubted that the Convention would be concerned.

The concept of guardianship was not necessarily determinative. The existence of a right or rights of custody and the actual exercise of them were necessary.<sup>1205</sup> Mr Anderson had care of the child because he was the child’s father, therefore he was exercising a “right of custody” as a person who under New Zealand law had the right to apply for custody and/or access, under sections 11 or 15 of the Guardianship Act. His Honour took the view that although Mr Anderson’s right had not been formally established through “the exercise of a judicial function,”<sup>1206</sup> the right in its abstract form was sufficient provided it could<sup>1207</sup>

effectively be exercised and, ultimately, enforced. ... There is no logical reason why a non-guardian father who exercises “rights of custody” by informal agreement with the mother should be in a worse position than a similar father who has a legally enforceable agreement or for that matter a custody or access order. Both would be obliged to bring proceedings in Court if their expectations were thwarted.

Judge Bisphan distinguished this case from *Dellabarca v Christie*,<sup>1208</sup> where it was held that the non-guardian father had no rights of custody because there was no enforceable agreement.

Although this case ran counter to what was implicit in *Dellabarca v Christie*, the point - whether there is any logical reason why a father with an informal agreement should be in a worse position than one with a legally enforceable one or a custody or access order - was not there specifically addressed. There was, His Honour repeated, no logical reason why a child should be

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<sup>1203</sup> *Anderson v Paterson*, above, 645.

<sup>1204</sup> *Anderson v Paterson*, above, 645. He is referring to the Guardianship Act s 6(2).

<sup>1205</sup> *Anderson v Paterson*, above, 645. Perhaps Judge Bisphan had *Neho v Duncan* [1994] NZFLR 157 (FC), 160 in mind: “The right to nurture a child ... is essentially a parental right arising from the statutory status of parental guardianship. But the manner in which that right to nurture is in fact exercised in a specific parent and child relationship must have a direct impact on the welfare of that particular child. In specific cases, therefore, the focus must be not so much on the parental right in the abstract, but rather on how or whether that right is exercised in the impact of its exercise or non-exercise on the child. Thus, in specific cases, it is analytically more appropriate to concentrate on the parental duties and obligations which are the correlatives of the parental right and it is only one analytical step from that to perceive parental duties and obligations in terms of the correlative right of the child to expect that those parental duties and obligations will be carried out and performed for the benefit of the child.” See also below n 98 and accompanying text.

<sup>1206</sup> *Anderson v Paterson*, above, 646.

<sup>1207</sup> *Anderson v Paterson*, above, 646.

<sup>1208</sup> *Dellabarca v Christie* [1999] NZFLR 97 (CA).

disadvantaged “simply because parents have agreed informally rather than by an enforceable agreement or by court order.”<sup>1209</sup> His Honour found support for his conclusion in *Re B (A minor)(Abduction)*<sup>1210</sup> which concerned an unmarried father. There Waite J had said<sup>1211</sup>

The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents’ relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression “rights of custody” when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

The difficulty lies in fixing the limits of the concept of “rights”. Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those propounded by law or conferred by Court order: or is it capable of being applied in a Convention context to describe the inchoate rights of a custodial or parental character which, though not yet formally recognised or granted by law, a Court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend on the circumstances of each case. If, before the child’s abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any Court order or official custodial status, it must in every case be a question for the Courts of the requested State to determine whether those functions fall to be regarded as “rights of custody” within the terms of the Convention.

While Judge Bisphan agreed with and adopted this statement he was “content to maintain” that sections 11 and 15 of the Guardianship Act provided the necessary rights of custody for non-guardian fathers for the purposes of the Convention:<sup>1212</sup>

Had it been necessary I would have held that the applicant had the inchoate rights referred to because he was “exercising functions of a parental or custodial nature” before the child was taken to the USA.

His Honour saw no difficulty in the possibility that implementation of his approach might allow step-parents similar rights.<sup>1213</sup>

### (iii) Outcome

His Honour made an order declaring that the removal of the child from New Zealand to the United States was wrongful within the meaning of article 3 of the Convention.

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<sup>1209</sup> *Anderson v Paterson*, above, 646.

<sup>1210</sup> *Re B (A minor)(Abduction)* [1994] 2 FLR 249 (CA).

<sup>1211</sup> *Re B (A minor)(Abduction)*, above, 260.

<sup>1212</sup> *Anderson v Paterson*, above, 647.

<sup>1213</sup> *Anderson v Paterson*, above, 647.

## 2. *P v K*<sup>1214</sup>

### (i) The Facts

Ms K and Ms M, in a stable lesbian relationship, entered into an agreement with P so that they could “found a family.” Mr P was to become a sperm donor for them and with his partner, involved in specific ways with the child, D, born in September 2001. Ms K and Ms M (the birth mother), according to the agreement, would take “primary co-parenting responsibility.”<sup>1215</sup> However P wanted it to be clear that his decision to become a father “has not been taken lightly and that the child’s birth and life is of great significance to him.”<sup>1216</sup>

The parties agreed that Mr P would be named on the birth certificate; that the child should know of and have contact where appropriate with Mr P’s relatives; that Mr P would make a commitment, with his partner, at the child’s baptism as “god parents”; would be consulted on the child’s first name and have his surname added to the mother’s surname for the child’s formal use; have access for not less than 14 days (non-cumulative) each year on request; and would pay money regularly into a trust account, from which it could be withdrawn by joint decision with Ms M. He would also pay up to one third of the day-care costs when Ms M, a paediatrician, returned to work. Although Ms K and Ms M would inform and consult Mr P about D’s upbringing, including schooling and religion and place of residence, within or outside Australia where the child was conceived, the final decisions would rest with them. There were arrangements in case of the incapacity or death of Ms M or Ms K. Mr P’s name was entered on D’s birth certificate.<sup>1217</sup>

From this agreement it is possible to infer that Ms M and Ms K were to be both autonomous and supported in their parenting responsibilities. The child would also, in Sturge and Glaser terms receive the benefits uniquely offered by fathers.<sup>1218</sup> It was arguably a situation that offered benefits to all concerned, without giving Mr P what amounted to full guardianship rights.

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<sup>1214</sup> *K v M* 12 July 2002 Family Court Auckland FP 004 331-B 02; *P v K and M* 8 August 2002 Family Court Auckland FP 004 331-B; *P v K* [2003] 2 NZLR 787 (HC).

<sup>1215</sup> 5. There were two agreements, “dated 11 July 2000 and 1 February 2001 but the variations are insignificant”: *P v K*, above, 791. They were probably drawn up before and after conception.

<sup>1216</sup> *P v K*, above, 791.

<sup>1217</sup> *P v K*, above, 791.

<sup>1218</sup> Sturge C and Glaser D “Contact and Domestic Violence - The Experts' Court Report” (2000) *Family Law* (September) 615, 616-617: “the [biological] father’s unique role in the creation of the child; the [biological father’s] sharing of 50% of his or her genetic material; the history of his or her conception and the parental relationship; the consequent importance of the father in the child’s sense of identity and value; the role modelling a father can provide of the father’s and male contribution to the parenting and rearing of children which will have relevance to the child’s

However by May 2002 when Ms K and Ms M arrived in New Zealand after D's birth in England they were unwilling for P to have access to the child. Their relationship with Mr P had deteriorated, for reasons not articulated in the judgments.<sup>1219</sup> Ms K applied to be appointed as a guardian of the child and for a joint custody order with Ms M.

At this time Ms K deposed:<sup>1220</sup>

[Mr P] has been in contact with us, (at times this has been unpleasant) initially him personally and more recently by means of a solicitor. ... He has indicated a desire to reach an agreement in relation to his contact with [D].

[Ms M] and I are more than willing to enter into respectful discussions about [D's] future. In the meantime ... we feel it is essential that [D's] legal status in terms of guardianship and custody is settled.

Ms K's counsel disclosed that Mr P's solicitors in Sydney had been in touch and that Mr P wished to have greater contact than was provided for in the agreement. Ms K's counsel submitted that P had no legal status in relation to the child because of the terms of the SCAA. The Family Court's Duty Judge directed that Ms K's application proceed on notice and be served on Mr P and that a counsel be appointed to represent the child.

Ms K applied for a review of these directions on the basis of Mr P having no legal status. Mr P himself filed a notice of defence opposing Ms K's applications and applied for orders for his appointment as an additional guardian of D and for custody.

(ii) Judicial response and outcome

(a) K v M<sup>1221</sup>

The issue before Judge Inglis QC in *K v M* was whether the Duty Judge's order that Mr P be served with Ms K's application for custody was correct or necessary.

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concepts of parental role models and his or her own choices about choosing partners and the sort of family he or she aims to create.”

<sup>1219</sup> In October 2001, the month after D was born in London, Mr P and his partner travelled from Australia to London to visit, with Mr P's name then being added to D's birth certificate on 15 October, returning in early November. Six months later Ms K initiated proceedings. In *Re Patrick* 28 Fam L R 579 (FCA) a similar agreement between a gay man and a lesbian couple also became problematic, even earlier in the process (before birth). It is possible to speculate that any family with a new baby about to arrive or at home has difficulty accommodating “others” at the same time as coping with the considerable demands of new parenthood. Both Mr P and Patrick's father also appeared to have extended families and in Patrick's father's case, friends who wanted to be included in their understandable pride and pleasure which must have compounded any difficulties. See also below nn 31, 95, 152, 237.

<sup>1220</sup> *P v K*, above, 793.

<sup>1221</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02.

Judge Inglis QC commenced by noting the lack of direct authority in relation to Mr P's status as D's father and the status of D in relation to him under the SCAA. He acknowledged a "very considerable debt"<sup>1222</sup> to *Re Patrick*<sup>1223</sup> a case with similar facts decided in the Family Court of Australia although it was decided in a distinguishable statutory context. He also addressed the use of the term "sperm donor" to describe Mr P, as<sup>1224</sup>

unjustifiably trivialising his undoubted biological relationship with the child as well as his interest in identifying himself as a figure in the child's life which all parties acknowledged in the agreement that was drawn up and signed before the child was born.

The term "biological father" also trivialised the relationship. Since there was no secrecy around the father's identity and it was intended that D should know who his father was His Honour would call Mr P "the father". His Honour also questioned the use of the term "artificial donor insemination"(AID) to describe D's conception to deflect attention from the reality that Mr P was known to Ms M and she wished to have his child. The difference here between AID and "direct congress" was only in the process chosen for conception. The issue was whether the difference was crucial in a legal sense.

He described Ms M and Ms K's relationship as sufficient to constitute them as a 'family', having "demonstrated a history of 'mutual interdependence, of the sharing of lives, of caring and love, of commitment and support'<sup>1225</sup> ... ordinarily assumed to exist"<sup>1226</sup> in a legal marriage. Ms K was a co-parent, "sharing responsibility for D's upbringing and care"<sup>1227</sup> with Ms M.

His Honour pointed out that the political or ideological aspects of same-gender relationships might have to be considered in later proceedings in relation to the extent these influences might have on D's upbringing, Mr P's motivation in attempting to obtain more contact and Ms M and

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<sup>1222</sup> *K v M*, above, 4.

<sup>1223</sup> *Re Patrick* [2002] 28 Fam L R 579 (FCA). The Family Court of Australia declined to include a sperm donor within their definition of parent, but nevertheless ruled for increased - and over time increasing - contact between a child and his biological father, a sperm donor whose agreement with a lesbian couple was contested. The father had been an acquaintance of the mother. The couple's view was that involvement by Patrick's "donor" was intrusive, trivialised the position of the lesbian co-parent and threatened their family autonomy. See also above n 27 and below nn 95, 152, 237.

<sup>1224</sup> *K v M*, above, 4.

<sup>1225</sup> *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 (HL), 38 Lord Slynn.

<sup>1226</sup> *K v M*, above, 5.

<sup>1227</sup> *K v M*, above, 4.

Ms K's in resisting that; and "the extent to which some adopted ideologies may involve some departure from ordinary human realities."<sup>1228</sup> He then turned to the relevant legislation.

The SCAA, His Honour noted, deals with paternity and maternity issues within a family unit where the adults are male and female, either married or in a "relationship in the nature of marriage."<sup>1229</sup> The legislation aimed to exclude as a parent the donor of material to enable conception, to protect donors against claims and prevent donors and children from making claims.

His Honour distinguished between "for all purposes" in section 5(1) of the SCAA and the termination only of the "rights and obligations" of the father and child towards each other (unless the father and mother later form a relationship defined as marriage) in section 5(2) which applies to Ms M.<sup>1230</sup> He viewed this distinction as important because it must mean that there remain "facets of the relationship apart from rights and obligations which are not extinguished."<sup>1231</sup> This was the situation with Mr P and D.

His Honour then turned to section 16 and questions whether section 5(2) and section 16 have the same effect in combination.<sup>1232</sup> Section 5(2) he notes does not substitute the "husband" for the donor as the only legally recognisable father. The important distinction is that section 5(2) "acknowledges the genetic paternity of the donor but excludes the 'rights and liabilities' that would otherwise flow from it."<sup>1233</sup>

For His Honour, the explanation for this distinction is that while (in 1987 terms, he acknowledges) there were "plausible policy reasons"<sup>1234</sup> for locating the child exclusively in the marriage or marriage-like relationship and totally excluding the donor, to protect the traditional nuclear family, these did not exist in situations outside section 5(1). It was understandable that the emphasis in these situations shifted, to protect the donor and the child from rights and liabilities against each other.

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<sup>1228</sup> *K v M*, above, 5.

<sup>1229</sup> SCA s 2.

<sup>1230</sup> Ms M is neither married nor living in a relationship in the nature of marriage with a man.

<sup>1231</sup> *K v M*, above, 8.

<sup>1232</sup> *K v M*, above, 8.

<sup>1233</sup> *K v M*, above, 9.

It was not disputed that Mr P was the father of D. This would be “inadmissible and irrelevant”<sup>1235</sup> if Ms K had been a “husband”. However since under section 5(2) neither Mr P nor D had any rights or liabilities this effect remained “notwithstanding any other evidence that Mr P was the father of D.”<sup>1236</sup> It was admissible evidence that Mr P was D’s father, but in law they had no rights or liabilities against each other. The statute law could not be ignored and the parties’ written agreement might not be effective in altering that situation.

However because D’s welfare was the first and paramount consideration under the Guardianship Act and Mr P’s legal status as a father had not been extinguished His Honour was “unable to hold that it is beyond argument”<sup>1237</sup> that Mr P had no identifiable standing to intervene in Ms K’s guardianship application directly, or indirectly by making his own applications in relation to D. Whether it was “an empty or toothless status remains to be seen.”<sup>1238</sup>

His Honour then moved to consider relevant provisions of the Guardianship Act, while preferring “not to discuss this side of the case in any greater detail than is necessary”<sup>1239</sup> to deal with the points he had mentioned, noting that the issues would have to be determined on the merits at a substantive hearing, He observed that most of these speak in terms of “mother” and “father” and that it is obviously they who are being referred to when reference is made to “parents”, except where reference is made to “step-parent”. In context none of these can mean anything other than the “biological parent or, where the child has been validly adopted, the adoptive parents, or, where s 5(1) of the SCAA applies, the ‘husband’ and the ‘wife’.”<sup>1240</sup>

His Honour then traversed the options for the Court to consider.<sup>1241</sup> Mr P was not a natural guardian, but might apply to be appointed as a guardian. The Family Court also had a general power to appoint a guardian, without limitation or qualification. Interim or permanent custody orders might be made on application by a father, mother, step-parent or guardian and with the

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<sup>1234</sup> *K v M*, above, 9.

<sup>1235</sup> *K v M*, above, 9.

<sup>1236</sup> *K v M*, above, 9, SCCA Act s 16(c).

<sup>1237</sup> *K v M*, above, 10.

<sup>1238</sup> *K v M*, above, 10.

<sup>1239</sup> *K v M*, above, 11.

<sup>1240</sup> *K v M*, above, 11.

<sup>1241</sup> Guardianship Act ss 6(2) and (3); 8; 11; 15.

Court's leave by anyone else. When making a custody order the Court may make an access order as it thinks fit; a parent without custody may apply for an access order.

Mr P could not be regarded as a "father" or "parent" because his "rights and liabilities" had been extinguished:<sup>1242</sup>

A right to apply for Guardianship Act orders is necessarily a right to assert a legitimate parental intervention in the child's upbringing, care and control. This is arguably the very kind of right which s 5(2) of the 1987 Act was designed to extinguish. ... I do not consider that s 23(1) of the 1968 Act, placing the welfare of the child as the first and paramount consideration ... can be used as an interpretation device so as to undermine the Legislature's clear intention in enacting s 5(2) of the 1987 Act.

His Honour went on to say that he considered it arguable however that sections 8 and 11 of the Guardianship Act were "not necessarily closed off to Mr P in the present case."<sup>1243</sup> He might be entitled to apply to become an additional guardian as someone "able to demonstrate an interest in D's future,"<sup>1244</sup> or for leave to apply for a custody order under section 11. Although his status as a biological parent might not be enough, coupled with the agreement "it could be argued that both Ms M and Ms K accepted that Mr P had a proper interest in D's welfare"<sup>1245</sup> and this would provide at least prima facie justification for applications by Mr P under sections 8 and 11.

In conclusion Mr P was arguably able:<sup>1246</sup>

to assert a proper interest in D's welfare arising from the circumstances as a whole, including his conceded parentage of D and the expectations arising from the agreement entered into between the parties before D's birth.

Ms K's application for guardianship should be served on Mr P, conciliation counselling was authorised and if the parties could not reach agreement counsel should approach the Registrar to arrange a pre-hearing conference for pre-hearing directions.

*(b) P v K and M*<sup>1247</sup>

Following Judge Inglis QC's statement that it was arguable that Mr P had sufficient interest to justify his "direct or indirect intervention in Ms K's guardianship application ... and entitled ... to apply under s 11 for leave to apply for a custody order."<sup>1248</sup> Ms K sought to withdraw her

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<sup>1242</sup> *K v M*, above, 12.

<sup>1243</sup> *K v M*, above, 12.

<sup>1244</sup> *K v M*, above, 12.

<sup>1245</sup> *K v M*, above, 12.

<sup>1246</sup> *K v M*, above, 13.

<sup>1247</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02.

<sup>1248</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02, 13.



application for custody of D (probably because following *Tito v Tito*<sup>1249</sup> section 11(2) of the Guardianship Act permits a court to attach a condition to a section 11(1) order, allowing access to someone other than a parent or step-parent). Mr P “presumably on advice received”<sup>1250</sup> following the decision had filed an application for interim custody. A mediation conference was convened and when the mediation conference failed to reach any agreement Judge O’Donovan directed that there be a hearing on the applications for leave and for “appropriate contact (shared care) between Mr P and D during Mr P’s visit to New Zealand,”<sup>1251</sup> noting that Mr P was seeking an interim order until he returned to Australia in three days time.

In *P v K and M* the issues Judge Doogue had to determine whether the Court had jurisdiction to make an order for interim custody, or to grant Mr P leave to apply for interim custody of D. If leave were granted for Mr P to apply for interim custody she also had to decide whether the merits justified an order being made. As well, Her Honour had to decide whether Ms K required leave to withdraw her application for custody and if so, whether the Court should make a custody order in favour of Ms K and Ms M attaching as a condition of the custody order an order granting access to Mr P. The applications of Mr P and Ms K to be appointed as additional guardians were not being considered, because of “earlier directions”. Since Judge O’Donovan directed that the hearing address the applications for “shared care” it seems that Judge Doogue should also have considered Mr P’s application for custody, but it appears that because of Mr P’s imminent departure for Australia, Her Honour chose to focus only on the interim application.

Her Honour first considered whether there was jurisdiction for an order to be made giving Mr P interim custody of D. He fitted within the “any other person” category of those who require the leave of the Court to make a custody application under section 11(1)(b). The primary argument made for Ms M and Ms K was that Mr P’s custody application was simply an application for access in disguise because the access provisions of the Act were not open to him. Her Honour quoted from Mr P’s affidavit evidence to demonstrate that what he sought was “temporary and intermittent contact.”<sup>1252</sup> He would like to take “any opportunity I can to have some contact with

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<sup>1249</sup> *Tito v Tito* [1980] 2 NZLR 257 (CA) where a custody order was made with a condition attached that a grandmother (who could not apply for access in the circumstances) have access.

<sup>1250</sup> *P v K* [2003] 2 NZLR 787 (HC), 12 Priestley J.

<sup>1251</sup> *P v K*, above, 13.

<sup>1252</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 4.

him.” He sought contact of only some hours duration.<sup>1253</sup> He did not want “to challenge in any way the primary caregiver role that [Ms M and Ms K] have of D.”<sup>1254</sup> It was “an inescapable conclusion that Mr P had made his applications to circumvent the difficulties occasioned by the inflexibility of the statute.”<sup>1255</sup>

Judge Doogue referred to counsel’s “clear line of Court of Appeal and High Court authority”<sup>1256</sup> to show that the Court did not have jurisdiction to make an access order under the guise of a custody order; and stated that neither Mr P’s counsel nor the counsel for D could distinguish these cases, so she was bound by them.<sup>1257</sup> That being so, considerations about leave to apply for custody and the merits of his application were unnecessary.

Her Honour then turned to the issue of whether Ms K could withdraw her application for custody and whether an order for custody in favour of Ms M and Ms K should be made, with a condition of access for Mr P. She took the view that the Court could regulate proceedings, in particular the withdrawal by Ms K of her application for joint custody of D with Ms M, as it saw fit having regard to the child’s best interests.<sup>1258</sup> That being so, the application for joint custody remained on foot until the Court ruled on it.

Counsel for Mr P and for the child argued that on the evidence a *Tito* order<sup>1259</sup> could be made, giving joint custody to Ms K and Ms M and attaching as a condition access in favour of Mr P. Her Honour gave four reasons for refusing to do this. There was no evidence that D’s current

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<sup>1253</sup> *P v K and M*, above, 4.

<sup>1254</sup> *P v K and M*, above, 4.

<sup>1255</sup> *P v K and M*, above, 4. It is not clear whether this is the Guardianship Act or the SCAA.

<sup>1256</sup> *P v K and M*, above, 4. The cases referred to were: *Miller v Miller* [1973] 2 NZLR 380 (SC); *Tito v Tito* (1980) 2 NZLR 257 (CA); *J v District Court at Wellington* (1993) (HC) 10 FRNZ 481; *Dixon v Hatcher* (2000) 19 FRNZ 627 (HC); *Y v M* (1993) 11 FRNZ 186.

<sup>1257</sup> Her Honour quoted from only one of these cases, *Y v M* (1993) 11 FRNZ 186 (CA), 196 where Hardie Boys J said in relation to joint custody: “it is important to understand what is involved in a joint custody order. It is in terms of the definition in s 3 of the Act, the joint right to the possession and care of the child ... nor is there any point in ordering it [joint custody] to enable access, for that too is a separate matter. Joint custody should therefore be ordered only if there is some purpose to be served in the interests of the child by giving both parents, in addition to access, the right to possession and care. That will depend of course on the individual case.” She appears to be unaware of the shifting language around custody and access (See above Chapter 1 V. The Terminology of Shared Parenting and Chapter 4 nn 16-23; and accompanying text).

<sup>1258</sup> Counsel had offered no authority for what was “in effect a notice of discontinuance,” and Her Honour for whom time had not allowed the opportunity to undertake her own research was assisted by *Marshall v Soper* 9 FRNZ 358 “where Judge Inglis QC considered s 23(1) could be relied upon to regulate the proceedings by restricting them”, *P v K and M*, 5

<sup>1259</sup> See above n 57 and accompanying text.

circumstances require intervention by the Court in the form of a custody order,<sup>1260</sup> the only reason the application for custody was before the Court was that Ms M and Ms K sought to withdraw it and while a *Tito* order was “technically possible” but would be “a contrivance to address the anomalies arising which have not been anticipated by the existing law.”<sup>1261</sup> The enforcement of such an order posed “real difficulties” under section 19(2).<sup>1262</sup>

Mr P’s applications for leave, custody and interim custody therefore failed. Ms K was granted leave to withdraw her application for joint custody. Applications by Ms K and Mr P for leave to apply and for appointment as additional guardians were to progress to hearing.

Returning to D, Her Honour was “saddened that these were the conclusions I have to reach”<sup>1263</sup> because on the untested evidence it appeared that Mr P had a lot to offer D and<sup>1264</sup>

[Ms] M and [Ms] K are short-sighted, indeed if they do not appreciate the damage they are more likely than not to do to D’s long term emotional wellbeing by precluding contact of a meaningful nature between D and [Mr] P.

In conclusion, Her Honour asked whether there would be any harm for Mr P to visit D briefly before Mr P returned home and stated that her decisions would have no bearing on custody/access issues that arose following any future decision about guardianship; the “guardianship route may not be subject to the same jurisdictional constraints as the present basis for seeking custody and/or access.”<sup>1265</sup>

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<sup>1260</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 6.

<sup>1261</sup> *P v K and M*, above, 6.

<sup>1262</sup> *P v K and M*, above, 6. Section 19(2) of the Guardianship Act reads: “Subject to subsection (4) of this section [i.e. only in exceptional circumstances if it is contrary to the wishes of a child over the age of 18] where any person is entitled to access to a child pursuant to an order made under s 15 or s 16 of this Act or registered under s 22A of this Act, a Family Court or District Court may, on the application of the person so entitled, issue a warrant authorising any constable or social worker or any other person named in the warrant to take possession of the child and deliver the child to the person entitled to access.” It may be that the “real difficulties” referred to are those discussed above Chapter 3 n 25: there have been no prosecutions for preventing an order for access being complied with within the last 5 years. “The concern about this particular provision is that a defence of reasonable excuse lends itself to a risk of re-litigation of the original issue.” (Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 24.)

<sup>1263</sup> *P v K and M*, above, 6.

<sup>1264</sup> *P v K and M*, above, 7.

<sup>1265</sup> *P v K and M*, above, 7.

(c) *P v K*<sup>1266</sup>

Almost four months later the case reached the High Court where Priestley and Heath JJ gave separate judgments. Priestley J's judgment was the principal judgment, and Heath J's mostly addressed policy issues. The issue was whether Mr P retained any parental rights.

Priestley J traversed the necessary nomenclature for publication, which includes Mr P being described as "the father" from the outset and then stated the issue as being<sup>1267</sup>

whether in the circumstances of this case, a father who was for the purposes of the AID procedure a sperm donor, retains certain parental rights in respect of the child.

He observed that what was important "for the purposes of the factual matrix"<sup>1268</sup> was the existence of the agreement, as a careful attempt to define the respective roles of Ms M, Mr P, Ms K and to a lesser extent, Mr P's partner. His Honour then turns to the Family Court proceedings.

He notes that "an unmistakable inference to be drawn"<sup>1269</sup> is that Ms M and Ms K have not hesitated to invoke available procedural obstacles presented by the Status of Children Amendment Act.<sup>1270</sup>

The points they raised [in both the Family and High Courts] would quite simply not have been available to them had the child been conceived as a result of heterosexual contact or a heterosexual relationship.

He then states that from D's point of view and "particularly having regard to the developed jurisprudence under section 23 of the Guardianship Act,"<sup>1271</sup> it was "unfortunate indeed"<sup>1272</sup> that the way he was conceived gave rise to policy considerations that otherwise would not exist, especially as his conception was preceded by "carefully considered negotiation"<sup>1273</sup> and the father was never an anonymous donor.

His Honour then traversed the Family Court decisions in some detail and concluded that<sup>1274</sup>

the consequences of the Family Court's decision [in *P v K and M*] are in effect to close all doors to an enquiry whether the child's interests are served by ongoing contact with his father other than by the s 8 GA route.

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<sup>1266</sup> *P v K* [2003] 2 NZLR (HC) 787.

<sup>1267</sup> *P v K*, above, 791.

<sup>1268</sup> *P v K*, above, 791.

<sup>1269</sup> *P v K*, above, 793.

<sup>1270</sup> *P v K*, above, 793.

<sup>1271</sup> *P v K*, above, 793.

<sup>1272</sup> *P v K*, above, 793.

<sup>1273</sup> *P v K*, above, 800.

<sup>1274</sup> *P v K*, above, 800.

He lists the detailed issues as<sup>1275</sup>

[a] Does s 5(2) SCAA prevent the father bringing, as parent, applications under ss 11(1)(a) and 15 GA?

[b] Is the agreement executed by the two couples an agreement to which s 18 GA attaches?

[c] Should the Family Court have dismissed the father's substantive custody application under s 11(1)(b) GA?

[d] Was the Family Court correct to dismiss the father's interim custody application?

[e] Was the Family Court correct to permit mother's partner to withdraw the custody application?

Because Mr P's section 8 application was extant and this decision would have ramifications for future litigation between the parties His Honour was also concerned to highlight other relevant issues to be determined in the Family Court. Judge Priestley then surveyed the relevant law, including section 18 of the Guardianship Act.<sup>1276</sup>

Before turning to the detailed issues, His Honour traversed the relevant law,<sup>1277</sup> aware that new legislation was being considered and that "[t]he social norms prevailing in 1968 are unlikely to have thrown up the prospect of a lesbian using the sperm of a homosexual donor to conceive a child to be raised by a lesbian couple."<sup>1278</sup> He referred to section 23 as<sup>1279</sup>

a golden thread in this area of family law, - a thread which is woven into the law of comparative jurisdictions and in to the United Nations Convention on the Rights of Children.

