Care of Children:
Families, Dispute Resolution
and the Family Court

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ABSTRACT

This study explored family members’ experience of, and satisfaction with, New Zealand Family Court dispute resolution processes concerning children’s care arrangements following parental separation. A qualitative method was employed, using individual interviews with 22 parents and 8 children from 15 families, in three court districts, during 2001-2002. Follow-up interviews were also conducted with the parents one year later to assess the factors affecting compliance with their agreements and court orders. Focus groups were held with 16 Family Court professionals (lawyers, counsellors, specialist report writers and judges) in two cities to obtain their views on the family members’ perspectives.

Sociocultural and ecological theories, the sociology of childhood and the UNCRC provided the conceptual basis for the research. Historical developments in child custody and divorce laws, which provided the impetus for the establishment of Family Courts internationally, have also been reviewed.

Each parent was legally represented, with 87% of the families also attending Family Court counselling and judge-led mediation conferences. Defended hearings occurred in 27% of the cases. Family members reported a broad range of views about their legal and court experiences. They valued their interactions with professionals who took an interest in them and their children, provided clear information and support, let them have their say, and competently managed the dispute resolution processes. Dissatisfaction was frequently expressed with the conduct of ex-partners and with professionals’ styles of practice, particularly where these involved erratic or uncompromising attitudes and adversarial tactics. The desire to respond to what was written in an ex-partner’s affidavit escalated some parenting disputes onto a litigation pathway. Delay, cost, gender bias, lack of enforcement of court orders, and inadequate opportunities to feel heard, understood and respected were also identified as problems associated with Family Court proceedings. Earlier access to a wider
range of information, support and conciliation services was recommended, together with more post-order explanation and support.

The professionals wanted a stronger emphasis on the Family Court as a court of law, rather than a social agency. A clearer demarcation between the court’s conciliation and adjudication functions was considered necessary to avoid clients having unrealistic expectations of the Family Court. Family members’ therapeutic needs were important, but thought best met within community-based agencies.

The children were aware of their parents’ court proceedings and most wanted the opportunity to play a more direct role in the decision about their future living arrangements.

Significant or modest changes had occurred in 60% of the families by the time of their follow-up interviews. Some changes had led to a reversal in the original care arrangements, while others had impacted upon the frequency of a child’s contact with their non-resident parent.

A new conceptual model for the resolution of post-separation parenting disputes has been developed. This integrates the theoretical framework underpinning the study with the international research evidence on the impact of parental separation and the principles and practices of an effective child-inclusive and culturally responsive family law system.
This thesis, and the research underpinning it, was completed over the period 2001-2005, but the thinking within it is really the culmination of 10 years work with the Children’s Issues Centre at the University of Otago. Over this time I have been skilfully guided and enthusiastically encouraged by my PhD supervisors, Professor Anne Smith (Director, Children’s Issues Centre) and Professor Mark Henaghan (Dean, Faculty of Law). Their long-standing commitment to advancing the well-being of children and their families has been a real inspiration.

I am most grateful to Associate Professor Pauline Tapp (Faculty of Law, University of Auckland) and Megan Gollop (Children’s Issues Centre) for their assistance with the data collection for this project. The collegiality of Anne, Mark, Pauline and Megan has been a huge influence on my views about New Zealand’s family law system, the significance of children’s perspectives and family members’ experiences, and the interrelationship between the social sciences and the law.

This study would not have been possible without the invaluable assistance of the Principal Family Court Judge and the Department for Courts in approving the research and so willingly helping to recruit the participants. I also owe a huge debt of gratitude to the parents and children who shared their family stories with me during our telephone conversations, emails and interviews. Their perspectives about the interface between their personal lives and the Family Court over children’s post-separation care arrangements have been remarkable. I am most appreciative, too, for the insightful contributions of the Family Court professionals who participated in the focus group discussions.

Finally, special thanks to my children, Lloyd (17), Alexander (14) and Victoria (10), my husband, Mike Manning, and my parents, Colleen and Forbes Taylor, for their support of, and pride in, my tertiary studies.
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<tr>
<td>ABA</td>
<td>American Bar Association</td>
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<tr>
<td>ACYA</td>
<td>Action for Children and Youth Aotearoa</td>
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<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<td>ATM</td>
<td>Automatic Teller Machine</td>
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<tr>
<td>CAB</td>
<td>Citizens Advice Bureau</td>
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<td>CCP</td>
<td>Children’s Cases Program</td>
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<td>COC Act 2004</td>
<td>Care of Children Act 2004</td>
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<td>CYFS</td>
<td>Department of Child, Youth and Family Services</td>
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<td>CYPF Act 1989</td>
<td>Children, Young Persons and Their Families Act</td>
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<td>FCWO</td>
<td>Family Court Welfare Officer</td>
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<td>FGC</td>
<td>Family Group Conference</td>
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<td>GST</td>
<td>Goods and Services Tax</td>
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<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission</td>
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<tr>
<td>HRSC</td>
<td>House of Representatives Standing Committee on Family and Community Affairs</td>
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<tr>
<td>MDF</td>
<td>Mums and Dads Forever</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>NZW:FEE</td>
<td>New Zealand Women: Family, Employment, Education</td>
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<tr>
<td>PPPR Act 1988</td>
<td>Protection of Personal and Property Rights Act</td>
</tr>
<tr>
<td>UFC</td>
<td>Unified Family Court</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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GLOSSARY OF MĀORI TERMS

_Hapū_ - sub-tribes; extended kin group consisting of many whānau

_Hui_ - gathering of people

_Iwi_ - tribe; descent group consisting of many hapū

_Marae_ - complex consisting of an open courtyard, meeting house and associated buildings

_Pākehā_ - New Zealander of European descent

_Rangitahi_ - young people

_Taonga_ - asset, treasure

_Tangata whenua_ - the people of the land

_Te Reo_ – Māori language

_Tikanga_ - right ways; right values, convention, custom; Māori laws and philosophies

_Tamariki_ - children

_Whakapapa_ - genealogies, descent

_Whānau_ - kin group; a group of relatives defined by reference to an ancestor, comprising several generations, and having a degree of ongoing family life focused in group symbols such as a name or land base

_Whanaungatanga_ - kinship relations; collectivism; caring for and maintaining relationships and contact with Māori relatives
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Chapter One
INTRODUCTION

I The Research Focus

The aim of this thesis is to explore the role the Family Court plays in assisting families to resolve disputes concerning children’s care arrangements following parental separation. How the court currently does, and should best, combine its judicial and therapeutic functions for the benefit of family members is the central focus of the study. Tracing the court’s historical development and the influence, over time, of changing conceptions about family transitions helps to locate the New Zealand Family Court within its current social context. Parents’ perceptions of their Family Court experiences, including their satisfaction with current services and their recommendations for change, form the cornerstone of the empirical component of the research. However, the impact of court dispute resolution processes has also been ascertained from the perspectives of the children who were the subjects of their parents’ legal proceedings. Particular consideration was given to how well heard, understood and respected parents and children felt at each stage – counselling, judge-led mediation and defended hearing – and by each Family Court professional – lawyer, counsellor, counsel for the child, specialist report writer and judge. The views of Family Court professionals were also obtained to determine the degree of consistency between consumers’ and professionals’ perspectives on the role and effectiveness of the Family Court.

II Significance of the Research

A Family Court is a separate court or a separate division of a state court of general jurisdiction that exercises comprehensive subject-matter jurisdiction over all legal issues related to children and families (Babb, 1998). It is based on the notion that effectiveness and efficiency increase when the court resolves a family’s legal problems in a single forum with as few appearances as possible. The Family Court is a unique jurisdiction that arose out of the recognition that
“work in family law has an extra dimension” (Beattie, Kawharu, King, Murray, & Wallace, 1978, p. 150). People come to the court because they are facing a family crisis or need specialist assistance to resolve a family dispute. Strong emotions and diverse motivations are, unsurprisingly, a hallmark of these cases. The parties have much at stake, including the stability and security of their future lives and, often, the welfare and interests of their children. Traditional adversarial approaches are recognised as being ill-equipped to effectively deal with such profoundly personal matters. In 1914 the first Family Court was established in the United States of America, although it took until the 1960s for the unified approach to expand to other American states (Ross, 1998), and then to Canada in the 1970s. Pacific nations subsequently adopted this initiative, with the Family Court of Australia coming into existence on 5 January 1976, and New Zealand's new court following five years later. The Royal Commission on the Courts, after a comprehensive review of our court structure, had found that a Family Court was “now necessary and desirable” (Beattie et al., 1978, p. 146). Their recommendation that a Family Division of the District Courts be formed was given effect in the Family Courts Act 1980. The New Zealand Family Court became operational the following year on 1 October 1981. It combined both judicial and therapeutic elements by providing a private forum with new, more informal conciliation processes designed to help the parties resolve their differences through counselling and judge-led mediation rather than adjudication.

The law governing separation and dissolution of marriage was reformed, via the Family Proceedings Act 1980, contemporaneously with the establishment of the Family Court. The new no-fault approach also took effect from 1 October 1981. The year 1981 was thus rather a watershed in the evolution of family law within New Zealand, with both the substantive law and the delivery of court services undergoing a radical overhaul. The following quarter-century has been spent consolidating this package of structural and legal reform and we seem unlikely to again witness changes of such magnitude. Current initiatives (Care of Children Act 2004; Law Commission, 2003, 2004) are much less dramatic, involving enhancements to the existing legal framework rather than a
fundamental rebuilding of the family law system, as is currently occurring in Australia (Australian Government, 2004; Gibson, 2005; Howard, 2005).

Social changes over the past two decades have resulted in a considerable expansion of the Family Court’s jurisdiction and greatly increased its workload. This has placed enormous pressure on the court’s ability to respond both efficiently and therapeutically. A plethora of reasons for “dissatisfaction with the performance of the Family Court” have been noted both in New Zealand (Law Commission, 2002a, p. 54) and internationally (Family Law Pathways Advisory Group, 2001; House of Representatives Standing Committee on Family and Community Affairs (HRSC), 2003; Hunter, 2002). These include the procedures and processes of the Family Court which can be emotionally draining and abusive, the cost of lawyers, the inadequacy of legal aid, poorly skilled professionals, the parties not feeling they had been properly heard or that their interests had been understood or given sufficient attention, delays, gender bias, secrecy, and the nature of the substantive law itself. An “alarming paucity of information” about the operation of the Family Court has, to some degree, allowed this criticism to flourish (Boshier, Beatson, Clark, Henshall, Priestley & Seymour, 1993, p. 30). Unfortunately, very little is known about the effectiveness of the court’s intervention in families’ lives:

It is disconcerting that, in spite of previous calls for more information to be collected regularly and systematically, little has been done. One might be led to conclude that throughout the 1990s there has been an attitude within the public service that data collection, extrapolation and interpretation is not a priority. It is unclear how government departments can run effectively when they cannot say who uses their services, how people use their services, how frequently and to what effect. We express reservations about this lack of basic information. (Law Commission, 2002a, p. 53)

Work undertaken by the Department of Justice shortly after the establishment of the Family Court (Holm & Liebrich, 1985; Lee, 1987; Liebrich & Holm, 1984) led to an extensive research programme being conducted, from 1989 to 1994, on Family Court proceedings dealing with custody and access matters (Hall, 1989; Hall & Lee, 1994; Hall, Lee & Harland, 1993a, 1993b; Harland, 1991a, 1991b; Hong, 1991; Lee, 1990) and the effectiveness of the Family
Court’s counselling services (Maxwell, 1989a; Maxwell, Pritchard & Robertson, 1990; Maxwell & Robertson, 1993a, 1993b; Maxwell, Robertson & Vincent, 1990, 1991). Both of these projects made extensive use of clients’ and professionals’ experiences with the 1981 reform package. Research on this scale has not been repeated since in New Zealand. Case law analyses and professional commentaries on the exercise and impact of statutory provisions remain prolific in the family law field (for example, Atkin, 2002a, 2002b; Atkin & Black, 1999; Austin, 1991, 1994; Caldwell, 1990; Clark, 2003; Doogue, 2004; Henaghan, 1994, 1996a, 2003; Tapp & Taylor, 2002), but empirical studies have been few in nature and limited to quite specific aspects of family law proceedings, including judge-led mediation (Barry & Henaghan, 1986), the role of counsel for the child (Caldwell, 2004; Gray & Martin, 1998; Taylor, Gollop, Smith & Tapp, 1999), Māori perspectives on guardianship, custody and access (Pitama, Ririnui & Mikaere, 2002), Family Court counselling (Goldson, 2003), and domestic violence (Chetwin, Knaggs & Te Wairere Ahiahi Young, 1999; Dixon, Widdowson & Adair, 2002; Maxwell, Anderson & Olsen, 2001).

Harland’s (1991a) study is the only one to have explored New Zealand family members’ perspectives on their involvement with the Family Court in custody and access matters, but this was very limited in its ascertainment of the views of each member of the same family (both adults and children). Nine former couples were interviewed, but none of their children. Some small-scale studies examining the experiences of parents and children (Buchanan, Hunt, Bretherton & Bream, 2001a, 2001b), and parents, children and lawyers / service providers (Murphy & Pike, 2004; Pike, Murphy & Ford, 2005; Pruett & Jackson, 1999) are beginning to emerge internationally, but none adopt a methodology to triangulate the views of each member of the same family. It is to help fill this vacuum that my research project was designed. Qualitative studies with family members can assist in fleshing out the picture of the Family Court garnered from statistical trends and other more quantitative research sources. Consumer satisfaction with Family Court services is a surprising gap in our research knowledge of dispute resolution processes. There are few means open to litigants, other than the utilisation of reapplications, appeal and complaint procedures, letters to the editor, media stories and government
submission processes through which to air their views about the family justice system. Those disenchanted by their experience, for either legitimate or vexatious reasons, are probably over-represented in these anecdotal mediums. Their feedback is therefore an inadequate basis on which to reform the family law system. Instead, properly conducted research is required to inform and monitor changes in this important arena. The comprehensive evaluation of the United Kingdom (UK) information meeting pilots (Walker, 2000a) and mediation services (Davis, 2000), as well as the ambitious reorientation of the Family Court of Western Australia (Murphy & Pike, 2002, 2003a, 2004), are exemplary in this regard (see chapter four).

Opportunities for children to voice their perspectives on parental separation and to contribute to family and legal decision-making processes have opened up in recent times as increasing recognition has been given to fostering the visibility, inclusion and participation of children in society. Child-inclusive practices have the potential to significantly transform services to meet children’s therapeutic needs, as well as their role in family law proceedings during times of family transition (Boshier, 2004a; Family Law Council, 2004; HRSC, 2003; see chapters three and four). In the past, children have reported quite ambivalent views of professional involvement, generally regarding it as a last resort (Butler & Williamson, 1994; Neale, 2002). They prefer to discuss family issues within their (extended) family or friendship networks, rather than reaching beyond these boundaries for professional help. Children who have engaged with Family Court professionals over their parents’ separation frequently feel confused or vague about who they have spoken with and what the role of the professional was in the dispute resolution process (Masson & Oakley, 1998; Neale, 2002; O’Quigley, 2000; Pike et al., 2005; Piper, 2000; Pruett & Jackson, 1999; Pruett & Pruett, 1999; Smith, Taylor, Gollop, Gaffney, Gold & Henaghan, 1997). Many have negative recollections of their interviews and become disillusioned with legal processes when they feel these interfere with their parents’ ability to remain friends (Pruett & Pruett, 1999).

Children also lack control over the appointment of their legal representatives and specialist report writers and generally find the nature of their encounters
with these professionals to be investigative, interventionist and interrogative, rather than friendly, supportive and therapeutic. Children in several English studies have described professionals as “bossy, inflexible, unfair, dismissive, intrusive, intimidating, interrogatory, critical, patronizing, judgemental, condescending, coercive, deceitful, secretive and untrustworthy” (Neale, 2002, p. 467). They were unhappy about the way their views were reported to the court (Bretherton, 2002; Buchanan et al., 2001a, 2001b; Piper, 2000), and wanted an information or consultation service to be set up for children and young people whose parents are separating (Lyons, Surrey & Timms, 1999). New Zealand children have also recounted the sense of confusion, lack of trusting relationship, breach of confidentiality and lack of feedback as problematic aspects of their interactions with Family Court professionals (Smith et al., 1997), although a more complimentary view was expressed by those children who had established positive relationships with the lawyers appointed to represent them (Taylor et al., 1999). Understanding the conceptions of childhood which have shaped family law, and the role adopted by Family Court professionals as they work with children and their families, is an important precursor to shifting court proceedings toward a more child-inclusive style of practice (Smart, Neale & Wade, 2001; Tapp & Henaghan, 2000; see chapters four and five). Children have been excluded and marginalised in the past, although there “are promising signs of real linkages developing between research, policy and practice concerning children” (Cashmore, 2003a, p. 16). This is driving the implementation of new service delivery initiatives that are being provided specifically for children, rather than just as adjuncts to services for adults (McIntosh, 2000; McIntosh & Moloney, 2005; Moss & Petrie, 1997).

III Theoretical Perspectives and the Family Court

The Family Court is relatively uninfluenced by theoretical approaches, and certainly lacks an integrated conceptual framework to inform its practice and service delivery. Internationally, therapeutic jurisprudence has had some impact in humanising legal and court dispute resolution processes. However, this pretty much fails to take account of children’s participatory role in family law proceedings and, to date, has had little to say about indigenous cultural beliefs
and values. I have drawn upon several theories – ecological, sociocultural and sociological - in an attempt to remedy these deficiencies and to develop a holistic, integrated model of post-separation family life and family law.

Ecological theory (Bronfenbrenner, 1979, 1986, 1992, 1994; Bronfenbrenner & Morris, 1998) contextualises intimate family relationships within the broader physical, economic, social and institutional ecology influencing family circumstances and shared intra-familial bonds. As family transitions create stresses and anxieties which strain parent-parent and parent-child relationships, the need for extra-familial support and intervention is inevitable. An ecological perspective can therefore help elucidate the ways in which family law professionals, the Family Court, and other agencies contribute to family well-being following parental separation. It also usefully counters the concept of the law as an autopoietic (closed) system (James, 1992; King & Piper, 1990; Teubner, 1989, 1993).