In relation to the SCAA, His Honour noted that section 5(2) has counterparts in subsequent sections dealing with birth technologies other than AID and "a cautious interpretative approach is thus essential lest this Court's decision has ramifications for other birth technologies."<sup>1280</sup> As well, section 16 reinforces section 5, "regardless of conflicting evidence relating to paternity."<sup>1281</sup>

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<sup>1275</sup> *P v K*, above, 800.

<sup>1276</sup> This states that an agreement between a father and mother about custody, upbringing or access shall be valid but not enforced "if the Court is of the opinion that it is not for the welfare of the child."

<sup>1277</sup> Sections 8, 11, 15, 18, 23 Guardianship Act and ss 5 and 16 of the SCAA. He notes that s 5(2) of the SCAA applies to Ms M a woman not married to or living in a relationship in the nature of marriage with a man.

<sup>1278</sup> *P v K*, above, 801.

<sup>1279</sup> *P v K*, above, 801.

<sup>1280</sup> *P v K*, above, 803.

<sup>1281</sup> *P v K*, above, 803.

He further notes that where possible New Zealand's domestic law should be interpreted to accord with UNCROC and that "Courts should strive to uphold the norms of the Convention where possible."<sup>1282</sup>

The articles of UNCROC the Court viewed as relevant in this case were article 3 (Best Interests of Child Standard); article 7 (Right to Name, Nationality, Care of Parents); article 8 (Right to Identity); article 9 (Separation from Parents). On the facts, His Honour noted, there were obvious tensions between the relevant New Zealand legislation, the Guardianship Act, the SCAA and UNCROC, because both biologically and on the birth certificate, Mr P was D's father and therefore his parent. Without attempting to define "parent" at this point, His Honour then turns to the issues.

*Does section 5(2) SCAA prevent the father bringing, as parent, applications under sections 11(1)(a) and 15 of the Guardianship Act?*

The Court decided that section 5(2) of the SCAA and "in particular section 5(2)(b)" prevented the father from exercising the statutory rights as a parent under the access provisions or as a father under the custody provisions of the Guardianship Act.<sup>1283</sup>

The Court first summarised arguments by both parties.

Counsel for Mr P and for the child argued that in the previous Family Court hearing, the issue of Mr P's access application was not raised, because Judge Doogue had "wrongly concluded"<sup>1284</sup> that Judge Inglis QC had determined that Mr P had no status to apply for access although he had held only that it was arguable that Mr P "could not properly be regarded as a father or parent"<sup>1285</sup> for the purposes of the Guardianship Act. They both "submitted strongly" that P was a parent and had status to apply for access under section 15(2) of the Guardianship Act.

Counsel also argued that it was never intended that the SCAA would extend to a single lesbian woman; and, in reference to the long title of the SCCA questioned whether on the facts D's

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<sup>1282</sup> *P v K*, above, 804. He references not only *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (see above Chapter 3 nn 88-92 and accompanying text) but also *B v G* [2002] 3 NZLR 233, 238 an adoption case where UNCROC is mentioned in passing in relation to the maintenance of family ties and the centrality of the welfare and interests of the child.

<sup>1283</sup> *P v K*, above, 808.

<sup>1284</sup> *P v K*, above, 805.

<sup>1285</sup> *P v K*, above, 805.

conception resulted from a “medical procedure”. Section 5(2) of the SCAA should be interpreted to ensure that D had a social father, and section 5(2)(b) while appearing to extinguish the “rights and liabilities” of a father did not assist in interpreting the Guardianship Act, where the interests of the child were paramount. D was the product of a named rather than an anonymous donor and P’s name was on his birth certificate. Articles 7,8 and 9(3) of UNCROC “oblige[d] the Court to hesitate”<sup>1286</sup> before interpreting section 5 (2) in a way that limited a parent’s rights. Counsel also referred to *Re Patrick*.<sup>1287</sup>

P’s counsel also submitted that the Guardianship Act provisions in sections 11(1)(a) and 15 created rights that were not necessarily the kinds of “rights” referred to in section 5(2), but a privilege or status “since the law did not impose a right to access on the child nor ... a corresponding duty on the part of a father to exercise access.”<sup>1288</sup> He based this argument on an analysis of the work of jurisprudentialist Professor W N Hohfeld.

K and M’s counsel submitted that the terms of section 5(2) of the SCAA were unambiguous and that neither P nor D had rights or liabilities in respect of each other. P’s status was that of a “shell” father. While he was D’s biological father and would be the only father D would have (unless he became adopted) P’s rights as a father or parent under the Guardianship Act were extinguished by section 5(2)(b) of the SCAA.

His Honour saw little benefit in the Hohfeld rights/duties analysis referring instead to Judge Inglis QC’s observations in *Neho v Duncan*.<sup>1289</sup> In summary these state that the focus must be not on abstract rights but on how or whether the “right to nurture” is exercised by a specific parent and the impact of the exercise of the right on the specific child who has a right to expect to be nurtured in a way that will serve his or her welfare.

His Honour reasoned that the framers of the SCAA were addressing perceived problems resulting from use of new birth technologies and that “undoubtedly”<sup>1290</sup> the statute was based on an assumption that the technologies would be used by heterosexual couples. It was significant that section 5(1) and section 5(2) differentiated between married couples and an unmarried woman or

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<sup>1286</sup> *P v K*, above, 805.

<sup>1287</sup> *Re Patrick* [2002] 28 Fam L R 579 (FCA). See also above nn 27, 31 and below nn 152, 237.

<sup>1288</sup> *P v K*, above, 806.

<sup>1289</sup> *Neho v Duncan* [1994] NZFLR 157, 160 (FC). See also above, n 17.

<sup>1290</sup> *P v K*, above, 807.

a married woman who used AID without her husband's consent<sup>1291</sup>. Analogous provisions existed in relation to other birth technologies.

A sperm donor to whom section 5(2) applies retains the status of a father, with the consequence that "a child born of an artificially inseminated unmarried woman is not fatherless"<sup>1292</sup> although it is "questionable whether the status of a father with restricted rights and liabilities is particularly meaningful."<sup>1293</sup> His Honour turned to the Parliamentary Debates to establish that the framers of the SCAA intended to ensure that the man a child regards as his or her father can fulfil the rights and responsibilities of a father, and, crucially: "If the mother's husband does not consent to the procedure, or if the mother is a single woman, the donor remains the father."<sup>1294</sup>

Priestley J concluded that "We need little persuasion to accept that the application of section 5(2)SCAA produces an unjust result so far as [P] is concerned"<sup>1295</sup> on the grounds that D is the result of<sup>1296</sup>

a carefully negotiated agreement between four adults, two of whom for psychological or sexual-political reasons wished to use P's sperm to produce a child instead of resorting to sexual intercourse.

If D had been conceived through a single act of sexual intercourse or a transitory heterosexual relationship, P would have had "unimpaired"<sup>1297</sup> rights as a father and it was anomalous that P's rights were only nominal, especially in this factual situation.

However, because of the policy of SCAA where section 5(2) exists among a number of sections "designed to ensure that donors involved in various new birth technologies are not exposed to parental liabilities nor in a position to exercise parental rights"<sup>1298</sup> there was a serious risk that to interpret section 5 (2) in a different way would affect cases with totally different facts.<sup>1299</sup>

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<sup>1291</sup> "The latter contingency perpetuates the policy of s 21(1)(b) of the Matrimonial Proceedings Act 1963 which listed '... artificial insemination with the semen of a man other than the divorce petitioner's wife' as a ground for divorce," *P v K*, above, 807.

<sup>1292</sup> *P v K*, above, 807.

<sup>1293</sup> *P v K*, above, 807.

<sup>1294</sup> (30 June 1987) 482 *New Zealand Parliamentary Debates* 10105; and (13 August 1986) 473 *New Zealand Parliamentary Debates*, 3869.

<sup>1295</sup> *P v K*, above, 808.

<sup>1296</sup> *P v K*, above, 808.

<sup>1297</sup> *P v K*, above, 808.

<sup>1298</sup> *P v K*, above, 808.

<sup>1299</sup> *P v K*, above, 808. His Honour may here be concerned about facts involving heterosexual parents.



Furthermore courts had been reluctant to dilute family law statutes that prescribe or change status.<sup>1300</sup>

In deciding that P could not apply for an access order as a father, nor for a custody order as a parent, the Court was<sup>1301</sup>

comforted ... by the knowledge that other remedies are available to this father under the GA to ensure appropriate contact between him and the child consistent with the paramount concern of the child's welfare.

*Is the agreement executed by the two couples an agreement to which section 18 of the Guardianship Act attaches?*

The Court found that although section 5(2) of the SCAA prevented P from "asserting the status of being a father in his capacity as a party to the agreements" and the agreements might not be "valid" for Guardianship Act section 18 purposes, it did not follow that it should be ignored. It was an "important part of the factual matrix."<sup>1302</sup> Any section 18 agreement "must bow to a best interest/welfare inquiry [and] so must this agreement."<sup>1303</sup>

The Court acknowledged reference to *Tripp v Hinckley*<sup>1304</sup> where the Supreme Court of New York rejected an argument that the father's status was only that of a "sperm donor" and allowed increased access and observed that<sup>1305</sup>

As a matter of policy the approach taken by the appellate division of the Supreme Court of New York accords with common sense, justice and a child-focused result.

*Should the Family Court have dismissed the father's substantive custody application under section 11(1)(b) of the Guardianship Act?*

By dismissing the substantive custody application the Family Court Judge was in error.<sup>1306</sup>

K's counsel had submitted that although P could seek leave to apply for custody under section 11(1)(b) of the Guardianship Act, the Family Court did not have jurisdiction to make an access order using the custody provisions of the Act. P's counsel argued that because Judge Doogue had

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<sup>1300</sup> The Court gave as examples *Re T* [1996] 1 NZLR 368 where Blanchard J declined to go behind s 20(1) of the Adoption Act 1955 to permit access by a birth parent; and *Re Peach* (18 November 2002) CA 81/02, where the Court of Appeal declined to extend to whangai the status of the claimant children of the deceased under the Family Protection Act 1955.

<sup>1301</sup> *P v K*, above, 808.

<sup>1302</sup> *P v K*, above, 809.

<sup>1303</sup> *P v K*, above, 809. The Court noted that there was no Guardianship Act mechanism to enforce a s 18 agreement.

<sup>1304</sup> *Tripp v Hinckley* (2002) 290 AD 2d 767 (N.Y. App Div).

<sup>1305</sup> *P v K*, above, 808.

<sup>1306</sup> *P v K*, above, 815.

accepted the terms of the instructions from the judge at mediation, which limited the hearing to “appropriate contact (shared care) between P and D during P’s visit to New Zealand” there had been a breach of natural justice. The substantive custody application should have been considered.

The Court found it “disturbing”<sup>1307</sup> that the hearing before Judge Doogue had been limited in scope. The parties were unprepared to argue P’s application for leave to apply for substantive custody and his application for substantive custody itself. Judge Doogue’s decision was made on jurisdictional grounds rather than a “child-focused merits inquiry.”<sup>1308</sup> Furthermore the reason Judge Doogue had given for dismissing the leave and (interim) custody applications was that Court of Appeal and High Court authority took away her jurisdiction to make “what is in effect and in reality an access order under the guise of a custody order.”<sup>1309</sup> It was also disturbing that having decided that she lacked jurisdiction Her Honour concluded that it was unnecessary for her to consider the applications for leave or their merits.

The Court was aware of a “developing practice” in the Family Court to move away from the terms “custody” and “access”, which often left the access parent “in the position of regarding him or herself as a second class parent.”<sup>1310</sup> It noted a widespread practice of time shared by children between parents being expressed in terms of custody orders, as a “qualitatively different concept from joint custody since the duplicate custody orders ... are usually expressed in temporal terms.”<sup>1311</sup>

The first kind of custody gives parents - and children - discretion about how the time is shared, the second is fixed. Judge Doogue’s<sup>1312</sup>

broadly stated assumption that she lacked the jurisdiction to preserve contact between the father and the child by a custody order because that would be an access order in disguise would, if correct, have disturbing implications to a commendable and well established Family Court practice ... her exhortation to the parties at the conclusion of her decision reveals her decision effectively precluded her from making orders which the child’s interests might well have required.

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<sup>1307</sup> *P v K*, above, 810.

<sup>1308</sup> *P v K*, above, 810. Compare *Cunliffe v Cunliffe* and *Collins v Sawtell*, above Chapter 5, where a child focused merits inquiry was avoided on the grounds of a lack of jurisdiction: perhaps denial of jurisdiction (and consequently a failure to address the welfare of a child) is sometimes a way to avoid addressing “hard” issues.

<sup>1309</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 4.

<sup>1310</sup> *P v K*, above, 810.

<sup>1311</sup> *P v K*, above, 810. Presumably because guardianship was here not directly an issue there is no reference to the parallel practice in the *Makiri v Roxburgh* and *W v C* tradition, though this judgment was released more than two months after *D v S* (no 11) which disapproved of *W v C*.

<sup>1312</sup> *P v K*, above, 810.

The Court then considered the definition of “custody” in section 3 of the Guardianship Act and concluded that although the provisions of section 15 might suggest that access is a lesser right than custody, section 3’s definition of “guardianship” includes the right to custody of a child His Honour was

not persuaded that there is a significant qualitative difference between expressing the time which a child will spend with each parent as “custody and access” or “custody and custody”.

A court’s function, to regulate parental authority, within the overriding policy of section 23(1) was to regulate parental authority and “the nomenclature of appropriate orders need not take on a life of its own.”<sup>1313</sup> Each case would differ.

The Court then traversed the cases referred to by Judge Doogue.<sup>1314</sup> *Miller v Miller* was distinguished on the grounds both that it involved a simple access application and that it was decided too long ago to be useful. *Tito v Tito* “falls well short of suggesting any jurisdictional problem” and was clear authority for the proposition that a section 11(2) Guardianship Act condition could allow access in favour of someone other than a parent or step-parent.<sup>1315</sup> In *J v District Court at Wellington* a grandmother sought very limited relief so that her grand-daughters could attend her wedding, rather than ongoing contact. Grieg J’s observation that “the purpose of an interim custody order is to hold the position about custody but ... is not a vehicle for providing temporary access though that may amount to the possession and the care of a child or children for 1, 2 or 3 days”<sup>1316</sup> indicated the difficulty raised by focusing on “nomenclature alone rather than the need to structure orders to care for a child in a way to promote that child’s welfare.”<sup>1317</sup>

In *M v Y* the issues were whether the High Court had jurisdiction to make an access order when none had been made in the Family Court and whether the High Court had been correct in awarding the parents joint custody, which had not been the father’s objective. The Court of Appeal rejected the High Court’s solution of a joint custody order. At the outset, parents had joint right to possession and care that included the right of determining where a child was to live but when one parent was granted custody, the other retained all other guardianship rights and normally, access. But joint custody should be ordered on only if there is <sup>1318</sup>

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<sup>1313</sup> *P v K*, above, 811.

<sup>1314</sup> *Miller v Miller* [1973] 2 NZLR 380 (SC); *Tito v Tito* (1980) 2 NZLR 257 (CA); *J v District Court at Wellington* (1993) (HC) 10 FRNZ 481; *Dixon v Hatcher* (2000) 19 FRNZ 627 (HC); *M v Y* (1994) 11 FRNZ 186 (CA).

<sup>1315</sup> *P v K*, above, 811.

<sup>1316</sup> *P v K*, above, 813.

<sup>1317</sup> *P v K*, above, 813.

<sup>1318</sup> *M v Y* [1994] 1 NZLR 527 (CA), 536.

some purpose to be served in the interests of the child by giving both parents, in addition to these rights of control [over the child's upbringing, which a non-custodial parent has under section 3 of the Guardianship Act], and in addition to access, the right to possession and care.

The decision to award joint custody depended on the individual case, and in *M v Y*, geographical distance, antagonism between the parents and absence of contact between the father and the child for almost half the child's life, an order for joint custody "had no discernible purpose."<sup>1319</sup>

His Honour repeated Hardie Boys J's statement word for word, as being "highly relevant"<sup>1320</sup> because there is<sup>1321</sup>

a subtle and important difference between "joint custody to A and B" and "custody to A every second weekend from after school on Friday to before school on Monday and or the first half of each school holiday, and custody at all other times to B".

One gives parental discretion as to how the custody is exercised (and will work well if parents understand the dynamics of a successful hierarchy of care). The other is less flexible, and *Tito v Tito* and *M v Y* were "nowhere near being authority for the proposition that an order of the latter type is jurisdictionally flawed."<sup>1322</sup> His Honour implies that the term "joint custody" can be used to describe both kinds of arrangement.

In *Dixon v Hatcher* where a child's mother had separated from the father before birth and the child had developed a significant relationship with her mother's new partner, the step-parent sought access when his relationship with the child's mother ended. The Family Court had in that case also perceived jurisdictional difficulties under section 15 of the Guardianship Act and made a shared custody order with defined terms. In the High Court it was held that the order was neither a joint or shared custody order but an access order "dressed up in another guise."<sup>1323</sup> Hansen J referred to shared custody orders as being contraindicated if there was continuing parental conflict and an inability to co-operate but recognised that in some circumstances a *Tito* order would be possible. The appeal was allowed on the basis that there was no jurisdiction to award access to the step-father and the order for joint custody was inappropriate in those circumstances. The matter was remitted to the Family Court. The Court read this decision as one that supported the view that showed that although the Court "will always be wary if a section 11(1) custody

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<sup>1319</sup> *M v Y*, above, 536.

<sup>1320</sup> *P v K*, above, 812.

<sup>1321</sup> *P v K*, above, 812.

<sup>1322</sup> *P v K*, above, 812.

<sup>1323</sup> *P v K*, above, 813.

order is sought solely as a ‘guise’ for an access order” by someone without section 15 Guardianship Act entitlement, “there is no necessary jurisdictional impediment.”<sup>1324</sup>

The Court would be “imprudent” to place unnecessary jurisdictional obstacles to “what appears to be a clear practice on the part of the Family Court, a specialist tribunal, to structure appropriate orders designed to promote a child’s welfare through parental sharing.”<sup>1325</sup>

P’s section 11 (1)(b) application and his application for leave had to be considered “against the overarching obligation of section 23(1) and the relevant UNCROC articles, rather than in a limited jurisdictional way. There had to be a best interests inquiry and “mature deliberation on what types of order the child’s interests required.”<sup>1326</sup>

The Court asserted that D having been conceived by AID was not a compelling reason for distorting his family relationships. It referred to D’s extended family<sup>1327</sup> who with leave had attended the hearing and the rights that relatives might have under section 16 of the Guardianship Act in certain circumstances;<sup>1328</sup> if Mr P had no sections 11(1)(a) and 15 Guardianship Act rights D’s generational relationships would be distorted.

*Was the Family Court correct to dismiss the father’s interim custody application?*

The interim application was dismissed on the flawed jurisdictional grounds defined in the discussion on the substantive custody application. Because Mr P’s need for interim relief (access while in New Zealand) had passed the Court did not need to revisit the issue.<sup>1329</sup>

*Was the Family Court correct to permit mother’s partner to withdraw the custody application?*

The Family Court Judge had also erred in permitting K to withdraw her application for custody and the Court decided to remit the withdrawal application to the Family Court, for determination alongside the other extant applications.<sup>1330</sup>

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<sup>1324</sup> *P v K*, above, 814.

<sup>1325</sup> *P v K*, above, 814.

<sup>1326</sup> *P v K*, above, 814.

<sup>1327</sup> These were described as “both the child’s grandparents (on different days) and a maternal uncle” but whether these were Ms M’s parents, Ms K’s parents, or Mr P’s parents was not stated: *P v K*, above, 814-815.

<sup>1328</sup> That is, if a “parent” of a child has died, been refused access or is making no attempt to exercise access. His Honour here seems to imply that if Mr P has no status giving him access to D, the child’s paternal grandparents, uncles and aunts might be able to have access, the visiting-type relationship Mr P sought, instead. On the other hand if D does not have a “father” arguably he has no legally recognisable family “through” his father.

<sup>1329</sup> *P v K*, above, 815.

<sup>1330</sup> *P v K*, above, 818.

The Court had “no difficulties with the proposition that withdrawal of a parental application relating to a child must be scrutinised.”<sup>1331</sup> It quoted at length from *McClelland v McClelland*,<sup>1332</sup> apparently in support of the proposition that because Family Court proceedings are “primarily non-adversarial and investigative”<sup>1333</sup> and “it may sometimes be the duty of the Court to look beyond the submissions of the parties in its endeavour to do what it judges to be necessary”<sup>1334</sup> because the Court’s first duty is to the child. Judge Doogue had correctly reserved to herself the power to regulate the proceedings with regard to the best interests of D.

His Honour did not express a view whether it was appropriate or not in this case to allow the withdrawal. However, the Court rejected submissions about the withdrawal made by K and M’s counsel<sup>1335</sup> and noted that having recognised that section 23 of the Guardianship Act was an important factor, by allowing K to withdraw her application (and so avoid the possibility of a *Tito* order) the Family Court had failed to “look ahead ... and to recognise that a *Tito* order might well be necessary to structure appropriate orders after a best interest inquiry” and closed “ [one possible route] ... whereby contact between D and P could be secured.”<sup>1336</sup> This was premature and Judge Doogue had erred. The withdrawal application was to be considered again by the Family Court alongside the other applications.

#### *Issues for best interests inquiry during sections 8 and 11(1)(b) hearing*

It was “not this Court’s province in its appellate role to interfere with or endeavour to influence the Family Court in determining applications still before it.”<sup>1337</sup> The Court noted Judge Doogue’s comments at the end of her decision about the possible value of Mr P having contact with D, the shortsightedness of K and M and the risk of emotional damage to D if contact between him and Mr P was limited;<sup>1338</sup> and added that D’s interests “might dictate limited contact for the next few years.”<sup>1339</sup>

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<sup>1331</sup> *P v K*, above, 815.

<sup>1332</sup> *McClelland v McClelland* (17 December 1998) Family Court Wanganui FP 083/205/97.

<sup>1333</sup> *Re L* [1997] AC 16 (HL), 28 Lord Jauncey of Tullichettle cited in *McClelland v McClelland*, above, by Judge Inglis QC and in *P v K*, above, 816.

<sup>1334</sup> *P v K*, above, 816, citing *Re E* [1984] 1 WLR 156 (HL), 158-9 Lord Scarman.

<sup>1335</sup> *P v K*, above, 817.

<sup>1336</sup> *P v K*, above, 817-818.

<sup>1337</sup> *P v K*, above, 818.

<sup>1338</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 7.

<sup>1339</sup> *P v K*, above, 818.

However, His Honour then listed the “obvious” issues “with which the Family Court would have to grapple.”<sup>1340</sup> These included the geographic separation of the parties and the age of the child and scrutiny of D’s current family arrangements, bonding and role models, as well as the absence of any significant bond between Mr P and D, the need to “preserve significant contact between [Mr P and D] so that the relationship has the potential to develop” and the extent to which Mr P’s input would be helpful or otherwise.”<sup>1341</sup>

He then noted the “available vehicles” for structuring “appropriate arrangements”: the section 8 applications; Mr P’s reinstated section 11(1)(b) application; and the custody application of Ms K “which will need to be determined with an eye on the respective roles and child sharing arrangements of the mother and her partner.”<sup>1342</sup>

His Honour then moved to the response of counsel for Ms K and Ms M to a question about preserving contact if the Family Court decided that contact was in the D’s best interests. Counsel had replied that this would be “with difficulty” and that if he were to argue that a section 8 Guardianship Act application that was a “contrivance” to circumvent the difficulties created for Mr P by section 5(2)(b) of the SCAA, Mr P’s lack of rights and liabilities would be highly relevant.<sup>1343</sup> The Court was unattracted by this position and pointed out that other jurisdictions had not allowed the AID of a lesbian “to stand in the way of a best interests inquiry.”<sup>1344</sup>

The Court then held that Parliament’s intention by enacting section 5(2) of the SCAA was to “preserve a father for this child.”<sup>1345</sup> There was (as accepted by Ms K and Ms M’s counsel) no jurisdictional bar to Mr P’s applying under sections 8 and 11(1)(b) of the Guardianship Act. Section 5(2) SCAA had little relevance given the “overarching imperative of section 23(1) of the Guardianship Act added to ... the imperatives of UNCROC that declared the D’s right to know and have contact with his father.”<sup>1346</sup> The factors the Court had mentioned as well as others would need to be assessed in the Family Court and this court “does not ... see any justification for those factors to be weighed in any different way from the weighing exercise in a case

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<sup>1340</sup> *P v K*, above, 818.

<sup>1341</sup> *P v K*, above, 818.

<sup>1342</sup> *P v K*, above, 818.

<sup>1343</sup> *P v K*, above, 818.

<sup>1344</sup> *P v K*, above, 819. The Court gave *Re Patrick* [2002] 28 Fam L R 579 (FCA), see above nn 27, 31, 95 and below n 237; and *Tripp v Hinckley* (2002) 290 AD 2d 767 (N.Y. App Div) as examples.

<sup>1345</sup> *P v K*, above, 819.

<sup>1346</sup> *P v K*, above, 819.

involving a child conceived through sexual intercourse.”<sup>1347</sup> While section 5 (2) SCAA limited the applications Mr P could bring “there is no sound policy reason ... why that ... necessarily weakens the merits of other applications.”<sup>1348</sup>

### *General comments*

After disposing of the issues, Priestley J made some general comments, followed by those of Heath J. These are now summarised together, with an emphasis on their statements about the role of a father following AID of a lesbian and about lesbian and gay family units.

Their Honours both noted an urgent need for legislation and clear policy decisions. The Court was aware anecdotally that AID techniques are frequently used by lesbians and gay men.

Priestley J observed that<sup>1349</sup>

The issue of infertility flowing from sexual preference undoubtedly has potential to spark both emotion and prejudice in the community. The fact remains that children are being born into and raised by such family units. New Zealand and overseas case law does not suggest any significant problems are posed for children in that situation.

In spite of this the use of AID could give rise to difficult issues and from the child’s perspective the legal complexities were unhelpful. It was undesirable that fathers and children in the situation of Mr P and D “should be left legally marooned.”<sup>1350</sup>

Heath J’s judgment, added to “explain why I take the view that many of the problems identified in this case are better addressed by Parliament than the Courts,”<sup>1351</sup> can be read alongside the submissions and papers of Family Court judges, as a slightly different view of possible legislative changes.<sup>1352</sup>

His Honour had found it surprising in his first year on the Bench to have been faced with cases challenging the meaning of “parent”, “father” and “child”. He mentions societal changes to family structures and practices, various Law Commission papers and the ability of Parliament

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<sup>1347</sup> *P v K*, above, 819.

<sup>1348</sup> *P v K*, above, 819.

<sup>1349</sup> *P v K*, above, 820.

<sup>1350</sup> *P v K*, above, 820.

<sup>1351</sup> *P v K*, above, 820.

<sup>1352</sup> See above Chapter 4 III. Family Court Response to *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access*.



and the Executive “to consult with the wider community and to gain a full appreciation of prevailing community values which should underpin the law.”<sup>1353</sup>

He then turned to consider the circumstances in which the Court should develop the law, referring to *R v Hines*<sup>1354</sup> where the Court of Appeal was divided about whether law reform should be left to Parliament, with the reasons being “instructive in this case also” and to the Law Commission’s proposal for a Care of Children Act that dealt with all aspects of the continuum of care arrangements for children, including a definition of “parenthood”.<sup>1355</sup>

His Honour observed that it would be necessary for Parliament to consider issues that went beyond the Court’s role. These were whether a distinction could properly be drawn between AID involving medical procedures and AID that did not involve medical procedures, observing that “it may be more necessary for Parliament to consider whether a more technologically neutral approach should be taken”,<sup>1356</sup> whether different rules for known and unknown donors could be justified; the need for a best interests inquiry to evaluate whether it was appropriate to enforce any agreement between those who use artificial procedures to have their children and known donors.

Heath J addressed the question of whether “different rules for known and unknown donors can be justified”<sup>1357</sup> in a slightly ambiguous way. He discussed the need for same-sex couples to acquire genetic material from someone of the opposite sex and to specify what will happen in the event of a dispute between a (known) donor and same-sex couples. He then stated<sup>1358</sup>

... as the law currently stands the provisions of s 6(2) of [the Guardianship Act] operate to make the mother of a child the sole guardian ... The donor ... has no status as a guardian unless appointed [by the Court]. ... While it is desirable to interpret statutes in a manner which does not discriminate on grounds of sexual orientation, existing law does discriminate, in relation to guardianship between gay and lesbian couples. Interpretation of the statute cannot remedy that situation.

It is not clear whether he is referring to discrimination between discrete couples – either the birth mother and her partner or the sperm donor and his partner - (where surrogacy is the issue) or

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<sup>1353</sup> *P v K*, above, 821.

<sup>1354</sup> *R v Hines* [1997] 3 NZLR 529 (CA) where the issues related to witness anonymity.

<sup>1355</sup> Law Commission/ Te Aka Matua o Te Ture *Adoption and Its Alternatives: A Different Approach and a New Framework* (2000).

<sup>1356</sup> *P v K*, above, 822.

<sup>1357</sup> *P v K*, above, 822.

<sup>1358</sup> *P v K*, above, 823.

discrimination against the relevant donor of genetic material by the couple who were to be a child's primary parents. His Honour did not address the issue of a mother's autonomy.

Justice Heath went on to consider surrogacy agreements and issues arising from same sex relationships.<sup>1359</sup> He then noted that since the Homosexual Law Reform Act was passed only in 1986 it was "highly unlikely" that Parliament considered the application of SCAA to children within same sex families. In 2002 statutes had to be interpreted in a way that did not discriminate on the grounds of sexual orientation<sup>1360</sup> and it was necessary for the law to be "always speaking".<sup>1361</sup>

When same sex couples wish to have children, they will have to "contract" with someone of the opposite sex, with an agreement to regulate "future interaction between the child and those involved in his or her conception."<sup>1362</sup> Any agreement reached about the exercise of contact by the "father" "in a manner akin to that described as "access" in the Guardianship Act 1968 will need to be dealt with by 'contract'."<sup>1363</sup> His Honour goes on to state that since in principle and in logic there is no difference between providing gay men or lesbian women with children because each requires the participation of someone of the opposite gender. The law needed to recognise this and to specify how to regulate a dispute between the couple for whom the child has been born and the donor of genetic material, or surrogate mother.

His Honour also questioned "whether there is any justification for treating the 'rights' and responsibilities of defined adults to children born from artificial insemination any differently from other situations involving extended families. He found the concept of whangai useful and relevant at a policy level "because it focuses on the extended nature of a "family" group; each member of that group can be responsible for different types of interaction with a child."<sup>1364</sup>

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<sup>1359</sup> He referred again to the Law Commission's *Adoption and Its Alternatives*, to its Study Paper *Recognising Same-Sex Relationships* (1999); and to the recognition of same sex couples in the Property (Relationships) Act 1976 (as amended in 2001).

<sup>1360</sup> Section 19, New Zealand Bill of Rights Act 1990 (Freedom from discrimination on grounds of discrimination in Human Rights Act 1993); Human Rights Act 1993 ss 20J(1) (Discrimination by ... bodies acting with legal authority) and 21(l) and (m) (Prohibited grounds of discrimination: (l) family status, including having responsibility for part or full time care of children or other dependants; (m) sexual orientation).

<sup>1361</sup> Interpretation Act 1999 s 6: An enactment applies to circumstances as they arise.

<sup>1362</sup> *P v K*, above, 823.

<sup>1363</sup> *P v K*, above, 823.

Judge Heath further noted that cases about children in same sex couples started to come before the Courts in the late 1990s.<sup>1365</sup> His Honour repeated that the Court has the choice of interpreting legislation according to section 6 of the Interpretation Act 1999, or leave the problem for Parliament to resolve by legislation. He concluded that he hoped that it would soon be possible for same sex couples who wish to have children to be allowed to do this, in a context regulated by law and recognising the paramount interests of the child, the relationships among the adults involved and the biological necessity for assistance from someone of the opposite sex.

His Honour then turned to the use of agreements “by which contact among those responsible for the conception of the child with the child should be regulated.”<sup>1366</sup> While it was “obvious that such agreements cannot be enforced in a manner akin to commercial contracts...circumstances change over time and the need for any form of contact to be in the best interests of the child militate against enforcement of an agreement strictly.”<sup>1367</sup> It seemed to him that agreements between the adults involved<sup>1368</sup>

... particularly in this case when made among a number of informed and intelligent adults (after what appears to have been careful thought) must be given significant weight in any assessment focusing on the best interests of the child. If the best interests of the child, after an appropriate inquiry, require contact to be terminated then that must occur. While any agreement is likely to assume greater importance in this type of case ... it must not be allowed to override the Court’s jurisdiction to protect the best interests of the child.

Mr P’s appeal in relation to access and interim custody was dismissed. His appeal in relation to his application for leave and for custody under s 11(1)(b) and the dismissal of Ms K’s application for custody was allowed. The case was remitted to the Family Court to timetable a hearing to determine the section 8 Guardianship Act applications of Ms K and Mr P and their custody applications, as well as Ms K’s application to withdraw her custody application.<sup>1369</sup>

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<sup>1364</sup> *P v K*, above, 823.

<sup>1365</sup> The examples given were *VP v PM* (1998) 16 FRNZ 621 (FC); and *A v R* [1999] NZFLR 249 (FC/HC).

<sup>1366</sup> *P v K*, above, 824.

<sup>1367</sup> *P v K*, above, 824-825.

<sup>1368</sup> *P v K*, above, 825.

<sup>1369</sup> *P v K*, above, 819.

### III. Discussion

#### 1. The research context

##### *(i) The allocation of responsibilities*

These two cases can be distinguished from those in earlier chapters because the mother and the father were not married and did not live together when the child was born. Separation and the de facto allocation of responsibilities before and after separation were not in issue, although arguably a hierarchy of care had been developed in *Anderson v Paterson* where there had been an informal allocation of responsibilities from when the child was about two, until immediately before Ms Paterson took the child to the United States. In *P v K and M* the issue was the respective roles of Ms M, Mr P, and Ms K who had together allocated responsibility in a contract before D was born. Mr Anderson and Mr P were auxiliary parents. According to Trinder et al arrangements for their contact with the children would work well if there were agreement about their roles “based ... on the idea of a resident and contact parent, usually on a gendered basis.”<sup>1370</sup> However, Judge Bisphan, Judge Inglis QC and Priestley J, perhaps because of a common concern in principle not to “leave the ‘access’ parent in the position of regarding him or herself as a second-class parent”<sup>1371</sup> tend towards granting these auxiliary parents a primary status. Apart from whether this was justifiable on a legal basis, this took away the potential for contact that “worked” in the sense of the Trinder et al research.

There is no discussion in these cases about parental responsibility as a concept, nor the parameters of its practice. The concern is with the rights of biological fathers. Neither the single mother (in *Anderson v Paterson*) nor the lesbian parents (in *P v K*) are distinguished as *parents* from biological fathers with tenuous parental rights.

Mr Anderson had never applied for guardianship, custody or access. Although he paid child support and had an informal agreement to care for the child, there is no evidence about how he exercised that care apart from the specific times he spent as an auxiliary parent. Judge Bisphan’s view - justified by reference to the Hague Convention’s “primary function [being] to protect

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<sup>1370</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, 27.

<sup>1371</sup> *P v K* [2003] 2 NZLR 787 (HC), 810 Priestley J.

children's rights"<sup>1372</sup> - that although Mr Anderson's right had not been formally established through "the exercise of a judicial function"<sup>1373</sup> its abstract form was sufficient to give him custodial rights may have been based on an assumption that the child would otherwise be disadvantaged. His Honour could not think of any reason "apart from the fact that it is in the statute"<sup>1374</sup> why Mr Anderson should not have rights of custody starting, apparently, from an assumption that the child would benefit if Mr Anderson's informal agreement for contact with the child were defined as "rights of custody." But perhaps he did not look carefully - as he could have given the inquisitorial nature of Family Court proceedings - at the overall responsibilities for the child and how they were exercised. The emphasis was on enforcement of Mr Anderson's rights made possible by repatriating Ms Paterson and the child.

The Court did not address the basis on which Ms Paterson had agreed for their child to spend time with Mr Anderson, or whether it was any different a basis than one whereby other extended family members might engage with the child. Ms Anderson's household was not defined by the court in the same terms as Ms B's in *K v B*.<sup>1375</sup> Her situation was however - apart from the fact that Mr Anderson was not the child's guardian - very close to that of many families where the father is a guardian with regular access and paying child support. It was distinguishable only by the absence of the assumptions that may be made if a father and mother were married or living together when a child is born, intending to create a family life together

The significance of this absence was arguably trivialised by Judge Bisphan perhaps because the years when Mr Anderson did not have contact with the child and Ms Paterson experienced the realities of single motherhood did not hold any meaning for him. Ms Paterson may not have understood her child's relationship with Mr Anderson as limiting her autonomy, especially if he had not moved to formalise it. She may not have encouraged contact if she had thought that it had the potential to allow Mr Anderson to intrude on her independent life.

Ms K and Ms M's case, as a lesbian family unit was quite different. They had an intention to create a family life but there were no legal structures within which they could establish this. Ms

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<sup>1372</sup> *Anderson v Paterson* [2002] NZFLR 641 (FC), 646.

<sup>1373</sup> *Anderson v Paterson*, above, 646.

<sup>1374</sup> *Anderson v Paterson*, above, 645.

<sup>1375</sup> See above Chapter 6 nn 11, 134-136, 146 and below nn 198, 207; and accompanying text.

M's position was more analogous to that of a single heterosexual woman who had made an agreement with a donor and then entered into a relationship with another man, a situation not to date addressed in the cases.

In *P v K and M*, the expectation that Ms K and s M would be responsible for their child D was articulated in the agreement, giving P privileges less than those of guardianship. The two women were to have “authority”, full decision-making capacity, and Mr P only the right to be consulted. Mr P acknowledged that he did not “wish to challenge in any way the primary caregiver role that [Ms M and Ms K] have of D.”<sup>1376</sup> Judge Doogue appeared also to acknowledge that it was Ms K and Ms M who would nurture D to independence:<sup>1377</sup> she quoted from Mr P's affidavit evidence to demonstrate that what he sought was “temporary and intermittent contact.” His application for custody was, at this time at least, a strategy only. Judge Inglis QC found that although the agreement could not alter the allocation of responsibilities provided for by the SCAA, nevertheless Mr P had some standing as someone with an interest in D. None of the judges in *P v K and M* addressed the issue of child support: it seems however that it may now be possible for a biological father without rights or liabilities to gain “custody” as Priestley J defines it without being required to contribute child support and without the child having any inheritance rights.

These circumstances were characterised by the intentions of the mothers to retain autonomy and of the fathers to accept this. Consequently giving the fathers greater parental status arguably made successful arrangements for contact even less likely, by further opening the door for their potential exercise of debilitating and ambivalent power. This possibility may have been well understood by these mothers.

#### (ii) Power and powerlessness

All the parties in these cases must have been experiencing a measure of situational powerlessness. This was likely to continue. The High Court was “somewhat disconcerted”<sup>1378</sup> by counsel's statement (for the mothers) in *P v K and M* if the Family Court should decide that contact between Mr P and D was in D's best interests that contact could be preserved “with difficulty.”<sup>1379</sup> However, the Trinder et al prerequisites for successful contact did not exist in

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<sup>1376</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02, 4.

<sup>1377</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 4.

<sup>1378</sup> *P v K* [2003] 2 NZLR 787 (HC), 818 Priestley J.

<sup>1379</sup> *P v K*, above, 818.

either case. Giving Mr P and Mr Anderson increased status would have arguably diminished the potential for successful contact. It would however give both an opportunity to exercise ambivalent or debilitating power, secure in their equal status and in spite of their auxiliary responsibility.

Mr Anderson was never a guardian and had never sought the formal responsibilities of custody or access. However he now has the power to control where Ms Paterson lives. Mr P has the opportunity to apply not only to be appointed a guardian but also to apply for custody. Since the withdrawal of Ms K's application for custody is still in issue and the High Court appeared to be giving the Family Court a broad hint that it was not to be withdrawn, Mr P may also be granted access, as the result of a *Tito* order, custody, guardianship or a combination of any two of these. He too may become able to control, inappropriately, the choices available to Ms M and Ms K at a far higher level than was envisaged by him or by Ms M and Ms K, on the evidence of the agreement.

Not only do these fathers have the (potential) opportunity to compromise the autonomy of their children's family unit but also the emotional health and consequently the physical health of the mothers through the various mechanisms of control available to them.<sup>1380</sup>

(iii) The benefits and disadvantages of a direct paternal relationship

In *Anderson v Paterson* the actual benefits of Mr Anderson's involvement in his child's life as someone with "custodial rights" were assumed rather than analysed. It is impossible to speculate on Ms Paterson's reasons for taking the child to the United States. Quite possibly she analysed the benefits and disadvantages of Mr Anderson's involvement along with the benefits and disadvantages of other aspects of the child's and her own life in New Zealand and concluded that the child would have opportunities later in her life to resume her relationship with her father if she wished; or perhaps to visit or be visited during her childhood.

There is no evidence that it was necessary "to spare [this child] already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are

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<sup>1380</sup> See above Chapter 2 II. 3. *Conditions that affect women as parents* and 4. *Control, power and powerlessness*.

taken arbitrarily by one parent from their settled environment:<sup>1381</sup> her parents were not together at her birth or at other times: their separation was not an issue in her life.

There is also no evidence that Mr Anderson's "inchoate rights of a custodial or parental character ... not yet formally recognised or granted by law"<sup>1382</sup> offered his child anything more than father-unique benefits that she could later enjoy, or the kind of relationship that she might have with a grandparent or aunt or uncle, that might be missed, but was not central to her life in the way his relationship with her mother was. Certainly using the language of "abduction" in this context seems inappropriate.

The conflation of access and guardianship with custody, as "a commendable and well established Family Court practice"<sup>1383</sup> in these cases, whether it gives parents - and children - discretion about how the time is shared, or is fixed, means that a court can more readily assume that there are benefits beyond the father-unique contributions to a child's wellbeing that justify giving a biological father full custody rights. This is explicit in *P v K* when - although the Court did not award Mr P custody, merely open the way for his application to be considered on its merits - the High Court was "not persuaded that there is a significant qualitative difference between expressing the time which a child will spend with each parent as 'custody and access' or 'custody and custody'" and when it adds that "the nomenclature of appropriate orders need not take on a life of its own."<sup>1384</sup> However, the nomenclature of "custody" and "access" already had meaning: it acknowledged that one parent had greater responsibility than the other and was central to the child's wellbeing; and honoured that truth.

Although *P v K* was primarily about jurisdiction, the High Court was concerned (while it was "not this Court's province ... to interfere with or endeavour to influence the Family Court"<sup>1385</sup>) to list the issues that the Family Court would have to "grapple with". It had already acknowledged that joint custody "must have a discernible purpose"<sup>1386</sup> but did not include how that discernible purpose might be circumscribed by a rigorous analysis and clear understanding of

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<sup>1381</sup> *Re B (A minor)(Abduction)* [1994] 2 FLR 249 (CA), 260 Waite J, cited in *Anderson v Paterson* [2002] NZFLR 641 (FC), 646.

<sup>1382</sup> *Re B (A minor)(Abduction)* above, 260, cited in *Anderson v Paterson*, above, 646.

<sup>1383</sup> *P v K* [2003] 2 NZLR 787 (HC), 810.

<sup>1384</sup> *P v K*, above, 811.

<sup>1385</sup> *P v K*, above, 818.

<sup>1386</sup> *M v Y* [1994] 1 NZLR 527 (CA), 536 cited *P v K*, above, 812.



the actual benefits and advantages of the relationship of the child with a non-guardian parent rather than those that are assumed to exist. Instead, it emphasised “the need to preserve significant contact between the child and his father so that the relationship has time to develop ... and the extent to which the father’s input would be helpful or otherwise.”<sup>1387</sup>

Some of the assumed benefits of preserving significant contact between the father and son may be because of a belief that a father – perhaps especially a boy’s father has intrinsically something to offer that the child lacks having “only” a mother. This assumption may account for the Court’s consistent reference in these cases to a non-guardian father as a “father” rather than a “parent”.

## 2. Legal issues

This section will analyse the decisions in *Anderson v Paterson* and *P v K and M* with a view to understanding how they extend parental authority through their interpretations of section 6(2) of the Guardianship Act and 5(2) of the SCAA, with reference to section 23(1)(A) of the Guardianship Act and UNCROC. It will also consider the role of agreements, section 23(1)(A) of the Guardianship Act and the lesbian family unit in these cases

### (i) The extension of parental authority

*Anderson v Paterson* was decided before the Court of Appeal rejected *W v C*’s principle that shared parental guardianship was the “starting point” for any investigation into allocation of the care of children.<sup>1388</sup> It preceded the High Court decision in *P v K* by two months. It will be argued however, that these two cases illustrate that the “starting point” of a father and mother with equal rights in the lives of their child has become so entrenched in family law jurisprudence that section 6(2) of the Guardianship Act and the concept of “access” have been rendered almost nugatory.

Section 6(2) acknowledges that the mother who is single at birth has not only sole authority in relation to her child but also sole responsibility for day to day care. As Judge Inglis QC pointed out in *W v C* some parents are provided “with an entrenched status as guardians [to protect] the family unit of parents and child from gratuitous or unjustified outside interference.”<sup>1389</sup> Section

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<sup>1387</sup> *P v K*, above, 818.

<sup>1388</sup> *D v S* [2003] NZFLR 81 (CA), 86.

<sup>1389</sup> *W v C* [2000] NZFLR 1057 (FC), 1062.

6(2) seems to provide this entrenched status for a single mother. In *K v B* Judge Inglis QC in refusing guardianship status to another father stated that giving him this<sup>1390</sup>

would ... invite problems over [the child's] care and upbringing and ... seriously undermine the quality of her home environment ... the mother would be forced into the position of having to co-operate with a man she does not wish to deal with and with whom her brief relationship ended even before she knew she was pregnant. I cannot see how the mother could regard that, in the circumstances, as anything other than an unacceptable intrusion into her life. There was no marriage and no domestic or family relationship between them and no factor other than their joint parentage of the child to justify that intrusion.

But in *Re the guardianship of ACL*, more recently, Judge Ellis refused guardianship status to a father who had access on the basis that "it was not the purpose of section 6(3) to create a legal structure around the child within which her parents may litigate disagreements about her care."<sup>1391</sup> There, the father's application was "not so much about the child's welfare but was more to do with his own perception of his rights."<sup>1392</sup> It will be argued that this may also be the case with *Anderson v Paterson* and *P v K*.

In an earlier case Judge Ellis had reviewed a number of cases and concluded that they<sup>1393</sup>

looked to the assertion of rights by the father and tended to suggest that a father who wished to be a guardian should be unless there was some good reason why not. Through the subsequent cases it is possible to discern the movement of the pendulum back towards the mother's point of view. When an unmarried mother decides to keep and raise her child alone the law in its wisdom gives her, and expects her to exercise, sole responsibility over the care and upbringing of the child. There are sound reasons for that, both socially and legally, as are demonstrated by the cases ... the law has provided that the welfare of the child will be best promoted by making the mother in the first instance solely responsible for the child's care and upbringing.

His Honour at that time decided that to become a guardian in these circumstances the applicant father had to demonstrate that such a change "will be of positive benefit to the child and will outweigh any potential disadvantages. That is not to be accomplished by resort to assumptions, nor to idealised notions of the father/son relationship."<sup>1394</sup> This view, expressed shortly before Sturge and Glaser's article appeared, may be the closest to their position ever stated in New Zealand.

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<sup>1390</sup> *K v B* [1991] NZFLR 168 (FC), 185. See above Chapter 6 n 111, 134-136, 146, above n 183-191 and below n 207; and accompanying text.

<sup>1391</sup> *Re the guardianship of ACL* [2002] NZFLR 165 (FC), 171. See above Chapter 2 n 151, Chapter 3 n 24-27, Chapter 6 n 146 and below nn 204-209; and accompanying text.

<sup>1392</sup> *Re the guardianship of ACL*, above, 171.

<sup>1393</sup> *Crawford v Herlihy* (2 July 1999) District Court Porirua FT 291/92, 15-16.

<sup>1394</sup> *Crawford v Herlihy*, above, 16.

But Judge Ellis had misjudged the “swing of the pendulum.” In 2001, two other Family Court judges disagreed with his formulation.<sup>1395</sup> *Re the guardianship of ACL* decided two weeks before *Anderson v Paterson* and (accompanied by two other Family Court judges) he now accepted “the correction offered by my fellow Judges.”<sup>1396</sup> The standard of proof required, and imposed on ACL’s father was merely to demonstrate that it was in the child’s best interests that he be appointed a guardian, on the balance of reasonable probabilities.

The father’s application to become a guardian was refused not only for the reasons given but also because his involvement with the child was<sup>1397</sup>

based on the premise that the mother will at all other times [than when he is exercising access] be responsible for all aspects of the child’s life. ... [H]is availability as a parent will be secondary to other concerns in his life. The mother does not have that luxury. She has had to order her life so that she is available to the child full time ... at some cost.

In *Anderson v Paterson* and *P v K*, in different ways, the hierarchy of care existed, explicitly acknowledged in *P v K* both in the agreement and in Mr P’s affidavit. Both Mr P and Mr Anderson can be characterised as “helpers”; there was no question initially that the children’s mothers were going to retain primary responsibility. Both Mr Anderson and Mr P were very willing to take responsibility for caring for their children and this limited responsibility for them as auxiliary parents could arguably be well expressed by access in the sense of a “visiting” relationship. However, each sought a shared, “primary” parental status based on a fiction that they shared responsibility, whereas as Ms Paterson demonstrated she was able to take entire responsibility and Ms M and Ms K were well able to do the same. If the status Mr Anderson and Mr P sought were granted them, there would be potential for them to exercise control over the choices of the mothers. The justifications for extension of authority in each case will now be discussed in turn.

(a) *Anderson v Paterson*

Judge Bisphan’s “starting point” was with the section 6(2) of the Guardianship Act. His view was that it should not place a non-guardian father in an inferior position to one who is a guardian, because “what surely is important is the relationship between the ‘non-custodial parent’ and the

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<sup>1395</sup> *Cable v Ryan* (12 September 2001) District Court North Shore FP 366/98; *McDermott v Kena* [2001] NZFLR 954 (FC).

<sup>1396</sup> *Re the guardianship of ACL* [2002] NZFLR 165 (FC), 170.

<sup>1397</sup> *Re the guardianship of ACL*, above, 171.

child after birth and as the child is growing up.”<sup>1398</sup> He also found support for giving “rights of custody” in the Hague Convention the widest sense possible, to give a non-guardian father who exercised access regularly “rights of custody”. However, there are a number of reasons why this may not be justifiable: the explicit wording of section 6(2) of the Guardianship Act; Mr Anderson’s own actions in not applying earlier to be an additional guardian so that whether on the balance of probabilities his guardianship was in the interests of the child could be tested; the Court of Appeal’s ruling in *Dellabarca v Christie*; and the provisions of the Hague Convention itself.

Ms Paterson had had a longer relationship with Mr Anderson than Ms B had had with Mr K; her child had a relationship with Mr Paterson, developed over a period of consistent caretaking. However, this may not be enough to justify compromising Ms Paterson’s status as sole guardian. In *Anderson v Paterson*, Judge Bisphan ignored the “sound legal and social reasons” for protecting a single mother’s sole guardianship status that Judge Ellis identified, including protection from the potential “intrusion” referred to by Judge Inglis QC in *K v B* which relates to debilitating use of power. These realities challenge Judge Bisphan’s assertions that there is no significance in the section 6(2) provisions and no reason why this father should be in a different position from a guardian father.<sup>1399</sup>

That Judge Bisphan sees no difficulty in extending his wide interpretation of “rights of custody” to include step-parents<sup>1400</sup> indicates the extent to he ignores the realities of women who care for children substantially alone. His judgment obscures the potential for interference in mothers’ autonomy by fathers who will only ever have an auxiliary role, with the “luxury” of being able to abandon it when they choose, and the potential effects of the interference on children.

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<sup>1398</sup> *Anderson v Paterson* [2002] NZFLR 641 (FC), 645.

<sup>1399</sup> [W]hy should a non-guardian father be in an inferior position to a father who is a guardian, even a married one? Apart from the fact that it is in the statute, what is so significant about living together ... at the time of the child’s birth? ... I fail to understand its current significance. ... Again... there is no logical reason why a child in such circumstances should be disadvantaged because parents have agreed informally rather than by an enforceable agreement or Court order (*Anderson v Paterson*, above, 645-646).

<sup>1400</sup> Although in *Gough v Brittin* [1999] NZFLR 529 (FC) it was held that a marriage relationship (rather than a relationship in the nature of marriage) whether before or after the birth of the child concerned was necessary before a step-parent relationship arose, in view of current philosophy about the role of step-parents (see above Chapter 4 nn 34-35 and accompanying text) it is possible that the “widest sense possible” might here extend to a step-parent who had been in a relationship in the nature of marriage.

The legislative scheme provides a procedure for fathers in Mr Anderson's position to gain "rights of custody"; given the serious consequences for Ms Paterson who will have to return from the United States, it is submitted that Judge Bisphan was in error to dismiss the scheme as without current significance.

Mr Anderson had arguably made a choice over the years not to apply to become a guardian of his child or for custody or access and to have tested his involvement as being in the best interests of the child. Any application for guardianship status would have to involve an assessment of Mr Anderson's potential influence on the child's welfare. It would necessarily also explore the effects on Ms Paterson of sharing her authority, since Mr Anderson's involvement is likely to be only auxiliary, as was that of the father in *Re the guardianship of ACL* and probably she "has had to order her life so that she is available to the child full time ... at some cost."<sup>1401</sup>

Ms Paterson's life unlike that of Mr Anderson was likely to have been "controlled by the [child's] own welfare and needs and the need to make decisions which are responsive to the [child's] welfare and interests."<sup>1402</sup> Here, by stating that for Mr Anderson the step of applying for guardianship is not necessary, Judge Bisphan appeared to be depending on the assumption that regular access to a father, absent physical or sexual abuse is, on balance of probabilities, always a good thing and more important than the conditions under which a mother parents alone.

This is not necessarily so. It may be disruptive, as here, to the child's present family if the father uses an informal access agreement, arguably very little different than a regular child care arrangement with a nanny or grandmother, to compromise the choices of the mother who is primarily responsible for making the family's overall circumstances "work" for the child.

In relation to *Dellabarca v Christie* where, because there was no enforceable agreement as to the care of the child it was held that the non-guardian father had no rights of custody, it is arguable that Mr Anderson's case was distinguishable only by being an unenforceable oral agreement rather than an unenforceable written one. It is submitted that the only right he held was the right to apply to the Court for custody, guardianship or access.

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<sup>1401</sup> *Re the guardianship of ACL* [2002] NZFLR 165 (FC), 171.

Finally, the Hague Convention, as Judge Bisphan noted without comment,<sup>1403</sup> has in article 5(b) a definition of “rights of access.” These “shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”<sup>1404</sup> The Convention thus discriminates between custody and access and provides for the maintenance of access rights, arguably the closest to those exercised by Mr Anderson. Mr Anderson’s position was therefore provided for elsewhere in the legislation.

*(b) P v K*

All three *P v K* decisions are about the possibility of extending parental responsibility to Mr P, whether as guardianship, custody or access. Ironically, of these, although Judge Doogue found that the evidence showed that the substance of Mr P’s application was that he sought “temporary and intermittent contact with D,”<sup>1405</sup> section 15 access entitlement, the only one excluding the element of “authority” inherent in custody and guardianship seems to be only “right” not available to Mr P, since he has none of the rights and liabilities of a “father”. Her Honour appeared, correctly, it is submitted, to view guardianship, custody and access as a hierarchy and if a parent was not qualified for access, a more significant status was also closed off. Her Honour was therefore following the Act in making the orders she did, consistently with the provisions of sections 6(2) and 15.

Judge Inglis QC’s overt starting point was that Mr P could not be regarded as a “father” or “parent” because his “rights and liabilities” had been extinguished. His view was that although “a right to apply for Guardianship Act orders is necessarily a right to assert a legitimate parental intervention in the child’s upbringing, care and control,”<sup>1406</sup> section 5(2) of the SCAA was arguably designed to extinguish this. However, he then found that while section 23(1) of the Guardianship Act could not be used as a device to undermine Parliament’s intention, guardianship and custody were “not necessarily closed off to Mr P in the present case”<sup>1407</sup> because sections 8 and 11 of the Guardianship Act do not limit the class of applicants to a parent or father.

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<sup>1402</sup> *Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94, [3] Judge Inglis QC.

<sup>1403</sup> *Anderson v Paterson* [2002] NZFLR 641 (FC), 645.

<sup>1404</sup> *Anderson v Paterson*, above, 646.

<sup>1405</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 4. Judge Doogue’s decision (following the second Family Court hearing) will be considered in what follows only where necessary in the context of the High Court’s ruling.

<sup>1406</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02, 12.

<sup>1407</sup> *K v M*, above, 12.