Sociocultural theory, whilst more usually oriented towards explaining and advancing children’s development, has much to offer the field of family law. The concept of scaffolding, in particular, can help inform parental and professional practice during times of family transition. It is not just children whose emotions, voice and participation need scaffolding by family members and any court professionals they engage with, but also adults who can benefit from application of its principles. The emotional affect, self-esteem and parenting abilities of most separated parents are severely diminished at the very time when they are having to make significant decisions about future care arrangements for their children (Day Sclater & Richards, 1995; Doogue, 2001; Hetherington, Law & O’Connor, 1993; Kelly, 2000, 2003; Tapp, 2002). They need scaffolding from the professionals they interact with on their journey toward divorce, just as their children also do. For different reasons, Family Court professionals should also open themselves to the possibility of scaffolding by their clients if they are to undertake their role most effectively. “Only by understanding what the family understand, or know already, can the expert make any use of their own, more general, expertise” (Cantwell, 2002, p. 546). Each person – parent, child and professional – should ideally work with each
other in a reciprocal partnership, acquiring the information and support they need to develop shared understandings and creative solutions to the challenges posed by post-separation family life.

The United Nations Convention on the Rights of the Child (UNCRC), which New Zealand ratified in 1993, has become increasingly important over the past decade as greater account has been taken of how to respect and give effect to children and young people’s Articles 12 and 13 rights in decision-making processes affecting them (Freeman, 1992, 1996). The traditional welfare orientation, so pre-eminent in family law, has silenced children in the past, but the UNCRC has helped children to emerge from behind the veil of family life to express their views and participate in family and legal decisions about their future care arrangements. This process has been greatly assisted by the recent theoretical shift - initiated by the sociology of childhood - from regarding children as the passive victims of harmful experiences, towards perceiving them as social actors with their own views and strategies for actively coping with challenges in their lives (James & Prout, 1997; Mayall, 1994, 2000a, 2002; Smith, Taylor & Gollop, 2000).

From a child’s perspective, parenting is regarded as a two-way process, with a negotiated and interdependent character (James, 1999). Children from separated homes feel no differently and are reluctant to stand on their rights unless they are particularly distressed about an aspect of their lives and have a strong view on how best to remedy it (Neale & Smart, 2000; Smart & Neale, 2000). A rights dominated discourse, which, of course, is consistent with the agenda of the law, can have a polarising effect and serve to isolate children from their family and community networks. Balancing children’s agency (voice / participation) and dependency (need for care / protection / guidance) is the next theoretical frontier in the family law field – and one with enormous practical implications for the Family Court. It is into this context that the concept of citizenship may be a timely vehicle through which to synthesise these theoretical strands concerning children’s rights and perspectives with the reality of the interdependent nature of their lives (Neale, 2004).
IV Personal Background to this Research

Over the past decade I have worked as a researcher with the Children’s Issues Centre at the University of Otago. The Centre is an interdisciplinary research and teaching unit, to which I contribute the socio-legal perspective. Since the Centre’s inception in 1995 we have been undertaking research into post-separation parenting issues. My dual qualifications in social work and law have equipped me well to investigate family dynamics during times of significant transition and to understand the impact of Family Court processes, and family law generally, on parents’ and children’s lives. I have a particular interest in international law and human rights issues affecting children, especially their voice and participation in dispute resolution processes. The UNCRC and the sociology of childhood have both been important influences in this regard. My particularly unique contribution, however, lies in the application of ecological and sociocultural theories to the family law field, leading to the development of an integrated approach that takes account of the diverse range of separating families and the adoption of child-inclusive practices.

This thesis builds on the various socio-legal research projects I have previously undertaken to explore children and young people’s perspectives on the break-up of their parents’ relationship, their participation in decision-making processes (within their family and the Family Court), and their satisfaction with their post-separation living and visiting arrangements (Gollop, Smith & Taylor, 2000; Gollop, Taylor & Smith, 2000; Gollop, Taylor, Smith, Gaffney, Gold & Henaghan, 1997; Smith et al., 1997). I have also researched the perspectives of children, young people and lawyers about the role of counsel for the child (Taylor et al., 1999; Taylor, Gollop & Smith, 2000a, 2000b), and completed a comprehensive review of family law judgments from New Zealand’s Family Court, High Court and Court of Appeal (Taylor, Gollop, Tapp, Gaffney, Smith & Henaghan, 2000; Tapp, Taylor & Henaghan, 2001). As well, I have undertaken a literature review of international research on reforms to guardianship, custody and access laws (Tapp & Taylor, 2001) and their implications for children following parental separation (Smith, Taylor & Tapp,
In the current study I was interested in turning my attention to the views of each family member, both ex-partners and their children, on their experience of the Family Court during custody and access proceedings. By ascertaining the perspective of each I felt that the opportunity for illuminating shared understandings, as well as any misperceptions, could best be identified. My other key interest concerned the role that Family Court professionals can play in smoothing the path of their client’s legal journey. Do they scaffold and enhance their client’s experience or act unwittingly as obstacles to a positive outcome? How much of this is within their control and how much of it is shaped by the family law system within which they work? Is any reorientation of Family Court dispute resolution processes necessary to acknowledge parents, children and professionals as partners within a joint enterprise? My enquiries have led to the development of a conceptual framework, grounded on existing models of service delivery, but adding the theoretical, cultural and child-inclusive dimensions which have been missing previously (see chapter eleven).

This thesis is being written during a time of significant change in the family law field. Both the substantive law governing guardianship, custody and access matters, and the role of the Family Court, have been under review. Public and professional consultation on the Guardianship Act 1968 (the statute under which the families I interviewed had their cases determined) culminated in the introduction of the Care of Children Bill into Parliament on 1 July 2003. The Care of Children (COC) Act 2004 subsequently took effect from 1 July 2005 (see chapter two). The Law Commission reviewed the role of the Family Court in two separate review processes – the first, prompted by widespread criticism of the Family Court, focused exclusively on the administration, management and procedure of the court itself (Law Commission, 2003). The second review examined the structure and function of all courts (including the Family Court) and tribunals in New Zealand except the top tier of the appellate system where the new Supreme Court now sits (Law Commission, 2004). Both Law
Commission review processes accepted the usefulness of the Family Court and sought a commitment to better resourcing of it.

V Organisation of the Thesis

On its 10th anniversary, the New Zealand Family Court was acclaimed as “a highly successful innovation in the court structure” (Atkin, 1992-93, p. 398) and the Principal Family Court Judge said he heard “no voices clamouring for a return to the traditional adversary system” (Mahony, 1991a, p. 26). This widespread acceptance that the Family Court provided a far preferable means of resolving family disputes has continued up to the present time, with the Law Commission (2003) declaring the New Zealand Family Court “a world leader in its field” and a “valuable institution providing a useful service to families in distress” (p. 4). The court is also said to be “universally admired” (Inglis, 2001, p. 13). This thesis critically examines whether such acclaim is justified in an international context.

Chapter Two outlines the historical development of child custody and divorce law, which helped to give impetus to the reform of court structures governing family disputes. The international development of Family Courts is reviewed, together with key milestones marking the court’s role in New Zealand since 1981. The legal framework governing parental disputes over children’s post-separation care arrangements is also explained.

In Chapter Three the demographic trends influencing family formation and dissolution within New Zealand, and the international research evidence concerning the impact of family transitions on parents and children, and their implications for the Family Court, are outlined. Children’s perspectives on post-separation family life are also reviewed, together with the research on children’s voice and participation within the family law system.

Research literature on family members’ and professionals’ perspectives on Family Court dispute resolution processes and practitioners’ styles of practice is
discussed in **Chapter Four**. This research is assessed against the dual goals of Family Courts to increase efficiency and deliver therapeutic justice.

The theoretical framework underpinning this thesis is outlined in **Chapter Five**. Ecological and sociocultural theories are discussed and applied in the context of post-separation parenting and Family Court service provision. The sociology of childhood and the UNCRC then provide a conceptual basis for the enhanced role of children’s voices and participation in family transitions and any associated family law proceedings.

**Chapter Six** provides a rationale for the qualitative methodology employed in the study. It also describes the research aims, method, sample, and means of data analysis. In **Chapter Seven** short summaries of each of the 15 family stories are outlined to illustrate the widely varying family histories and relationship difficulties which prompted the research participants’ involvement with the family law system.

The study’s findings are outlined and discussed in the next three chapters. In **Chapter Eight** the results relating to Family Court professionals (lawyers, counsel for the child, specialist report writers and other professionals) are examined. **Chapter Nine** outlines the Family Court dispute resolution processes utilised by the families, including counselling, judge-led mediation, defended hearings and appeals. In **Chapter Ten** the factors affecting the making of, and compliance with, parental agreements and court orders are reviewed.

**Chapter Eleven** discusses the study’s conclusions and their policy and practice implications. A new conceptual model is also developed which integrates theory, research and law with the role of the Family Court in parental disputes about the care of children.
Chapter Two

THE FAMILY LAW SYSTEM IN NEW ZEALAND

I Introduction

Family law as a specialty discipline, practiced by specialist family lawyers, in specialist Family Courts presided over by specialist judges, is a relatively recent phenomenon in the history of the law and courts. Historically, family law was part of ecclesiastical law (Smith, 1988), but it really only emerged, in the form we are familiar with today, in the mid-20th century as the sharp jurisdictional demarcations between different forms of matrimonial and domestic proceedings broke down and there was a recognition that family disputes were best resolved within one forum capable of responding to the legal and social needs of families via conciliatory processes. To set this innovation within context, this chapter begins by tracing the path taken by the law relating to children, from the common law supremacy of father’s rights through to today’s welfare of the child principle. The development of divorce law from its very restricted, fault-based beginnings in the English Ecclesiastical Courts through to the modern no-fault approach introduced in New Zealand in 1981 is also explored.

Reform of the administrative structures governing family law matters first occurred in the United States of America. Cincinnati pioneered the establishment of a Family Court in 1914, although it took the impetus provided by the Standard Family Law Act 1959 to encourage the creation of more state-based Unified Family Courts (UFCs) in America from the 1960s onwards (Babb, 1998; Pearson, 1999; Ross, 1998). Japan was also amongst the early promoters of integrated Family Courts. Developments in the 1970s in the Canadian provinces of Ontario and British Columbia, and in Australia, were strongly influential on the 1978 report of the Royal Commission on the Courts (Beattie et al., 1978) that recommended a Family Division of the District Court should be formed in New Zealand. This new court, New Zealand’s first Family
Court, was established on 1 October 1981 as part of a family law reform package that also significantly amended the substantive law governing separation and divorce. The chapter outlines key milestones in the court’s development, and concludes with an explanation of the legal framework governing the determination of children’s post-separation care arrangements. It was within this statutory context that the families participating in my study resolved their parenting disputes.

II Historical Development of Child Custody Law

New Zealand’s family law heritage can be traced along a continuum originating with the law of the Roman Empire where children were under the complete authority of their father via the doctrine of patria potestas (Austin, 1994; Gardner, 1986). Roman law later had a significant influence on the development of the English common law which, in turn, subsequently shaped the approach adopted to child custody issues in the colonies.

England

The English concept of guardianship dates from the Anglo-Saxon period when a father had the right to ‘custody and governance’ of all children aged under 14 (Hall, 1989). Custody law developed once the system of tenured land holding was abolished in 1660, thereby enabling the legal relationship between parents and children to be distinguished from the predominant interest of feudal law in children as heirs to land and estates (van Krieken, 2005). A mother could only defeat her husband’s right to custody by establishing that his conduct would gravely imperil the child’s life, health or morals (Davidson, 1988).

The superiority of a father’s rights over his children prevailed in English common law through until the 19th century. This was accompanied by a strong bias towards legitimacy thereby “ensuring that a legal relationship arose only between a father and his child born within marriage” (Ullrich, 1981, p. 99). The illegitimate child was filius nullius (‘nobody’s child’) and, as no legal consequences arose from his parentage, technically no-one was entitled at law to custody nor responsible for the child’s maintenance (Henaghan, 2002a).
However, a mother had better rights to the custody of an illegitimate child, unless her care was extremely detrimental to the child or the father had acquired custody of the child “without force or fraud” (Austin, 1994, p. 36). Eventually the mother’s right to custody was acknowledged in 1883 by Jessell MR in *R v Nash* (1883) 10 QBD 454, and later confirmed by the House of Lords in *Barnado v McHugh* [1981] AC 388.

Custody disputes were relatively uncommon because of the restricted grounds and expense of divorce, and the lack of financial support from the state for separated mothers. When they did arise, the courts were primarily concerned with the enforcement of a father’s common law right to physical possession of his legitimate children and his right to control their upbringing. Mothers and children had no status in the proceedings whatsoever as both were denied legal personality and competence under the common law patriarchy (Maidment, 1984; Taylor, 1998a):

Originally at common law the custody of a child of any age whatever, even an infant at its mother’s breast, could not be taken from its father, except if it was shown that either he was unfit to remain the custodian of the child or that his so remaining would be an injury to the child. (*In re Taylor* [1876] 4 Ch D 157 per Jessell MR at p. 159)

Two court procedures were available for resolving custody disputes. Through the common law a writ of habeas corpus could be sought from the Court of King’s Bench by the person with the legal right to custody (the father, or the guardian appointed by him to recover the child from any person who was keeping him or her without legal cause). This court would usually enforce the father’s right to custody regardless of his behaviour or the child’s age, unless he was shown to be unfit to be a custodian (Ullrich, 1981). The other procedure was in the Court of Chancery, which anyone could invoke on behalf of the ward child’s interests (Maidment, 1984).

The first statutory encroachment on the common law rights of fathers came with the Custody of Infants Act 1839 (also known as Talford’s Act). This was regarded as a victory of first-wave feminism, although it was “an early and isolated inroad into the law as it affected married women” (Maidment, 1984, p.
It was prompted by Caroline Norton, a reasonably wealthy wife who had separated from her abusive husband. He had successfully claimed the right to her property and earnings, and was endeavouring to blackmail her by refusing her access to her children. When she realised the common law would not assist her she initiated a public campaign and persuaded Sergeant Talford to introduce a Bill into Parliament to reform the law (Austin, 1994). The Bill passed in 1839 and allowed a mother to petition the Court of Chancery for an order for access to her child and, if the child was under seven years old, for possession of the child until he or she reached seven years of age. This was “a turning point in the law by making the first legislative inroad on behalf of a mother into the absolute common law rights of a father over his children” (Maidment, 1984, p. 101). This Act also required, for the first time, the court to keep in mind ‘the interest of the children’, although this ranked third after consideration of parental rights and marital duty.

The Custody of Infants Act 1873 extended the 1839 provisions by allowing mothers to seek custody of, and access to, their children aged 16 years and under. The statute also incorporated reference to children’s interests, but these were again subordinate to the father’s legal right to custody of his children. Unfortunately the full potential of both the 1839 and the 1873 reforms failed to materialise in England as “the more usual approach of the Courts was to cling to the notion of the primacy of father’s rights, despite the legislative changes” (Austin, 1994, p. 17). Traditional attitudes lingered and children’s interests continued to be largely interpreted in accordance with their father’s rights. The injustice of cases like that of In Re Agar-Ellis [1883] 24 Ch D 317 prompted women’s groups to seek joint guardianship (parental rights) over their children through legislation (Maidment, 1984). The Guardianship of Infants Act 1886 was heralded as a legal milestone for its introduction, in section 5, of the ‘welfare of the child’ principle. This was the first time that legislation acknowledged that questions of custody might turn on the welfare of the child instead of the father’s rights:

This resulted in a fundamental change in the attitude of the Court to the resolution of disputes concerning custody and access between husband and wife. ... Cases decided after 1886 show a clear decline in the common
law right of parents as an important consideration in custody and access proceedings, and a corresponding increase in the true welfare of children as the dominant consideration. (Dickey, 1990, p. 321)

The Guardianship of Infants Act 1925 elevated the welfare of the child to ‘the first and paramount consideration’ and was “hailed as a landmark in the legal protection of children” (Maidment, 1984, p. 105). However, this principle was not initially developed out of concern for the needs and rights of children, but rather as a means of enhancing the rights of women in the custody and access stakes over which their husbands had had such pre-eminence. Its child-centredness emerged over time and it has now, of course, become the key, albeit indeterminate, principle of modern child custody law (Chisholm, 2002; Henaghan, 1998; James, James & McNamee, 2003; Kelly, 1997; Piper, 2000; Thomas & O’Kane, 1998a).

New Zealand

It was the English Custody of Infants (Talford’s) Act 1839 which became the law in New Zealand in 1840 (Ullrich, 1981). Mother’s rights were first extended 30 years later in the Married Women’s Property Act 1870. This allowed a magistrate or justice of the peace who was making an order with respect to division of a wife’s property following the breakdown of her marriage, to also make an order giving her custody of male children up to the age of 10 years and female children up to the age of 18 years, or sooner if they married (section 3). The broader provisions of the Law Amendment Act 1882 enabled a mother, by her next friend and regardless of her property position, to file a petition in the Supreme Court seeking access and custody or control of her male and female children up to 16 years of age (section 12).

Mother’s rights were further extended by the Infants’ Guardianship and Contracts Act 1887 which enabled a mother to apply to the Supreme Court for a custody or access order in respect of any of her minor children. Following the lead of the English Guardianship of Infants Act 1886, the 1887 Act was also responsible for the introduction of the welfare of the child principle in New Zealand law. The court was given the power to “make such order as it may think fit … having regard to the welfare of the infant and to the conduct of the parents
and to the wishes as well of the mother as of the father” (section 6). This section was re-enacted unaltered in the Infants Act 1908. The 1887 and 1908 Acts both also contained a provision enabling the court to declare the guilty party in a judicial separation or divorce to be unfit to have custody of the children of the marriage (section 8). The automatic right to possession and custody of legitimate children remained with the father, and the mother was merely given the right to apply for a court order in her favour. The court did, however, hold that where a father asked for a writ of habeas corpus to take the child out of the custody of its mother, it was entitled to give effect to the provisions of the 1908 Act and consider the merits of the mother as custodian even though the mother had not made an application under section 6 (Re JH and LJ Thomson (Infants) (1911) 30 NZLR 168).