His Honour did not consider the policy behind section 6(2) of the Guardianship Act and the potential differences between the functions of a parent and a father which with the provisions of section 15 provide for fathers who are not guardians to maintain contact with their children without compromising the mothers' authority. It is submitted that it would have been appropriate for him to focus on this especially given that he referred to plausible policy reasons why a donor in section 5(1) shall "for all purposes not be the father." The section aimed to protect the security of the traditional nuclear family (at least in 1987 terms). But here although there "may ... be a 'psychological' nuclear family,"<sup>1408</sup> since the donor under section 5(2) had none of the rights and liabilities of a father<sup>1409</sup>

[i]t is understandable ... that the emphasis should switch to protecting the donor by excluding the child's 'rights and liabilities' in respect of him ... [and the] donor's 'rights and liabilities' in respect of the child." In this switch, from protecting the nuclear family to protecting the donor (with protecting the child not an issue) His Honour ignored the policy behind section 6(2) of the Guardianship Act protecting a single mother from interference by her child's father. He could have found, it is submitted, that section 5(2) of the SCAA was enacted to be congruent with section 6(2), for good social and legal reasons. A nuclear family existed of a kind that was protected in law, consisting of Ms M and the child, as well as a "psychological" family. This nuclear family was entitled to some consideration, even if the Court (and the parents) preferred to focus on the psychological family.

Nor did Judge Inglis QC address the language used to describe the second parent in the SCAA. It is specific. It refers to a donor as "the father" rather than "the parent". There is therefore an argument that "for all purposes" in section 5(1) includes provision of the father-unique elements of parenting described by Sturge and Glaser.<sup>1410</sup> Some, if that (social) father is honest, will not be available to the child, or will be available on a limited basis: information about the [biological] father's unique role in the creation of the child; the [biological father's] sharing of 50 per cent of his or her genetic material; the history of the child's conception and the parental relationship; the consequent importance of the father in the child's sense of identity and value. The presence or absence of these father-unique elements are one way to distinguish the two sections. Under section 5(2) the father-unique benefits could all be available without the father or child having

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<sup>1408</sup> *K v M*, above, 9.

<sup>1409</sup> *K v M*, above, 9.

“rights or liabilities”. Paradoxically, although a donor under section 5(2) has none of the rights or liabilities as a *parent*, (arguably the meaning of “for all purposes” in section 5(1)), he has the potential for offering more father-unique benefits to a child than the social, fictional “father” in section 5(1).

Together, section 6(2) of the Guardianship Act and the father-unique benefits arguably offered by a section 5(2) donor make it possible to create a paradigm protecting Ms M and the child while creating an appropriate auxiliary role for the donor, particularly apposite as a child enters adolescence, when identity issues become more significant than for a younger child. How that role might be facilitated is discussed in Part III.

The “starting point” is articulated directly in *P v K*. Priestley J began with the *Neho v Duncan* principle that the focus must be on how or whether the “right to nurture” is exercised by a specific parent and the impact of the exercise of the right on the specific child. The child has a right to expect to be nurtured in a way that will serve his or her welfare. Again, this seems to imply that Mr P as the “father” (rather than “parent”) has a right to nurture his child and the child to be nurtured by him in a way that serves his welfare. Although Mr P’s and the child’s “rights and liabilities” in relation to each other have been extinguished, the “rights” have been brought back into play. His Honour seems not to be referring here to M’s and the child’s rights to function peacefully as a family, as provided for in section 6(2) of the Guardianship Act and in the Preamble to UNCROC.

Priestley J then referred to the “developing practice in the Family Court” to move away from the terms “custody” and “access”, which had often left the access parent “in the position of regarding him or herself as a second class parent.”<sup>1411</sup> He was also aware of the widespread practice of time shared by children between parents being expressed in terms of duplicate custody orders “usually expressed in temporal terms,”<sup>1412</sup> that is, in the same way that custody and access orders were formerly expressed. He distinguished the cases on which Judge Doogue had based her decision that she had no jurisdiction to create an “access order in disguise,” saying that she

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<sup>1410</sup> See above n 26 for the full list.

<sup>1411</sup> *P v K* [2003] 2 NZLR 787 (HC), 810.

<sup>1412</sup> *P v K*, above, 810. Presumably because guardianship was here not an issue there is no reference to the parallel practice in the *Makiri v Roxburgh* and *W v C* tradition, though this judgment was released more than two months after *D v S* (no 11) which disapproved of *W v C*.



focused on “nomenclature alone rather than the need to structure orders to care for a child in a way to promote that child’s welfare.”<sup>1413</sup>

The Court would be “imprudent” to place unnecessary jurisdictional obstacles to

what appears to be a clear practice on the part of the Family Court, a specialist tribunal, to structure appropriate orders designed to promote a child’s welfare through parental sharing.

There had to be a best interests inquiry and “mature deliberation on what types of order the child’s interests required.”<sup>1414</sup>

His Honour further stated that “having regard to the developed jurisprudence under section 23 of the Guardianship Act,” it was “unfortunate indeed”<sup>1415</sup> that the way D was conceived gave rise to policy considerations that otherwise would not exist. The jurisprudence that developed the Family Court’s practice, to avoid the terminology of “custody” and “access” it can be inferred, was prevented from operating on this occasion only because of the way D was conceived.

Priestley J’s path to extending parental authority relied on two main arguments, one overt and one covert. Both appear to start from the view that His Honour assumed that contact between Mr P and the child was a good thing.<sup>1416</sup> He was<sup>1417</sup>

comforted ... by the knowledge that other remedies [than an access arrangement] are available to this father under the GA to ensure appropriate contact between him and the child consistent with the paramount concern of the child’s welfare.

His emphasis was on finding a remedy rather than considering whether a remedy was justified. His first, overt, argument was that Family Court orders are now flexible and sophisticated and social mores have changed, so that the terminology of “custody” and “access” and part of the definition of custody<sup>1418</sup> are dated and inappropriate. Within the overriding policy of section 23(1) of the Guardianship Act, the Court had to regulate parental authority. Since section 3’s definition of guardianship included custody, although section 15 suggested that access was a lesser right than custody, there was not a “significant qualitative difference” between expressing the time a child spends with a parent as “custody and custody” or “custody and access”.

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<sup>1413</sup> *P v K*, above, 813.

<sup>1414</sup> *P v K*, above, 814.

<sup>1415</sup> *P v K*, above, 793.

<sup>1416</sup> This appears to have been justified by Mr P’s role as a *father*. See discussion below nn 242-246 and accompanying text.

<sup>1417</sup> *P v K*, above, 808.

<sup>1418</sup> He is not explicit about which part but was perhaps referring to “possession and care.”

The second, covert, argument relates to section 6(2) in association with section 15. It is arguable that these provisions exist partly to address the circumstances that exist in both *Anderson v Paterson* and *P v K*, where parents have had a transitory relationship resulting in a child who will be brought up by the mother. Her authority is protected by being the sole guardian. His Honour implied, by not discussing this aspect of the legislation, that section 6(2) was also dated and inappropriate. As also illustrated by *Anderson v Paterson*, it seems that “the best interests of the child” in these circumstances are likely to be met, in the current Family Court jurisprudence, by the father having equal authority with the mother regardless of the provisions of sections 6(2) and 15 that allow for a structure that recognises the hierarchy of care involved.

Priestley J’s reasoning arguably applied to both his overt and covert arguments and was aimed at affirming the Family Court’s move away from “custody” and “access,” so that the access parent no longer regards himself as a second class parent. Although the hierarchy of care may continue to be the predominant form of parenting, expressed in temporal terms, the “authority” of the primary parent, or in section 6(2) situations, the sole parent is to be compromised.

If Mr P had no rights under sections 11(1)(a) and 15 Guardianship Act D’s generational relationships would be distorted. D’s extended family<sup>1419</sup> might also have rights under section 16 of the Guardianship Act in certain circumstances.<sup>1420</sup> Judge Doogue’s inquiry was cut off by a perceived jurisdictional problem expressed at “too high a level”<sup>1421</sup> because the Court’s first duty was to the child. While section 5 (2) SCAA limited the applications Mr P could bring “there is no sound policy reason ... why that ... necessarily weakens the merits of other applications.”<sup>1422</sup> This appears to be an argument that makes sections 6(2) and 15 of the Guardianship Act almost meaningless. If someone with no rights or liabilities as a father can apply for guardianship and custody, the autonomy of mothers these sections provide for appears no longer to exist.

Heath J’s description of the kind of parental sharing involved both more and less radical, in advocating the use of a contract.

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<sup>1419</sup> These were described, *P v K*, above, 814-815, as “both the child’s grandparents (on different days) and a maternal uncle” but whether these were D’s maternal grandparents, Mr P’s or Ms K’s parents was not stated.

<sup>1420</sup> That is, if a “parent” of a child has died, been refused access or is making no attempt to exercise access. His Honour here seems to imply that if Mr P has no status giving him access to D, the child’s paternal grandparents, uncles and aunts might be able to have access instead.

<sup>1421</sup> *P v K*, above, 815.

His Honour was less radical in finding a place for a conventional access-type relationship. He was more radical in proposing that the ability of an AID father (or surrogate mother) to maintain a relationship with the child “in a manner akin to that described as “access” in the Guardianship Act would need to be dealt with by ‘contract’.”<sup>1423</sup> It may be that he was disagreeing, in a quiet way, with Priestley J (he agreed that “the appeal should be disposed of in the manner which he suggests”<sup>1424</sup> and that sections 5 and 16 of the SCCA should be interpreted as applying in this case about the need to conflate access and custody) but cannot suggest an alternative solution. Furthermore, agreements have their own difficulties.

(ii) Role of agreements

Judicial views on the effect of the formal and informal agreements with non-guardian fathers, in *Anderson v Paterson* and *P v K*, seem to show that informal or invalid agreements are likely to be interpreted by the Family Court to accord with its philosophy that fathers are essential absent physical or sexual abuse or that the “access” parent should not be left “in the position of regarding him or herself as a second-class parent.”<sup>1425</sup> A father who is not a guardian may be able to use an implied or actual agreement as a stepping stone to control of maternal decision-making within the household of a mother who is sole guardian (already at risk from the social conditions faced by single mothers and possibly in *P v K* from discrimination against lesbian mothers) to further risk for her and her child.

Priestley J’s statement that “the agreements affecting this child, and particularly the contact arrangements must be the starting point”<sup>1426</sup> seems to confirm this. Although he added that “in the same way that a section 18 agreement must bow to a best interests/welfare inquiry, so must this agreement,”<sup>1427</sup> the language (“the starting point”) echoes that of *W v C*. Whether His Honour would have viewed the jurisdictional problem differently if the agreement had not existed is impossible to tell. However there seems little doubt that His Honour is giving a clear direction to the Family Court that the agreement is the starting point during their consideration of Mr P’s applications.

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<sup>1422</sup> *P v K*, above, 819.

<sup>1423</sup> *P v K*, above, 823.

<sup>1424</sup> *P v K*, above, 820.

<sup>1425</sup> *P v K*, above, 810.

<sup>1426</sup> *P v K*, above, 809.

<sup>1427</sup> *P v K*, above, 809.

The agreement between Mr P and Ms K and Ms M may raise issues that go beyond agreements made by those conceiving a child under section 5(2) of the SCAA. If D had been conceived by AID to married couple, Mr P would have had no rights. But what if there were an agreement between a married couple and a known donor of genetic material? Section 5(1) states that “for all purposes” the social father is the father. But following Priestley J’s analysis, would a named donor of genetic material, who had donated according to an agreement, with no rights as a father or mother, perhaps be in the same position as Mr P, especially given UNCROC’s concern that children know their parents and society’s knowledge about biological father- and mother-unique benefits for children? Under the provisions of the Human Rights Act,<sup>1428</sup> not yet applicable to Ms K and Ms M in this context, their relationship would arguably also be enough to offer them autonomy and protection from Mr P’s efforts to change the grounds of their agreement. Once gay and lesbian partnerships are legitimised for all purposes, will any court still be concerned about the involvement of someone of the opposite gender being necessary and if so why? Will UNCROC’s “both” parents be understood as both social parents regardless of gender?

Justice Heath’s endorsement of contractual arrangements (subject to the Court’s scrutiny if there were disagreements) also begs questions about practicalities. When coupled relationships, whether heterosexual or same sex even with only two parents, involve children it is, as has been explored, often extraordinarily difficult to manage care of children before and after the relationships break down. With four “parents” involved the difficulties become exponential.<sup>1429</sup> The expectation that these parents will be able to regulate parenting by agreement, even or especially agreements monitored by the Court (with a history of being often unsuccessful in imposing solutions on two parents who will not accept a hierarchy of care) seems an extraordinary weight to place on same sex couples, often anyway faced with challenges not faced by heterosexuals. With respect, whangai arrangements are different in that they operate within a hapu or iwi context which has no parallel in non-Maori same sex cultures. Where, as anecdotally is often the case, known donors come from the families or friends of lesbians or gays, the

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<sup>1428</sup> See above, n 168.

<sup>1429</sup> Ken Duncum’s play *Cherish* (2003) presents completely believable permutations of difficulties between a lesbian and gay couple each of whom terminated their relationship during the play, primarily because of issues around children. The fact situation in *Re Patrick* [2002] 28 Fam L R 579 (FCA) was very similar to that of *P v K*. See above nn 27, 31, 95, 152.

potential for making an agreement “work” through imposed, Family Court-based solutions cannot be any better any more than where a donor is known to a heterosexual couple.

Priestley J did not explore these possibilities. He noted only that if D had been conceived through a single act of sexual intercourse or a transitory heterosexual relationship, Mr P would have had “unimpaired”<sup>1430</sup> rights as a father and that it was anomalous that Mr P’s rights were only nominal, especially in this factual situation. If Ms M and Ms K’s relationship were formally recognised, Mr P’s rights would not even have been nominal; the agreement might then have been as irrelevant as an agreement between a heterosexual couple and a donor arguably would be today.

It is hard to know whether in future a Court would refer as readily to *Tripp v Hinckley*<sup>1431</sup> where the Supreme Court of New York rejected an argument that the father’s status was only that of a “sperm donor” and allowed increased access (custody was apparently not an issue) observing that<sup>1432</sup>

As a matter of policy the approach taken by the appellate division of the Supreme Court of New York accords with common sense, justice and a child-focused result.

If it were to do so, logically it would be open for courts to do so where heterosexual couples also accessed genetic material from a known donor by agreement, displacing the provisions of section 5 (1) of the SCAA. In view of concerns about secrecy about genetic information<sup>1433</sup> and the limited role of father-unique and mother-unique benefits for children, in contrast to the holistic benefits of *E v M*-style nurture, agreements about contact with biological parents who have never been part of a child’s household may become both more common and more sophisticated in spite of difficulties about enforcement, in situations other than prevention of relocation. Any ideological requirement that they yield to the Court’s perceptions of children’s welfare interests, as well as to court orders would cause the difficulties inherent in any enforcement. It would become necessary to define more closely what “parent” means, whether there is any role for a “mother” or “father” as distinguishable from “parent”, what “responsibility” means, what actual benefits various adults bring to a child’s life and how a child’s primary carer and household will be protected from inappropriate interference by another party, or several other parties.

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<sup>1430</sup> *P v K*, above, 808.

<sup>1431</sup> *Tripp v Hinckley* (2002) 290 AD 2d 767 (N.Y. App Div).

<sup>1432</sup> *P v K*, above, 809.

<sup>1433</sup> See Chapter 2 above, nn 211-215 and accompanying text.

(iii) Section 23(1)(A)

No-one in the discussions about “fathers” in these cases referred to section 23(1)(A) of the Guardianship Act. However, the consistent use of “father” rather than “parent” to describe both Mr Anderson and Mr P also implied (contrary to section 23(1)(A)) that any “father” had something special to offer a child, beyond the Sturge and Glaser father-unique benefits.<sup>1434</sup> Mr Anderson may have been offering more than father-unique benefits to his child, and Mr P may have wanted to offer more. However, justifying their involvement as custodians in an attempt to “restructure” families that never existed arguably imported a “presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.”

In *Anderson v Paterson* Judge Bisphan refers consistently to “a non-guardian father” without exploring the concept of non-guardian parents in general, which might include all those who undertake “caring for” parental responsibilities, like Ms K, step-parents (to whom His Honour refers only in seeing no difficulty in relation to similar, “custodial” rights) and grandparents. This is consistent with the extra-judicial views of Family Court judges signalling a widening of the parental “base” within the jurisprudence.<sup>1435</sup>

Judge Inglis QC went to some length to name Mr P as “father” rather than “sperm donor” but did not explore the meaning of “father”, the distinction between “father” and “parent” and how these related to section 23(1)(A). Priestley J’s ruling that Parliament’s intention by enacting section 5(2) of the SCAA was to “preserve a father for this child,”<sup>1436</sup> has a different meaning if the word “parent” is substituted for “father.” But D’s need for a parent to provide nurture did not need to be preserved; he had two parents already. His welfare needs were arguably met by them (Judge Doogue found that there was no evidence that “the child’s current circumstances require intervention by the Court in the form of a custody order”<sup>1437</sup>). Arguably the only way to justify the fathers’ involvement in these families that appear to be “working” is that they offer something because of their gender, as *fathers*, rather than as parents providing day to day care. As already

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<sup>1434</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 616-617. See above n 26 for full list.

<sup>1435</sup> See above Chapter 4 n 35 and accompanying text.

<sup>1436</sup> *P v K* [2003] 2 NZLR 787 (HC), 819.

<sup>1437</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 6.

argued father-unique benefits are limited, however, and may be outweighed by various detriments including ongoing conflict.

His Honour's ruling that section 5(2) SCAA had little relevance given the "overarching imperative of section 23(1) of the Guardianship Act added to ... the imperatives of UNCROC that declared the D's right to know and have contact with his father"<sup>1438</sup> also implies that Mr P's gender is significant. Priestley J may here have overstated the imperatives of UNCROC. The UNCROC right is "to know and have contact." This does not mean custody; it can be preserved through access in its meaning as a visiting-type relationship which may involve an element of day to day care but does not necessarily import the kind of authority invested in guardianship or custody status.

*(iv) The lesbian family unit*

As well as disregard for Ms M's status as sole guardian, ambivalence about the lesbian family unit permeates the Family Court judgments in *P v K and M*. Judge Inglis described Ms M and Ms K's relationship as sufficient to constitute them as a "family", having "demonstrated a history of 'mutual interdependence, of the sharing of lives, of caring and love, of commitment and support'<sup>1439</sup>," that are "ordinarily assumed to exist"<sup>1440</sup> in a legal marriage. Ms K was a co-parent, "sharing responsibility for D's upbringing and care"<sup>1441</sup> with Ms M.

But while according dignity to Ms K and Ms M's family unit and acknowledging that Ms K and Ms M were co-parents, His Honour also seems to imply that their politics and ideology might not be in the best interests of D; and that these would be examined in later proceedings in a way that "ordinary human realities"<sup>1442</sup> (heterosexual ideology and politics) might not be, because of their possible influence on D's upbringing, Mr P's motivation in attempting to obtain more contact and Ms M and Ms K's in resisting that. Their family unit was not protected from interference by the Court.

Judge Doogue also implied that Ms K and Ms M's household was functioning as a family unit, with only one parent as a custodian, when she stated that "there is no evidence that D's current

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<sup>1438</sup> *P v K*, above, 819.

<sup>1439</sup> *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 (HL), 38 Lord Slynn.

<sup>1440</sup> *K v M* (12 July 2002) Family Court Auckland FP 004 331-B 02, 5.

<sup>1441</sup> *K v M*, above, 4.

circumstances require intervention by the Court in the form of a custody order,”<sup>1443</sup> with the result that she refused all the applications except Mr P’s and Ms K’s for guardianship.

However, in being “saddened that these were the conclusions I have to reach,”<sup>1444</sup> because on the untested evidence it appeared that Mr P had a lot to offer D she, like Judge Inglis QC seemed to be concerned about the quality of Ms K and Ms M’s parenting, rather than accepting as valid the integrity of their family unit and their assessment of D’s needs in relation to Mr P. From her statement that Ms M and Ms K were short-sighted if they did not appreciate the damage they were more likely than not to do to D’s long term emotional wellbeing by precluding contact of a meaningful nature between D and Mr P<sup>1445</sup> the obvious inference is that in her judgment their family is not enough for D without his having a relationship with Mr P.

This is consistent with current judicial ideology, and with the comments of Judge Doogue herself, at the Law Society Conference two years earlier.<sup>1446</sup> Like Judge Inglis QC, Her Honour appeared to be saying on the one hand that a lesbian family is acceptable, but on the other hand this lesbian family, like a family headed by a single mother, is not “protected from [what they perceive as] gratuitous or unjustified outside interference”<sup>1447</sup> by non-guardian fathers. By seeking to entrench the status of a non-guardian father, the judges also compromised the autonomy of the single guardians, who may be labelled “bad” if they resist this.

In the High Court, Priestley J noted that “an unmistakable inference to be drawn” was that Ms M and Ms K had not hesitated to invoke available procedural obstacles presented by the SCAA because the arguments they raised would not have been available to them had the child been conceived as a result of heterosexual contact or a heterosexual relationship.<sup>1448</sup>

He did not acknowledge, and nor did Heath J, in his later discussion of the Law Commission’s report on adoption, that if lesbian relationships of the kind Ms K and Ms M had, as described by

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<sup>1442</sup> *K v M*, above, 5.

<sup>1443</sup> *P v K and M* (8 August 2002) Family Court Auckland FP 004 331-B 02, 6.

<sup>1444</sup> *P v K and M*, above, 6.

<sup>1445</sup> *P v K and M*, above, 7.

<sup>1446</sup> See above Chapter 4 nn 65-71 and accompanying text.

<sup>1447</sup> *W v C* [2000] NZFLR 1057 (FC), 1062 Judge Inglis QC.

<sup>1448</sup> *P v K* [2003] 2 NZLR 787 (HC), 793.



Judge Inglis, were acknowledged to be “in the nature of marriage”, Ms K would be D’s second parent and Mr P would have no standing at all under section 5(1) of the SCCA.<sup>1449</sup>

As well, the issue was not entirely a lesbian one. The procedural grounds Ms M and Ms K invoked would also have been available to a single heterosexual or lesbian woman, who self-inseminated a known donor’s sperm. A heterosexual or a lesbian woman, who unlike Ms M actually was “single”<sup>1450</sup> in the same situation might well also believe that she had a right to choose the extent of her sperm donor’s involvement. Again, because Priestley J did not refer to section 6(2) of the Guardianship Act, it can be inferred that His Honour did not see this provision as one that provides on its face a significant (and reasonable) protection for single heterosexual women and lesbians, both single and in a relationship, from inappropriate intrusion by their children’s fathers into their family lives, if they had not been married to or living with them when their child was born.

If, as Priestley J observed, the statute was “undoubtedly”<sup>1451</sup> based on an assumption that the technologies would be used by heterosexual couples, why was section (5)(2) included, for single women as well as for a married woman who used AID without her husband’s consent?<sup>1452</sup> His Honour’s statement that the provision produces “an unjust result so far as [Mr P] is concerned”<sup>1453</sup> on the grounds that D is the result of “a carefully negotiated agreement between four adults, two of whom for psychological or sexual-political reasons wished to use Mr P’s sperm to produce a child instead of resorting to sexual intercourse,”<sup>1454</sup> trivialises the relationship of Ms K and Ms M and the day to day care they are committed to providing for D as his parents.

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<sup>1449</sup> The Law Commission had looked at three ways whereby couples like Ms K and Ms M could be protected in exactly these circumstances, whether to amend the SCAA to give legal status to lesbian-led families and considered to be parents in the same way as heterosexual couples, whether to opt into the SCAA presumptions rather than have them apply automatically, or whether to require them to apply in this situation for step-parent adoption or an enduring guardianship order (a proposed form of guardianship within a new framework). The Commission saw retaining the status quo as a fourth option and identified “the issue” as being whether Parliament should leave the regulation of parental relationships to the discretion of the biological mother and her partner or enact presumptions to preclude a legal relationship between the donor father and the child: Law Commission/ Te Aka Matua o Te Ture *Adoption and Its Alternatives: A Different Approach and a New Framework* (2000), 211-212.

<sup>1450</sup> Counsel for Mr P’s submission that the framers of the SCAA had never envisaged that it would extend to a single lesbian woman, *P v K and M* begs the questions of whether Ms M was “single”; and whether a lesbian is a woman or not.

<sup>1451</sup> *P v K*, above, 807.

<sup>1452</sup> “The latter contingency perpetuates the policy of s 21(1)(b) of the Matrimonial Proceedings Act 1963 which listed ... artificial insemination with the semen of a man other than the divorce petitioner’s wife” as a ground for divorce”, *P v K*, above, 807.

<sup>1453</sup> *P v K*, above, 808.

It also glosses over Mr P's reasons for providing sperm (some of which may have affected his wanting to change the terms of the agreement or provided reason, once they were revealed, for Ms K and Ms M to alter their relationship with him). Responsibility for the situation seems to be allocated too easily to the mother, and her partner.

His Honour's comment that the custody application of Ms K "will need to be determined with an eye on the respective roles and child sharing arrangements of the mother and her partner" appears to be clear signals to the Family Court both that Ms K is not to be permitted to withdraw her application for custody (opening the way for a *Tito* order); and that this family unit is one where child care responsibilities will be monitored without hesitation in a way that does not happen with heterosexual partnerships, protected from "gratuitous or unjustified outside interference."<sup>1455</sup>

His Honour's ambivalence about lesbian parenting practices seems to extend to gay parenting as well, if surrogacy is required, when he states that since in principle and in logic there is no difference between providing gay men or lesbian women with children because each requires the participation of someone of the opposite gender. He seems to imply that different arrangements would always be necessary for a lesbian or gay couple than for a heterosexual couple. Equally, when he notes, that because section 5(2) exists among a number of sections "designed to ensure that donors involved in various new birth technologies are not exposed to parental liabilities nor in a position to exercise parental rights,"<sup>1456</sup> there was a serious risk that to interpret section 5 (2) in a different way would affect cases with totally different facts, it is possible that he is thinking of the facts affecting heterosexual households.

Since His Honour found no suggestion that any significant problems are posed for the children<sup>1457</sup> of AID, it would have been possible here to affirm the integrity of a lesbian family unit rather than to conflate the need for genetic material from a member of the opposite sex with a presumption that each child needs parenting from a both a woman and a man.

His Honour also noted that the use of AID could give rise to difficult issues, that from the child's perspective the legal complexities were unhelpful and that it was undesirable that fathers and

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<sup>1454</sup> *P v K*, above, 808.

<sup>1455</sup> *W v C* [2000] NZFLR 1057 (FC), 1062 Judge Inglis QC.

<sup>1456</sup> *P v K*, above, 808.

<sup>1457</sup> But see discussion above Chapter 2 III. 4. (i) *Identity and the genetic connection*.

children in the situation of Mr P and D “should be left legally marooned.”<sup>1458</sup> His Honour did not explore whether and how this was any different from child whose biological father was a known donor to a heterosexual couple, with or without the knowledge of the mother’s husband or partner.<sup>1459</sup> However it can be inferred that His Honour saw the problem in terms of father absence and, perhaps, lesbian familial illegitimacy rather than in positive terms of the second parent presence provided by Ms K. He may also be referring to child support and inheritance implications.<sup>1460</sup>

#### IV. Concluding Remarks

This chapter has explored the justification for giving guardianship rights to fathers who did not have them at their children’s birth, within the context provided by Part I. Arguably, both *Anderson v Paterson* and *P v K* represent a new “high point”<sup>1461</sup> in the recognition of parents’ equal and shared right to exercise guardianship responsibilities. These cases have the potential to replace *W v C*’s “starting point” of shared guardianship with a starting point of shared custody, eliminating the use of a custody and access structure for exercising parental responsibility, an arguably more appropriate expression of the hierarchy of care.

Cumulatively these cases result, it is submitted, in the institutionalisation of the assumption that absent sexual or physical abuse, if a father wants to be involved in his child’s life, his right to

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<sup>1458</sup> *P v K*, above, 820.

<sup>1459</sup> His Honour’s reluctance to interpret s 5(2) any differently because it might affect other fact situations (impliedly in heterosexual contexts) seems justified by the facts in a recent English case before the Queen’s Bench, presided over by Dame Elizabeth Butler-Sloss. There it was held that the husband of a woman who was mistakenly impregnated with another man’s sperm in the course of fertility treatment, and who subsequently gave birth to twins, was not the legal father of the twins. (*Leeds Teaching Hospitals NHS Trust v A and others* [2003] EWHC 259 QB, summarised in *The Independent* 5 March 2003, 18). The mother’s husband was held to have remedies “to protect [his] position”, including application for a residence order giving him parental responsibility and an application, with his wife, to adopt the twins. The newspaper summary does not refer to the position of the biological father. The solution in this case contrasts with Ms K’s options: following *Re an Application by T* [1998] NZFLR 769 (HC) (where a lesbian’s application to adopt her partner’s child was refused) she and Ms M are unlikely to be able to protect their family’s integrity by Ms K adopting D; with a custody (residence) order the family becomes exposed to a *Tito* ruling. But, most importantly, there is no acknowledgement throughout *P v K* that Ms K, or Ms K and Ms M, jointly have a status that requires protection.

<sup>1460</sup> The question of Mr P’s possible child support liability if he became a guardian/custodian is not raised anywhere in the case.