One year after the 1925 English initiative in elevating the status of the welfare principle, the Guardianship of Infants Act 1926 also directed the New Zealand courts “to regard the welfare of the infant as the first and paramount consideration” (section 2). Mothers were deemed to have the same powers as fathers to apply to the Supreme Court in respect of any matter affecting their infant (section 3). Fathers and mothers were now, in law, on an equal footing in relation to their children, such that neither parent had any superior legal claim to their children (Ullrich, 1981). However, four key principles continued to operate as legal fetters on judges’ decisions about custody outcomes (Austin, 1994; Webb & Adams, 1986). These presumptions concerned:

1. **Tender years:** This maternal preference principle dictated that young children of tender years (usually under the age of seven years) should be in the custody of their mother who could best care for them following parental separation (for example, Austin v Austin (1865) 55 ER 634; Re JH and LJ Thomson (Infants) (1911) 30 NZLR 168).

2. **Same Sex:** This principle held that daughters should be in the custody of their mothers and sons with their fathers (for example, Warde v Warde (1876) 41 ER 1147 where the presumption was hinted at; and Re Hylton [1928] NZLR 145 and Parsons v Parsons [1928] NZLR 477 where it was adopted). The tender years and same sex principles had the potential to clash with each other.
For example, in *Palmer v Palmer* [1961] NZLR 129 the two-year-old boy was placed with his mother on the basis of the tender years principle, but the judge noted that he may have to be transferred to his father’s custody at a later age so as not to be deprived of this important male influence. The Guardianship Amendment Act 1980 finally legislated against the application of such presumptions, no matter what the age of the child(ren).

3. **The right of a natural parent over other relatives or carers:** The context within which this principle operated usually concerned the death or absence of a mother with a young infant or child. The father would place the child with relatives or other carers because his employment or living circumstances meant he was unable to care for the child himself. However, a subsequent remarriage would place the father in a position to reclaim his child, despite the child’s reluctance to leave the carers to whom he or she had by this stage become very attached. When the child had had little contact with the father over the years and no prior relationship with the new stepmother the issue was particularly acute. Nevertheless, where disputes arose about the future placement of such children, the courts generally allowed the natural father’s right to his child to prevail over the carers’ wishes (for example, *In re Thain (An Infant)* [1926] 1 Ch 676; *In re Mills (An Infant)* [1928] NZLR 158).

4. **Matrimonial guilt:** Immoral conduct on the part of a husband, unless of an extremely gross nature, had little, or no, impact on his status or rights as a father. Conversely, women who committed adultery were initially excluded from obtaining a custody or access order with respect to their children. Even when such orders did later become possible, the courts frowned upon the woman’s conduct to such an extent that no matter how good a mother she may have been, the moral welfare of the child was, more often than not, thought to be best served by giving custody to the innocent parent (for example, *Van Der Veen v Van Der Veen* [1923] NZLR 794; *Salaman v Salaman* [1923] NZLR 454). However, by the late 1920s as social attitudes began changing, it was recognised that a woman’s matrimonial guilt did not necessarily negate her competency as a mother. In *Bolton v Bolton* [1928] NZLR 473, for example, the court accepted that the mother did remain a priceless influence in the lives of
her children and her relationship with them should not be forfeited. The removal of any reference to marital misconduct in the Guardianship of Infants Act 1926 had also encouraged such outcomes, although traditional judicial attitudes to adulterous mothers continued despite the legislative change (for example, Cubitt v Cubitt [1930] NZLR 227; Otter v Otter [1951] NZLR 739). Section 23(1) of the Guardianship Act 1968 confirmed, finally, that the conduct of a parent would only be taken into consideration by the Family Court to the extent that it was relevant to the welfare of the child.

The court’s willingness to alter long-standing custody arrangements, in accordance with the particular principle (tender years, same sex, natural parent, matrimonial guilt) they were enforcing, took little account of the impact of such dramatic changes on the child. The child’s own views about the sudden transition they faced were also irrelevant, even if they were being sent to live with a father, or his agent, whom they scarcely knew. Where any consideration was given to the distress this could cause the child, the court explained the wrench away through reference to the apparently comforting – and widely quoted - explanation of Eve J in In re Thain (An Infant) [1926] 1 Ch 676:

One knows from experience how mercifully transient are the effect of partings and other sorrows and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days. (p. 684)

The law governing guardianship, custody and access matters was eventually extensively reformed by the Guardianship Act 1968. For the first time in New Zealand law, the concept of custody was split into the two components of physical possession (defined as custody), and the right to control upbringing (defined as guardianship). This made it possible for separated parents to both retain parental rights of control over significant aspects of their children’s upbringing (for example, education, name and religion), while only one parent retained physical possession:

The split between the right to control and the physical possession of the child in the New Zealand legislation is a very useful and practical device which pays many dividends when attempting to define the legal relationship of separated parents with their children. (Ullrich, 1981, p. 115)
Prior to 1968 the status of the custodial parent compared with the non-custodial parent was most unclear. Custody had been defined as the ‘bundle of powers’ that a parent held in respect of a child and therefore appeared to include those powers subsumed under ‘guardianship’ in the 1968 Act. If one parent was given custody it was not certain whether the other parent retained any rights at all. By separating out the legal incidents of the status of natural parent, guardian and custodian, the Guardianship Act 1968 provided a framework within which parental privileges and obligations could be determined independently of the marriage relationship (Ullrich, 1981). The Act therefore enabled both the mothers and fathers of legitimate children to each acquire the right of guardianship and custody at the birth of their child. While this was becoming necessary because of the increase in parental separation, de facto relationships and remarriages, the legislative initiative was “more by accident than design” because public and judicial perceptions of family life were “still firmly rooted in a concept of lifelong marital security and fidelity which is inconsistent with the reality of daily life” (Ullrich, 1981, p. 116).

The section central to legal decision-making about children (Henaghan, 1998; Webb & Adams, 1986) was section 23(1) of the Guardianship Act 1968 which provided that “the Court shall regard the welfare of the child as the first and paramount consideration.” This child-centred provision thus signalled Parliament’s intent to finally remove any specific reference to the rights of mothers and/or fathers in setting out those considerations that the court had to take into account in determining issues under the Act.

Most distinctions between legitimate and illegitimate children were abolished with the passage of the Status of Children Act 1969. However, a child born ex-nuptially still had to be re-registered following the marriage of their parents (section 19A, Births and Deaths Registration Act 1951), and the unmarried father’s status as a guardian of his child was circumscribed by the guardianship provisions introduced in the Guardianship Act 1968. If the father was not married to the mother, or living with her at the time of the child’s birth, then the mother became the sole guardian of her child (section 6). The Act was amended in 1969 to enable a man to apply to the court declaring that he is a guardian of
the child (section s6(A) Guardianship Act 1968). The Status of Children Act 1969 also enabled, for the first time, a putative father to seek a High Court declaration to prove his paternity even if the mother of the child was not actively supporting this process (sections 8(4) and 10). Once parenthood was proven then the legal rights which flowed from this status applied.

The Guardianship Act 1968 and the Status of Children Act 1969 were important precursors to ensuring equality between parents in legal disputes and overcoming the injustices inherent in the legal regime formerly governing nuptial and ex-nuptial children.

III Historical Development of Divorce Law

The law relating to separation and divorce in New Zealand, like that for child custody law, was intimately connected with statutory developments in England governing domestic issues between husband and wife.

England

Up until the mid-19th century the Ecclesiastical Courts in England had acquired complete jurisdiction over matrimonial causes (Fogarty, 2001; Smith, 1988). Canon law did not provide for divorce because such proceedings were considered contrary to Christian doctrine. Thus the only remedies available in the Ecclesiastical Courts were decrees of nullity, of divorce a mensa et thoro (divorce from ‘board to bed’), and for restitution of conjugal rights. The latter was a remedy for desertion, and led to excommunication if the respondent did not obey the decree by returning to cohabit with the petitioner. Later it became possible for a non-complying respondent to be committed for contempt instead (Inglis, 1968).

Alternatively, the dissolution of a marriage could be achieved by a private Act of Parliament, but this was an exclusive and very expensive process that only the extremely wealthy could afford. The decree of nullity and the private Act of Parliament were the only remedies entitling the divorced parties to remarry. However, the former was appropriate only in exceptional cases, and the Parliamentary remedy was so costly it was beyond the means of most
citizens (Inglis, 1968). In the two centuries preceding 1857 there were just 250 such Acts in England, of which only nine were granted on the petition of the wife (Fogarty, 2001).

The Matrimonial Causes Act 1857 was the first statute to introduce judicial divorce (Smith, 1988). It provided restricted, entirely fault-based grounds upon which a decree of dissolution of marriage could be obtained by court process using civil law. The decree for restitution of conjugal rights and the decree of divorce a mensa et thoro (renamed as judicial separation) were retained (Inglis, 1968). A judicial separation did not alter the status of the parties – they remained husband and wife, but neither was entitled to insist upon cohabitation with the other and their property rights were affected. The 1857 Act created a court for divorce and matrimonial causes to which the matrimonial jurisdiction of the Ecclesiastical Courts was also transferred. The procedures were gender discriminatory and expensive, so access to these petitions remained largely the domain of the wealthy (Fogarty, 2001). Women were further deterred from seeking to divorce their husbands by section 35 of the Act which provided for the court to make orders for the custody of the children of the marriage “as it thinks fit” (Maidment, 1984, p. 120). Many wives considered the potential loss of their children too great a sacrifice.

New Zealand

Prior to 1840 the isolated European settlements in New Zealand were governed only by informal, self-made law (Beattie et al., 1978). On 6 March 1840, when New Zealand was annexed to the British Crown as an extension of the colony of New South Wales, the laws of England took effect. It thus became possible for a New Zealand resident to obtain a full divorce allowing remarriage via a private Act of Parliament in England (Carmichael, 1982). However, as for English petitioners up until 1857, the expense rendered this a virtually prohibitive remedy.

A judicial system, with significant implications for the administration of subsequent divorce law, also began to develop from 1840. Police magistrates and justices of the peace, appointed as officers of New South Wales, initially
administered justice among the European settlers. The Māori people remained “largely beyond control by the embryonic colonial administration, with much of the country seldom seeing an official” (Beattie et al., 1978, p. 13). However, the Letters Patent (or Royal Charter) of 16 November 1840, which constituted New Zealand as a separate colony, empowered the Legislative Council “to make laws for the peace, order and good government of New Zealand.” The Governor promptly exercised his power to constitute and appoint judges, justices of the peace and any other necessary officials. Two of the first six Ordinances made by the Legislative Council at their June 1841 session established criminal and civil courts. By the 1860s the Court of Appeal and a three tier system of courts of first instance - Resident Magistrate’s Courts, District Courts and the Supreme Court – had emerged. The complex issue about which tribunals and laws should govern disputes involving Māori people was settled (if not resolved) by the end of the century. With the exception of Māori land and various related matters, Māori “were to be governed almost completely by the English derived law” (Beattie et al., 1978, p. 2).

New Zealand’s first domestic statute governing divorce was the Divorce and Matrimonial Causes Act 1867, which was almost identical to the English Matrimonial Causes Act 1857 (Carmichael, 1982). It allowed divorce (in the case of the wife) only on the ground of her adultery. However, the grounds applying to a husband were much broader and included: adultery with a woman, whom, if his wife were dead, he could not marry (because of consanguinity or affinity); adultery coupled with cruelty or wilful desertion; bigamy with adultery; or rape, sodomy or bestiality (Inglis, 1968). Cases could only be heard in Wellington, with three judges required to hear each petition (Carmichael, 1982). The Divorce and Matrimonial Act 1881 later enabled one judge sitting alone to determine divorce petitions.

Throughout the 1880s and 1890s the suffragette movement sought to extend the narrow grounds for divorce. Their efforts, together with a supportive Legislative Council, overcame the opposition of the churches to pass the Divorce Act 1898 (Carmichael, 1982). This statute removed many of the double-feature requirements of the 1867 Act so that a husband’s adultery in
itself became sufficient for a wife to petition for divorce. The restricted range of
grounds for divorce was also expanded to include desertion for five years;
habitual drunkenness for four years coupled with failure to maintain and cruelty;
non-compliance with a decree for restitution of conjugal rights; and attempted
murder of the petitioner as long as the sentence imposed was at least seven years
imprisonment. As well, the narrow jurisdictional requirements governing
 domicile were reformed to enable the New Zealand courts to entertain a
deserted wife’s petition for divorce. At common law a wife’s domicile was
always that of her husband’s. If her husband deserted her, and became
domiciled elsewhere than in New Zealand, she was left without a remedy even
if her grounds for divorce for strong. The Divorce Act 1898 introduced a new
statutory provision deeming her to have retained a separate domicile in New
Zealand, thus enabling her to petition for a divorce.

New grounds for divorce were introduced by the Divorce and Matrimonial
Causes Amendment Acts in 1907, 1912, 1920 and 1922. These concerned
criminal convictions for various offences (including murder, wounding or actual
bodily harm of a child or spouse); confinement as a lunatic; and unsoundness of
mind. By this time, New Zealand had the most liberal divorce laws in the British
Empire (Carmichael, 1982; Inglis, 1968). No further reforms occurred until the
Divorce and Matrimonial Causes Amendment Act 1953 abolished one ground
for divorce, but extended others. A proviso in the Act also enabled a respondent
to have the divorce petition dismissed upon proof that the petitioner’s wrongful
conduct caused the separation.

The Matrimonial Proceedings Act 1963 consolidated the whole of New
Zealand’s divorce law and vested jurisdiction in the Supreme Court. The 1953
proviso was repealed and the domicile issue was further clarified by giving the
wife a separate domicile altogether for the purposes of divorce (section 3).
Decrees of dissolution and divorce were made in two stages (section 33). A
decree nisi was initially issued confirming that on the facts before the court the
petitioner had proved his case. A decree nisi absolute, completing the divorce,
was then made three months later (or six weeks later if the court so directed by
special order). The period elapsing between each decree provided any interested
person opposed to the divorce an opportunity to voice their concern. The 1963 Act also added a new ground for divorce - artificial insemination of the wife without the husband’s consent (section 21(1)(b)). There were now 24 grounds for divorce, but the law lacked coherency:

This is hardly surprising, in view of the fact that new grounds have been added from time to time, or old grounds changed, as social conditions appeared to warrant. There has never been any systematic approach to the grounds for divorce as a whole, and the results are sometimes curious. For example, no-one could doubt that there are instances of matrimonial cruelty which are at least as serious in their consequences as an isolated act of adultery. Yet adultery entitles a petitioner to an immediate divorce, while cruelty entitles him to a separation decree, which in turn entitles him to a divorce when the decree has been in full force and effect for three years: either that, or the petitioner may put up with the cruelty, so long as it is coupled with habitual inebriety or drug addiction, for three years and then petition for divorce. It is difficult to see why a petitioner who may have suffered severely in health through the other spouse’s cruelty and whose marriage has been wrecked beyond hope of redemption should have to wait three years for his freedom, while a petitioner who proves adultery can obtain immediate relief. (Inglis, 1968, p. 91)

The Matrimonial Proceedings Act 1963 did, however, include a new provision directing the Supreme Court to give consideration to the possibility of reconciliation between the parties seeking divorce (section 4). This brought divorce proceedings in line with the duty imposed on other family proceedings in the Magistrates Courts by the Domestic Proceedings Act 1939. However, the Supreme Court - or ‘Agony Court’ as it was better known - applied a strict adversarial approach, with expert evidence only occasionally accepted, and then, begrudgingly (Trapski, 1983). Judges were reluctant to place children, in particular, on “the emotional dissecting table” of the social scientists (Epperson v Dampney (1976) 10 ALR 227 per Street CJ).

In 1968 the Matrimonial Proceedings Amendment Act reduced the waiting period for establishing the grounds for desertion, separation and drunkenness from three to two years. A reduction was also made in the period for living apart from seven to four years. New Zealand’s divorce law then remained unchanged until the more liberal Family Proceedings Act 1980 took effect.
It is impossible to consider the law relating to divorce without also taking account of the law governing maintenance, separation and guardianship. While the Supreme Court had exclusive jurisdiction with respect to divorce, the domestic jurisdiction of the Magistrates Courts had responsibility for proceedings concerning maintenance orders, separation orders and guardianship orders. The Destitute Persons Ordinance 1846 provided for the maintenance of destitute persons (by their relatives) and illegitimate children (by their putative fathers). Deserted wives could also take proceedings against their husbands for maintenance, including support for their children. An 1894 Act made the first provision for separation orders, and the grounds for these were extended in 1896 (Inglis, 1968). The Destitute Persons Act 1910 consolidated and revised the law governing affiliation orders (adjudging a man as the father of a child), separation orders and guardianship orders (Beattie et al., 1978). However, in 1968 the Domestic Proceedings Act replaced the 1910 statute with a new code that extensively amended the substantive law and incorporated several “important jurisdictional and procedural innovations aimed at improving and humanising family cases in the lower courts” (Beattie et al., 1978, p. 13). The Domestic Proceedings Act 1968 introduced conciliation procedures with the aim of endeavouring to effect reconciliation between the parties in applications before the domestic jurisdiction of the Magistrates Court:

It had become obvious that while there might be some hope of reconciling a husband and wife at the stage when separation, maintenance or guardianship proceedings had commenced, any such hope was in the great majority of cases completely dispelled after the parties had appeared in court and had paraded the whole of the family’s dirty linen before magistrate and counsel in their evidence. It was accordingly thought desirable that every effort should be made to reconcile the parties before the proceedings reached the stage of being heard. The position now is that no applications for separation, maintenance or guardianship orders can be heard by the court until the dispute has been placed in the hands of a conciliator. This requirement may be dispensed with by a magistrate if he is satisfied that any attempt at reconciliation would be a waste of time. (Inglis, 1968, pp. 8-9)

The philosophy of the Act, and the duty on lawyers to promote reconciliation, was outlined in section 13 which stated that:
In all proceedings under this Act between a husband and wife, it shall be the duty of the Court and of every solicitor or counsel acting for the husband or wife to give consideration from time to time to the possibility of reconciliation of the parties, and to take all such proper steps as in its or his opinion may assist in effecting a reconciliation. (section 13, Domestic Proceedings Act 1968)

A spouse who wanted to reconcile could apply to the court to be referred to a conciliator. If a spouse applied for a separation order, spousal maintenance or custody then the court would refer the case to a court-appointed conciliator or a conciliator approved by a marriage guidance organisation (sections 14 and 15). The court did, however, retain a discretion not to refer the parties where this was desirable. The 1968 Act also gave the court greater powers to obtain reports and call witnesses of its own motion, widened the grounds for a separation order, renamed affiliation orders as paternity orders, strengthened the obligations of a father to maintain any child born ex-nuptially, and extended the non-molestation order to prevent or deter a man from molesting or harassing his separated wife.

**Summary of the Historical Development of Custody and Divorce Law**

Marriage was traditionally regarded as a religious sacrament rather than a social contract. Because of its central role in upholding the tenets of the Christian doctrine in marital and family life, the law adopted a restrictive approach to relationship breakdown:

The law was primarily concerned with preserving the marital relationship and placed legal obstacles in the way which had to be negotiated before a marriage could be legally terminated. The law spelt out in detail the obligations of the parties to each other, and to their children. Lawyers did what they do best – argued for the rights of their clients – and after all the arguments had been heard the Judge decided. (Henagan, 2002b, p. 242)

Separation, divorce, maintenance, custody, access and guardianship were thus all legal events, handled by lawyers and judges through expensive legal procedures. While reflecting the social attitudes of the times, these statutes and procedures were biased against wives and mothers, and lacked a child-centred focus. Little cognisance was taken of the emotional and social consequences of relationship breakdown on individual family members, because the law’s sole interest was in the strict applicability of those rules governing the consequences
of adult disharmony. Considerable emphasis was placed on upholding marriage and, prior to 1969, on the legitimacy of children. Eligibility for a divorce, separation decree, separation order and spousal maintenance was restricted to the establishment of fault by one of the marriage partners (Law Commission, 2002a).

By the late 1960s the statutes governing family life in New Zealand had evolved considerably. The Domestic Proceedings Act 1968 provided an embryonic model for conciliation proceedings within the domestic jurisdiction of the Magistrates Court; the Guardianship Act 1968 highlighted the overriding importance of the welfare of the child principle; and the Matrimonial Proceedings Act 1963 consolidated New Zealand’s divorce law. All three statutes were responsible for heralding a new statutory era in family law that provided a significant platform from which to launch the subsequent 1981 reform package. However, their limitations, together with the fragmentation of domestic proceedings between the Supreme Court and Magistrates Court, remained an impediment to the delivery of responsive, effective and efficient services for separated families. International developments in integrating and humanising those aspects of the law relating to family life were therefore looked to with interest by New Zealand over the ensuing decade.

IV  Historical Development of the Family Court Internationally

Integrated Family Courts were pioneered in the United States of America (Babb, 1998; Pearson, 1999; Ross, 1998) and subsequently implemented in Canada and Japan (Fogarty, 2001) and, later, Australia and New Zealand. Widespread use of the general term ‘Family Court’ has somewhat obscured the national and regional variations between Family Court proceedings and powers in each country and the differences in legal traditions, demographic factors and government structures (Babb, 1998; Flango, 2000; Smith, 1988). Nevertheless, they all shared a common impetus for reform of their administrative structures governing family matters. The jurisdictional fragmentation which split family law proceedings between a multiplicity of domestic courts in each country was
costly, and led to delay, confusion and frustration for the parties and professionals alike. UFCs, whose jurisdiction extended to the full scope of family problems, were considered vital in improving efficiency by enabling the one forum to cater holistically for all the needs of the family. Social concerns arising from problematic family relationships were a second driving force in the development of integrated Family Courts. It was thought the stability of marriage and the family could be enhanced by a more responsive court which was less adversarial, more informal and provided ancillary services (such as counselling) to aid dispute resolution. Traditional adjudication would become a last resort for the minority of families unable to resolve their disputes via these new reconciliation and conciliation processes.

**United States of America**

The establishment of Family Courts evolved out of the juvenile court movement which promoted the co-ordination of court services concerning child abuse, neglect and juvenile delinquency (Kay, 1968). The first juvenile court was inaugurated in Chicago in 1899 (Babb, 1998), and consideration was given shortly thereafter to the benefits of specialised courts for a broader range of family legal proceedings. Roscoe Pound, Dean of the Harvard Law School, has been credited as the “guiding spirit” behind the drive for trial court unification (Schepard & Bozzomo, 2003, p. 337). In a famous address Pound (1964) gave to the American Bar Association (ABA) in 1906 he argued that the multiplicity of courts was characteristic of an archaic legal system, and that a unified approach would improve efficiency and the conservation of resources.

The first UFC was established in Cincinnati, Ohio, in 1914 (Ross, 1998; Pearson, 1999). Courts with jurisdiction over cases for both children and families subsequently developed in Des Moines, St. Louis, Omaha, Portland, Gulfport and Baton Rouge, although these were relatively isolated initiatives (Babb, 1998). It took another 40 years for the development of state-wide UFCs to be officially encouraged. Roscoe Pound (1959) began extending the efficiency arguments he had applied in support of trial court unification to the family law field. Then, in 1959, the Standard Family Court Act was developed to assist interested states to create Family Courts:
… to protect and safeguard family life in general, and family units in particular, by affording to family members all possible help in resolving their justiciable problems and conflicts arising from their inter-personal relationships, in a single court with one specially-qualified staff, under one leadership, with a common philosophy and purpose, working as a unit, with one set of family records all in one place, under the direction of one or more specially-qualified judges. (Committee on the Standard Family Law Act of the National Probation and Parole Association, 1959, p. 104)

Following the Act’s publication, the first state-wide UFC was created in Rhode Island in 1961 (Pearson, 1999). New York established a separate Family Court in 1962, and a Family Division was implemented in Hawaii in 1965 (Babb, 1998). Delaware, South Carolina, New Jersey and Vermont also established state-wide Family Courts over the following decades, while other states expanded their juvenile courts to incorporate other family issues, thereby transforming themselves into family courts (Babb, 1998).

Since 1980 the ABA has actively encouraged expansion of UFCs within America (Belgrad, 2003). Their Presidential Working Group (ABA, 1993) endorsed their establishment, and in June 2002 the ABA created a UFC Co-ordinating Council to provide a mechanism for institutional co-ordination of the concept (Babb, 2003). However, a recent nationwide survey of American states has revealed “a striking amount of variety and inconsistency in how America’s courts process family law cases” (Babb, 1998, p. 34). Only 11 jurisdictions determine such cases within a separate Family Court or within a separate Family Division or Department of an existing trial court. Unsurprisingly, most of these states were the ones that adopted unified proceedings early on. Fourteen other states manage family disputes within a separate Family Court or Family Division in just selected parts of their state (Babb, 1998). Nine states are planning or piloting Family Court projects, while the remaining 17 states process family law cases via their general civil trial docket and are yet to initiate any form of specialised court services (Babb, 1998). Despite the enthusiasm of the ABA and other national professional bodies for UFCs, their widespread adoption within America remains elusive, and family law cases are still dealt with in a fragmented and ad hoc basis in most states. Pearson (1999) believes
that resistance to the concept has arisen from “cost considerations, large case volumes, the low status of family law cases, and the opposition of matrimonial lawyers” (p. 630). Domestic violence victims also fear that a unified approach downplays the seriousness of a perpetrator’s criminal offending.

**Canada**

The Ontario Juvenile and Family Courts Act 1934 provides one of the earliest references to a Family Court, although this, like its 1968 successor, preceded the true unified model (Ontario Law Reform Commission, 1974). In 1968 the Provincial Courts Act replaced both the Juvenile and Family Courts and the Magistrates’ Courts with the Ontario Provincial Court (Family Division), together with a parallel Criminal Division. This aimed to regularise the status of Family Courts and centralise their administration, but the court’s effectiveness was severely limited by its restricted jurisdiction in family matters:

Four different branches in the judicial hierarchy, the Supreme Court, the County Courts, the Surrogate Courts and the Provincial Courts (Family Division) administer family law in Ontario and this results in overlapping and competing jurisdiction, fragmented jurisdiction, and conflicts in philosophy and approach to the same problems among the different courts. The end result is inefficiency, ineffective treatment of family problems, and unnecessary confusion. (Ontario Law Reform Commission, 1974, p. 3)

It was not uncommon for family proceedings to be underway in three different courts simultaneously. Unsurprisingly, this tremendous waste of public and private resources provided impetus for the creation of UFCs in Canada (Allard, 1972; Macdonald 1967; Payne, 1973). The Ontario Law Reform Commission initiated an extensive research project on family law in 1965, and took the opportunity in their 1974 report to recommend that the existing Provincial Courts (Family Division) be abolished to make way for a new unified Family Court of Ontario. This would be capable of exercising jurisdiction in all family law matters:

With society in transition, with changing social conditions, attitudes and mores, and with the impact that these often bewildering changes are having on family life, increasing pressure is brought to bear, not only for reform in substantive family law, but also for reform in its administration. More and more is being and will be demanded of family law and it is the
Family Courts that will have to carry the increased burden. (Ontario Law Reform Commission, 1974, p. 1)

The Commission had a clear vision of the two-fold function of the Family Court as being both judicial and therapeutic. The provision of ancillary services was critical, especially intake and family counselling. There was also a desire to enhance the status of Family Courts so they no longer languished at the lower echelons of the court structure, failing to command respect from the public and the legal profession, and hampered in their ability to attract highly qualified judicial personnel.

From the 1970s, interest in UFCs began emerging in other Canadian states, including British Columbia (Farquhar, 1973; Selbie, 1973), Nova Scotia (Fraser, 1968), Alberta (Institute of Law Research and Reform, 1972), Quebec (Office of the Civil Code Revision, 1974), Manitoba (Manitoba Law Reform Commission, 1973), Newfoundland (Gushue & Day, 1973) and Saskatchewan (Hall, 1974). In British Columbia, the Royal Commission on Family and Children’s Law (1974) established a UFC pilot project on 15 June 1974 that integrated the work of the Supreme Court, County Court and Provincial Court (Family Division) in the South Fraser Judicial District so far as they dealt with family and children’s matters. The usual formality associated with court proceedings was relaxed, and 27 counsellors and two advocates were appointed to advise parties, help conciliate disputes, prepare custody reports, and ensure that the children’s interests were properly brought before the court. Although the Commission encountered difficulties in implementing a unified approach (primarily because of constitutional issues), the pilot was considered successful and the phased implementation of Family Courts was recommended throughout the province.

**Australia**

These North American initiatives were of considerable interest to South Pacific nations (Mahony, 2002), although the Family Court of Australia was “a Court which was conceived almost as an afterthought, had a difficult gestation and birth, and survived a troubled infancy” (Fogarty, 2001, p. 90). In December
1971, the Australian Senate became concerned about the “oppressive costs, delays, indignities and other injustices” in the administration of divorce and custody law (Fogarty, 2001, p. 92). However, it was not until a Senate Committee reported on the Family Law Bill 1974 that the proposed Family Court of Australia was first recommended:

There is a need for a new start in matrimonial law and administration in creating a new entity not interchangeable with existing courts. The Court will require new standards and methods, both in its physical environment, its procedural methods and in its approach to marital problems. Court premises should be separated from existing courts, and business be conducted in modern surroundings with small well-provided court rooms, enabling easy dialogue between the court and the parties. (Standing Committee on Constitutional and Legal Affairs, 1974, cited in Fogarty, 2001, p. 95)

The Bill passed through Senate in November 1974, but had a more difficult passage through the lower House due to strong opposition to the proposed single ground of divorce. The Family Law Act 1975 was finally passed on 21 May 1975, and later proclaimed to come into operation on 5 January 1976. This short period of time to establish the new Family Court as a specialist superior Federal Court, and to recruit staff, created enormous problems:

To put it at its mildest, when the Court opened its doors in some (but not all) of the capital cities of Australia it was completely unprepared for the task. But there was a strong feeling that the considerable public expectations should not be disappointed. (Fogarty, 2001, p. 95)

The court was immediately overwhelmed by the en masse transfer of proceedings still pending in the State Supreme Courts and by the huge increase in divorce applications in 1976. Western Australia was the only state to avail itself of the invitation to establish a state court funded by the Federal Government, and their Family Court opened on 1 June 1976.

While the Family Court of Australia was initially closed to the public to protect parties’ privacy, this was reversed in 1983 in response to complaints that proceedings were “unduly secretive and essentially unaccountable” (Nicholson & Harrison, 2003, p. 442). Court proceedings have become more formalised over the years as a result of attacks on the court and its judges in the early
1980s. Complexity has also been added with the recent development of Federal Magistrates Courts to provide a faster, cheaper and simpler forum for the determination of family law disputes, including divorce (Pidgeon, 2003). While they do not list cases likely to last longer than two days, their overlapping jurisdiction with the Family Court of Australia means there are essentially two rival courts. As well, other State and Territory magistrates and children’s courts have a limited jurisdiction in family law, and are responsible for child protection and apprehended violence orders. There can therefore be a complex interaction between State and Federal responsibilities in some cases involving Australian children.

V Development of the New Zealand Family Court

The Royal Commission on the Courts was appointed on 4 October 1976 to inquire into the structure and operation of the judicial system of New Zealand. At the time of the Commission’s appointment the jurisdiction in family law was divided between the Magistrates Court and the Supreme Court (Law Commission, 2002a). The Magistrates Court, in its domestic jurisdiction, determined cases concerning separation orders, spousal and child maintenance following separation, adoption, paternity, and orders under the Matrimonial Property Act 1976 in respect of property up to a certain value. A significant jurisdiction the Magistrates Court lacked in the family law field was the power to grant divorces, which remained vested in the Supreme Court and occupied approximately 7.7% of their total sitting time (Beattie et al., 1978). The Supreme Court also had exclusive jurisdiction in matters pertaining to separation decrees, post-divorce maintenance for wives and children, and matrimonial property over a certain value. Both courts had jurisdiction to deal with custody and access disputes (Law Commission, 2002a). Clients found the adversarial process and the “very severe atmosphere” of these courts (Sturm, 2001, p. 14) to be a “bruising and harrowing experience” (Mahony, 1991b, p. 382). They wanted change - and this was reflected in the fact that nearly one-third of the submissions made to the Commission supported the need for family
law reform. Two Dunedin magistrates, Ross SM and Murray SM, were also instrumental in the push for a Family Court in New Zealand (Henaghan, 2002b).

The Royal Commission was concerned about the split in the family jurisdiction between the Supreme Court and the Magistrates Court because it provided an opportunity for harassment by parties’ cross-filing applications under different jurisdictions. An application for a separation order and related orders concerning possession of the matrimonial home could be averted, or delayed, by filing a petition for divorce in the Supreme Court. The Commission concluded that it was “fundamental that the family as a unit should be dealt with as an organic whole” (Beattie et al., 1978, p. 150) and, like the Canadian, American and Australian reformers, this was an important driving force in the establishment of a Family Court in New Zealand. The growth in the number of domestic proceedings was also important. In 1970 there were 10,717 domestic proceedings applications, but by 1976 the figure had increased by 18.3% to 12,679 (Beattie et al., 1978). The economic and social conditions of the times meant that an even larger expansion of domestic proceedings was anticipated and there needed to be a forum capable of responding to this increased workload.

Some of the previous innovations in the courts had also proved disappointing. Despite the Domestic Proceedings Act 1968 making an attempt at specialisation by limiting jurisdiction under the Act to magistrates appointed to exercise it, this laudable aim was unfortunately circumvented by the number of sole-magistrate centres, and the need for magistrates to remain mobile to meet the demands of circuit work. Evidence before the Royal Commission revealed a frustrating picture with respect to achieving the full potential of the new conciliation procedures in the domestic jurisdiction of the Magistrates Court (Beattie et al., 1978). Few applications had been made in some localities under section 14 (providing for reference to conciliation on the request of either spouse), and there was a broad range of interpretation and practice, even among lawyers who specialised in family law. Legal aid provisions also encouraged litigation which might otherwise have been avoided because lawyers had to issue proceedings to protect recovery of their costs.
Commission members visited Family Courts in Canada, America and Sydney, and were particularly influenced by developments in Ontario. In the debate about whether the Family Court should function as a court of law or as a social agency, the Royal Commission agreed with the Ontario Law Reform Commission (1974) that “Family Courts have a two-fold function: judicial and therapeutic” (Beattie et al., 1978, p. 151). Since “work in family law has an extra dimension” (p. 150) it was essential that emphasis be given to further developing the conciliative intent of the reform process:

Conciliation should concentrate on helping the parties rebuild some degree of relationship so that they can at least discuss rationally any matters arising out of the break-up of the marriage. In a calmer frame of mind, they may be able to work out arrangements for the welfare of the children in a way that minimises injury to them. (Beattie et al., 1978, p. 149)

The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable. (Beattie et al., 1978, p. 152)

The Royal Commission’s report, submitted on 10 August 1978, stated that “a Family Court is now necessary and desirable in New Zealand” and recommended “that a Family Division of the District Courts should be formed” (Beattie et al., 1978, p. 146). The Family Court would “be given exclusive, original jurisdiction in all family matters” (p. 349) and be “presided over by specialist judges, with professional support services attached” (p. 158). Ideally, it would be “manned by a team with special skills and training, who can deal flexibly with human problems as they arise, relating the clients’ particular needs to legal necessities” (p. 149). The active participation of the parties in the conciliation process was also envisaged.