<sup>1461</sup> von Dadelszen, *P Rights or Obligations? - Review of the Guardianship Act 1968* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001). See above Chapter 4 n 62.

participate is to be given priority over the measurable benefits of it to the child and the effects that his participation might have on the conditions under which the mother has to parent. Both *Anderson v Paterson* and *P v K* focus on including the father qua father, as an equal parent, rather than interpreting section 6(2) of the Guardianship Act in a way that supports the children's primary carers and, arguably, compromises their peaceful family life.<sup>1462</sup>

These cases appear to attempt to eliminate the legal structure of custody and access that supports the realities of parental responsibility shared on a primary and auxiliary basis, and offers children the best opportunity for contact with a second parent that "works". Where parents agree about how to share parenting, the loss of this structure is unlikely to matter. However, it is submitted, that where parents disagree, particularly if the primary parent seeks autonomy and the auxiliary parent wants to exercise ambivalent or debilitating power, the replacement of the structure with another that gives the auxiliary parent more authority will further institutionalise gender inequities in parenting and place women and children's wellbeing at risk.

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<sup>1462</sup> Just as this thesis was completed, a newspaper report of the disposition of *P v K*, made after a decision by Judge Fleming of the Family Court Auckland had been upheld by the High Court and the expiry of the appeal period. Although the mothers were given joint custody, the biological mother's partner and the biological partner were both appointed guardians. According to the report "the men" that is, the biological father and his partner, were awarded more access than they sought, from 14 days a year to monthly access, increasing to seven days a month. While this is a custody/access regime it also reflects Family Court judges' proposals for new legislation. It increases the number of guardians confirming the direction of *Anderson v Paterson*: where a mother is initially sole guardian, whether the father was not married or living with her when the child was born, or, as here - in terms of the legislation- not a "father" at all if she has an (otherwise unenforceable) agreement with the biological father of her child that agreement will be enforced. This can be seen both as an illustration of the disciplining function of access law and, again, as acceptance of the *W v C* starting point of shared guardianship regardless of the relationship of father and mother and the father's previous involvement. In the longer term it is possible to imagine that the child, if his mothers were to separate (and many relationships are placed under intolerable stress by this kind of prolonged litigation) the child may shuttle between three households. The headline indicates that this decision is seen as a fight for possession, with no discussion in the article of what the donor father and his partner will be offering that the child's mothers do not, of the potential effects of the decision on the primary carers and the effects on the child of the conflict that may continue between the adults concerned: Milne J "Gay Men Win Legal Fight for Toddler" (2004) *Sunday Star Times* 18 April A1. An associated report's headline carefully discriminates between "parents" and "sperm donors": Milne J and Henzell D "Same-Sex Parents Wary of Ruling: Need for Legal Agreement Between Sperm Donors and Parents Underlined" (2004) *Sunday Star Times* 18 April A2.

## Part II: Summary

*This Part surveyed leading cases where biological parents could not agree about their respective roles in a hierarchy of care for their children, and the auxiliary parents wanted to define and exercise their rights in ways that may have been debilitating or ambivalent to the primary parents and their children.*

*The analysis found that over the last decade, in these cases, the Court has ignored the presence and imperatives of the hierarchy of care while developing the principle of equal and shared parental obligations as the fundamental position, justified by reference to the provisions of the Guardianship Act. This principle, similar to the allocation of parental responsibilities under section 13 of the Act, was most precisely articulated by Judge Inglis QC in *W v C*. Although *W v C* was overruled by the Court of Appeal in *D v S (no 11)* its influence seems to have persisted in the Family Court decision in *Anderson v Paterson* and the High Court decision in *P v K*, advocating guardianship rights for fathers who were not guardians when their children were born. Overall, the jurisprudence appears to aim at ensuring that an auxiliary parent does not find himself “in the position of regarding [himself] as a second-class parent.”<sup>271</sup>*

*At the same time, it is submitted, the Court has been reluctant to address the exercise of ambivalent or debilitating power by auxiliary parents and their unwillingness to undertake their “equal and shared parental obligations.” In *Cunliffe v Cunliffe* and *Collins v Sawtell*, the Family Court decided that it was unlikely to have jurisdiction to enforce these obligations if an auxiliary parent was unwilling to exercise them. It therefore did not investigate the effects of this unwillingness on the primary carer or the children, or penalise the parent concerned. When neither parent initially has custody and a hearing is necessary, the Court may be sympathetic towards a mother who has to care for her children by default, as in *Bramley v MacDonald*, but the Court’s ability to provide a solution supporting the primary carer appears to be limited. Only one case, *W v W*, was found where the Court used its wide discretion to impose a monetary penalty on an auxiliary parent already paying child support, apparently because the Court understood the parent’s minimising of his child support obligations as part of an overall strategy to control the primary carer, including physical violence.*

*It was noted that the Court is reluctant because of the provisions of section 23 (1)(A) of the Guardianship Act, to acknowledge gendered parenting patterns and gender inequities. However in W v C, D v S and P v K the Court sometimes appeared to justify decisions favouring auxiliary parents on gendered grounds. Because the auxiliary parent in these cases was a father, the expectations of his parenting contributions tended to be different and differently justified, than for the primary carers, the mothers.*

*In summary, in these cases the Court appeared to assume that mothers who were primary carers would continue to parent whatever the conditions were and that auxiliary parenting, however exercised, would enhance the wellbeing of their children. “Good” primary and auxiliary parents will therefore make decisions based on these assumptions and this will benefit their children. Mothers who do not accept these assumptions may be “disciplined”, overtly as in D v S (no 9) and Anderson v Paterson or more subtly as when the Court claimed lack of jurisdiction in Cunliffe v Cunliffe and Collins v Sawtell or imposed a third parent on the two parent family in P v K.*

*This can be justified by use of Trinder et al’s dominant child welfare discourse, implying that putting the child first includes ensuring that the child has contact with an auxiliary parent, and fitting with the “best interests” principle which the Court uses to justify all its decisions. However there was also evidence of the Court using one of Trinder et al’s alternative discourses, giving parental (paternal) needs equal prominence, with the child’s. Judge Inglis QC in W v C and Judge Somerville in D v S (no 9) seem to have been influenced by this discourse, often used by fathers in Trinder et al’s “consistently battling” group, including perhaps every father in these cases. This discourse may also have influenced Priestley J’s reasoning in P v K, where the child already had two parents. The Court did not refer, explicitly or implicitly, to the value of building the children’s relationships with their primary parents, Trinder et al’s other discourse, in any of the cases.*

*Trinder et al also found that the mothers in the “consistently battling” group used elements of all three discourses when contact was not working. However, although the mothers in W v C, Anderson v Paterson and P v K resisted the children’s fathers being given an equal parental*

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<sup>1</sup> P v K [2003] 2 NZLR 787 (HC), 810, Priestley J.

*status, in general the Court's assumptions appeared to be shared by primary carers as well as auxiliary carers. Gender inequities were not cited by Ms Bramley and Ms S, the only mothers to challenge the assumption that they would continue to provide primary care regardless of the conditions inherent in doing so. None of the primary carers in these cases asked that their children's fathers be removed as guardians because they were unwilling to play an appropriate role, were unsupportive of the mothers' work as primary carers, were emotionally abusive of the mothers and children, or prevented the family establishing a peaceful life. It seems possible that these mothers did not do so because there was no discourse from which to address their situation. It is submitted that they may have experienced actions based on the questioned assumptions as emotionally abusive, whether they were the auxiliary parents' inappropriate exercise of ambivalent or debilitating power or the responses of the legal system itself. But having no discourse within which they could fully articulate their situation, perhaps because the language around the experience of emotional abuse is undeveloped<sup>2</sup> and possibly fearing the Court's and the auxiliary parents' power to "discipline" them,<sup>3</sup> they remained silent.*

*It is argued that reform is necessary, to provide a discourse within which primary carers can be heard. In Chapter 9 it will be proposed that the reform be based on supporting and protecting the relationship between a child and his or her primary carer, with an acknowledgement of the role of the hierarchy of care and gender inequities. At the same time, it is submitted, it is important to provide for change in the short or longer term, that includes the auxiliary carer in the child's life.*

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<sup>2</sup> See above Chapter 2 n 120.

<sup>3</sup> See above Chapter 4 n 54 and accompanying text.

### Part III: Reform

*The decisions surveyed in Part II appear to confirm that the jurisprudence of shared parenting depends on the assumptions in question in this thesis. The justification for these decisions tended to be incompatible with the social science narrative from Part I, and thus possibly damaging to women who are primary carers and to their children. The thesis now addresses these issues, turning to reform. Chapter 9 begins by surveying a range of proposals for law reform to benefit children whose parents do not live together and cannot agree about how to share responsibility for them, and related perspectives on the wishes or views of children. It then proposes two avenues for reform. The first is a change of belief system, allowing for alternative interpretations of the Guardianship Act and use of its associated judicial discretion. The second part of the proposal addresses legislative reform, aiming to fulfil the intentions of UNCROC as expressed in its Preamble. Finally, Chapter 9 uses elements of the proposed reforms to resolve seven of the eight considered cases. The Conclusion to the thesis follows, in Chapter 10.*



## Chapter 9. Law Reform

*[A child] "for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding ... brought up in the spirit of the ideals proclaimed in the Charter of the United Nations ... in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."*<sup>1463</sup>

*The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too ... Today contact does not have to be exclusively physical or face to face if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents, who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the Convention on the Elimination of All Forms of Discrimination Against Women ... That Convention requires that such discrimination and inequality should be eliminated from the law of this country. - Justice Kirby*<sup>1464</sup>

### I. Introductory Remarks

In view of the findings of Trinder et al that commitment to contact and parents' role bargains in "working" contact arrangements were in place early in the decision-making process, and that where contact was "not working" repeated attempts to impose a solution resulted in little improvement, the Family Court's present emphasis on enforcing auxiliary parental rights may not be helpful.<sup>1465</sup> This enforcement appears to privilege auxiliary parents' experience of situational powerlessness, while performing "a disciplining function in relation to maternal behaviour,"<sup>1466</sup> in relation to primary caregivers, justified by the rhetoric of the paramountcy of the welfare of the child. It is arguably institutionalisation of gender inequity.

It has been argued that the cases considered in Part II demonstrate that contemporary Family Court jurisprudence does not take into account the gendered nature of parenting and gender inequities identified in the social science narrative. Because there appears to be inadequate understanding of and concern for the mechanisms of the hierarchy of care and the consequences for primary parents and their children when the hierarchy does not work, Family Court decision making depends on the two assumptions under question in this thesis. Reform is therefore necessary to support and protect the primary carer whose wellbeing is crucial to the wellbeing of

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<sup>1463</sup> Preamble UNCROC.

<sup>1464</sup> *U v U* [2002] 24 Fam L R 74 (HCA), 110-111.

<sup>1465</sup> Trinder et al suggest that resources should be directed towards more creative work to improve parental and parent-child relationships and advocate greater access to counselling services for children and making available advice on how to make access work: Trinder L Beek M and Connolly J *Children's and Parents' Experience of Contact after Divorce* (2002) <http://www.jrfor.org.uk/knowledge/findings/socialpolicy/092asp> (accessed 9 March 2003), 5.

<sup>1466</sup> Boyd S "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) *Social & Legal Studies* 5(4) 495, 502.

children as well as to achieve the actual rather than assumed benefits of a child's relationship with an auxiliary parent. This would require a change in interpretation of the Guardianship Act or amendment of its provisions, to reflect and support the commitment of primary carers (most of them women) to caring for children. These changes should take account of the damage done to children by ongoing conflict, and the role of gender inequities in the parenting process.

This reform can be justified by reference to UNCROC's principles detailed in its Preamble. These advocate *a* family environment and "an atmosphere of happiness, love and understanding" and an upbringing "in the spirit of peace, dignity, tolerance, freedom, equality and solidarity" and are arguably a more appropriate reference point than specific articles in the instrument that are conceptually outdated in their reference to *the* family.

Because the best interests of the child are central to discussions about their care when their parents do not live together, the broad, discretionary, nature of section 23(1) in the Guardianship Act (and similar provisions in other jurisdictions) have concerned many commentators. These commentators sometimes suggest "rules" to make explicit the values of the community and the Courts and to benefit children as well as parents by providing some certainty and by limiting the parameters of parental conflict after separation. A selection of these suggestions will be described and discussed, followed by discussion of the role of children's own views.

The chapter will then focus on an alternative structure for reform that sees the best interests of the child as being met by support for that child's primary carer. This can occur in two ways, through interpreting provisions of the Guardianship Act to reflect a change in value system or by legislative amendment. These will be considered in turn, following a discussion of competing theories about how to meet the best interests of the child and the child's wishes and values.

Finally, to demonstrate use of the proposed reforms, possible solutions to the cases in Part II will be suggested.

## II. A Reform Structure

### 1. Competing theories

Each of the five following suggested rule systems for promoting the best interests of the child, from writers from the United States, United Kingdom and New Zealand,<sup>1467</sup> tends to emphasise one of Trinder et al's three dominant discourses.<sup>1468</sup> Summaries of positions of the commentators<sup>1469</sup> on the wishes and views of the child follow to put these in perspective.

#### (i) The best interests of the child

In New Zealand, Henaghan has noted that the Court has to take into account all aspects of welfare, physical, moral and emotional and that the factors to be considered are unlimited.<sup>1470</sup> He identifies only one area in the Guardianship Act where values are prioritised, in section 16B where (physical and sexual) safety is prioritised. He states that the outcome of cases depends on the emphasis of a particular section 29A reporter, who becomes a substitute decision maker, the position of the counsel for the child,<sup>1471</sup> and the factors a judge wishes to emphasise.<sup>1472</sup>

Henaghan's analysis of the best interests test is that it is personal and individualised, attempts to look into the future, is idealistic, attempts to do as best it can and is dependent on the judgments that people in authority make about litigants. In advocating the use of rules, along with parent education, conciliation and a change of legal language to reflect shared day to day care where both parents are guardians, Henaghan sees that rules have four benefits. These are that arguments must be made in terms of the rule and this restrains the decision makers, that there is an objective

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<sup>1467</sup> Henaghan R M "Custody Decisions - Discretion Gone Too Far?" (2000) *Otago Law Review* 9(4) 731; Fineman M A "Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking" (1988) *Harvard Law Review* 101(4) 727 (the ideas in this article were further developed in *The Illusion of Equality; the Rhetoric and Reality of Divorce Law Reform* (1991) University of Chicago Press and *The Neutered Mother the Sexual Family and Other Twentieth Century Tragedies* (1995) Routledge); Smart C and Neale B *Family Fragments?* (1999) Polity Press; Eekelaar J "Beyond the Welfare Principle" *Child and Family Law Quarterly* (2002) 14(3) 237; Kelly R F and Ward S L "Allocating Custodial Responsibilities At Divorce; Social Science Research and the American Law Institute's Approximation Rule" (2002) *Family Court Review* 40(3) 350.

<sup>1468</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation (*Making Contact*) 36-37. See also above, Part II: Summary

<sup>1469</sup> Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307; Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615; Eekelaar J "Children's Rights: From Battle Cry to Working Principle" *Liber Amicorum Marie-Therese Meulders-Klein: Droit Compare Des Personnes et De La Famille* (1998) Bruylant.

<sup>1470</sup> Henaghan refers to *G v G* [1978] 2 NZLR 444 (CA) and *D v W* 13 FRNZ 336 (not viewed).

<sup>1471</sup> This view is similar to that of Fineman. See below n 22. But see *D v S* (no 9) where counsel for the child was not mentioned and his position was ignored.

<sup>1472</sup> Henaghan, above, 736.

measure for outcomes, that the rule makes clear what the values are and there is an opportunity for authority to be reasonably clear and specific rather than open-ended and vague.

Henaghan proposes two rules. The first is that both parents have common responsibilities for the upbringing of children. These responsibilities include deciding where the child is to live, educating, nurturing and providing a set of values for the child. His second rule is that where there is a disagreement between parents or caregivers over where a child should live or the exercise of parental responsibility the Court should decide this on the basis of minimum disruption to the child's environment, routine and relationships.<sup>1473</sup> The first rule is similar to Judge Inglis QC's formulation in *W v C*.<sup>1474</sup> Henaghan proposes exceptions to these rules only where a child consistently expresses a view seeking change, there is clear evidence of physical sexual or emotional harm to the child and a need to protect the child, or it is necessary to keep a parent or caregiver safe.

There are problems with the basis on which these rules are formulated and with the rules themselves. These will be discussed in turn.

Firstly, in identifying only one area in the Act where values are prioritised, Henaghan has ignored some provisions prioritising significant values for women and their children and offering

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<sup>1473</sup> Henaghan, above, 740. He refers to the Children (Scotland) Act 1995. This provides that

- (1) A parent has in relation to his child the responsibility –
- (a) to safeguard and promote the child's health, development and welfare;
  - (b) to provide, in a manner appropriate to the stage of development of the child-
    - (i) direction;
    - (ii) guidance, to the child;
  - (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
  - (d) to act as the child's legal representative,
- but only in so far as compliance with this section is practicable and in the interests of the child;
- and that

- (2) ... [A] parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right – to have the child living with him or otherwise to regulate the child's residence; to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing; if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and to act as the child's legal representative.

This is the law on which the Law Commission based its proposed changes. See above Chapter 4 n 29. This was "of some interest" to Heath J in *P v K* [2003] 2 NZLR 787, 821.

<sup>1474</sup> See above Chapter 6 nn 35, 74, 95-100; and accompanying text.

potential acknowledgement or are dismissive of women's realities as they care for children. Consequently the rules ignore the mechanisms necessary if the hierarchy of care is to work successfully (including the likelihood that the hierarchy will not work well if imposed). They may reinforce the assumptions that women will continue to parent regardless of the conditions they are required to parent under and that a fixed relationship with a second parent is necessary for a child to flourish.

Section 6 of the Act, for instance, prioritises values by providing for a mother to be the only guardian if she was not married to or living with the child's father at the time of the child's birth. It recognises the institution of single motherhood and assigns a value to and protects the relationship between the mother and the child. If that child's biological father wishes to be formally involved with the child's upbringing he must go through a legal process to become a guardian, to have the right to access, or to gain custody. Henaghan's rules would obscure the way the institution of a family headed by a single mother is valued and protected in this section.

The provisions for custody and access (sections 13 and 15) also arguably reflect values by acknowledging that there are two kinds of parental commitment, a primary one involving day-to-day care and an auxiliary one entitling a parent or other person to "visit" or "reach" a child.<sup>1475</sup> These sections value and protect the hierarchy of care described by Trinder et al, in particular the commitment of a primary parent, just as the limits on who is eligible for custody or access value parents, distinguishing and protecting their status from those who do not have it. As discussed however, "access" and "shared custody" are used ambiguously to describe a continuum of auxiliary commitment including some day to day or protective care.<sup>1476</sup> It is therefore possible to ignore the distinction between primary and auxiliary care, the hierarchy existing in many successful arrangements, however described and the attendant susceptibility of primary parents to gender inequities, including the exercise of ambivalent or debilitating power by the auxiliary carer.<sup>1477</sup>

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<sup>1475</sup> "Reaching" can be text-based or electronic.

<sup>1476</sup> See above Chapter 1. V. Terminology: The Language of Shared Parenting.

<sup>1477</sup> Henaghan acknowledges that "at the time of break-up parties tend to follow the pattern of child-care before break-up. The person who had been carrying out the predominant care tends to continue ..." Henaghan, above, 739.

The other problems are with the rules themselves. It may be difficult to create common responsibilities for children after separation if they have not been shared before, particularly if there has been or is conflict about what “common responsibilities” mean.<sup>1478</sup> The shared responsibility and maintenance of the status quo espoused by Henaghan - where there is a pre-separation hierarchy of care and a post-separation conflict - gives a second parent equal “authority” while placing heavy demands on the primary caregiver. This person, now in difficult social and economic circumstances, has to maintain the family structure as closely as possible to a hierarchy of care (including facilitation of her child’s relationship with his or her father) even if this did not work in the past, is causing conflict and is likely to cause conflict in future. She has to remake a household without autonomy because it is assumed that her child’s relationship with the other parent will be best managed by as little change being made as possible.

Underlying both of Henaghan’s rules is the assumption that a particular kind of relationship with a second parent existed and will endure or be developed further after separation, and does not address a possibility that this will not be appropriate in the short term or longer term. This is arguably unrealistic, given the disruption that has already occurred in a child’s life when his or her parents separate, to try to fix a child’s environment, routine and relationships for some time after parental separation when each parent has to establish a life independently of the other.<sup>1479</sup> This process *requires* change and part of that change may be that a second parent’s significance changes for a child, as well as everything else. A child’s environment will also change if a matrimonial home does not survive the separation.

Furthermore when there is conflict during this process there may be new issues around protection of a child or caregiver that exacerbate uncertainty and may be capable of resolution only through fundamental change in relationships and environment. Henaghan includes emotional harm as something from which the child should be protected; and requires that section 16B be read consistently with section 23(1): the conduct must *affect* the child. However, perhaps because s 16B covers the effects of physical harm only, he does not discuss the possibility that prolonged conflict between parents including the use of debilitating and ambivalent power by a second parent (which may not be terminated by the use of clear rules) will adversely affect the child and might only be resolved changes to the child’s routine, relationships and environment.

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<sup>1478</sup> See above Chapter 2 II. Gender Issues and Shared Responsibility.

*D v S* (no 11) has now formally disapproved of one of Henaghan's rules, as formulated by Judge Inglis QC in *W v C*, at least its application in relocation cases, because this would give a presumptive weighting in making an "all factor" approach to assessing how to meet a child's welfare needs.<sup>1480</sup> However an implicit rule about shared parental responsibility now appears to be judicially endorsed and extended to biological fathers who are not guardians<sup>1481</sup> and may be extended to family members, genetic and social,<sup>1482</sup> beyond the present provisions of either the Guardianship Act, or the Children, Young Persons, and Their Families Act. It is submitted that the issues decided in the cases in Part II would not be readily resolved by use of these rules.

In contrast to Henaghan, Fineman proposes a primary parent rule to protect "the primary caretaking role that is stereotypically and statistically associated with mothers;"<sup>1483</sup> her proposal is located within Trinder et al's second discourse. She argues that in the United States trend towards shared parental responsibility and mandatory mediation represents an appropriation of authority by the helping professions who see divorce as an emotional crisis.<sup>1484</sup>

In spite of the imposition of a shared parenting ideal, the social role and function of sole custodial parent continues and the substance of arrangements made "resemble sole maternal custody and paternal visitation."<sup>1485</sup> The change of language to accommodate fathers' interests obscures the reality that mothers continue to take primary responsibility for children. Although they may no longer exist as a legal category custodial mothers still exist as an institution albeit one "placed in

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<sup>1479</sup> See above Chapter 2 II. Gender Issues and Shared Responsibility.

<sup>1480</sup> *D v S* (no 11) 6. See Chapter 7 III. 3. *W v C* is overruled: *D v S* (no 10) and *D v S* (no 11).

<sup>1481</sup> See above Chapter 8.

<sup>1482</sup> See above Chapter 4 n 35 and accompanying text.

<sup>1483</sup> Fineman M A "Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking" (1988) *Harvard Law Review* 101(4) 727, 730.

<sup>1484</sup> This may also be so in the United Kingdom and Australia, and in New Zealand. Henaghan, in naming "Overseas Experience" as an influence in New Zealand notes that the outcomes of legislative changes in Australia and the United Kingdom, emphasising joint responsibility, are "dependent ... on the perspectives brought to the changes. The counselling/mediation professions have seen the changes in the most positive light. They believe the change in wording from custody/access to joint responsibility have led to important attitude changes in separated parents where they are more likely to share decision-making and work closely as parents. These professions believe more education in how to achieve this ideal will create more shared parenting situations ... Lawyers are more sceptical about whether the changes have made any real difference:" Henaghan M "Shared Parenting: Where From? Where To? Children's Rights and Families" (2001) in S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, 59-60. While "education" is advocated by the helping professions in New Zealand, they are working within a context where counselling is already well provided for in the legislation.

<sup>1485</sup> Fineman, above, 733.

the shadows.”<sup>1486</sup> A primary caretaking rule would have the advantage of involving an inquiry into past factual situations (an inquiry traditionally undertaken by courts) allow most parents to predict the outcome and be gender neutral on its face (though not necessarily in its outcome given that women are generally the primary caretakers of children). It would also prevent the appropriation of authority by the helping professions.

Fineman advocates that custodial mothers’ experience within the gender based hierarchy of care for children figure “significantly in the establishment of new rules to govern the process and content of custody decision making.”<sup>1487</sup> She also claims that concern about the status and functions of custodial mothers may be “incompatible with the symbolic presentation of equality by liberal mainstream feminism”<sup>1488</sup> where some feminists argue for joint custody in the belief that it will ensure that men take equal responsibility for their children.<sup>1489</sup> One limitation of the primary caretaking rule is that it does not address problems with auxiliary parenting that is debilitating or ambivalent.

The American Law Institute has recently proposed an approximation rule to replace the open-ended best interests standard.<sup>1490</sup> To be referred to as the “past-care taking standard,” it does not aim to identify a “primary” caretaker and thus differs from Fineman’s proposed rule. Its application would result in custodial responsibility (or physical custody), being allocated among parents in proportion to the time each parent had spent performing direct caretaking functions for children, before separation, a maintenance of the status quo, like Hengahan’s rules. In a detailed response to this proposal social scientists Kelly and Ward<sup>1491</sup> conclude that this rule is consistent with social scientific research and theory and that the establishment of this kind of “clear, predictable and rigorously enforced [rule]”<sup>1492</sup> about joint parenting may achieve its goal of

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<sup>1486</sup> Fineman, above, 733.

<sup>1487</sup> Fineman, above, 768.

<sup>1488</sup> Fineman, above, 768.

<sup>1489</sup> This may be a reason why New Zealand’s Ministry of Women’s Affairs is silent in a recent report about the implications for mothers taking the greater share of parental responsibility within new legislation about parenthood (Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*).

<sup>1490</sup> American Law Institute *Principles of The Law of Family Dissolution: Analysis and Recommendations* (2003) Executive Office American Law Institute.

<sup>1491</sup> Kelly R F and Ward S L "Allocating Custodial Responsibilities At Divorce; Social Science Research and the American Law Institute's Approximation Rule" (2002) *Family Court Review* 40(3) 350.

<sup>1492</sup> Kelly and Ward, above, 365.



reducing parental conflict around the time of divorce; this would be a major accomplishment because of what is known about the effects on children of parental conflict. However, it has the same shortcomings as Henaghan's second rule. It might reduce some conflict but it is unlikely to resolve the issues raised by the cases discussed in Part II. The Approximation Rule appears to fit within the discourse that places children first.

Eekelaar<sup>1493</sup> has been another critic of the best interests principle, on the grounds of its lack of transparency and lack of fairness. He too has sought ways to make the values within the principle more transparent and to isolate the values themselves.

The lack of transparency, in his view, means that because the interests of others or untested assumptions about what is good for children drive decisions, children may not be sufficiently protected. The principle is unfair because it "prevents consideration being paid to the interests of participants other than the child."<sup>1494</sup> He points out that children's interests do in fact seem subservient to those of adults in some situations, where there are closed adoptions and anonymous donors of genetic material, for instance.

Eekelaar suggests that decisions should just from multiple points of view, not made only to sustain the interests of the child. This could be done by using a "more nuanced approach ... the concept of wellbeing."<sup>1495</sup> The concept of wellbeing<sup>1496</sup>

accords well with a rights analysis for, if people have rights to anything, it must include the right that their wellbeing should be respected. The proclamation of certain rights, such as the right to respect for family life, is but a statement that one important aspect of wellbeing should have special protection.

Eekelaar claims that the best solution balances a child's wellbeing with the wellbeing of each parent. If one solution damages one parent a great deal and advances a child's wellbeing a great deal, an alternative would be sought that may diminish a child's wellbeing somewhat and damages a parent to a far lesser degree. As Eekelaar points out, this method is already in use in divorce. Parents are permitted to divorce despite possible harm to children.

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<sup>1493</sup> Eekelaar J "Beyond the Welfare Principle" *Child and Family Law Quarterly* (2002) 14(3) 237.

<sup>1494</sup> Eekelaar, above, 238.

<sup>1495</sup> Eekelaar, above, 243. Wellbeing includes, for Eekelaar: the physical and mental health necessary to achieve significant goals; the opportunity to maintain and establish important personal relationships; the ability to benefit from educational, social and economic activity and integrate into society; the ability to develop abilities and interests and to realise life plans; to access guidance towards achieving these goals where necessary including moral or other-regarding components and an important element of self-determination.

<sup>1496</sup> Eekelaar, above, 243.

Eekelaar acknowledges that since, like the best interests principle, his method requires value judgment and involves subjectivity special care must be taken in evaluating the impact and potential impact of a solution on the wellbeing of children. Unless any available solution offers more detriments than benefits for a child no solution that offers more detriments than benefits should be acceptable. Children's interests should be privileged but not given priority. Imbalance of detriments among the parties should be avoided.