The experience of the Los Angeles Conciliation Court, and the pilot project operating counselling services through the Family Court in British Columbia, were also influential on the New Zealand proposals. “A soundly structured,
adequately staffed family counselling service” was considered “essential to the Family Court’s success” (p. 165). This would concentrate on encouraging “discussion and resolution of the problem by the parties themselves” (p. 166) with the goal of “avoiding recourse to trial” (p. 167).

The contribution of additional support services by specialists (psychologists, psychiatrists, general medical practitioners, and social workers specialising in family problems) was thought to be substantial:

The primary purpose of a clinical service would be to provide diagnostic and treatment referrals for those exhibiting behaviour problems, or whose mental or emotional health required such attention. (Beattie et al., 1978, p. 175)

This service would be substantially different from a counselling service, but opinion was divided about “whether specialists in the mental health field should be members of staff or available on a consultative basis” (Beattie et al., 1978, p. 174). The proposed reception centre of the Family Court counselling service would have three main functions: to define and classify the problem(s) and refer the party or parties to the conciliation branch of the court, or to the appropriate departmental or community agency. It was also recommended that the Family Court be physically separate from the general courts and achieve “a proper balance between the formal and the casual, in both conduct of proceedings and physical surroundings” (Beattie et al., 1978, p. 181). The general thrust of the Family Court, both in its philosophy and its physical features, was therefore “as a place where people can be helped to resolve their family problems in a just and humane manner” (Beattie et al., 1978, p. 181).

**Establishment of the Family Court (1981)**

The report of the Royal Commission on the Courts met with almost universal approval, and 90% of its recommendations were quickly enacted by the Government (Trapski, 1983). Those pertaining to the Family Court were almost totally adopted and the New Zealand Family Court was established as a division of the District Court on 1 October 1981 (Family Courts Act 1980).
**Jurisdiction:** The new Family Court acquired jurisdiction over marriage dissolutions, spousal and child maintenance, matrimonial property, guardianship, custody and access, adoption, paternity, property disputes arising out of agreements to marry, non-molestation orders, and contributions towards the cost of domestic purposes benefits for sole parents (Law Commission, 2002a). However, the attractiveness of the court’s style of operation, and its perceived success, led to a burgeoning of its jurisdiction over time (Atkin, 1992-92; Law Commission, 2002a, 2003). Responsibility for the Domestic Protection Act 1982, Protection of Personal and Property Rights (PPPR) Act 1988, and the Children, Young Persons and Their Families (CYPF) Act 1989 had all been added by the end of the 1980s. Wardship applications in custody and access cases, family protection and testamentary promises claims were subsequently added in 1991, although the High Court retained its powers concurrently with the Family Court. The Family Court’s jurisdiction has since been further extended and currently includes matters arising under the following statutes:

- Adoption Act 1955 and Adult Adoption Information Act 1985;
- Births, Deaths and Marriages Registration Act 1995;
- COC Act 2004 – which replaced the Guardianship Act 1968 from 1 July 2005;
- Civil Union Act 2004;
- CYPF Act 1989 - care and protection;
- Child Support Act 1991;
- Domestic Violence Act 1995;
- Family Courts Act 1980 – constitution, jurisdiction, powers and procedures;
- Family Proceedings Act 1980 – paternity, separation, maintenance, dissolution and voiding of marriages, counselling referrals;
- Family Protection Act 1955 – claims made by family members under a will;
- Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003;
- Law Reform (Testamentary Promises) Act 1949;
- Marriage Act 1955 – marriage, and consent for minors to marry;
- Mental Health (Compulsory Assessment and Treatment) Act 1992;
- Property (Relationships) Act 1976;
- PPPR Act 1988 – for adults who are incapacitated and unable to make or communicate decisions or to manage their affairs;
- Status of Children Amendment Act 2004 – regulates the legal status of children born as a result of assisted human reproductive procedures.

**Workload:** The Family Court has one of the highest workloads of a New Zealand court. In terms of volume of cases, it is second only to the criminal jurisdiction (Law Commission, 2004). Its workload has increased enormously since its establishment as its jurisdiction has expanded. Expenditure on the Family Court now has a departmental cost of around $25 million per annum (Boshier, 2004a; Law Commission, 2002b). A further $40 million is spent each year on court services, including the cost of lawyers for children, specialist services, and the provision of domestic violence programmes (Boshier, 2005a).

**Location:** The Family Court operates as a division of the District Court and is one of six specialist courts within the court system more generally. Family Court services are currently offered in 61 locations throughout New Zealand. Several places have main courts, while the other outlying courts provide services on a circuit basis (Law Commission, 2004). The Family Court’s accessibility is considered one of its strengths and was a key reason behind the Royal Commission’s recommendation to establish the court within the District Court rather than the High Court.

**Judges:** Family Court judges interpret and apply the law to help resolve disputes between family members (Law Commission, 2002a). They are specially warranted District Court judges, appointed by the Governor-General by reason of “their training, experience and personality” as suitable “to deal with matters of family law” (section 5(2)(b), Family Courts Act 1980). Most also sit for approximately 20% of their time in the general jurisdiction of the District Court (Law Commission, 2004). This cross-w warranting is valued by judges because working in more than one jurisdiction increases their job satisfaction and stimulates new ideas (Mather, 2003). It also enables judicial resources to be allocated more flexibly to aid court administration. Judges are
responsible for the way in which their court runs and have the power to control proceedings and to prevent abuse of the court (Law Commission, 2002a). The Family Court bench is headed by a Principal Family Court Judge (section 6, Family Courts Act 1980). There are currently 43 full-time judges with a Family Court warrant, and four acting warranted judges (often retired judges).

**Inquisitorial role:** The role of a Family Court judge differs slightly from that of other judges because of the inquisitorial nature of family law. The strict rules of evidence are relaxed so that the Family Court can receive any evidence it thinks fit, regardless of whether it would be otherwise admissible in a court of law (section 128, COC Act 2004\(^1\)). Nevertheless, evidence must be credible and reliable, and not lose sight of the fundamental principles of natural justice. The court can call witnesses on its own behalf whose evidence may assist the court, rather than just relying on the witnesses called by the parties (section 199, CYPF Act 1989; section 165, Family Proceedings Act 1980; section 129, COC Act 2004\(^2\)). The lawyer acting for the child has a similar right to call any person as a witness in the proceedings (section 7, COC Act 2004). The Family Court also has the power to make orders by consent (section 170, Family Proceedings Act 1980; section 202, CYPF Act 1989; section 86, Domestic Violence Act 1995).

**Informality:** The Family Court has more informal surroundings than traditional courts, and, when cases do proceed to trial, the court is required to conduct proceedings “in such a way as to avoid unnecessary formality” (section 10, Family Courts Act 1980). Wigs and gowns have never been worn by Family Court judges and counsel. This informality is intended to reduce stress, relax the participants and encourage communication between them. Recent concern that the court’s informality has eroded its authority and professionalism, has led to proposals to increase formality through changes to court layout and the way in which lawyers’ address judges (Boshier, 2005a).

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\(^1\) A similar principle formerly applied in section 28 of the Guardianship Act 1968.
\(^2\) This replaced section 28A of the Guardianship Act 1968.
To protect the parties’ privacy and encourage their frank disclosure of personal details, Family Court sittings have been closed to the public and the reporting of cases has been restricted. However, to enhance accountability and transparency, and to help restore public confidence in the court, the COC Act 2004 has recently enabled greater openness of Family Court proceedings. A wider range of people are now entitled to attend hearings (section 137), and there are broader rights to publish non-identifying reports of proceedings in the public (section 139). The publication of cases for professional purposes continues, although the names of the child and parties must now be removed (Henaghan, 2005).

Support Services: A range of support services are available in the Family Court to meet the needs of family members, including counselling and judge-led mediation. The Family Court co-ordinator (initially called ‘counselling co-ordinator’) is appointed under the Family Courts Act 1980 (section 8) to provide information about the court and to facilitate client referrals to the specialist services on offer.

Appeals: Appeals from the Family Court go to the High Court (section 174(1), Family Proceedings Act 1980), where they are usually heard by a single generalist judge, although they can be heard by a full bench of two judges (Law Commission, 2004). The High Court mostly has power to rehear and to decide cases afresh, or to refer them back to the Family Court to rehear generally or specifically. There is generally a right of appeal from the High Court to the Court of Appeal on questions of law (section 174(5), Family Proceedings Act 1980).

Reviews of the Family Court

The Family Court has been formally reviewed on two occasions since its establishment:

1. 1992-1993: The initial review was undertaken by a committee appointed in December 1992 by the Principal Family Court Judge (Judge Mahony) and chaired by his successor (Judge Boshier). The committee was tasked with revisiting “the philosophy upon which the Court was created, and by examining
how the Court was presently functioning, to report on whether the balance seemed right” (Boshier et al., 1993, p. 22). The review was completed in 1993 and made a number of recommendations for improvements to service delivery. Prominent among these was the call for the establishment of a separate Family Conciliation Service (recommendation 5.7.1), along the lines of that initially recommended by the Royal Commission, and utilising mediation as the primary method of dispute resolution (recommendation 5.7.3). The role of the Family Court would become quite distinct from the role of the Family Conciliation Service (recommendation 6.5.1), with the former only to be used, and applications filed, when a decision on a family law issue was required (recommendation 6.5.4). Parents would be able to approach the Family Conciliation Service without the assistance of lawyers:

It is our view that a Family Conciliation Service reflecting the Royal Commission’s recommendations should be set up alongside the judicial Family Court structure. Disputes under the Guardianship Act should be filed directly with the Family Conciliation Service unless there are urgent serious welfare issues requiring the immediate intervention of the Court. Once filed the matter should remain with the Family Conciliation Service until resolved. Only when serious welfare issues arise or there is a failure to reach agreement would the matter be referred by the Family Conciliation Service to the Family Court. (Boshier et al., 1993, p. 52)

Whilst the report’s case management recommendations were acted upon to increase the efficiency of the court, the Family Conciliation Service was not endorsed by the Government of the day.

2. 2001-2004: The second review of the Family Court was more recently conducted by the Law Commission, which received terms of reference from the Government in June 2001 to:

… undertake a review to consider what changes, if any, are necessary and desirable in the administration, management and procedure of the Family Court in order to facilitate the early resolution of disputes. (Law Commission, 2002a, p. 1)

A scoping paper, published in July 2001, was followed by a discussion paper (Law Commission, 2002a) which revealed that the present dispute resolution system is inadequate for responding to family transitions in the most timely,
helpful and holistic manner possible. Following the receipt of 126 written submissions, the Law Commission’s final report, *Dispute Resolution in the Family Court* (2003) was disseminated. This strongly recommended better resourcing of the present system to reduce the delays caused by insufficient court time, the shortage of report writers and lack of assistance from the Department of Child, Youth and Family Services (CYFS). A new, expanded conciliation service was also proposed with mediators being contracted to offer mediation services to clients. The current judge-led mediation conferences would be renamed ‘settlement conferences’ to emphasise their differing role and dynamics. The report promoted the participation of children in conciliation processes (particularly counselling and mediation) and the ascertaining and incorporation of their views in dispute resolution procedures. Upskilling court staff and contracted professionals, extending the role of the Family Court co-ordinator, enhancing information about the court within the community, and making court services more culturally responsive were also all recommended. The Law Commission made “no recommendations for major jurisdictional or operational change” (Ministry of Justice, 2003, p. 2), but rather focused upon ways of improving the conciliation processes and altering public perceptions of the court. The Government’s response to the Commission’s report (Ministry of Justice, 2003) centred on three immediate initiatives:

- extending a public information strategy for the Family Court to heighten awareness of the principles upon which decisions are made in cases so as to bring greater balance to the public perception of the Family Court;
- developing a pilot of non-judge led mediation using qualified mediators to provide another opportunity for dispute resolution without judicial intervention;
- preparing an integrated training package for Family Court staff to enhance their skills, efficiency and client responsiveness.

The role of the Family Court was also examined when the Government asked the Law Commission, in 2001, to review the structure and operation of the court system in New Zealand (excluding the top appellate tier which subsequently evolved into the new Supreme Court in 2004). The purpose of the review was to
ensure that “the courts best reflect society’s values and preferences” (Law Commission, 2002b, p. 2). The Family Court, as the only court that can determine personal relationship issues, the consequences of their breakdown, and the position of children, was naturally an important component of the review process. The Law Commission’s (2002b, 2002c) public discussion papers generated more than 400 submissions, and extensive consultations / hui were held with professional bodies, litigants, and Māori and Pacific Island communities. The final report, produced in March 2004, commended the nationwide presence, specialised focus, and distinct culture and processes of the Family Court. It recommended a departure from the catch-all District Court model which it considered anomalous in comparison with the independent status of other specialist courts (like the Environment and Employment Courts). The Law Commission (2004) therefore proposed that the Family Court become one of the nine courts collectively termed the Primary Courts (recommendation 45). It would sit as a separate court, forming a distinct part of the Primary Court structure, headed by a Principal Judge, with its work being undertaken by warranted judges (recommendation 111).

VI Statutory Framework

Contemporaneously with the establishment of the new Family Court, the legislative framework governing matrimonial and domestic proceedings was also reformed as part of the comprehensive 1981 family law package. It was designed to overcome the legal obstacles and the previously formal, authoritarian and adversarial approach adopted to the termination of a marriage in the Supreme Court (Henaghan, 2002b; Trapski, 1983). This statutory regime, with minor amendment, remains the cornerstone of New Zealand family law today.

Separation and Dissolution of Marriage

The Family Proceedings Act 1980 took effect on 1 October 1981 and, for legal purposes, renamed ‘divorce’ as ‘dissolution of marriage’. An application for an order dissolving a marriage was now to be made to the newly created
Family Court on the sole ground “that the marriage has broken down irreconcilably” (section 39(1)). This is established by the couple living apart for a period of two years (section 39(2)). Thus the necessity to prove fault by one of the marriage partners was removed from the law. An application for a dissolution can be made jointly, or by either spouse (section 37(1)).

The Family Proceedings Act 1980 considerably expanded the conciliation processes first introduced into the Magistrates Court by the Domestic Proceedings Act 1968. Litigation between the parties was thereby intended to become a last resort when all other methods of reaching a positive outcome had failed (Smith & Taylor, 1998). The conciliation processes established by the Act enable separating or separated couples to access state-funded counselling (usually six sessions) by request (section 9) or upon the direction of the court if certain orders have been applied for (Law Commission, 2003). Where there has been domestic violence, the couple cannot be directed to attend counselling together (section 10). The Act places a statutory duty on legal advisers (section 8) and counsellors (section 12) to promote reconciliation and conciliation. The purpose of the counselling is to establish whether or not the couple wish to resume or continue their relationship and, if not, whether any understandings have been reached between them about matters in issue (section 11). The counsellor then reports back to the Family Court on the outcome.

When no agreement has been reached at counselling, the couple attend a mediation conference (section 13). This is chaired by a Family Court judge and aims to identify the matters in issue between the parties and tries to obtain agreement on their resolution (section 14). The judge has the power to make consent orders relating to any agreements reached concerning care of children, maintenance and property division (section 15). When agreement is not reached at the mediation conference, the case proceeds to a defended court hearing where evidence is adduced and the judge makes the final decision and issues court orders accordingly.

The conciliation process within the Family Court is “aimed at structural problem solving, not therapy” (Henaghan, 2002b, p. 250). It is a part of the legal process and not designed to explore or resolve therapeutic issues like emotional
distress at the ending of the relationship, or more entrenched mental health, personality or addiction problems. Counselling and mediation are also parent-focused, not child-centred, although the Family Proceedings Act does make provision for the appointment of a lawyer to represent the child (section 162). As well, the Family Court can only make an order dissolving a marriage once it is satisfied that suitable arrangements have been made for the custody, maintenance and welfare of every child of the marriage under the age of 16 years, unless this is impractical or special circumstances apply (section 45). Quite frequent regard is made to this requirement, although its effectiveness is questionable as it does not operate until at least two years following separation, and it leaves aside consideration of arrangements for those children whose parents were never married (Henaghan, 2002b). The Family Court can also obtain a written report from a social worker on the proposed arrangements for the children (section 46), although this almost never occurs (Ellis, 1995; Johnston, 1996).

**Guardianship, Custody (Day-to-day Care) and Access (Contact)**

As part of the 1980 family law reform package the Guardianship Act 1968 was amended to provide the new Family Court with the jurisdiction to hear and determine guardianship, custody and access matters (section 4, Guardianship Act 1968, as amended by section 3 of the Guardianship Amendment Act 1980). Twenty years later the Government responded to mounting pressure to modernise the law governing these parenting issues by releasing a discussion paper, in August 2000, as a means of initiating a review of the Guardianship Act 1968 (Ministry of Justice & Ministry of Social Policy, 2000). Four aspects of the law were raised as particular concerns: the outdated language and key concepts; the lack of emphasis on children and young people’s rights; the need for a greater focus on the rights and responsibilities of parents; and the inadequate recognition given to the wider family/whānau and cultural diversity. The 359 public submissions received by the closing date of 30 November 2000 generally confirmed these issues as problematic, although there was a divergence of views about the balance to be struck between children’s and parents’ rights, and whether or not the law should give special effect to Māori
aspirations and values (Ministry of Justice & Ministry of Social Development, 2001). While the review process was focused around the substantive law, it was inevitable that the law’s intimate connection with the Family Court would mean that submissions would also traverse its perceived inadequacies. Views were divided on the appropriateness of the Family Court as the agency for resolving custody and access disputes. A number of alternative processes, either within the existing court, or external to it, were suggested (see chapter four).

Contemporaneously with the Government’s review of the Guardianship Act 1968, legislative reform was also being proposed from two other quarters. The Law Commission (2000) recommended that a Care of Children Act be introduced to amalgamate adoption (Adoption Act 1955), guardianship, custody and access (Guardianship Act 1968), and child care (CYPF Act 1989) within the one statute, thereby avoiding piecemeal reform:

The advantage of such a Care of Children Act is that it enables child placement issues to be dealt with coherently. Each care option on the spectrum, from temporary care to permanent placement, would be canvassed as an option for that particular child. Such an approach, with an emphasis upon the best interests of the child, would be consistent with the principles espoused in UNCROC. (Law Commission, 2000, p. 42)

A Shared Parenting Bill was also proposed by Muriel Newman MP to enable separated parents to be equal in their responsibility for the upbringing of their children, unless there was a compelling reason that one of them was unfit.

The Government elected to proceed with neither the proposed Care of Children legislation, nor the Shared Parenting Bill. The magnitude of the Law Commission’s recommendations would have seriously delayed reform of the Guardianship Act 1968 so the Government rejected their proposed amalgamation of all the law relating to child care arrangements (M. Wilson, 2002). Newman’s proposal, despite its resonance with fathers’ rights groups, was rejected on the basis that a shared parenting presumption was both impractical and likely to undermine children’s rights (see chapter four). Instead, the Government introduced a new Care of Children Bill into Parliament on 1 July 2003. The Justice and Electoral Committee subsequently received 277 written submissions and heard 102 oral submissions. It recommended, by
majority, that the Care of Children Bill be passed with various amendments when it reported back to Parliament on 29 June 2004. Following the third reading (9 November 2004) and Royal Assent (21 November 2004), the COC Act took effect on 1 July 2005. It was not intended to radically overhaul the existing statutory framework (Atkin, 2003; Goodwin, 2003a), but rather proposed modest changes to modernise the language and procedures pertaining to the law on the guardianship and care of children. Nevertheless, there is now a much stronger focus on the rights and views of children (Boshier, 2005b, 2005c; Henaghan, 2005; Wren & Halford, 2005). The Act is also designed to promote co-operative parenting and to recognise that a diversity of family arrangements can exist for the care of children.

The key features of the Guardianship Act 1968, under which the families in this research had their post-separation parenting disputes resolved, and its recent amendment via the COC Act 2004, include:

**The welfare (and best interests) of the child principle:** Section 23(1) of the Guardianship Act 1968 retained the welfare of the child as the first and paramount consideration for the court in any application under the Act. A non-exhaustive list of factors aided the court in determining the welfare of the child (*D v W* (1994-1995) 13 FRNZ 336). These added greatly to the complexity of the court process, but were justified on the basis they provided an individualised approach, with each case being “seen as unique on its facts” (Henaghan, 1998, p. 1).

Section 4 of the COC Act 2004 now states that “the welfare and best interests of the child must be the first and paramount consideration” (emphasis added). The addition of the phrase ‘best interests’ is consistent with Article 3 of the UNCRC, and indicates the court’s focus not only on the immediate welfare (care and nurture) concerns, but also on a wider inquiry into the child’s longer-term interests (such as the maintenance of meaningful relationships with each parent) (Henaghan, 2005). The Act, for the first time in New Zealand law, sets out the mandatory principles relevant to determining what serves a child’s welfare and best interests (section 5). These non-exhaustive guiding principles
include: the primary responsibility of parents and guardians for the child; continuity in arrangements for the child’s care, development and upbringing; consultation and co-operation between parents, guardians, and others with day-
to-day care of, and contact with, the child; the preservation and strengthening of family ties; the protection of the child’s safety (the only principle expressed in an imperative fashion); and the preservation and strengthening of the child’s identity. The court is also required to make and implement any decisions affecting the child within a time frame appropriate to the child’s sense of time (section 4(5)(a)).

Consistent with section 23(2) of the Guardianship Act 1968, section 4(3) of the COC Act states that the conduct of a parent may be considered only to the extent that it is relevant to the child’s welfare and best interests. The mandatory presumption of parental neutrality has also been retained in section 4(4) to avoid children being placed in the care of a particular parent due to their sex.

Guardianship: The Guardianship Act 1968 defined ‘guardianship’ as “the custody of a child … and the right of control over the upbringing of a child” (section 3). ‘Upbringing’ was further defined to include “education and religion” (section 2), but it also referred to other significant aspects of a child’s life, including a change of name and major health issues. The COC Act 2004 has continued with the term ‘guardianship’ but now defines this as “all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child” (section 15). Additional provisions stipulate matters relating to the exercise of guardianship (section 16(1)) and the important matters on which guardians should consult and agree, such as the child’s name, residence, non-routine medical treatment, education, culture, language and religion (section 16(2)). The Guardianship Act 1968 did not specifically require joint decision-making between guardians, but section 16(5) of the COC Act 2004 now requires a guardian to act jointly “by consulting wherever practicable with the aim of securing agreement” with any other guardians of the child.

While guardianship has always been an automatic incident of motherhood, it has not necessarily been so of fatherhood. Under the Guardianship Act 1968, a father was only a guardian if he was married to the mother at the time of the
child’s birth or conception, if he subsequently married her, or he was living with her at the time of the child’s birth (section 6(1) and (2)). In other circumstances the unmarried father had to apply to the Family Court to be appointed a guardian of his child (section 6(3)). The COC Act 2004 now enables such fathers to become guardians if they register their name on the child’s birth certificate (section 18). The court can appoint other people to be guardians, and with an administrative check by a Family Court Registrar, an eligible step-parent can now be appointed as an additional guardian of a child (sections 21-25). If guardians disagree about an important matter concerning the child, they can request counselling or apply to the Family Court for its direction (section 44). Guardianship now terminates on a child’s 18th birthday (two years prior to that stipulated under the Guardianship Act 1968), or earlier if the child marries before that age (section 28).

**Custody / Day-to-day Care:** Custody, as an incident of guardianship, was a central concept in the Guardianship Act 1968 where it was defined as “the right to possession and care of a child” (section 3). Under the COC Act 2004, ‘custody’ has been renamed as ‘day-to-day care’ and is widely defined to include care that is provided only for one or more specified days or parts of days (section 8). Under this definition day-to-day care can therefore include care by a parent for half-a-day per week (Henaghan, 2005). The role of providing day-to-day care is further defined in section 8 as “exclusive responsibility for the child’s day-to-day living arrangements.”

Day-to-day care is relatively unproblematic in intact families. However, when parents’ separate then a reallocation of the children’s care arrangements usually becomes necessary (Smith & Taylor, 1998). Decisions need to be made about where the children will live (including whether a shared care arrangement is possible) and how contact will be maintained with the non-resident parent. Such arrangements can be determined solely by the parents without recourse to legal or judicial involvement, with the exception of the enquiry by the Family Court into the arrangements for the children of married parents when an application for the dissolution of their marriage is being considered (section 45, Family Proceedings Act 1980).
Where custody proceedings were previously brought before the Family Court following parental separation, the court used to grant a custody order (interim or permanent) in favour of just one parent, or make a joint custody order (section 11, Guardianship Act 1968). Parents, step-parents and guardians, or any other person with the leave of the court, could apply for a custody order (section 11(1)). Any order made could be subject to such conditions as the court thought fit (section 11(2)), and only applied until the child reached 16 years of age, unless there were special circumstances (section 24). Even where the right to custody was forfeited following parental separation, the non-custodial parent still retained the other rights and responsibilities of guardianship:

The right of control over upbringing is seen as an ongoing one and can only be removed by a court if the parent is unwilling to exercise it or is unfit for some grave reason or the child is declared to be in need of care and protection. … Legal policy does not cut out a parent as a decision-maker in a child’s life just because parents no longer live together under the same roof. (Henaghan, 1992, p. 99)

The parties will always be parents, even if they are no longer partners, and both retain the right to participate in major decisions concerning their child. The key difference under the Guardianship Act 1968 was that the non-custodial parent no longer had the legal right to play a role in decisions about the day-to-day care of the child, as this was vested in the custodial parent, except during access visits. Disregard for the guardianship rights of non-custodial parents was, at times, problematic so the role of lawyers and judges in ensuring each parent understood the enduring legal significance of guardianship was an important aid in facilitating post-separation agreements between parents (Blaikie, 1996, 2001; Ullrich, 1981).

**Access / Contact:** In the context of the Guardianship Act 1968, access was relevant only where custody had been awarded or given to one parent (section 15). Access was not defined in the statute, but referred in these situations “to the arrangements for a child or young person to spend time with their non-custodial parent” (Ministry of Justice & Ministry of Social Policy, 2000, p. 9). Section 15(1) allowed the Family Court, on making a custody order, to also make an order for access to the child by the non-custodial parent. Alternately, a non-custodial parent could apply for an order granting access (section 15(2)) so that
the arrangements would have legal weight. Natural, adoptive and step-parents had an automatic right to apply for access independent of any custody issue, but other relatives (grandparents, aunts, uncles and siblings of the child) only enjoyed such a right if a parent had died, been refused access by the court, or was not attempting to exercise access (section 16). Access orders could be made subject to such conditions as the court thought fit (section 15). Under the COC Act 2004, ‘access’ has been renamed as ‘contact’ and includes “all forms of direct and indirect interaction with the child” (section 8). Section 48(3) later defines direct contact as “face-to-face contact”, and indirect contact as “contact by way of letters, telephone calls, or email.”

**Parenting Orders:** The COC Act 2004 does not subject day-to-day care and contact to separate and distinct orders, as the Guardianship Act 1968 did for custody and access. Rather, day-to-day care and contact are the subject of one order, now called a ‘parenting order’ (sections 47-57). The Family Court has jurisdiction to make a parenting order specifying certain persons to have the role of providing day-to-day care or contact with the child. The times of the day-to-day care may be specified, and the role may be exercised solely or jointly with one or more other people. The parenting order can further stipulate the type of contact (direct or indirect), the duration and timing of any contact, and any arrangements that are necessary or desirable to facilitate the contact. The range of people now able to apply for parenting orders has been extended beyond parents and guardians to also include a partner of a parent of the child (section 47). Any other person (including members of the child’s family, whānau and cultural group) must have the leave of the court to apply. The court has a broader range of options at its disposal to make parenting orders work more effectively (sections 63-69), including stronger enforcement powers to deal with any breaches (sections 70-77).

**Allegations of Domestic Violence:** Sections 58-62 of the COC Act 2004 enact sections 16A-16C of the Guardianship Act 1968. Where the Family Court is satisfied that a parent has been violent against the child or other immediate family member, then it cannot make any order giving that person day-to-day care of, or unsupervised contact with, the child unless the court accepts that they
will be safe. Section 61 outlines a list of matters the court must take into account in determining whether the child will be safe. These include the nature and seriousness of the violence used, its frequency, how recently the violence occurred, the likelihood of further violence occurring, the physical and emotional harm caused to the child, the child’s views, any steps taken by the violent party to prevent further violence, the attitude of the other party to the proceedings about the child’s safety, and all other matters the court considers relevant. The Parliamentary intent of the Act “is to give the child’s safety priority” (Henaghan, 2005, p. 27). The cost of supervised contact that is ordered under the COC Act, and supervised by an approved provider, is funded out of public money (section 62).

**International Child Abduction:** The Guardianship Amendment Act 1991 implemented the Hague Convention on the Civil Aspects of Child Abduction in New Zealand and has now been replaced by sections 94-124 of the COC Act 2004. The substantive wording remains the same, and the Ministry of Justice continues to act as the Central Authority to respond to complaints about a child being abducted to or from New Zealand.

**Child’s Wishes / Views:** Section 23(2) of the Guardianship Act 1968 required the Family Court to “ascertain the wishes of the child, if the child is able to express them” and to “take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.” Concern about the restrictive wording of this provision, which effectively limited the ascertaining of children’s views and discounted the weight of any expressed views in family law proceedings (Henaghan, 2002b; Taylor, 1998a; Taylor & Henaghan, 1997; Taylor, Smith & Tapp, 2001a, 2001b), has had an influential impact on its amendment in the COC Act 2004. Children’s views have been moved to the front of the new Act to emphasise their prominence within the new regime governing parenting matters. Section 6(2) states that “a child must be given reasonable opportunities to express views on matters affecting the child; and any views the child expresses (either directly or through a representative) must be taken into account.” The ‘age and maturity’ qualification in the former statute has been removed. The COC Act also amends the word ‘wishes’ to
‘views’, consistent with Article 12 of the UNCRC. It also implies that account must now be taken of a wider range of issues and concerns important to the child (not just the child’s future aspirations as the word ‘wishes’ implies), and that the court needs to try to understand the situation from the child’s point of view. The Act does not provide any guidance as to how children’s views are to be ascertained, but it is anticipated this will become a matter of increasingly important professional significance within the Family Court.

Children aged 16 years and over who are affected by a Family Court decision, or a refusal of consent by a parent or guardian in an important matter, are now able to apply to the court to have the decision reviewed (section 46). A child to whom the proceedings relate (or a party to the proceedings) may also appeal to the High Court (section 143).

**Counsel to Assist the Court:** Section 130 of the COC Act 2004 has replaced section 30 of the Guardianship Act 1968 enabling the Family Court to appoint a lawyer to assist the court. Such counsel may, for example, prepare a brief to provide argument on a point of law or undertake a special task in the proceedings to assist the court. While the role is defined similarly under both statutes, the COC Act has significantly placed the provision concerning counsel to assist the court much later in the Act from the one relating to the appointment of a child’s legal representative. “This is a clear legislative signal that the role[s] of acting for the child and assisting the Court are very different” (Henaghan, 2005, p. 33).

**Counsel for the Child / Lawyer to Act for the Child:** The Guardianship Act 1968 provided for a barrister or solicitor to be appointed to represent any child who was the subject of proceedings under the Act (section 30). Section 7 of the COC Act 2004 continues the previous law in requiring such an appointment (unless it would serve no useful purpose) in cases where the day-to-day care of the child or contact with the child are an issue and the matter appears likely to proceed to a hearing. The new Act has, however, renamed ‘counsel for the child’ as a ‘lawyer for the child’ and requires this lawyer to meet with the child (unless exceptional circumstances apply) in order to facilitate the performance
of their duties and to comply with section 6 regarding the ascertainment of children’s views. Practice Notes govern the selection and appointment of lawyer for the child (2005), as well as their code of practice (2000).


**Specialist Reports:** Section 133 of the COC Act 2004 re-enacts section 29A of the Guardianship Act and allows the Family Court to request a qualified person to prepare a written cultural, medical, psychiatric or psychological report on the child who is the subject of the application if this is necessary for the proper disposition of the case. The cultural report is a new feature under this Act and can address any aspects of the child’s cultural background. Cultural reports are also available under sections 178-179 of the CYPF Act 1989. The specialist report writer is able to be called by the Family Court as a witness. A copy of their report must be distributed to the lawyers for each party and the lawyer acting for the child, who may give or show the report to the child if the court so orders, but must explain its purpose and contents to the child unless this would be contrary to the child’s welfare and best interests.

Social worker reports, provided under section 29 of the Guardianship Act 1968, are now enacted under section 132 of the COC Act 2004. However, these reports have been rare because of a reluctance by CYPS to provide them (Johnston, 1996). The Family Court’s current over-reliance on psychologists has led the Principal Family Court Judge to call for the re-establishment of social work reports “as potent weapons for assembling data in order to address welfare issues” (Boshier, 2004c, p. 15). Reports on a child or young person can also be sought from social workers under the Adoption Act 1955 (section 10) and the CYPF Act 1989 (section 186).

**Court Process:** The conciliation framework of the Family Court is central to the resolution of disputes concerning guardianship, day-to-day care and contact where the parents are unable to reach their own agreements. The parent initially
files an application with the court, together with a brief affidavit. Most parties then attend counselling (sections 9-12, Family Proceedings Act 1980). This is only bypassed if counselling has been recently undertaken, the application requires urgent judicial intervention, or domestic violence is an issue (sections 10 and 19A, Family Proceedings Act 1980). If the counselling sessions are unsuccessful in enabling agreement to be reached then the parties proceed to a mediation conference (sections 13-15, Family Proceedings Act 1980). If this, too, fails to reach agreement then the court will usually appoint a lawyer to act for the child and request a specialist report. Only a small number of highly litigious or complex cases require a defended hearing where the Family Court judge decides what is in the welfare and best interests of the child and issues orders accordingly. Judges may reserve their decision, but the courts do try to give priority to cases involving children so their care arrangements following parental separation can be determined as quickly as possible.

**Other Relevant Family Law Statutes**

Several other statutes play an important role in managing the issues arising from relationship breakdown. These include:

1. **CYPF Act 1989**: A custody order can be made where children at the centre of a bitter and acrimonious parenting dispute are declared to be in need of care and protection (section 14).

2. **Domestic Violence Act 1995**: This statute took effect on 1 July 1996 and aims to mitigate the effects of domestic violence by allowing a partner to a domestic relationship to obtain a protection order against the other partner or family member to protect them, and their children, from physical, sexual or psychological violence. A minor, via a representative, can also make an application for protection under this Act (section 9).

3. **Child Support Act 1991**: Administered by the Inland Revenue Department, this legislation provides a formula assessment based on taxable income to determine the minimum level of financial support payable by a liable parent. It
also provides for the collection and payment of child support and spousal maintenance.

4. Property (Relationships) Act 1976: This Act acknowledges marriages, and since 1 February 2002, de facto relationships (including same sex relationships), as an equal partnership. It provides for the division of a couple’s property following separation or death. All relationship property is divided equally regardless of the nature of each party’s contribution, unless an exception can be made out through extraordinary circumstances, economic disparity or a relationship of short duration. Parties can also contract out of equal division in certain situations.