Eekelaar also acknowledges that the concept of wellbeing may appear no more transparent than the best interests concept. However, he argues, it ensures that the interests of the others involved are openly addressed rather than "smuggled" into the process. He also claims that the way he has articulated wellbeing gives firm guidance about the matters to be considered. His view is that parents' opportunity to bring up their children, educate and socialise them and maintain their relationships with them are an important part of their wellbeing and there should be rules that they hold these rights unless there are strong reasons for them to be removed. However, if a parent does not already have a relationship with a child it is harder to assume that the wellbeing of a parent will be undermined if a relationship is not established or that the relationship can be exercised without detriment to the child and other parent. A good example of this may be, in *P v K*, the introduction of his biological father, Mr P, into D's life at the age of two and a half.<sup>1497</sup> While Mr P's wellbeing may be improved by this, the child's life and his mothers' lives may be detrimentally affected, without there being any close examination of the positive things that D's relationship with Mr P will contribute. Eekelaar's proposal is an example of Trinder et al's third discourse, as it addresses parental needs, as do Smart and Neale. It would provide an opening for consideration of gender inequities and the exercise of ambivalent and debilitating power by auxiliary parents, as well as the situational powerlessness of all parties.

Smart and Neale<sup>1498</sup> advocate a "discourse of responsibility" and the use of an "ethic of care" after separation. In this discourse attention would be paid to past economic and nurturing responsibilities as well as to the kinds of relationships established between the parents concerned

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<sup>1497</sup> See above Chapter 8 n 270; there is no indication in the newspaper report of the economic consequences, whether Mr P will now become liable for child support.

<sup>1498</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press 170-173.

and between the parents and the child or children. It would replace any discourse of rights and reference to “an abstract principle of welfare of children in general.”<sup>1499</sup> Its attention to past responsibilities also echoes Fineman’s concerns and has similarities to the Approximation Rule.

In the terms referred to in the discussion on responsibility for parenting before separation, contact in these circumstances can be conceptualised as a continuation or development of a “helper” role for the father. Trinder et al refer to this kind of agreement as one that “can result in low conflict but extensive contact resembling shared care, but with a different meaning for participants.”<sup>1500</sup> This seems to indicate that custody and access, the status quo advocated by Henaghan or the approximation rule of American Law Institute are all appropriate responses to child care responsibilities after separation, where parents are prepared to accept the gendered hierarchy of responsibility.

All these rule systems would ensure that a hierarchy of care would continue. However they would not necessarily resolve the situations identified by Trinder et al as difficult to resolve within the legal system, where either parent is unwilling to work in accordance with their role, including situations where auxiliary carers exercise of power inappropriately.<sup>1501</sup>

Smart and Neale ask how adequate a system of family law can be which leaves mothers feeling coerced, silenced and undervalued while fathers feel powerless and aggressive. In response to what they see as an “inflexible rights perspective ... that demands equal rights in the apparently certain knowledge that they alone secure the welfare of the child”<sup>1502</sup> to ensure equal rights for mothers and fathers - most fully expressed in New Zealand in *W v C* and *P v K* – they refer to Sevenhuijsen’s work<sup>1503</sup> for a core proposition “that there needs to be a ‘pluriform’ law which takes account of different situations and which abstains as far as possible from positing an abstract ideal of ‘good family life.’”<sup>1504</sup>

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<sup>1499</sup> Smart and Neale, above, 171.

<sup>1500</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation 28.

<sup>1501</sup> See above Chapter 1 n 24 and accompanying text.

<sup>1502</sup> Smart and Neale, above, 188.

<sup>1503</sup> Sevenhuijsen, S *Citizenship and the Ethics of Care: Feminist Considerations About Justice, Morality and Politics* (1998) Routledge.

<sup>1504</sup> Smart and Neale, above, 189.

The rights based perspective Smart and Neale refer to was perhaps reinforced in *D v S* in affirming *Stadniczenko*'s all-factor child-centred ruling. This made the father's right to access as important as the custodial mother's rights to choose the custodial family's place of residence. A child-centred enquiry in a family law system that emphasises and values equal rights, inevitably skews that enquiry in the way discussed in relation to *D v S* (no 9).<sup>1505</sup> However, a "pluriform" law might truly address the needs of 'this child, these parents, this (new) family'. Smart and Neale propose four principles that would form the basis of a pluriform law: those of actuality, care, recognition of selfhood and recognition of loss.

Actuality would mean that decisions would not be based on what was perceived to be best for children in general (for instance that they have contact with both parents) but on the needs and wishes of the children concerned. Decision making should also recognise who the primary carer has been, whether both parents have a relationship with the children and whether there is a climate of coercion and fear. The authors do not expand on the meaning of "whether both parents have a relationship with the children." Perhaps this means a relationship characterised by the parent's willingness to exercise the full range of *E v M* responsibilities, a "supportive, involved relationship" of the kind described by Pryor and Rodgers.<sup>1506</sup>

The principle of care would replace the principle of the welfare of the child and might also be a way to maintain the welfare of the child more effectively. It would "place the child in a set of relationships,"<sup>1507</sup> acknowledging the history of care for a child while allowing for change so that, for instance, fathers who had been uninvolved with their children before separation could become highly involved. Smart and Neale's research demonstrated that relationships kept changing and could both improve and deteriorate. Improvement depended on the establishment or re-establishment of trust. This takes time. The principle of care would<sup>1508</sup>

recognise that ... transitions must occur with sensitivity and that there are real consequences for *both* parents which need to be acknowledged rather than dismissed. Allowing for the passage of time seems vital in cases where there is serious conflict.

It emphasises that coercion is not a good approach and that parents need to be cared for too if they are to be effective.

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<sup>1505</sup> See above Chapter 7 III. 2. (iii) (b) *D v S* (no 9): *the D v S* (no 7) principles.

<sup>1506</sup> See Appendix 1.

<sup>1507</sup> Smart and Neale, above, 193.

<sup>1508</sup> Smart and Neale, above, 193.

The third principle, the principle of the recognition of selfhood, was developed to meet the need of many of the women<sup>1509</sup> Smart and Neale interviewed whose self was eclipsed by the exercise of debilitating power, when their former partners made it difficult for them to move forward.<sup>1510</sup> This condition was often exacerbated by lawyers, mediators and judges who also ignored the women's loss of confidence and sense of identity and need to become themselves and find themselves again.

This is significant for redressing the imbalance between caring about the rights of fathers and children more than caring about women. It is also significant for the messages given to children about how women and caregivers are valued, or undervalued. In *Pullen v Robson*, for instance, the mother had had custody for three years, since the children were aged about five and two. Her younger child was of school age and she wanted to relocate to Wellington to look for work. Their father had a new partner, a new baby and a permanent job. She was not allowed to relocate, although "given her spirit of drive and enterprise, it would not be surprising if she very quickly found at least as temporary job as a stepping stone"<sup>1511</sup> and would in the meantime retain her present home in case things did not work out. The father's relationship particularly with the elder child was particularly important; and the fact that the children were settled. The Court did not address the issues that the children's relationship with their father might change now he had not only a new partner but a new child<sup>1512</sup> and that the mother finding employment was perhaps as important as the father's permanent employment. The mother's need to find herself was dismissed in the terms already referred to.

The principle of the recognition of loss developed from Smart and Neale's experience of the non-residential parent's sense of loss, especially if they rarely saw their children. They found that for many men, especially, this sense of loss generated anger and attempts to use the legal system "in a rather coercive way"<sup>1513</sup> though it also generated hopelessness and despair. Smart and Neale point out that the legal system cannot repair relationships, it can only coerce or reallocate parental authority and that there is no evidence that either of these works in a meaningful way, for

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<sup>1509</sup> See above Chapter 7 nn 3 and 140 for *Gledhill v Gledhill*, a possible example of a case about a man who may have been affected by the need to find himself.

<sup>1510</sup> See above Chapter 2 II. 4. (iii) *Debilitative power*.

<sup>1511</sup> *Pullen v Robson* (12 August 1997) Family Court New Plymouth FP 0443155 94, 2 Judge Inglis QC.

<sup>1512</sup> See above Chapter 1 n 23 and accompanying text.

<sup>1513</sup> Smart C and Neale B *Family Fragments?* (1999) Polity Press 196.

instance whether enforced access arrangements benefit children. This conclusion is similar to that of Trinder et al who suggest that non-intervention, but recognising loss, supporting the excluded parent and providing ways to communicate when circumstances change may be helpful.<sup>1514</sup>

Smart and Neale found that two of the mothers in their study who were being denied contact with their children (and they believe that this is an experience which more mothers may face in the future) were in contact again after a year. If only legal, adversarial, support is available it locks auxiliary parents into a “potentially coercive and damaging [to all parties] engagement”<sup>1515</sup> with the other parent. Very few of the parents in the Smart and Neale study were able to devise an alternative to legal action without support, and without the kind of affirmation of themselves as parents which they might have received if their loss was acknowledged.

The necessity to adhere to UNCROC principles and the CEDAW principle that subjugates a mother’s wellbeing to her child’s<sup>1516</sup> militates against the replacement of the paramountcy principle with the “principle of care” in New Zealand. However, there is much to recommend a change in a value system that imposes shared parenting where it is not appropriate, and as in *W v C, D v S, Anderson v Paterson* and *P v K* appears to focus on and respond primarily to the emotional states of fathers dealing with loss. If a system truly responds to all factors it would ask what is really going on with this father, this mother, this child, this new family unit or new family units? How can this auxiliary parent be helped to deal with loss, this primary parent with her need to re-establish her sense of self and this child retain what is essential for her or his wellbeing while dealing with ongoing change? If children do well with an “activist”, “adult” or autonomous mother how can this mother be supported to be offer this kind of mothering? Who does the child confide in, depend on emotionally?

There is at least one precedent for dealing with aspects of caring for the primary carer and children, to place alongside the cases in Part II that were about caring for the auxiliary parent. In *V v T*, the Family Court cancelled an access order, offering a mother "respite and recovery." In this case, Judge Green stated that access was not in the children’s best interests because<sup>1517</sup>

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<sup>1514</sup> See above n 3.

<sup>1515</sup> Smart and Neale, above, 197.

<sup>1516</sup> Art 5(b) “... the interest of the children is the primordial consideration in all cases.”

<sup>1517</sup> *V v T* [1994] NZFLR 454 (FC), 459.

the benefit of their having some contact with their natural father was outweighed by the risk of disrupting their settled existence with their mother whose ability to continue to parent these children well could easily be undermined. To risk this would be to put the father's needs ahead of the children's primary need for stability and security with their primary caregiver.

In this case the mother was traumatised by and still fearful of the second guardian and the Court was concerned not to "trivialise his violent behaviour" or "demand too much of the mother."<sup>1518</sup> This kind of response could be extended to women debilitated by their children's fathers after separation, who need to find themselves and establish the new family unit on a strong basis without also having to deal with additional disruption caused by shared care.

There may however be other reasons why a primary caregiver wants to limit a second guardian's rights, for a short time or altogether. She and the children may need time as in *V v T*<sup>1519</sup> to recover from the second guardian's violence, especially the psychological effects. She may also need time on her own to adjust to a new status with potentially adverse economic, social and health consequences and to establish a new family environment that works for her and the children.

#### (ii) Children's wishes and views

Consideration of children's wishes is problematic. While most commentators believe that children must be heard, there is no consensus about what to do with the information, not surprisingly, as no two situations are alike.

It is not hard to imagine that many children would wish most of all to live happily with two parents, ideal siblings and an extended family, with good friends nearby. If that is not possible some may like a better relationship with one or both parents, more access to a parent or grandparent who provides stability or comfort, or a range of benefits that are unavailable with either parent.<sup>1520</sup> Often, children's wishes - or views - whether they have two parents at home or not, are unattainable - or incongruent with those of adults. They may be difficult to accommodate in family life generally, especially when there is more than one child and individual children's

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<sup>1518</sup> *V v T*, above, 459.

<sup>1519</sup> The Court cancelled an access order on the grounds that access was not in the children's best interests because the benefit of their "having some contact with their natural father was outweighed by the risk of disrupting their settled existence with their mother whose ability to continue to parent these children well could easily be undermined. To risk this would be to put the father's needs ahead of the children's primary need for stability and security with their primary caregiver:" *V v T*, above, 459.

views are opposed to their parents' or to each other's. Children are unlikely for instance ever to endorse the disruption of moving from a home or school where they are happy. As Smart, who advocates that children's voices be heard, points out in relation to care after parents separate:<sup>1521</sup>

[If] we really do allow children to speak, and if we really attempt to hear what they say, it will become harder to find solutions ... [A]t present, in policy terms, children are regarded as the object of their parents' concerns and desires ... just apportionment of the child (or the child's time) is seen as the solution to the conflict between the parents ... [O]nce the child ... becomes a speaking participant in the process, the idea of apportionment rapidly appears to be less than ethical as solution.

This begs the question of the limits of a hierarchy of concern that requires the Court to hear children's views and mediate between their views and those of their parents in the context of the belief system the law represents. Listening to children speak is affected by what the adults around them expect or want, consciously or unconsciously, to hear. For instance, a discussion in Smith et al<sup>1522</sup> synthesising the group's research, highlights the positive things about access for children, while not ignoring some of the difficult issues, because it appears to want to affirm the positive aspects of access. Another reading of the figures (2.5 things children liked and 3.9 things they disliked, on average) by someone concerned about the risks of access may be less optimistic. The point of view of a judge or section 29A report writer affects the way information about children's needs is processed and how that person will define or articulate the options available to a child.<sup>1523</sup>

Sturge and Glaser summarise the practical difficulties, if we "really do allow children to speak ... and attempt to hear what they say":<sup>1524</sup>

- Distinguishing between wishes [or views] and deeper feelings [a child might for instance articulate a desire to spend time with a parent of whom he or she is fearful and by whom he or she may be damaged, because of a desire to be like other children or an unrealistic hope that things will change];
- Statements influenced by a specific context [a child may be asked about a relationship with a parent when his or her parents separate, but, because the context is one that encourages ongoing or developing

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<sup>1520</sup> See above Chapter 2 nn 201-202; about one fifth of the children surveyed liked the material/environmental aspects of access visits.

<sup>1521</sup> Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307, 309.

<sup>1522</sup> Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre 46-50.

<sup>1523</sup> See for instance, above Chapter 7 where the High Court in *D v S* (no 10) found that the Family Court in *D v S* (no 9) ignored aspects of the s 29A report that did not conform to his beliefs.

<sup>1524</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 627. The authors state "Eekelaar draws attention to the many practical difficulties [considering children's wishes and feelings] encounters" but it is unclear if their list derives from his work or which publication they refer to. Henaghan defines determining the child's competence as "the difficult issue" (Hengahan R M "Custody Decisions - Discretion Gone Too Far?" (2000) *Otago Law Review* 9(4) 731, 740) and refers to an "excellent" analysis by Eekelaar of children's competence and how to determine it (Eekelaar J "Children's Rights: From Battle Cry to Working Principle" *Liber Amicorum Marie-Therese Meulders-Klein: Droit Compare Des Personnes et De La Famille* (1998) Bruylant).



shared parental responsibility, is not told that there could be an option of not seeing one parent for a while in order to let things “settle down”, to minimise conflict for a finite period];

- Separating out the incidental or transitory;
- Pressure from disputing adults;
- Risk of [child] being burdened with guilt;
- Risk of [child] receiving hostility from others;
- Decision [of child] affected by information quality and provider bias [information may not be offered that might affect a child’s response, for instance about the longer term or economic or social consequences of various options] ;
- Articulation affected by age and how they think it will be received;
- Whether they have promised someone what or not to say;
- Whether they have support;
- Where and how they are asked [if asked a simplistic or “closed” question such as “would you prefer [sole custody] or [joint custody]?” without any qualifiers such as “[joint custody] with ongoing conflict or [sole custody] without”<sup>1525</sup>];
- Where it is difficult to explain the alternatives to children.

As well, according to Pryor and Rodgers, although children want involvement in decisions they do not want responsibility for them.<sup>1526</sup> In a family with two resident parents this is taken for granted. Children may be consulted about their views on how the effects of a decision can be ameliorated for them but part of “the provision of shelter, clothing, food, together with love and affection”<sup>1527</sup> to dependent children means that ultimately it is parents who have to decide when changes are necessary. Hearing and respecting a child’s views does not necessarily involve giving a child what she or he wants, whether or not parents share a household.

In some cases children may be merely informed of a decision, and a court will not and cannot interfere. Parental separation or divorce are examples of a shared or individual (where, say, a parent decides unilaterally to leave a two parent household) decisions made by parents that may mean that loved family, friends, places and cultural practices are relinquished or lose a central place in a child’s life regardless of a child’s views.

In general court involvement establishes whether an adult decision is in the best interests of a child only if one parent asks for that involvement after parental separation.<sup>1528</sup> It is submitted that

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<sup>1525</sup> This example was suggested by a newspaper report of a presentation by Paul Amato who stated that “American studies showed “most children from broken families in sole custody wished they were raised in joint custody” (Bell, L “Divorce ‘As Bad for Kids as High-Fat Diet’ ” (2003) *Dominion Post* 5 December A5). This begs the questions of what kind of joint custody, what “joint custody” meant to these children and whether, if joint custody had been imposed it could have damaged them.

<sup>1526</sup> See Appendix 1.

<sup>1527</sup> *E v M* (13 September 1979) High Court Wellington M361/779, approved by the Court of Appeal in *Director-General of Social Welfare v L* [1989] 2 NZLR 314, 324-5.

<sup>1528</sup> Or when married parents are required to show they have made arrangements for their child[ren] when they seek dissolution of their marriage: Family Proceedings Act s 45.

where the adult who has primary responsibility for a child seeks to make the kind of autonomous decision that two parents living together with their children would make, with or without consultation with their children, and without interference from the legal system, the Court should be reluctant to interfere. The threshold where it interferes - when for instance a primary parent seeks to relocate - should be a high one with the onus on an auxiliary parent to show that the decision will result in positive harm to a child.

If a child, like some of the children or young people in Smith et al's research, wants to see more of a second parent and the second parent has a new family where the second parent's new partner - rather than the parent - cares for the child, it may not advance the child's welfare to understand the child's fervent wishes for more contact with the second parent as a reason for more contact time. It may even be a reason for suspending contact if there are other factors that make the contact overall a less than beneficial experience for the child and the primary carer.

## 2. An alternative proposal

An alternative proposal fits within Trinder et al's second discourse. It values strengthening the relationship between a primary carer and her child, and refers to the philosophy articulated in the Preamble to UNCROC rather than its slightly outdated articles, as well as the view of Justice Kirby in *U v U*, quoted at the head of this chapter. It brings the institution of custodial mothers, mothers who care for their children most of the time, out of the shadows, so that any "rules" about the welfare of a child should be formulated on the underlying value of the commitment of the child's primary carer. In its entirety, it is submitted, the proposal also makes it less easy for decision makers to make assumptions about primary parents continuing to parent regardless of the conditions under which they are required to do so and about the involvement of auxiliary parents being desirable absent physical or sexual abuse.

It has been argued that the paramountcy of the child's welfare demands deep concern for the welfare of the person with primary responsibility for that child especially when that person is a woman and therefore subject to gender inequities. Parental willingness before as well as after separation is also an important aspect of parental conduct to be considered when allocating parental responsibility; and the provision arguably intended to ensure only that "the mother principle" was eliminated from decision-making does not prevent consideration of gendered

parenting patterns that affect parenting capacity. It having been noted that the adult “right to found a family” and the protection of that family that flows from this has resulted in laws that enable some adults to practice parenthood to the exclusion of children’s biological parents, it will be further submitted that the Act should be amended to legitimise and protect the family created by a primary parent in certain circumstances. While one of the weaknesses of all rules, whether a rule giving each parent equal responsibility (which must be enforced) or one prioritising support and protection of a primary parent when there is ongoing conflict, is a lack of flexibility. These amendments would create that flexibility. Psychological violence, it is argued, should be included in the definition of violence in the Act to enable ambivalent and debilitating parental behaviour to be addressed and further legitimate primary parental judgment about their children’s safety with an auxiliary parent. Fineman’s proposal for a post-separation primary parent rule to protect “the primary caretaking role that is stereotypically and statistically associated with mothers”<sup>1529</sup> is preferable to proposals by Trinder et al.<sup>1530</sup> These while valuable in conjunction with changes to the prevailing value system and legislative change would on their own further entrench appropriation of authority by helping professions who see divorce as an emotional crisis.

The present division of responsibility into guardianship, custody and access provides effective legal mechanisms for managing the hierarchy of care after separation. Children could in fact be best served by retaining the language of custody and access as functional descriptions of roles that are likely to continue to reflect parenting responsibilities, in the 30 per cent of families with children headed by one parent of whom a high proportion are mothers. There should be strong support and protection of this carer rather than attempts to impose acceptance of conditions to enable the hierarchy of care to operate successfully, with two parents’ involvement. This goes further than Fineman’s rule in that as well as a primary rule protecting the mother/child dyad it involves addressing the difficulties her responsibilities create for the mother and listening to her judgment on how the Court can apply the legislation to help resolve them, particularly in relation to a child’s contact with a second parent.

The alternative proposal will now be described in two parts, one addressing a change in the present value system, the other possible amendments to the Guardianship Act.

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<sup>1529</sup> Fineman M A "Dominant Discourse Professional Language and Legal Change In Child Custody Decision Making" (1988) *Harvard Law Review* 101(4) 727, 730. See also above n 22.

<sup>1530</sup> See above n 3.

(i) Change in value system

It is submitted that it is possible to interpret the Guardianship Act according to a belief system that does not conflate rights and responsibilities and values the commitment of primary carers. The assumption that a mother will continue to be primary carer regardless of the conditions and the consequences (that *because* of her gender a mother will be available) could be abandoned. Gender inequities, the significant economic and social difficulties in establishing and maintaining a new household and the potential adverse effects of these on a child would be acknowledged as factors affecting the welfare of children. It would also be acknowledged that the effects of these factors are likely to be exacerbated by ongoing interparental conflict and legal proceedings.

The assumption that a relationship with a second parent is necessary for the wellbeing of a child, or an absolute right unless that parent is “unfit” could be replaced by acknowledgement that the provisions in the Guardianship Act for “custody” and “access” reflect the realities of the hierarchy of care; and by a closer scrutiny of the auxiliary parent’s past and current willingness as well as the actual benefits he offers the child. Investigating the extent of the auxiliary parent’s understanding and commitment to his role in the hierarchy of care could be a part of that process.

All this could be managed under current Act, given sections 23 (1)(A) and 10(2) with their provisions for consideration of parental conduct and willingness before and after separation. Use of section 10(2), for example, could be extended to cases where an auxiliary parent, unwilling to accept an appropriate position in the hierarchy of care and to support the primary carer, creates conflict and causes harm by exercising parental responsibilities ambivalently or in a way that debilitates the primary carer.

However, it would also be open to an auxiliary parent to argue that a “willing” primary parent is by definition the guardian who endorses access to an auxiliary parent and facilitates access regardless of difficulties, including the auxiliary parent’s unreliability. The auxiliary parent could then attempt to have a primary parent unwilling to facilitate access removed as a guardian, as a “bad” primary parent. It is therefore essential that the Court understands and values the dynamics of the hierarchy of care, and the primary parent’s commitment within it, as well as the risks posed by an auxiliary parent’s exercise of ambivalent or debilitative power. Otherwise the current judicial strategy of threatening a change of custody if mothers are unwilling to facilitate shared care places the primary parent and child at risk, a risk increased if every father is seen as a

viable primary parent (as in *W v C*, *D v S*, *Anderson v Paterson* and *P v K*), or if another viable parent exists within a father's extended family.

Once the value system changed, a range of solutions analogous to those suggested in the judiciary's submission to *Making Contact Work* for use in situations where a custodial parent declines to facilitate access could also be available.<sup>1531</sup> It would become a matter of judgment whether a child would be more harmed by a continuing relationship with a reluctant parent or by the termination of that relationship; or, alternatively, the application of an *in terrorem* provision or financial penalty might encourage a parent to change his ambivalent or debilitating behaviour.

The armoury's actual or threatened custody change, with a trigger provision if a primary parent refuses access has its counterpart, in the actual or threatened loss of guardianship rights if they are not exercised, under the "unwillingness" provision of section 10(2).<sup>1532</sup>

A declaration by the Court that a child is in need of care and protection<sup>1533</sup> has the advantage of bringing into play Children, Young Persons, and Their Families Act's family group conference process and the inclusion of the wider family in the process of establishing a regime to benefit the child.

Of the other Family Court judges' suggestions, the requirement that a father enter into a bond against non-compliance with access orders, costs awarded against him as "an unjustifiably oppositional parent", or "payment of a sum of money to the mother and/or to the child as the Court thinks fit ... by way of reparation" might be appropriate.<sup>1534</sup>

Alternatively if the primary parent received a DPB and was therefore unable to seek direct compensation under the Child Support Act, the Court could use its discretion to require the

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<sup>1531</sup> See Chapter 4 above n 50 and accompanying text. The "threatening armoury" the judges' submission describes includes use of section 19 of the Guardianship Act to place the child under the Wardship or Guardianship of the Court. That seems most likely to work where both parents *want* to have responsibility; the Court is then the arbiter, and can introduce another carer if necessary.

<sup>1532</sup> See above Chapter 3 nn 10-27.

<sup>1533</sup> Children, Young Persons, and Their Families Act s 14(1)(h).

<sup>1534</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts, 8.

access parent to pay for alternative care.<sup>1535</sup> It might also be appropriate for the Court to require a father who refuses to exercise contact regularly and reliably or to exercise it at all, to attend a programme of education and counselling to address his behaviour.

Where a second parent wants to retain contact and the primary parent is prepared to facilitate it (as for instance in a relocation case like *D v S* by including financial assistance to enable travel and accommodation) it is possible for a child and a second parent to maintain a relationship without their living in geographical proximity. This can be done through email or telephone communication as well as in person. No belief system makes it easier “to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have.”<sup>1536</sup> However, removing the element of judicial coercion of primary parents, inherent in justification depending on an ideology that requires a “good” primary parent to forego benefits for herself and her children to suit an auxiliary parent’s needs, (as in the cases in Chapter 5, in *W v C*, or when auxiliary parents want children to remain nearby rather than “re-jigging” access arrangements, as in *D v S* and *Anderson v Paterson*) allows for an alternative view of the factors.

It is acknowledged that a difficulty with any change to benefit primary carers is protecting and supporting a child’s primary household while also enforcing the provisions of the Child Support Act. Is it “fair”, when parents are unable to resolve their conflict about the operation of the hierarchy of care, that one parent must provide economically for a child without being able to maintain and develop a relationship with that child, even in the short-term? Could this contribute to a variant on the “no taxation without representation” argument? Is it any less “fair” than requiring primary parents to provide by far the greater part of *E v M*-style nurturing in conditions that disadvantage them economically and socially? How can one kind of economic and social loss be compared with another? It is suggested that returning to the comparative social and economic benefits for the child is one way to address this issue.

The suggested changes in values could be supplemented by amendments.

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<sup>1535</sup> Since Ms Bramley worked outside the home, she received child support directly.

<sup>1536</sup> *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA), 500.

*(ii) Amendments to the Guardianship Act*

It is submitted that legislating for shared, equal, responsibility is unlikely to provide solutions in fact situations like those in the cases considered, where parents did not have and seemed unlikely to develop, a shared understanding about their responsibilities. Amendments to the Guardianship Act are therefore necessary to legitimise and protect a family headed by a single parent and to protect children from the effects of ongoing conflict. These could be based on the findings of Trinder et al, that shared care works best when based on a hierarchy where both parents share an understanding of their respective roles and each supports the other in their role. When parents cannot reach a shared understanding about their parenting responsibilities the use of these amendments would replace repeated, ineffective, attempts to impose conditions that enforce shared parenting regimes.

These amendments go further than Fineman's rule and incorporate aspects of Smart and Neale's ethic of care, to protect the primary parent/child dyad, address the challenges their responsibilities create for primary parents within a risk-generating social context and honour their judgment on how the Court can apply the legislation to help resolve these challenges, particularly in relation to a child's contact with a second parent. In recognition of the issues raised by Eekelaar and Smart and Neale, in caring for auxiliary parents and their relationships with children, the amendments also provide for a support system for auxiliary parents dealing with loss and a structure that enables children moving towards independence to initiate, with support, a relationship with parents who are no longer in their life but may be able to provide some unique benefits to them, particularly in relation to identity issues.

*(a) Legislating for arrangements that "work"*

The first proposed amendment would formalise - where appropriate - the status of a child's primary and auxiliary carers, along the lines identified by Trinder et al as a hierarchy that works, for parents and children. One parent has most of the responsibility and facilitates the involvement of the other. Each parent accepts his or her role and acts within its parameters, as well as accepting the role of the other parent. This reflects the reality for many families.

Formalising this basic structure for post-separation parenting would offer an opportunity to protect and support the primary carer. If either parent became unwilling to abide by their

agreement, by default the relationship between the primary carer and the child would be prioritised. By mutual agreement, parents could choose to parent in another way in the short-term or the longer term.