VII Chapter Summary

The legal reforms described in this chapter span several centuries and depict the enormous influence that social changes affecting the family have had on the nature of the law governing domestic relations and the role of the courts:

The nature of the divorce and custody decision-making process can only be understood when the legal structure is located in its social context. … And this social context itself must be seen in an historical perspective, for what society does and values today is inextricably linked with what was done and believed in the past. A sense of history brings with it a sense of balance. (Maidment, 1984, p. 1)

Early common law emphasised fathers’ almost absolute right to the custody of their children. However, from the mid-19th century, the supremacy of fathers’ rights gradually eroded as statutes increasingly accorded the rights of custody and access to mothers. Several prominent ‘rules’ or ‘presumptions’ also assisted judges in determining which care arrangements would best promote the newly recognised principle of the ‘welfare of the child.’ The custody of girls and infants was thought best entrusted to mothers, and boys to fathers, while mothers who had committed adultery were presumed to be unfit custodians regardless of the age or sex of their child. This rigid, legalistic approach to child custody disputes became disfavoured during the latter part of the 20th century as the social sciences promoted an individualised response to family problems. “The meaning judges gave to the welfare principle became informed by
psychological and emotional concerns” (Austin, 1994, p. 27). This discourse, whilst still influential, is now supplemented by an increasing focus on the rights, voice and participation of children embroiled in parental disputes over their care. Aligning the statutory law with the diversity of current family forms and the importance of enduring parent-child relationships is also a key focus.

The law relating to divorce was once, like the law relating to children, bound up with rules, principles and presumptions. These were mostly directed toward upholding the sanctity of marriage rather than providing an easy path for its dissolution. From 1857 in England, and 1867 in New Zealand, a restricted range of fault-based grounds developed to facilitate divorce for some couples. The gradual expansion of these grounds over the following century ultimately created an unwieldy approach to divorce. Coupled with the detrimental consequences of the adversarial approach of the law to family disharmony and breakdown, and the fragmentation of domestic proceedings between several courts, it was clear that formidable impediments to the effective resolution of family proceedings existed. Family Courts emerged as the catalyst for overcoming these rigid jurisdictional demarcations and were intended as a major departure from the previous unsatisfactory approach. “It must be a new Court, not a legal sham: not the old under a new name” (Trapski, 1981, p. 387). The emphasis on conciliation forged an entirely new, more informal, approach to profoundly personal family disputes and marked the emergence of family law as a specialist field. While Family Courts originated in the United States of America, it has been since the 1970s within the Commonwealth countries of Canada, Australia and New Zealand that Family Courts have become firmly established and intimately associated with the “human face of justice” (Mahony, 1991b, p. 384). Statutory reforms have also ensured that divorce law is no longer concerned with fault, accusation and blame, but is instead directed toward helping couples resolve any problematic issues and sustain their parenting roles across the boundaries of their own re-formed relationship.
Chapter Three
FAMILY TRANSITIONS

I  Introduction

Legal disputes about the care of children, triggered by parental relationship breakdown, account for the greatest number of substantive applications made to the New Zealand Family Court. During the period July 2004 to June 2005, 24,905 (37%) of the 66,499 new applications related to guardianship matters (Boshier, 2005c). The significance of these cases to the well-being of children and parents, and the work of the Family Court, means it is important to take account of the demographic and research evidence concerning the impact of family transitions. This chapter initially outlines the New Zealand population trends in union formation, dissolution and reconstitution, and then reviews international research findings on the effect of separation and divorce on family members. Children’s perspectives on post-separation family life have recently emerged in a new line of research prompted by the sociology of childhood. These have provided a more comprehensive picture of how children manage the experience of living across different households, and the input they want into family and legal decision-making processes. The chapter therefore concludes with a review of the literature pertaining to children’s voice and participation in the family law system.

II  New Zealand Families Today

Over the past 50 years New Zealand has experienced profound changes in patterns of family formation, dissolution and reconstitution as “the nuclear family built around durable conjugal ties and a distinct division of labor based on gender has given way to a multiplicity of kinship types” (Furstenberg, 1997, p. 1). These rapid shifts in household composition and family behaviour, driven by economic events, social transformations and cultural shifts, have significant implications for the nature and complexity of disputes coming before the Family Court (M. Wilson, 2002). Marriage is no longer the key event orchestrating the
onset of sexual relationships and parenthood (Furstenberg, 1997; Pool, Jackson & Dickson, 1998). Instead there has been a decline in the marriage rate, a widespread postponement of marriage in favour of informal unions or sole living, and a weakening of the link between marriage and childbearing. The New Zealand family is now smaller; childbearing has been delayed (especially for European women); the instability of relationships has increased, leading to higher levels of separation, divorce and repartnering; more children are being raised by sole-parents; women’s economic role in the family has fundamentally changed; there is less differentiation in roles between the sexes; and the population is aging and becoming more ethnically diverse (Ministry of Social Development, 2004a; Pool, 1996; Pool et al., 1998).

Demographic data on the New Zealand family emanates from each five-yearly census (the most recent being in 2001) and the New Zealand Women: Family, Employment, Education (NZW: FEE) survey conducted with 3,000 women in October 1995 (Dharmalingam, Pool, Sceats & Mackay, 2004; Pool, 1998). However, there are significant gaps in knowledge about some important aspects of family life, particularly concerning step-families, blended families and joint-custody families (Ministry of Social Development, 2004a).

**Union Formation**

**Marriage:** New Zealand’s marriage rate³ peaked at 45.5 in 1971 and has now reduced to 13.9 in 2004 (Statistics New Zealand, 2005a). Factors contributing to our low marriage rate include the rise in cohabitation, the trend towards delayed marriage and an increasing proportion of New Zealand citizens remaining single. There were 21,006 marriages in 2004, of which just under a quarter were remarriages of previously divorced persons (Statistics New Zealand, 2005a). In 1971, only 16% of marriages involved the remarriage of one or both partners, whereas they now account for just over one in three marriages because of the increased number of divorced people in the population. There is also a strong trend toward later marriage, with the number of teenage brides dropping from 32% in 1971 to 3% in 2003. The median age of first marriage has also risen considerably, with spouses now, on average, 6.7 years older than their 1971

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³ The number of marriages per 1,000 not-married population aged 16 years and over.
counterparts. In 2004, men marrying for the first time were, on average, 29.9 years and first-time brides were 28.1 years old (Statistics New Zealand, 2005a).

**Cohabitation:** The most significant trend in partnering patterns in New Zealand has been the increase in cohabitation as young people’s preferred first union (Dharmalingam et al., 2004). This cohabitation trend has counterbalanced the declining marriage rate, with the net result that there has been little change in the overall proportion of women living with a partner (Dharmalingam et al., 2004; Ministry of Social Development, 2004a). Relationships have not gone out of fashion, but rather been repositioned and taken a different form (Pool, 1998). Women are also increasingly likely to enter into more than one union in their lifetime (Dharmalingam et al., 2004).

**Living apart together:** Like Sweden, France and Australia, New Zealand is currently experiencing a major shift in union formation at younger ages whereby couples live separately, often in their parents’ homes or in flats, while simultaneously pursuing an intimate relationship (Ministry of Social Development, 2004a; Pool, 1998). In the NZW:FEE study, one third of all women aged 20-24 years who were in a union of any kind were living apart from their partners, usually with their parents (Dharmalingam et al., 2004).

**Same-sex couples:** Same-sex relationships were recognised for the first time in the 1996 census, accounting for 684 couples (Henaghan, 2002a). By 2001 there were 3,714 same-sex couples, of whom 1,356 had children (Statistics New Zealand, 2002).

**Union Dissolution**

**Divorce:** New Zealand’s divorce rate per 1000 married population has been stable since the mid-1980s (Henaghan, 2002a; Statistics New Zealand, 2001a). It is very similar to that experienced in Australia, Europe and North America, aside from those times when legislative reforms engendered sharp peaks (Richards, 2002; Rodgers & Pryor, 1998). New Zealand had its last major increase in divorce in the early 1980s, in response to the Family Proceedings Act 1980 allowing for divorce on the sole ground of irreconcilable difference
The number of marriage dissolutions jumped from 6,493 in 1980 to 8,590 in 1981, peaked at 12,395 in 1982, and subsequently fell to 8,555 in 1989 (Statistics New Zealand, 2001a). The annual number of orders for dissolution then rose sharply during the mid-1990s to stabilise between 9,500 and 10,000 (Statistics New Zealand, 2001a). There were 10,609 dissolutions granted by the Family Court in 2004, up 1% on the 10,491 recorded in 2003 (Statistics New Zealand, 2005b). Less than half (47%) of these involved parents with children under 18 years of age, with 9,185 children - 4,226 (46%) aged less than 10 years, and 4,959 (54%) aged 10 to 17 years - experiencing the termination of their parents’ marriage (Statistics New Zealand, 2005b).

**Separation:** There is no reliable data about the separation patterns of married and cohabiting couples because separations can occur without any formal legal agreement, and the commencement and termination of de facto relationships is statistically unrecorded (Law Commission, 2002a; Ministry of Social Development, 2004a; Pool, 1996). However, the separation rates of married spouses appear to have stabilised, following their increase during the 1980s (Dharmalingam et al., 2004). Cohabitation is associated with higher rates of relationship breakdown than marriage (Law Commission, 2002a; Qu & Weston, 2001). Most cohabitating unions do not endure, with more than half either being dissolved or converted into a marriage within two years. Following separation, there is now an increased propensity to repartner, with about one-third of women repartnering within two years, and 75% within 10 years. Eighteen percent of all mothers live at some point in a blended family. About a fifth of children spend some time living in a blended family before they reach 17 years of age, although the duration is relatively short, with one-third of the children ending their time in this family form within three years, and half within five years (Dharmalingam et al., 2004).

**Population Trends**

**Ethnicity:** The majority of the New Zealand population is of European ethnicity (80%), followed by Māori (14.7%), Asians (6.6%), Pacific peoples (6.5%) and other (0.7%) (Ministry of Social Development, 2004a). Children are more ethnically diverse than adults, with 18% of children identifying with more than
one ethnic group, compared with 6% of adults (Statistics New Zealand, 2001b). An increasing proportion of children will have Māori or Pacific ethnicity in the future, reflecting the younger age-structure and higher fertility levels of these ethnic groups. Extended family networks are an important feature of these cultures (Law Commission, 2002a), with 8% of Pacific, 6% of Asian, 3% of Māori and 1% of European family households comprising three generations in 2001 (Ministry of Social Development, 2004a). Māori women are much more likely to cohabit, to give birth at earlier ages, to sole-parent, or to live in a blended family, in comparison with their non-Māori counterparts (Dharmalingam et al., 2004).

Children: Children under the age of 15 years comprise nearly one-quarter (23%; 847,740 children) of the New Zealand population of four million people (Statistics New Zealand, 2001b). Childbearing patterns have undergone significant changes, with women (especially Europeans) delaying the age at which they become mothers for the first time, the interval between births increasing and family sizes reducing significantly (Dharmalingam et al., 2004). Of those households with children, there is an average of 1.9 children per household (Ministry of Social Development, 2004a). New Zealand’s overall fertility rates have now reached sub-replacement levels (Ministry of Social Development, 2004a). During the 1960s and 1970s, Māori experienced the most rapid decline in fertility rates ever recorded anywhere in the world (Ministry of Social Development, 2004a; Pool, 1998).

New Zealand’s most common family type is a couple with children (42%) compared with couple-only families (39%) and one-parent with children families (19%) (Statistics New Zealand, 2002). Most New Zealand children live in households in which there are two parents, and most children living with a woman are her biological offspring (Pool, 1998). Children may be “less exposed to the continuous and stable influence of two parents [but] kinship bonds remain strong and omnipresent for most children” (Furstenberg, 1997, p. 13). Fathers are now more involved in raising their children than they were 30 years ago (Law Commission, 2002a).
**Sole-parenting:** The proportion of sole-parent families has grown significantly over the past 25 years, particularly among ethnic minorities (Ministry of Social Development, 2004a). Eighty-two percent of the parents in one-parent families are women (Statistics New Zealand, 2002) and around half of all mothers spend some time as a sole-parent before they reach 50 years of age (Dharmalingam et al., 2004). For most, sole-parenting is a transitory period resulting from the death of a partner, separation or divorce. Over half cease to be a sole-parent within five years (Dharmalingam et al., 2004).

**Economic circumstances:** Young adults and children have suffered a major erosion in their economic position over the last quarter century, with the pace and scale of some demographic changes being directly attributable to the financial pressures experienced by families (Pool, 1998; Thomson, 1999). Sole parents, Māori and Pacific families have been particularly adversely affected by the neo-liberal reforms of the 1980s and the 1991 budget cuts (Atwool, 1999; Blaiklock, Kiro, Belgrave, Low, Davenport & Hassall, 2002; Child Poverty Action Group, 2003; Kiro, 2000; UNICEF, 2005). While the proportion of families living in poverty has recently decreased, it is low-income and beneficiary (especially sole-parent) families with children who remain concentrated below the poverty threshold (Ministry of Social Development, 2004a). Income inequality has increased dramatically in New Zealand, with the gap between high- and low-income (80th to 20th percentile) households widening by 17% between 1982 and 1998 (Law Commission, 2002a). Again, it is households with children who are skewed towards the lower echelons of income distribution (Ministry of Social Development, 2004a).

**Implications for the Family Court**

The Family Court deals with the implications arising from the social, economic and cultural issues driving demographic changes in household composition and transition. With more people living in de facto unions, having children outside of marriage, separating, repartnering and living as blended families, the opportunity for disputes over post-separation property, financial support and childcare arrangements increases, as does the complexity of those issues (Law Commission, 2002a; Qu & Weston, 2001; M. Wilson, 2002). The
Law Commission (2002a) predicts that Family Court cases, especially those involving children, will “become more prolonged and difficult to resolve” (p. 114) as parental responsibilities and obligations across and between different families and households magnify. The economic pressures faced by families with young children, including sole parents, will exacerbate this. The rise in the Māori population, together with the increasing diversity of immigrant populations, will impact upon the provision of culturally sensitive professional staff and procedures within the Family Court (Law Commission, 2002a, 2003).

Pool (1998) believes that much of the court’s ‘bread and butter work’ will continue into the future, but that its case-mix will change and some new issues will emerge. The living–apart together trend, where there is mutual dependency without co-residency, will pose a significant challenge for the Family Court and risk third party (e.g. grandparent) conflicts over the day-to-day care of any children. New birth technologies, same-sex parenting, step- and blended-families all have legal ramifications as well.

Family law statutes are increasingly facing amendment to grapple with the implications of social and economic change on family forms (Boshier, 2004a; 2005a). The Property (Relationships) Act 1976 was amended in 2001 to incorporate de facto and same-sex couples as equal partners in the division of relationship property following separation or death. In 2004 the Civil Union Act was passed to provide for couples of the same or different sex to acquire legal recognition of their relationship. The COC Act 2004 has updated the law governing guardianship, day-to-day parenting and contact. Further reform of the laws governing adoption and assisted reproduction is awaited.

The changes affecting New Zealand family formation norms, nuptiality patterns and reproductive behaviour have been profound, and will undoubtedly continue as some of the most significant demographic shifts have involved members of the youngest cohorts in our population (Dharmalingam et al., 2004; Statistics New Zealand, 2001a). The Family Court is therefore increasingly likely to be facing more difficult cases in the future as a result of the varied
III The Impact of Separation and Divorce on Family Members

Much of the research on the impact of marital transitions on children has been undertaken in America, but the outcomes for children of divorced families in countries like New Zealand, Australia and England (where the divorce rate is actually much lower) have been found to be very similar (Amato, 2004; Feehan, McGee, Williams & Nada-Raja, 1995; Fergusson, Horwood & Lynskey, 1994; Fergusson, Lynskey & Horwood, 1994; Maxwell, 1989b; Pryor & Rodgers, 2001; Richards & Ely, 1998; Rodgers, 1998; Rodgers & Pryor, 1998). There is also considerable international consistency in the qualitative research findings on children’s own perspectives on separation and divorce (Butler, Scanlan, Robinson, Douglas & Murch, 2002; Gollop, Taylor & Smith, 2000; McDonald, 1990; Neale, 2001; Smart & Neale, 1999, 2000).

The consistency of research findings across settings suggests that the link between divorce and child problems is a general phenomenon, irrespective of variations in culture or policy environments. (Amato, 2004, p. 31)

Various factors have been identified as exacerbating, buffering or moderating the separation/divorce experience for adults and children. The impact of this transition can, at times, be highly problematic and leave a lingering legacy of adversity affecting the individual throughout their life course. This is particularly so when manipulation, conflict, hostility and violence work to sabotage, or even destroy, the bonds between former spouses, and between children and one or other (or sometimes both) of their parents. Wallerstein, Lewis and Blakeslee (2000) paint a particularly pessimistic picture, arguing that the impact of divorce on children is cumulative and reaches a climax as delayed problems emerge in adulthood. However, the more commonly accepted view is that it is “the diversity rather than the inevitability of outcomes that is notable in response to divorce and remarriage” (Hetherington et al., 1993, p. 228). People (both adults and children) vary greatly in their reactions, with some benefiting from the uncoupling of the relationship, others experiencing temporary

pathways taken by family members in entering, terminating and reconstituting relationships (Pool, 1998).
decrements which improve over time, and yet others facing a downward trajectory from which they might never fully recover (Amato, 2000; Buchanan & Bream, 2001; Day Sclater & Richards, 1995; Lamb, Sternberg & Thompson, 1997; Maxwell & Robertson, 1993a; Smart & Neale, 1999). While children are at an increased risk of a variety of problems when their parents separate, it is the quality of their relationship with their parents, and their parents’ ability to co-parent authoritatively, which are the critical factors in determining post-separation adjustment and well-being (Amato, 2004).