This is very similar to “custody” and “access” but is explicit about the responsibilities involved, about the necessary shared agreement if the arrangement is to work and the protection given the primary carer and child.

Whenever parents could not agree about their responsibilities, or the auxiliary parent was unwilling to have some aspect of his or her responsibility facilitated by the primary parent, the Family Court would ask the primary parent and where appropriate the child in these situations, “How can the Court help?” Ideally the investigation into how help might be given would be informed by the inequities under which primary parents, especially those who are women, are required to parent. This would include acknowledgement and understanding of the respective roles of situational powerlessness and ambivalent and debilitating power.

*(b) A clean break*

The second proposed amendment provides for a “clean break”. Having established that, when an auxiliary parent was ambivalent, primary parents found unrealistic the current welfare principles promoting auxiliary parental contact, Trinder et al advocated, in these circumstances, a clean break. This solution was sometimes also favoured by the auxiliary parent.<sup>1537</sup>

This suggestion is congruent with the inference to be drawn from information about gender inequity, from Smart and Neale’s discussion of ambivalent and debilitating power and from the MANALIVE analysis: primary parents whose access to resources are limited need more resources. A clean break provides resources of time and space for a primary parent to address the challenges of creating a new household; it may make the difference between a child having a primary household that “works” and one that does not. IT may contribute to positive changes after the passage of time.<sup>1538</sup>

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<sup>1537</sup> Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation 13-14.

<sup>1538</sup> See above n 46.



Provision for a clean break need not be limited to situations where an auxiliary parent exercises ambivalent or debilitating power. It could be extended to resolve conflicts arising at transition times, when parents cannot reach a shared understanding of their parenting responsibilities (at initial separation, when one parent has a new adult partner, when step-families are formed or as children's needs change).<sup>1539</sup>

This amendment would offer opportunities for a temporary “clean break” or “time out”

(iii) immediately after separation or at other transition times when either parent wants a clean break for a finite period to (re)establish a separate life;

(iv) when a primary parent wants a clean break because a second parent exercises debilitating or ambivalent power;

(v) if either parent believes that arrangements for shared parenting are not working, after two years of separation.

Parents who are in a general agreement about their responsibilities but have a short- or longer-term difficulty in establishing a workable regime could take advantage of this provision, arguably conceptually compatible with current legislation that from time to time legitimises and protects family groupings excluding biological parents.

A fixed period for review of an auxiliary parent's involvement would be necessary however, because circumstances change. There needs to be allowance for this and opportunity to renegotiate responsibilities. As noted, there is much to be gained for primary parents as well as for children when children have good relationships with their auxiliary parents.<sup>1540</sup> After a period of consolidation, when negotiation with their child's auxiliary parent is no longer just one of a primary carer's many problems, and if the auxiliary parent too has had time and opportunity to reflect and learn, relationships which were unmanageable may well become not only manageable but beneficial for all.

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<sup>1539</sup> See above Chapter 1 n 23.

<sup>1540</sup> See above Chapter 1 n 34 and accompanying text.

One of the problems with a clean break of any kind, noted by Trinder et al, was that none of the children wanted to terminate contact entirely.<sup>1541</sup> However, part of a mother's - and ultimately a court's - responsibilities is to make decisions about those with whom children associate and what activities benefit them to a greater or lesser extent, depending on the child's age. "Authoritative", "activist" or "adult" mothers appropriately have this responsibility, as part of a "close and attentive" involvement with a child and the provision of "education in its broadest sense" that always includes helping a child to deal with disappointment. A clean break with an auxiliary parent may also be a situation where children do not want to have responsibility for making a decision.<sup>1542</sup> A child may wish to have contact with an auxiliary parent, for the parents to live together again. In their view, their parents' behaviours may be inexplicable and unfair, particularly if changes are made without being discussed with them. But since children are also resilient, the benefits of a decision for which they are not responsible may be considerable, if the result is an end to conflict and a primary parent whose focus is entirely on them and the household's daily challenges rather than partly bound up with a conflict with the other parent.

The clean break approach brings some certainty into the life of the primary parent and the child. If for a defined period it gives them an opportunity to relax, gain strength, establish routines, and develop a fresh perspective and confidence. All of this is likely to be useful when any defined period ends and contact is renewed. From anecdotal evidence, primary parents already sometimes make a clean break without formal court orders, as do auxiliary parents.<sup>1543</sup> Unlike a clean break following an adoption, this does not extinguish the child's relationship with his or her auxiliary parent for all time. The intention and the effects, for all concerned, vary.<sup>1544</sup>

The clean break provision could also work in association with or instead of the provision for terminating guardianship for an unwilling parent under section 10(2). This possible outcome under existing legislation could be explicitly provided for as either an *in terrorem* ( a threat based on past parenting practices) or a "trigger" provision (coming into effect if behaviour does not

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<sup>1541</sup> There seems to be no research about what happens when a mother decides that a clean break might be best, at least for a while, and about the response of children to this taking of responsibility by their mother, who cares for them and is likely to make similar decisions about other contact outside the immediate family on a regular basis, at least until the children become adolescent.

<sup>1542</sup> See above n 63 and accompanying text.

<sup>1543</sup> See above Chapter 2 nn24-32 and accompanying text.

<sup>1544</sup> There may however be child support issues. In *O v H* [1998] NZFLR 673, a case where a mother with a new partner had effectively "divorced" her child from his father, Judge Inglis QC made a ruling about child support that could act as a precedent, minimising the father's child support responsibilities.

change). It might be better placed alongside the clean break provision rather than (as currently) connected to removal where of guardianship where a guardian is “for some grave reason unfit”.

There would have to be a default provision for when both parents sought a clean break and neither wanted to have responsibility for their child or children. In this situation children would be in need of care and protection under the Children, Young Persons, and Their Families Act and a family group conference would be appropriate for generating a solution.<sup>1545</sup>

*(c) Extension of section 16B protection*

Bringing one parent’s psychological abuse of the other into already difficult proceedings as a basis for deciding whether or not a second parent can have an ongoing relationship with his or her child has disadvantages. It might be seen as offering too great potential for every primary carer to limit her child’s relationship with the other parent, given the proposed prioritising of the relationship between the primary carer and the child.

On the other hand, because the less well known post-separation forms of control - the exercise of ambivalent and debilitating power - can profoundly affect the wellbeing of both primary carers and children, is necessary to include psychological violence in the definition of violence, preferably with physical and sexual abuse as a subset of psychological abuse, thus extending the protection of section 16B to primary carers who have been psychologically abused.<sup>1546</sup>

In conjunction with a clean break amendment it would be especially helpful, given the (ab)uses of power identified,<sup>1547</sup> to extend the protection of section 16B(5)(f)and(g) to primary carers who have been psychologically violated after separation. A violated carer could then have a strong voice in the decision as to whether shared parenting of any kind was appropriate. It would be necessary to distinguish each parent’s - and their child’s - situational powerlessness from the exercise by an auxiliary parent of ambivalent or debilitating power.

An auxiliary parent who exercised power inappropriately and wanted to retain access “shared” care rights would then have to establish what he offered a child and precisely how this would

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<sup>1545</sup> Children, Young Persons, and Their Families Act s 14(1)(h).

<sup>1546</sup> See Chapter 2 above n 77 and accompanying text.

<sup>1547</sup> See above Chapter 2 II. 4. *Control, power and powerlessness*.

benefit the child. If the emotional costs of access, for the primary parent as well as the child, were likely to be greater than the benefits for a child, and the parent's "willingness" to change was in question, access could be suspended for a defined period, to enable change to occur, with assistance. In some circumstances it could continue under supervision (depending on what could be demonstrated as positive benefits from this).

This proposal is consistent with the ideas of Sturge and Glaser who describe domestic violence as a "very serious and significant failure in parenting - failure to protect the child's carer and failure to protect the child emotionally."<sup>1548</sup> They suggest that where the other parent is abusive to the primary carer that parent must show, in order for an application for contact to be considered, positive grounds as to why contact is in the child's best interests. They also propose that an abusive parent must set out how he or she proposes to help the child heal and recover from the damage done.<sup>1549</sup>

These provisions, an extension of section 16B to include psychological violence and contact by a violent parent being conditional on a specific course of action, would ensure that judges and the parents themselves had to move beyond assuming contact with a second parent benefited children and to reflect on what actual benefit was offered. The provisions would also demand that an auxiliary parent reflect on whether resistance to accepting the realities of the hierarchy of care was helpful for a child in the long term; on his behaviour towards the child's primary parent; and on his modeling of appropriate parental behaviour.

When an auxiliary parent did not want to change, there would be an opportunity for the primary parent to establish that the other parent was "unwilling" to parent appropriately, in the extended sense of section 10(2) of the Guardianship Act, or to ask for a clean break.

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<sup>1548</sup> Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615, 624.

<sup>1549</sup> Sturge and Glaser, above, 623-624. The authors suggest that unless certain conditions are in place, they would tend to be against contact. These conditions are: (a) some (preferably full) acknowledgment of the violence; (b) some acceptance (preferably full if appropriate i.e. the sole instigator of the violence) of responsibility for that violence; (c) full acceptance of the inappropriateness of the violence particularly in respect of the domestic and parenting context and of the likely ill-effects on the child; (d) a genuine interest in the child's welfare and full commitment to the child, i.e. a wish for contact in which he is not making the conditions; (e) a wish to make reparation to the child and work towards the child recognising the inappropriateness of the violence and the attitude to and treatment of the mother and helping the child to develop appropriate values and attitudes; (f) an expression of regret and the showing of some understanding of the impact of their behaviour on their ex-partner in the past and currently; (g) indications that the parent seeking contact can reliably sustain contact in all senses.

*(d) Family support programmes*

With these changes it would be necessary to provide for specific programmes to ensure support for parents and children in coming to terms with the inevitable disappointments and grief. It is submitted that generic “counselling” is not enough.

There is already a good model provided in the Domestic Violence Act of programmes that educate and support parents who have been involved in violence.<sup>1550</sup> It is submitted that these programmes could be extended to parents who cannot agree about their shared responsibility and whose conflict may damage their children. Within these programmes they could learn how a successful hierarchy of care operates, the various uses of power after parents separate, and the difference between situational powerlessness and psychological abuse. The programmes would aim to help parents and children to come to terms with grief if their contact were suspended, or terminated, to understand the mechanisms of gender inequity and to develop skills to make any future shared responsibility worthwhile for all concerned. They could also include a facility to help an abusive auxiliary parent to formulate and present a plan of how he proposed to help healing as well as develop a relationship with the child, as suggested by Sturge and Glaser.

*(e) Support for children to reconnect with an absent parent*

Provision should be made for young people moving towards independence, perhaps from the age of around 13, to have, independently of the primary carer, assistance to approach a second parent whose involvement in their lives has been limited, for any reason. Adolescents arguably may want - and are entitled to - not only involvement in decisions but also to be able to take some responsibility for them. With support, from the kinds of programmes suggested, an adolescent could both approach a second parent and manage the consequences of this. This would integrate the overarching intentions of UNCROC as expressed in the Preamble and its requirement<sup>1551</sup> article States Parties ensure contact between children and both parents.

All these proposed changes could be argued against as leaving a second parent with only a “shell” of guardianship. However, this shell need not be permanent if managed as advocated, with allowance for changes over time and support provided for all concerned. Furthermore it is submitted that the alternative of an unsatisfying auxiliary parental relationship results in mothers

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<sup>1550</sup> Domestic Violence Act ss 29-44.

and their children sometimes having a “shell” of a life in other respects. This may arguably be more damaging to children than attempts to sustain a direct relationship that is not working.

*(f) Relocation*

If adherence to the hierarchy of care philosophy and the protection of the primary parent were to be the established legislative position, the primary carer would have the right to relocate in most circumstances, placing the burden of proof on the auxiliary parent to show that relocation would be harmful to the child.<sup>1552</sup> At present, since the auxiliary parent (as in *D v S*) initiates proceedings to prevent a primary carer from relocating, that parent seeks to demonstrate that relocation will be harmful to the child, through loss of a status quo including a relationship with the auxiliary parent. However under the proposed change the “all factor” assessment would be replaced by an approach that started from the right of the primary parent to organise her family’s life in a way that worked from her point of view, and placed a higher burden on the auxiliary parent.

### III. Alternative Solutions To The Cases

#### 1. Paternal ambivalence

Alternative solutions to *Cunliffe v Cunliffe* and *Collins v Sawtell* and *Bramley v MacDonald*<sup>1553</sup> could be available through use of current legislation, in conjunction with a change in judicial values, or through the suggested changes in the legislation. These solutions do not provide the outcomes sought by the mothers concerned. However they arguably could provide benefits by acknowledging the respective parents’ status in the hierarchy of care and making decisions based on this. The decisions made could free mother and child from the effects of ongoing conflict between parents and court proceedings, while not foreclosing on a future relationship between a child and his or her auxiliary parent. They could also provide the potential benefit for the mother of financial compensation to offset the disadvantages to her of the alternative solutions. *Cunliffe v Cunliffe* and *Collins v Sawtell*, where only one parent is committed to the hierarchy of care and

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<sup>1551</sup> UNCROC art. 7.1.

<sup>1552</sup> On October 5 2003 the State of California amended section 7501 of its Family Code explicitly affirming the California Supreme Court’s decision in *In Re Marriage of Burgess* (1996) 13 Cal. 4<sup>th</sup> 25 (Calif SCt), thus giving a parent entitled to custody of a child the right to change a child’s residence, subject to the power of the Court to restrain a removal that would prejudice the rights or welfare of the child.

<sup>1553</sup> An alternative solution is not offered for *W v W* (16 January 1998) Family Court Palmerston North FP0544 427979; its position in Chapter 5 exemplifies the use and range of judicial discretion when a Family Court judge prioritises concern for the primary parent.

seeks a change and the other parent is exercising ambivalent or debilitating power and does not seek a change will be considered separately from *Bramley v MacDonald* where neither parent is committed to the hierarchy of care and both seek change.

In both situations, acknowledging the existence of the hierarchy of care and abandoning the assumptions that the primary carer will continue to parent regardless of the conditions under which she is required to do this and that the auxiliary parent's involvement is necessary for the children's wellbeing would be the first step. It would then be possible to examine how to improve the primary parent's conditions and the day to day situation for the child or children with the kind of flexibility characterised by *W v W* particularly when violence is involved.<sup>1554</sup>

(i) Possible outcomes under existing legislation

(a) Judicial review: a path for facilitating a change in values?

The first solution, judicial review, aims to create a change in Family Court jurisprudence. It is arguably most suitable for *Cunliffe v Cunliffe* and *Collins v Sawtell*-type cases and possible within the current legislation. It takes into account the provisions of the Guardianship Act, the wide discretion of the Family Court (as demonstrated in *W v W*), the New Zealand suggestions to *Making Contact Work*<sup>1555</sup> and two relevant international instruments, CEDAW and UNCROC.<sup>1556</sup> This solution could also have effect on the consideration of cases like *Bramley v MacDonald* where jurisdiction is an issue in relation to enforcement provisions and the Court attempted to "enforce" some aspects of access informally, by changing the access regime, rather as it might have in directed mediation.<sup>1557</sup>

Because evaluation of the best interests of a child is often a "delicate balancing exercise," judicial review will rarely be successful in cases about parental authority.<sup>1558</sup> However, since in *Cunliffe v Cunliffe* and *Collins v Sawtell* the Court refused to evaluate the children's welfare, no delicate balancing exercise was attempted or required. A successful judicial review was therefore a possibility given the lacunae in the law for primary parents concerned about auxiliary parents' inappropriate exercise of ambivalent power. This points to a potential a role for CEDAW and

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<sup>1554</sup> See above n 84.

<sup>1555</sup> Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts 23-26.

<sup>1556</sup> See above Chapter 3 III. The Role of Human Rights in the Allocation of Parental Responsibility.

<sup>1557</sup> See above Chapter 4 nn 36, 47; and accompanying text.

<sup>1558</sup> See above Chapter 3 n 92 and accompanying text.

UNCROC albeit with the attendant problems attached to their use.<sup>1559</sup> Judicial review would provide an opportunity to acknowledge the realities of the hierarchy of care and its effects on women and children, and analysis of and affirmation of the consequences of lack of support from a second guardian.

There are a number of arguments that could be made based on the issues raised. These include that the Family Court:

- Failed to consider the welfare of the children concerned, particularly by assuming that a guardian's right to access, however exercised or not exercised, would benefit them (justified by reference to the paramountcy provision and discretion provided in the Guardianship Act (the Act) and to UNCROC, particularly its Preamble);
- Omitted to search for the least detrimental option for the children, by not exploring fully the effects on them of the failure by their fathers to exercise access reliably and of the unresolved conflict between their parents (this search also justified by reference to the paramountcy provision of the Act and to UNCROC's Preamble);
- Misinterpreted the Act which arguably provides, in section 10(2) in conjunction with section 16, for an *in terrorem* provision when an access parent is unwilling to exercise access;
- Misinterpreted section 10(2) by subsuming the second part of it into the first as a provision to be used "only in extreme and unusual cases";
- Failed to consider the compounding of gender inequities caused by the use of ambivalent power by the father concerned, and the effects of this on the child, through a misinterpretation of section 23 (1)(A) of the Act. It can be argued that this section is concerned only to ensure that "there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child." It therefore does not preclude consideration of gender inequities, the social and economic differences between men and women as guardians and the effects of these on the care that children receive (justified by reference to provisions of CEDAW and the paramountcy provision);
- Erroneously assumed that the mother would "by default" and "informally" take up full responsibility for caring for the child including addressing the ongoing effects (if any) of the father's neglect; and thereby institutionalised an inequity;

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<sup>1559</sup> See above Chapter 3 III. The Role of Human Rights in the Allocation of Parental Responsibility.



- Misinterpreted section 11 of the Act by deciding that a concern about access not being exercised according to an agreement was not a “dispute between guardians.”

If judicial review were successful, the Family Court might then consider the range of solutions available under a change in value system.

*(b) Change in value system*

With a change in value system priority could be given to considering a range of possibilities for promoting a peaceful family life for the children’s primary household, including the *in terrorem* provisions proposed for primary parents who resist facilitating access.<sup>1560</sup> Different questions would be asked and different options explored than is now the case. For instance, is a child whose father exercises access rarely if at all (as in *Collins v Sawtell*), unreliably (as in *Cunliffe v Cunliffe*), or inequitably, with neither parent wanting to be the primary carer (as in *Bramley v MacDonald*), showing signs of neglect to the extent of requiring a Children, Young Persons, and their Families family group conference? Would the primary family benefit from suspension of the father’s guardianship under section 10(2) of the Guardianship Act, on the grounds of his unwillingness?

Whether or not there were parallel child support proceedings was it also possible to recognise the exercise of debilitating or ambivalent power and use judicial discretion to order the auxiliary carers to compensate the primary carers for the uncertainty and inconvenience caused, or to pay for counselling for them or the children?

*(c) Section 20A*

There seems never to have been a case where a primary caregiver has attempted to take action under section 20A against a father who has not exercised “reasonable” access because he is hindering or preventing access by his failure to exercise it, but this might be an option to pursue. While this may seem an untenable solution, if auxiliary care is viewed from the point of view of the child and the paramountcy of the child’s welfare is prioritised over the parents’ rights, it is not illogical.

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<sup>1560</sup> See above n 68 and accompanying text.

(ii) Possible outcomes under proposed legislation

With a change of legislation, by default the child's relationship with the primary parent would be prioritised. That would mean, in *Cunliffe v Cunliffe*, *Collins v Sawtell* and *Bramley v MacDonald*, that the mothers would have more choices.

The extension of the present section 16B would also give them the right to decide, where psychological abuse like unreliability is an issue, whether an abusive auxiliary parent could maintain a relationship with their child, with an option of supervised access. It is possible to define the auxiliary parents' behaviours as a kind of violence and make access contingent on their undertaking a programme designed to improve their parenting, or, since they arguably do not know how to parent (do not parent in a way that enhances their children's stability) able to exercise access only under supervision. This would be supplemented by a family support programme designed to support parents who wanted to change.

If Mr Cunliffe or Mr Sawtell chose not to exercise access, or exercised it unreliably, who else might be available to replace them as guardians? Or Mr W if Judge Inglis QC's strategies did not work? Or even Mr MacDonald? A trigger provision that suspended an unwilling auxiliary parent's guardianship rights might be useful if a mother wanted help from another family member with something positive to offer her child. The family member could then apply for access.<sup>1561</sup> This could however be a double edged solution, if it resulted in the exercise of debilitating power by that family member, including ongoing litigation or in the family member attempting to prevent the mother relocating.

None of the mothers were asking for a father to be removed as guardian, but it may have been something they would consider if enforcement were not possible. Arguing for termination or suspension of guardianship might however become an attractive option for mothers in the position of Ms Cunliffe, Ms Collins, or Ms Bramley who, after weighing up the benefits of access, decide that it will be better to have a "clean break." This would promote a peaceful family life and free the mother concerned from having to expend emotional energy on engagement with her child's father and from protecting her child from the consequences of his unwillingness. It would also enable her and the child to move forward without ongoing uncertainty.

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<sup>1561</sup> Guardianship Act s 16.

Whether or not unreliability or other debilitating or ambivalent patterns of behaviour are related to child support issues, resolutions might also include the imposition of a financial penalty like the one in *W v W*, along with the other mechanisms that are already available. A finite clean break from the auxiliary parent is the other option. The equivalent of the “unwillingness” element of section 10(2) of the Guardianship Act would also be available.

All three mothers wanted to “share” the parenting responsibility more equitably. However, since the fathers were unwilling, these kinds of solutions, within a belief system that embraced changed values, signal that society takes auxiliary parental unwillingness seriously, believe it is abusive of children and their primary parents, and is looking for ways to create change and support primary parents.

## 2. Paternal insistence on equality: *W v C*

### *(i) Possible outcomes under existing legislation: Change in value system*

*W v C*, it has been argued, valued the needs of Mr W above those of Ms C and their child. It could have been decided on the basis that Mr W was unwilling to commit himself to an appropriate role within the structure of the hierarchy of care. This unwillingness was arguably compromising the wellbeing of the primary carer and their son. He could have been threatened with removal as guardian under section 10(2) if unwilling to accept his role; or actually had his guardianship removed.

### *(ii) Possible outcomes under proposed legislation*

The legislation for arrangements that “work” would have placed Mr W in a different position at the outset. Ms C could have asked for a (finite) clean break on the basis that she needed to establish a household with their son and that Mr W’s involvement would compromise this for the time being (although she was happy to organise their son’s relationships with his paternal extended family). Ms C would also have had the option of attempting to bring Mr W’s erratic behaviour under the extended provisions of section 16B. She and Mr W would have had the opportunity to take advantage of the family support programme while the clean break was in operation, giving Mr W the opportunity to consider how he might best re-establish and maintain his relationship with their child at the end of the clean break, in a way that supported and

enhanced his life with his primary carer. If at the end of the clean break period, if better conditions for a relationship between Mr W and their child could not be negotiated, the option remains for the child to contact Mr W at the age of 13, with support from adults other than Ms C. In the meantime Ms C would also be free to relocate and move forward in her life with the child.

### 3. Relocation: D v S

In this case, possible outcomes following reform will be considered only in relation to the Family Court decisions.

#### (i) Possible outcomes under existing legislation: Change in value system

There was no question that Ms S was the primary carer but this was not immediately acknowledged by according her custodial status, as it could have been. Ms S became custodian only in *D v S* (no 3) and then following *D v S* (no 7) had to share custody with Mr D. With a change in value system her status as primary carer, and Mr D's as the auxiliary carer would have been acknowledged by making her custodian at the outset. The difficulties she faced, as primary carer, would also have been acknowledged, and ways sought of supporting her. Mr D wanted to retain contact with the children and Ms S was willing to facilitate that, by offering financial assistance for travel and accommodation: the hierarchy of care could have worked well, but for Mr D's unwillingness to accept an appropriate role. Section 10(2) could have been used as an *in terrorem* provision, on the basis that Mr D as an auxiliary parent was sustaining conflict by his unwillingness to engage appropriately in the hierarchy of care.

#### (ii) Possible outcomes under proposed legislation

Under proposed legislation, the parents' status as primary and auxiliary carers would have been a starting point. The desire of Ms S to relocate would have been acceptable, with mechanisms in place to ensure that the auxiliary relationship was sustained. If this was unacceptable to Mr D, Ms S would have had the option of a clean break and the potential of protection through the extension of section 16B if necessary. All family members would have the option of access to the New Zealand support programme, though realistically this would have been most useful for Mr D who remained in New Zealand. If the clean break became extended, or Mr D's unwillingness to engage with an appropriate role in the hierarchy of care resulted in his guardianship rights being removed, the children would have the right to support for re-establishing a relationship with Mr D when they reached adolescence. Again, this might be compromised by their residence in

Ireland, but with contemporary communications systems, and given Ms S's commitment to the children's relationship with Mr D, it could be possible to organise something.

#### 4. Paternal insistence when not a guardian

##### *(i) Possible outcomes under existing legislation*

The provisions of sections 6 and 15 of the Guardianship Act, the auxiliary roles of Mr Anderson and Mr P and the knowledge that successful contact works best when parents are clear about their roles as primary or auxiliary parents call for solutions that acknowledge the primary status of Ms Paterson and Ms M. It is submitted that the better solution in both cases would have been to protect the relationship between the mother and child, as provided for in section 6(2). This would allow the mothers to choose whether to relocate, whether to engage in other relationships and whom to permit to develop relationships with their children. For Ms M this would also have provided additional protection for her and her child if her relationship with Ms K ended. It is perhaps overly optimistic to imagine that lesbian relationships are any more enduring than heterosexual ones. Some will be, some will not. The suggested solution would be preferable to shared parenting that offers Mr Anderson and Mr P a status that obscures the realities of their involvement in parenting. This might be difficult for Mr P if Ms K's application for custody were withdrawn as that would make a *Tito* order impossible. In *Anderson v Paterson* Mr Anderson, as an access parent, could if he wished to take advantage of the access provisions of the Hague Convention.

From the children's point of view, this solution would meet their needs as intended by UNCROC and expressed in its Preamble, in particular their needs for a peaceful family life. For B, in *Anderson v Paterson*, the disruption of having her mother taken up with the legal proceedings and then having to return to New Zealand must have been considerable. D's care may also have been compromised by the legal proceedings in *P v K*. The children's potential for good relationships with their fathers seem unlikely to be improved by a change in their fathers' status that gives them more opportunities to disrupt the children's lives.

*(ii) Possible outcomes under proposed legislation*

The proposed legislative changes<sup>1562</sup> are almost the reverse of the jurisprudence underlying the decisions in these cases, in that auxiliary parenting is an acceptable status and a clean break is provided for. Both recognition of the father's auxiliary role and a clean break would be appropriate in these cases, it is submitted. The support of the proposed family programmes, or something similar in Australia, would perhaps be useful for Mr P. The proposed provision whereby children are given extra-familial support to approach biological family after the age of 13 would protect their interests in relation to father-unique benefits and give them the greatest chance of a peaceful childhood.

#### IV. Concluding Remarks

This chapter addressed proposals for reform and the values they espouse. It then presented an alternative proposal based on acknowledgement of the realities of the hierarchy of care and relying on relinquishing the assumptions that primary carers will continue to care for their children regardless of conditions and that auxiliary carers should be included in their children's lives unless their physical or sexual abuse is an issue. The proposal was presented in two parts, the first suggesting changes in the values underlying the present judicial (and societal) belief system about parenting and the second suggesting legislative changes. Possible alternative solutions to the cases in Chapters 5 to 8 were then outlined, based on the proposal made.

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<sup>1562</sup> See above Chapter 3 III. Family Court Response to *Responsibilities for Children Especially When Parents Part: The Laws about Guardianship, Custody and Access*.

## Chapter 10. Conclusion

Part I began, in Chapter 2, with a social science-based narrative addressing the gendered basis of parenting, represented as a hierarchy of care both affected by and effecting social and economic inequities including the exercise by auxiliary parents of ambivalent and debilitating power. The existence of a hierarchy of care in spite of the continuing inequities, it was argued, supports the assumption that women will continue to exercise parental responsibilities regardless of the conditions under which they have to do this. Chapter 2 also explored the possibility that a child's need for a relationship with a second parent (or any biological parent) has narrow and specific parameters; enforcing the relationship may harm the child and the primary carer if parents who do not live together are in conflict about their parental responsibilities.

The contextual survey continued in Chapter 3 with an examination of relevant legislation and international instruments, with some assessment of their relationship to the material in Chapter 2. Chapter 4 then examined the current belief system of Family Court judges in relation to parenting responsibilities, particularly when parents are in conflict, as expressed in selected submissions, reports and conference papers. While acknowledging that the judiciary is required to work within the legislation, it was submitted that it also chooses not to incorporate an understanding of the hierarchy of care into its jurisprudence. As well, it assumes that women will continue to parent in spite of difficulties grounded in gender inequities and emphasises enforcement of auxiliary parents' rights to "access" and "shared responsibility" (both currently contested terms) rather than support and protection of primary carers. It was submitted that this belief system may allow the Court to discipline mothers, expressed in a form of institutionalised inequity experienced as abusive by mothers.

Within the framework presented in Part I, Part II analysed significant cases representing common issues faced by parents in conflict, attempting to establish the extent to which their facts and outcomes reflect the tensions inherent in the contextual material, the social science, the legislation and the Family Court's philosophy. It was submitted that the cases in general confirm a disjuncture between the given social science narrative, and to some extent the law itself, and the interpretation and application of the law according to contemporary Family Court jurisprudence of shared parental responsibility. In the cases, the rhetoric of shared responsibility appears to mask the existence of the hierarchy of care and the prerequisites that require it to function

successfully when parents live apart, as well as assuming that absent sexual or physical abuse, the benefits of a relationship with an auxiliary parent will outweigh the risks. In the two cases, *Bramley v MacDonald* and *D v S*, where women who were primary caregivers challenged a core assumption and refused to continue as primary parents in circumstances that were unsatisfactory for them, the Court struggled to find (*Bramley v MacDonald*) or justify (*D v S*) an outcome promoting the wellbeing of the children concerned. Mr MacDonald did not want more responsibility; Mr D's commitment and capacity may have been limited to his function as an auxiliary parent rather than a primary one.

*Cunliffe v Cunliffe*, *Collins v Sawtell*, *W v C*, *Anderson v Paterson* and *P v K* illustrated how the law is interpreted to ensure that a father who insists on his right to be involved with his child can establish that involvement, without an understanding of and commitment to the mechanisms necessary if the hierarchy of care is to function successfully. In justifying this involvement, it was argued, the Court tended to ignore the nexus of challenges to the wellbeing of their child's primary household, including, where it existed, the exercise of debilitating and ambivalent power. *W v W*, however, illustrated the potential of judicial discretion if the Court recognises the exercise of power and control. The auxiliary parent's past willingness and what he offers the child (in *Cunliffe v Cunliffe*, *Collins v Sawtell*) and the effects on the primary household of establishing or maintaining a child's relationship with him, may not be investigated. Existing legislation that limits the circumstances where a father is a "father" or a guardian to protect the primary household may be ignored (*Anderson v Paterson*, *P v K*). Relocation was identified as an area where judicial disciplining of women is particularly noticeable (*W v C*, *D v S*, *Anderson v Paterson*). In conclusion, it was noted that mothers' difficulty in explaining their point of view within any one of Trinder's three discourses about auxiliary parenting arrangements may have been due to their being unable to articulate their sense of having been abused, whether by the inappropriate exercise of debilitating or auxiliary power by the other parent, or by the legal system.

Chapter 9 considered proposals for improving decision-making about care of children when their parents live apart and cannot agree were and made an alternative proposal. Based on the demonstrated need for a change in the present judicial belief system it suggested incorporating a new belief system within the present legislative framework of the Guardianship Act and some amendments to the Act.



It is acknowledged that this kind of reform is unlikely. As this conclusion is written, in the United Kingdom there is an upsurge of demonstrations by aggrieved fathers. It has been noted that mothers tend not to be active in the same way, perhaps because they are too deeply engaged in their work of caring for children in a society where gender inequities form part of their challenging daily experience. Any improvement to the conditions under which mothers care for children, it is submitted, will be slow. It will have to be informed by more research into the dynamics of situational powerlessness, affecting each family member in a different way, and the effects of the exercise by auxiliary parents of ambivalent and debilitating power as well as the exercise of institutionalised debilitating power. Research into ways of educating the judiciary and parents about the hierarchy of care and the futility of imposing it would be welcomed. Experiments with creative solutions for ensuring that children have peaceful family lives seem another possibility. These should focus on solutions that do not assume that benefits flow from contact with an auxiliary parent while ignoring potential risks and assuming that a primary parent, to be a “good” parent must forgo an independent, adult, life.

In short, this thesis has identified a need for and advocates a quiet revolution. This would encourage all members of society honour and support the work of mothers as primary carers, particularly those unable to reach an agreement with auxiliary parents about sharing responsibility for their children.

## Appendix 1

*Selected areas of debate about families, from three perspectives, from Pryor J and Rodgers B Children In Changing Families; Life After Parental Separation (2001) Blackwell, 254.*

Topic of Debate	Conservative Perspective	Liberal Perspective	Emergent Perspective
Mothers	Mothers are the key to the wellbeing of children, and should put childrearing before a a career	Mothers can be adequate parents while working full- or part-time. Lone mothers can be and usually are competent parents	Children benefit most when mothers make choices about careers and families that suit them, and are supported by others
Fathers	Fathers should be present in families as economic providers and heads of the household	Fathers can be positive or negative influences for their children. If other factors are positive, children can thrive without fathers	Economic provision and presence are not a sufficient. Children want their fathers in their lives and thrive in supportive, involved relationships.
Children	Children are dependent and vulnerable, should be protected and treated as "children".	Children are resilient and agentic, and should have equal say with adults in decisions regarding their lives	Children do not see themselves as vulnerable, and want involvement in decisions but not responsibility for them.
Diversity	Family diversity is bad for children and society.	Diversity of family forms allows individuals to adapt to current social and economic circumstances	Diversity in itself is not bad, but instability is. Family relationships regardless of family structure are central to children's wellbeing.

## Appendix 2

### ***D v S* and its interrelationship with other cases and publications**

<b>1999</b>	<i>W v C</i> Family Court Tauranga 20 October	Judge Carruthers
<b>2000</b>	<i>Relocation Cases; A New Zealand Law Society Seminar</i> June	M Henaghan, B Klippel and D Matheson
	<i>W v C</i> Family Court Tauranga 27 June	Judge Inglis QC
	Principal Family Court Judge sends preliminary letter to Minister of Justice re <i>Responsibility for Children</i> , enclosing a copy of <i>W v C</i> 11 September	Judge Mahony
	<b><i>D v S (no 1)</i></b> Family Court Christchurch 2 November	Judge Callaghan
	Principal Family Court Judge Mahony sends Secretary for Justice Family Court Judges' submission to <i>Responsibility for Children</i> discussion 11 December	Committee includes Judges Doogue, Brown, Walsh, Johnston, Callaghan; Judges Adams and von Dadelszen send individual responses (12 October, 10 November)
<b>2001</b>	<i>Children Whose Parents Live Apart: Family and Legal Concepts</i>	A Smith, M Gollop, N Taylor and P Tapp
	"Anti-Father Family Court Judges Exposed" <i>Christchurch Star</i> 23 January	D Carlin and B Cheriton
	<b><i>D v S (no 2)</i></b> High Court Christchurch 2 April	Panckhurst J
	<b><i>D v S (no 3)</i></b> High Court Christchurch 11 May	Panckhurst J
	"New Family Court Judge Has History of Anti-Father Bias" <i>Christchurch Star</i> 15 June	D Carlin
	<b><i>D v S (no 4)</i></b> High Court Christchurch 5 July	Panckhurst J

	<b>D v S (no 5)</b> Court of Appeal 10 July	Gault J for Gault , Keith and Blanchard JJ
	<b>D v S (no 6)</b> Court of Appeal 24 September	Tipping J for Richardson P, Tipping and Anderson JJ
	Judges present papers at Triennial NZLS Conference and 4 <sup>th</sup> NZ Family Law Conference 4-6 October	Principal Family Court Judge Mahony, Judges Blaikie, Doogue and von Dadelszen
	<i>Re the guardianship of ACL</i> Family Court 29 November	Judge Ellis
	<b>D v S (no 7)</b> Court of Appeal 4 December	Richardson P for Richardson P, Keith, Tipping and Anderson JJ; Blanchard J dissenting
	<b>D v S (no 8)</b> Court of Appeal 18 December	Richardson P for Richardson P, Keith , Blanchard, Tipping , Anderson JJ
	Family Court response to <i>Making Contact Work</i> n.d. [2001]	Judge Clarkson, Ms Southwick and Mr Jefferson for the Family Law Section of the NZLS, in consultation with Family Court Judges
<b>2002</b>	<i>Anderson v Paterson</i> Family Court Christchurch 25 January	Judge Bisphan
	<b>D v S</b> ? stay proceedings late January, early February	?
	<b>D v S (no 9)</b> Family Court Christchurch 20 March	Judge Somerville
	<b>D v S (no 10)</b> High Court Christchurch 5 July	Chisolm and Fraser JJ
	<i>K v M</i> Family Court Auckland 12 July	Judge Inglis QC
	<i>P v K and M</i> Family Court Auckland 8 August	Judge Doogue
	<b>D v S (no 11)</b> Court of Appeal 1 October	Gault P, Blanchard Glazebrook JJ
	<i>P v K</i> High Court Auckland 13 December	Priestley and Heath JJ

## Bibliography

- Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work; The Facilitation of Arrangements for Contact Between Children and Their Non-Residential Parents; And the Enforcement of Court Orders for Contact: A Consultation Paper* (2001) Lord Chancellor's Department, London
- Advisory Board on Family Law: The Children Act Sub-Committee *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (2002) Lord Chancellor's Department, London
- Amato P and Gilbreth J G "Non-Resident Fathers and Children's Wellbeing: A Meta Analysis" (1999) *Journal of Marriage and the Family* 61 557
- American Law Institute *Principles of The Law of Family Dissolution: Analysis and Recommendations* (2003) Executive Office American Law Institute, Philadelphia
- Anna (1999) "Judge Nakahara on PAS and the Role of the Court in Family Law" *Parental Alienation Newsletter* <http://www.vevch/en/pas/bw199901htm> (accessed 30 March 2001)
- Austin G "The UN Convention on the Rights of the Child - and Domestic Law" (1994) *Butterworths Family Law Journal* 1(4) 63 and 1(5) 87
- Backett K *Mothers and Fathers; A Study of the Development and Negotiation of Parental Behaviour* (1982) Macmillan, London
- Barwick H, Burns J and Gray A *Gender Equity In the New Zealand Judicial System: Judges' Perceptions of Gender Issues* (1996) Judicial Working Group on Gender Equity
- Behrens J "Shared Parenting: Possibilities and Realities" (1996) *Alternative Law Journal* 21(5) 213
- Bell, L "Divorce 'As Bad for Kids as High-Fat Diet' " (2003) *Dominion Post* 5 December A5
- Bergeron M "Hegemony Law and Psychiatry; A Perspective on the Systemic Oppression of Rogue Mothers in *In re Aaron S*" (1996) *Feminist Legal Studies* 4(1) 49
- Biddulph, S *Manhood: An Action Plan for Changing Men's Lives* (1999) Hawthorn, Stroud
- Biddulph, S *Raising Boys: Why Boys Are Different – And How to Help Them Become Happy and Well-Balanced Men* (1998) Celestial Arts, Berkeley Calif.
- Birks S *The Family Court: A View from the Outside* (1998) (Issues Paper No 3) Centre for Public Policy Evaluation, Massey University, Palmerston North

- Birks S *Submission to the Law Commission on Preliminary Paper 47: Family Court Dispute Resolution* (2002) <http://econmasseyacnz/cppe/issues/LCPP47subhtm> (accessed 24 March 2003)
- Blaikie E O K *Keep the Mediation Process Simple: It's My Party and I'll Go if I Want To (Access Issues)* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts
- Blundy A *Every Time We Say Goodbye; The Story of a Father and a Daughter* (1998) Century, London
- Boyd S "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) *Social & Legal Studies* 5(4) 495
- Braver S L, Ellman I M and Fabricus W V "Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations" (2003) *Journal of Family Psychology* 17(2) 206
- Bstan-dzin-rgya-mtsho Dalai Lama XIV *Worlds In Harmony; Dialogues on Compassionate Action* (1992) Parallax, Berkeley CA
- Burns D "Relocation – 'Solomon's Choice'" in *Child Relocation and Abduction Cases* (2002) Auckland District Law Society
- Carlin D "New Family Court Judge Has History of Anti-Father Bias" (2001) *Christchurch Star* 15 June #
- Carlin D and Cheriton B "Anti-Father Family Court Judges Exposed" (2001) *Christchurch Star* 23 January #
- Chesler P "Is Every Woman One Divorce Away from Financial Disaster?" *On the Issues* (1997) Winter 17
- Clarkson D F *Response to Questions Posed in "A Consultation Paper Issued by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law"* (2001) Department for Courts
- Coalition for Safe Families – Anti Fathers' Group Propaganda  
<http://www.menz.org.nz/News%20archive/truthmen.htm> (accessed 19 February 2002)
- Cohen O "Parental Narcissism and the Disengagement of the Non-Custodial Father After Divorce" (1998) *Clinical Social Work Journal* 26(2) 195
- Collier R "'Waiting Till Father Gets Home': The Reconstruction of Fatherhood In Family Law" (1995) *Social & Legal Studies* 4 5

Crawshaw V "Boys Caught up in Tug-of-Love" (2003) *New Zealand Herald* 15 October A21, 29 October A20, 12 November A24

Department of Justice Policy and Research Division *A Survey of Family Court Judges* (1993)  
Wellington

Deutsch F M *Halving It All; How Equally Shared Parenting Works* (1999) Harvard University Press, Boston

Dolgin J L "Just a Gene: Judicial Assumptions About Parenthood" (1993) *UCLA Law Review* 40  
637

Doogue J *Psychological Abuse: The Family Court Response 2001 and Beyond - A Personal View* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts

Dowd N E "Stigmatizing Single Parents" (1995) *Harvard Women's Law Journal* 18 19

Duncum K *Cherish* (2003) unpublished play, performed at Circa Theatre, Wellington, December 2003

Dunn J, Davies L C and O'Connor T G "Family Lives and Friendships: The Perspectives of Children in Step-, Single-Parent, and Non-Step Families" *Journal of Family Psychology* 15(2) 272

Edin K "What Do Low-Income Single Mothers Say About Marriage?" (2000) *Social Problems* (February) 47(1) 112

Eekelaar J "Beyond the Welfare Principle" *Child and Family Law Quarterly* (2002) 14(3) 237

Eekelaar J "Children's Rights: From Battle Cry to Working Principle" in *Liber Amicorum Marie-Therese Meulders-Klein: Droit Compare des Personnes et de la Famille* (1998) Bruylant, Brussels

Elias S "Family Courts - 20 Years After Reform; the Family Court and Social Change: Address to the Conference of the Family Courts of Australia at Sydney on Thursday 26 July 2001" (2002) *Family Court Review* 40(3) 297

Else A A *Question of Adoption: Closed Stranger Adoption in New Zealand 1944-1974* (1991)  
Bridget Williams Books, Wellington

Else A "The Uses of History in Adoption and Healing" in *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption Education and Healing Trust, Wellington

- Evans P *Verbal Abuse Survivors Speak Out; On Relationship and Recovery* (1993) Bob Adams, Holbrook, Mass.
- Faller K "The Parental Alienation Syndrome: What Is It and What Data Support It?" (1998) *Child Maltreatment* 3(2) 100
- Family Court Judges Committee *Submission on Behalf of the Family Court Judges of New Zealand in Response to the Discussion Paper for Review of the Laws About Guardianship Custody and Access* (2000)
- Fergusson D M Horwood L J Lynskey M "The Childhoods of Multiple Problem Adolescents: A Fifteen year Longitudinal Study" *Journal of Child Psychology and Psychiatry* 35(6) 1123
- Fineman M A "Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking" (1988) *Harvard Law Review* 101(4) 727
- Fineman M A *The Illusion of Equality; the Rhetoric and Reality of Divorce Law Reform* (1991) University of Chicago Press, Chicago
- Fineman M A *The Neutered Mother the Sexual Family and Other Twentieth Century Tragedies* (1995) Routledge, New York
- Frances J and Tortell L "Ritual Abuse and the Law" (1993) in *Women's Suffrage Centennial Law Conference Papers* Wellington Women Lawyers Society, Wellington
- Gardner R *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse* (1987) Creative Therapeutics, Cresskill NJ
- Gardner R *The Parental Alienation Syndrome; A Guide for Mental Health and Legal Professionals* (1992) Creative Therapeutics, Cresskill NJ
- Global Development Research Center <http://www.gdrc.org/gender/framework/what-is.html> (accessed 28 June 2003)
- Gottlieb C, Lalos O and Lindblad F "Disclosure Of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes" *Human Reproduction* (2000) 15(9) September 2052
- Griffiths M *Feminisms and the Self: The Web of Identity* (1995) Routledge, London
- Haines, L "Society's Dirty Washing" (2004) *Dominion Post* 10 April E3
- Harland A *Custody and Access Orders: Interviews With Parents About Their Court Experiences* (1991) Department of Justice Policy and Research Division, Wellington



- Hawkins J M and Allen R (eds) *Oxford Encyclopedic Dictionary* (1991) Clarendon, Oxford
- Henaghan M and Atkin B (eds) *Family Law Policy in New Zealand* (2002) LexisNexis Butterworths, Wellington
- Henaghan M "Legally Rearranging Families; Parents and Children After Break-up" (2002) M Hengahan and B Atkin (eds) *Family Law Policy In New Zealand* LexisNexis Butterworths Wellington
- Henaghan M, Klippel B and Matheson D *Relocation Cases* (2000) New Zealand Law Society Continuing Legal Education Department, Wellington
- Henaghan M "Shared Parenting: Where From? Where To? Children's Rights and Families" (2001) S Birks (ed) *Proceedings of Social Policy Forum 2000* Centre for Public Policy Evaluation, Palmerston North
- Hengahan R M "Custody Decisions - Discretion Gone Too Far?" (2000) *Otago Law Review* 9(4) 731
- Hetherington E M "Should We Stay Together for the Sake of the Children?" E M Hetherington (ed) *Coping with Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective* (1999) Lawrence Erlbaum Associates, Mahwah NJ
- Humphrey M and Humphrey H "A Fresh Look at Genealogical Bewilderment" (1986) *British Journal of Medical Psychology* 59 133
- Iwanek M "Adoption in New Zealand - Past Present and Future" *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption and Healing Trust Wellington
- Kaganas F and Day Sclater S "Contact and Violence - The Winds of Change?" (2000) *Family Law* (September) 630
- Kelly R F and Ward S L "Allocating Custodial Responsibilities At Divorce; Social Science Research and the American Law Institute's Approximation Rule" (2002) *Family Court Review* 40(3) 350
- Kruk E "The Disengaged Noncustodial Father: Implications for Social Work Practice With the Divorced Family" (1994) *Social Work* 39(1) 15
- Lamb, M *The Role of the Father in Child Development* (2003) (4ed) Wiley, Chichester N.Y.

- Larre C and Rochat de la Vallee E *Rooted in Spirit: The Heart of Chinese Medicine* (1995)  
Station Hill Press, New York
- Law Commission/ Te Aka Matua o Te Ture *Adoption and Its Alternatives: A Different Approach and a New Framework* (2000) Wellington
- Law Commission/ Te Aka Matua o Te Ture *Family Court Dispute Resolution; A Discussion Paper (Preliminary Paper 47)* (2002) Wellington
- Law Commission/ Te Aka Matua o Te Ture *Recognising Same-Sex Relationships* (1999)  
Wellington
- Lee A A *Survey of Parents Who Have Obtained a Dissolution* (1990) Department of Justice  
Policy and Research Division, Wellington
- Leibrich J, Paulin J and Ransom R *Hitting Home: Men Speak About Abuse of Women Partners*  
(1995) Department of Justice in Association with AGB McNair, Wellington
- Ludbrook R “Closing the Wound - An Argument for the Abolition of Adoption” *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption and Healing Trust, Wellington
- McDowell H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study*  
Unpublished Doctoral Thesis (Auckland) (1995)
- McGrail A *Infertility, The Last Secret; What Happens when You Want to Have a Baby* (1999)  
Bloomsbury, London
- Macleane M and Eekelaar J *The Parental Obligation: A Study of Parenthood Across Households*  
(1997) Hart, Oxford
- McLoughlin D “Crackdown Aims at DPB Mothers” (2003) *Dominion Post* 8 April A6
- Maxwell G and Robertson J (1990) “Child Support after Separation – Part 1” *Family Law Bulletin* 2(8) 94
- Milne J “Gay Men Win Legal Fight for Toddler” (2004) *Sunday Star Times* 18 April A1
- Milne J and Henzell D “Same-Sex Parents Wary of Ruling: Need for Legal Agreement Between Sperm Donors and Parents Underlined” (2004) *Sunday Star Times* 18 April A2
- Ministry of Justice (2000) *The Human Rights Act 1993; Guidelines for Government Policy Advisors*
- Ministry of Justice *Responsibilities for Children Especially when Parents Part: The Laws About Guardianship Custody and Access; Discussion Paper* (2000)

- Ministry of Women's Affairs "Briefing to the Incoming Minister – Status of Women in New Zealand" *Panui; An Occasional Publication of the Ministry of Women's Affairs* (2000)
- Ministry of Women's Affairs *Next Steps Towards Pay Equity; A Background Paper on Equal Pay for Work of Equal Value* (2002)
- Ministry of Women's Affairs *The Status of Women In New Zealand 2002; The Fifth Report on New Zealand's Progress on Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (2002)
- Ministry of Youth Affairs *He Hui Whakatau i Te Mana o Te Tamaiti o Te Whakakotahitanga o Nga Whenua o Te Ao/ United Nations Convention on the Rights of the Child; Initial Report of New Zealand* (1995)
- Monk, F "Loan Justice" (2004) *Listener* 7 February 26
- Morris A "Adding Insult to Injury" (1999) *Trouble & Strife* (40) 30-35
- National Center on Addiction and Substance Abuse at Columbia University *Back to School 1999; National Survey of American Attitudes on Substance Abuse V: Teens and Their Parents; Report* (1999)
- Neale B and Smart C (2000) *Good To Talk? Conversations With Children After Divorce; Report for the Nuffield Foundation* Centre for Research on Family, Kinship and Childhood, University of Leeds
- Nelson R (2000) "Where Did I Come From? Studies Raise Issue of What to Tell Children Conceived with Donor Sperm" <http://my.webmd.com/content/article/1728.60883> (accessed 28 October 2002)
- New Zealand Parliamentary Debates* (1968); (1980); (1986); (1987)
- Niehoff D *The Biology of Violence: How Understanding the Brain, Behavior and Environment Can Break the Vicious Circle of Aggression* (1999) Free Press, New York
- Paterson L *Making Up Mums: Changing Discourses of Single Motherhood in New Zealand 1975-1995* (2002) Paper delivered at Conference on Mothering Law Politics and Public Policy 26-28 October 2002 Center for Research of Motherhood, York University, Toronto
- Paton D "Specific Needs of Women Still Have To Be Catered For" (2003) *New Zealand Herald* November 12 A23
- Perry B "Neurodevelopmental Adaptations to Violence: How Children Survive the Intragenerational Vortex of Violence" in *Violence and Childhood Trauma: Understanding*

- and Responding to the Effects of Violence on Young Children* (1996) Gund Foundation, Cleveland Ohio
- Pert C *Molecules of Emotion; Why You Feel the Way You Feel* (1997) Scribner, New York
- Polikoff N D "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?" (1996) *Santa Clara Law Review* 36(2) 375
- Pryor J and Rodgers B *Children In Changing Families; Life After Parental Separation* (2001) Blackwell, Oxford
- Quaintance L "Court of Injustice" (2001) *North & South* (June) 35
- Rhoades H "The 'No Contact Mother': Reconstructions of Motherhood In the Era of the 'New Father'" (2002) *International Journal of Law Policy and the Family* (16) 71
- Ritchie J "Women and the Family in New Zealand" (2000) in H Margolis and A Else (eds) *Hui Raranga Wahine/Women's Studies Association (New Zealand) Conference 1999: Papers Women's Studies Association*, Wellington
- Rodgers B and Pryor J (1998) *Divorce and Separation: Outcomes for Children* Joseph Rowntree Foundation, York
- Rodwell, J *Repartnered Families: Creating New Ways of Living Together – Beyond the Nuclear Family* (2002) Penguin, Auckland
- Scheib J, Riordan M and Rubin S "Choosing Identity-Release Sperm Donors: The Parents' Perspective 13-18 Years Later" *Human Reproduction* (2003) 18(5) May 1115
- Sevenhuijsen, S *Citizenship and the Ethics of Care: Feminist Considerations About Justice, Morality and Politics* (1998) Routledge, London
- Sharp C "Putting Children First" (1998) *New Zealand Law Journal* (December) 424
- Sheldon, S "Unmarried Fathers and Parental Responsibility: A Case for Reform?" (2001) *Feminist Legal Studies* 9 93
- Silverstein L B and Auerbach C F "Deconstructing the Essential Father" (1999) *American Psychologist* 54(6) 397
- "The Six Most Anti-Family" (2001) *Northland Age* 25 January 7
- Smart C "The Children Act 1989: The English Experience" (2000) in *9th National Family Law Conference Proceedings* Melbourne Television Education Network

- Smart C "From Children's Shoes to Children's Voices" (2002) *Family Court Review* 40(3) 307
- Smart, C "Towards an Understanding of Family Change, Gender Conflict and Children's Citizenship" (2003) *Australian Journal of Family Law* 20
- Smart C and Neale B *Family Fragments?* (1999) Polity Press, Cambridge
- Smith A, Gollop M, Taylor N and Tapp P *Children Whose Parents Live Apart: Family and Legal Concepts* (2001) Children's Issues Centre, Dunedin
- Smith A, Taylor, N, Gollop, M, Gaffney, M Gold, M and Henaghan, M *Access and Other Post-Separation Issues; A Qualitative Study of Children's, Parents' and Lawyers' Views* (1997) Children's Issues Centre, Dunedin
- St John S *Income Expectations of Men and Women After Separation* (1995) (Paper for the Family Law Conference October 1995)
- Statistics New Zealand *2001 Census: Families and Households (2001) – Reference Reports* (2002)
- <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Reference+Reports+2001+Census:+Families+and+Households+2001?open> (accessed 10 October 2003)
- Sternberg E M *The Balance Within; The Science Connecting Health and Emotions* (2000) Freeman, New York
- Sturge C and Glaser D "Contact and Domestic Violence - The Experts' Court Report" (2000) *Family Law* (September) 615
- Sturm D "Focus is on Interests of the Child" (2003) *Dominion* 2 October 35
- Tesler P H *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (2001) Section of Family Law American Bar Association, Chicago
- Trinder L Beek M and Connolly J *Making Contact; How Parents and Children Negotiate and Experience Contact after Divorce* (2002) YPS for Joseph Rowntree Foundation, York
- Trinder L Beek M and Connolly J *Children's and Parents' Experience of Contact after Divorce* (2002) <http://www.jrforuk/knowledge/findings/socialpolicy/092asp> (accessed 9 March 2003)
- Tronto, J *Moral Boundaries; A Political Argument for An Ethic of Care* (1993) Routledge, New York
- Turner A and Coyle A "What Does It Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) *Human Reproduction* 15(9) 2042

- Van Scoyoc S *The Perfect Mother: Invisible Woman* (2000) Robinson, London
- Verrier N *The Primal Wound: Understanding the Adopted Child* (1993) Gateway, Baltimore
- von Dadelszen P *Rights or Obligations? - Review of the Guardianship Act 1968* (2001) (Paper presented to the Triennial New Zealand Law Society Conference and 4th New Zealand Family Law Conference 6 October 2001) Department for Courts
- Wallbank J (1998) "Castigating Mothers: the Judicial Response to 'Wilful' Women in Disputes Over Paternal Contact in English Law" (1998) *Journal of Social Policy and Family Law* 20(4) 357
- Wallbank J (2000) *Challenging Motherhood(s)* Longmans, London
- Wallerstein J and Lewis J "The Long-Term Impact of Divorce on Children: A First Report From a Twenty-Five Year Study" (1998) *Family and Conciliation Courts Review* 36 368
- Wallerstein J "On Sanford Braver's "Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations"  
<http://www.thelizlibrary.org/liz/braver-wallerstein.html> (accessed 22 October 2003)
- Webb P R H *Butterworths Family Law Service* (2002) Wellington
- Webb P R H et al *Family Law In New Zealand* (10<sup>th</sup> edn, 2001 2v) Butterworths, Wellington
- Weitoft G, Haglund B and Rosen M "Mortality Among Lone Mothers In Sweden: A Population Study" (2000) *Lancet* 355 (9211) 1215
- "What others are saying" (2000) *Evening Post* 14 September 6
- Whitehead M, Burstrom B and Diderichsen F "Social Policies and Pathways to Inequalities in Health: A Comparative Analysis of Lone Mothers In Britain and Sweden" (2000) *Science and Medicine* 50(2) 255
- Willis J and Sharp N "Traversing the Many Layers of Adoption" in *Adoption and Healing; Proceedings of the International Conference on Adoption and Healing* (1997) New Zealand Adoption Education and Healing Trust, Wellington
- Wilson T "Testimony on SB 571 – Rebuttable Presumption for Joint Legal Custody; Family Law and Fathers' Rights Antics in Maryland *Feminista!* 2(2)  
<http://www.feminista.com/v2n2/wilson.html> (accessed 26 January 2003)
- Wolchik S, Fenaughty A and Braver S "Residential and Non-Residential Parents' Perspectives on Visitation Problems" (1996) *Family Relations* 45 23