**Divorce as a Normative Process**

Divorce is not a discrete event, but part of a multifaceted process of family experiences and transitions occurring over an extended period of time (Amato, 2000; Flowerdew & Neale, 2003; Hetherington, 2003; Kelly, 2003). It begins while the couple live together and ends long after their divorce is concluded:

… divorce should be viewed not as a discrete event but as part of a series of family transitions and changes in family relationships. The response to any family transition will depend both on what precedes and follows it. … In many families, divorce may trigger a series of adverse transactional factors such as economic decline, parenting stress and psychological dysfunction in family members. For others, it may present an escape from conflict and an unsatisfying marital relationship, a chance to form more gratifying and harmonious relationships, and an opportunity for personal growth and individuation. (Hetherington et al., 1993, pp. 208-209)

Many of the adjustment problems seen in children of divorce can, in part, be accounted for by the experiences of these children within marriages that later end in divorce (Kelly, 2000, 2003; Richards & Ely, 1998). Children living with chronically hostile or violent parents are better off, in the long-term, if their parents divorce (Amato & Booth, 1997; Kelly, 2003).

By regarding separation and divorce as a process it is easier to take account of the timing of individual responses and to support family members accordingly. Often one spouse wants the marriage to end more than their partner does, giving them an opportunity to mourn the end of their relationship at an earlier stage. In contrast, their partner will experience their greatest degree of emotional distress during a later phase of the relationship breakdown (Amato,
Over time, most divorced parents are happier than before their divorce, with women in particular developing new skills and being less depressed than other women who remained in unhappy marriages (Hetherington & Kelly, 2002). Divorce can be an opportunity for personal growth and fulfilment, or an escape from a dysfunctional, unsatisfying or abusive relationship.

Since the early 1990s the perception of divorce as a pathological experience has been replaced by the view that it is now a more normative experience in the life course of families (Hetherington, 2003; Kelly, 2003; Smart, 2000a). There has been an ideological shift away from divorce as a disaster for family members with especially deleterious consequences for children, towards a risk and resiliency model capturing the diversity of parents and children’s adjustment and their lived reality as they work to retain close parent-child bonds in the aftermath of separation (Flowerdew & Neale, 2003). With divorce becoming more common and socially accepted, some studies have shown its effect on children to now be weaker than that noted in older studies dating from the 1950s (Amato, 2000; Amato & Keith, 1991; Hetherington et al., 1993; Kelly, 2000). However, a recent Australian longitudinal study found no general trend supporting the view that the adverse outcomes associated with parental divorce have declined over time (Rodgers & Stitzel, 2005).

Impact of Separation and Divorce on Children

Parental separation is almost always very distressing for children with feelings of resentment, anger, sadness, shock, disbelief and abandonment as common features (Kelly, 2003; Richards, 1996, 2002). These are compounded by a breakdown in household routines, parental task overload and a diminished quality of parenting in the first two years following separation (Amato, 2004; Hetherington et al., 1993). Not surprisingly, the adults’ preoccupation with the ending of their relationship and the consequent emotional, practical and property issues at stake, makes it difficult for them to avoid being irritable, disengaged, erratic and, at times, punitive towards their children (Day Sclater & Richards, 1995; Hetherington et al., 1993; Hetherington, Bridges & Insabella, 1998). Over time, the death of a parent is actually less disruptive and traumatic.
for children than a divorce (Amato & Keith, 1991; Richards, 1982; Richards & Ely, 1998).

Most children do show some problems in the first two years following their parents’ divorce (Kelly, 2003). However, after this initial crisis period, many children exhibit remarkable resiliency and emerge as well-functioning, competent or even enhanced individuals. Other children suffer sustained developmental delays or disruptions, and still others appear to adapt well in the early stage of the transition but show delayed effects, especially in adolescence and early adulthood. Studies comparing children whose parents have divorced, with those of similar social background whose parents remained married, have shown consistent, but small, differences in the behaviour of children from divorced families (Amato, 2004; Kelly, 2003; Rodgers & Pryor, 1998). The differences between children from intact and separated families can be quite small and long-term negative effects only apply to a small number of children:

Although short-term distress at the time of separation is common, this usually fades with time and long-term adverse outcomes typically apply only to a minority of children experiencing the separation of their parents. However, these children have roughly twice the probability of experiencing specific poor outcomes in the long-term compared with those in intact families. (Rogers & Pryor, 1998, summary)

These poorer outcomes include a higher probability of being in poverty and inadequate housing; poorer educational attainment; leaving school / home younger; beginning sexual relationships and entering cohabitation, marriage and childbearing earlier (especially females); exhibiting behavioural problems, depressive symptoms and lowered self-esteem; higher levels of delinquency, substance use and criminal offending; and a greater propensity to divorce (Amato, 2000; Kelly, 2003; Pryor & Rodgers, 2001; Rodgers & Pryor, 1998).

The age at which children experience their parents’ separation does not in itself appear important. Similarly, there is no consistent evidence that boys are more adversely affected by parental separation than girls (Pryor & Seymour, 1998). It is possible though that girls and boys have different ways of exhibiting their distress, either through internalising, in the case of girls, or externalising
behaviour in the case of boys (Hetherington et al., 1998; Rodgers & Pryor, 1998).

Divorce is a risk factor for children, but despite the increase in risk, resilience is the normative outcome of divorce for children (Amato, 2004; Emery, 1999a; Kelly, 2000; Pryor & Rodgers, 2001). Children’s expressions of pain about their parents’ separation should not be confused with poor psychological adjustment or pathology (Kelly, 2003). There are important individual differences in children’s adjustment following a divorce and many of these are attributable to post-divorce family relationships, especially: (a) the quality of a child’s relationship with their residential parent, (b) the degree and manner in which conflict is expressed between parents, (c) the family’s economic standing, and (d) the child’s contact and relationship with their non-custodial parent. While many children may be resilient, they are not, however, invulnerable (Emery, 1999a), and it is clear that children do pay a price in juggling the complexity of post-divorce relationships and in moving between different households to maintain significant family bonds (Gollop, Taylor & Smith, 2000; Smart, 2000a, 2000b, 2001).

**Conflict and Hostility**

There is very strong evidence that conflict between the parents prior to, during and/or after the breakdown of their relationship leads to reduced levels of child well-being (Amato, 1993a, 1993b; Amato & Keith, 1991; Emery, 1999a; Hetherington et al., 1993; Kelly, 2003). Where inter-parental conflict is about the child or directly involves the child, is particularly intense, enduring and unremitting, or involves violence, and there are no buffers to ameliorate its impact, then children can be very adversely affected (Amato, 1993a, 2004; Hetherington, 2003; Kelly, 2000; Lamb, 1999; Lamb et al., 1997; Osofsky, 1995; Pryor & Rodgers, 2001; Richards, 1996; L. Smith, 2000; Sturge & Glaser, 2000).

Children from high-conflict married families appear to fare better following divorce as the amount of stress to which they are exposed is generally reduced (Amato, Loomis & Booth, 1995; Booth & Amato, 2001). However, children
from low-conflict married families can be worse off as they often experience their parents’ separation as unexpected, unwelcome and unpredictable:

Curiously our results suggest that divorces with the greatest potential to harm children occur in marriages that have the greatest potential for reconciliation or for managing a divorce such that it is less detrimental to their children. After all, a marriage characterized by mild disengagement has more on which it can build than does a marriage characterized by chronic hostility. (Booth & Amato, 2001, p. 211)

In some families where conflict is sustained or accelerates following separation the child ‘caught in the middle’ is subject to each parent’s denigration of the other and becomes the conduit for parental communications and disputes (Hetherington et al., 1998; Rodgers & Pryor, 1998). This highly destructive pattern of implacable parental hostility can engender loyalty conflicts in the child and, in a minority of cases, escalate to the point where some children become completely alienated from a parent and refuse contact (Sturje & Glaser, 2000). Other times, the conflict may not so manifestly destroy the parent-child relationship, but the efforts of a parent to gate-keep or sabotage the other parent’s relationship with the children can discourage continued contact, causing resentment and anger (Hawthorne, 2005; Hetherington et al., 1998).

Where parents can avoid placing their children ‘in the middle’ then their children are not significantly different from children in low-conflict families. Buffers that help to protect children in high conflict situations include a good relationship with at least one parent/caregiver, parental warmth, support from siblings, and adolescents having positive self-esteem and peer support (Kelly, 2000). Parallel parenting can also offer advantages for some children:

When anger continues in one or both parents, parallel parenting in separate domains is a common outcome. Although co-operative parenting is clearly beneficial after divorce, the disengaged parents may function effectively in their parallel domains, and in so doing, enhance their children’s adjustment. (Kelly, 2000, p. 970)
Where conflict or violence cannot be deflected from the children, a cautious approach to parental contact should be encouraged, and consideration given to supervision by relatives or contact centres.

**Economic Circumstances**

Separation and divorce split the economic resources of the family, causing an often sharp decline in the household income and standard of living of the custodial parent and children (Amato, 2004; Amato & Keith, 1991; Brown, 1994; Smith, 1996). Reliance on a state benefit severely diminishes the life chances of children (Maxwell & Robertson, 1993a). Economic hardship, coupled with a non-resident parent’s refusal or inability to pay child support, influences the amount of adversity and disruption children face following their parents’ separation (Amato, 2004; Hetherington et al., 1993, 1998; Pryor & Seymour, 1998; Somerville, 1996). Relocating to less expensive accommodation in a different neighbourhood, enrolment at a new school and a general lack of commodities (e.g. books, computers) and activities are significant by-products of children’s less satisfactory financial circumstances. The economic consequences of divorce can also implicitly underlie parents’ motivations with respect to children’s future living arrangements and child support payments (Emery, 1999a).

**Post-separation Parenting**

Following parental separation the majority of children (70-80%) remain living with their mother and have contact with their father on a regular or intermittent basis (Lee, 1990; Pryor & Seymour, 1998; Qu, 2004; Quirk & Mason, 1997; Richards, 1982). This mother sole-custody/father contact arrangement holds true whether the decisions have been made privately between the parents or ordered by the Family Court. Most children, when asked, express a preference to have continuing contact with both parents, whatever the custody arrangements (Cashmore, Parkinson & Single, 2005; Fabricius, 2003; Hess & Camara, 1979; McDonald, 1990; Pryor, 2001; Pryor & Seymour, 1998; Smith et al., 1997). Many want to see their non-resident parent more frequently and for longer periods of time (Gollop, Smith & Taylor, 2000). However, contact by both non-custodial mothers and fathers diminishes rapidly following divorce
(Emery, 1999a; Furstenberg, Morgan & Allison, 1987; Hetherington et al., 1998; Rodgers & Pryor, 1998; Seltzer, 1991), although the percentage of children with no contact with their fathers two years after divorce has decreased substantially in the past two decades (Amato, 2004; Kelly, 2000). About one-third of non-resident fathers remain “highly involved in their children’s lives, another third are disengaged but still maintain some contact, and a final third have little or no involvement” (Amato, 2004, p. 35).

The failure by many divorced fathers to sustain their relationships with their children, and the overwhelming sense of loss they feel about this, is an important social concern (Hawthorne, 2005). Higher levels of paternal involvement in intact-family life (Julian, 1998; Yeung, Sandberg, Davis-Kean & Hofferth, 2001), together with gender-neutral statutes, have led fathers to seek more time with their children via shared care arrangements or more liberal contact regimes involving weekend, mid-week and holiday contact, including overnight stays. It is impossible to predict post-divorce father-child relationships from pre-divorce behaviour (Hetherington et al., 1998). Some highly involved fathers gradually disengage from their children after separation because the enforced marginality, intermittent and somewhat artificial nature of the contact is too painful or causes difficulty in maintaining close ties (Hawthorne, 2005; Hetherington & Kelly, 2002). In contrast to these ‘divorce de-activated’ fathers, ‘divorce-activated’ fathers rise to the occasion and become far more involved in their children’s lives following separation. Rather than adopting a traditional parenting relationship with their children, “most non-residential fathers have a friendly, egalitarian, companionate relationship” with an emphasis on entertainment and fun (Hetherington et al., 1998, p. 177). However, retreating to a weekend entertainment role can diminish the long-term importance of the non-resident parent’s role in the child’s life. Where parent-child relationships are positive, then the visiting schedule should permit both school week and leisure time involvement, including overnight visits, to enable sufficient time for real parenting activities that maintain meaning and attachment for both parties (Kelly, 2000; Kelly & Lamb, 2000). These activities should include assisting
children with homework and other projects, providing emotional support, and setting limits authoritatively.

Research conducted by the Australian Institute of Family Studies (Smyth, 2004a, 2004b, 2005; Smyth, Caruana & Ferro, 2004) has identified five different patterns of father-child contact: 50/50 shared care, little or no contact, holiday-only contact, daytime-only contact, and standard contact (every weekend or every other weekend). Family dynamics and demographic factors (including material resources, physical distance between parents’ homes, the quality of the co-parental relationship, and repartnering status) are key correlates of which pattern is adopted by which family. Standard contact schedules have, to date, dominated post-separation parenting regimes, in part, because of their promotion by lawyers and the Family Court, together with parents’ lack of information about other possible patterns of care (Smyth, 2004a, 2005).

Patterns of parenting following separation are now very varied, despite the predominance of the mother sole-custody model. Around 6% of separated families share the care of children, defined as at least 30% of the nights per year (Smyth, 2004a). One third of children with a natural parent living elsewhere rarely or never see this parent (Parkinson & Smyth, 2003; Smyth, 2004a). Of those who do see their non-resident parent, another third never stay overnight (Smyth & Ferro, 2002). Underlying this broad picture of parent-child contact is a considerable amount of dissatisfaction with post-separation parenting arrangements, especially by men (Hawthorne, 2005; Parkinson & Smyth, 2003; Smyth, 2004a). Many non-resident fathers would prefer more contact with their children, higher levels of overnight stays and/or a change toward shared care or even paternal sole-custody (Smyth, Sheehan & Fehlberg, 2001). In contrast, mothers’ report significantly higher levels of satisfaction with existing custodial arrangements.

Children’s perspectives on their fathers are generally favourable and reveal considerable sensitivity to, and awareness of, fathers’ roles and responsibilities (Kerslake Hendricks, 2000). Children who have close relationships with their fathers benefit from frequent contact with them after parental separation,
especially when fathers remain actively involved as authoritative parents (Amato & Gilbreth, 1999). Fathers’ payment of child support is closely associated with their patterns of child contact – those with the most frequent involvement in their children’s lives provide the greatest financial support, while those with little contact pay the least (Amato, 2004). Fathers’ education and income are also positively associated with their children’s educational attainment, and fathers are as important as mothers in predicting children’s long-term outcomes (Amato, 1996).

**Parenting as a Life-long Commitment**

An enduring and meaningful relationship between a child and each of his or her separated/divorced parents is now firmly encouraged and desired in law, policy and practice, except where protection from abuse, hostility or violence is necessary (Ministry of Justice & Ministry of Social Policy, 2000; HRSC, 2003; Rodgers & Pryor, 1998; Tapp & Taylor, 2001). Co-operative, consensual, authoritative co-parenting following divorce is regarded as the ideal parenting style, as it is most closely associated with a variety of positive child outcomes (Amato, 2004). About one-quarter of divorced parents settle into this pattern (Buchanan, Maccoby & Dornbusch, 1996). In many other cases the best that can be achieved is ‘parallel parenting’ where there is independent but non-interfering parental relations and minimal communication. This pattern characterises about two-thirds of post-divorce families (Amato, 2004). While negative feelings between separated parents usually diminish over time, around 10% of parents remain trapped in intractable animosity toward one another, even several years after their divorce (Johnston, Kline & Tschann, 1988). These are the parents who return to court to fight over their children’s residence and contact arrangements, and other issues such as education, religion and child support.

Smart (2003a) believes there has been “a profound change in our understanding and our expectations of parenthood” (p. 25) as children have become more important to both mothers and fathers, and both parents want close emotional bonds with their children throughout childhood. Parenthood,
not marital status, is now the central focus in family law, and this is not just to do with biology but rather the quality of intimate parent-child relationships. Smart (2003a) argues that this “shift towards prioritising active, emotionally involved parenthood (as opposed to mere legal paternity) as a basis for policy occurred at precisely the time when fathers were still defined as insignificant actors in the psychology of parent-child relationships” (p. 24). Their perceived loss of power in the domestic context contributed to the rise of the Fathers’ Rights movement in the 1970s/1980s. Up until then there was no felt need for such a movement. This has given rise to a fertile ground for a new manifestation of gender conflict through which fathers are seeking to assert legal rights as children are becoming increasingly valued for the meaning they give to the emotional lives of each parent. Gender conflict is a social phenomenon, a sign of the times, which cannot be deflected merely by parental education or court tactics. Rather, conflicts over residence and contact “need to be understood as the sharp end of a significant cultural change in mothering and fathering” (Smart, 2003a, p. 36), and not as a private squabble between ex-partners or biases in the legal process. Presumptions (like shared care – see chapter four) while soothing non-resident fathers rights in particular, leave little room for children themselves to insert their perspectives into family or legal decision-making processes.

**Step-families**

During the 1970s and 1980s there was a presumption (albeit a declining one) that the re-creation of a ‘proper’ family life was the best thing for children once their parents had divorced (Smart, 2000a). Thus the emphasis was on the custodial parent remarrying to form a reconstituted nuclear family. By ‘starting again’ as a ‘proper’ family the children were provided with a seemingly regular household structure which conformed to expected societal standards:

New husbands were presumed to become the main father figure for the children and it was not uncommon for children to be adopted, or at least to take their step-father’s name so that they would ‘look like’ a proper family to the outside world. (Smart, 2000a, p. 146)

In terms of discipline and role models, the step-father replaced the natural father, and the first father was presumed to remarry and start his own ‘new’
family. “No-one imagined that these two separate households should be entwined to any extent” (Neale & Smart, 1997a, p. 203). It is only relatively recently that socio-legal policy has encouraged (indeed expected) a natural father to maintain his post-divorce parental responsibilities in spite of the mother’s remarriage. One of the consequences is that a parent’s new partner is often no longer regarded as a substitute father or mother for the children and that it is the children who drive the nature of the step-parent relationship (Pryor, 2005a; Smart, 2000a). As a result, step-parents have had to forge a new type of parenting style with their step-children. This can be distant and disengaged, although conflict and negativity are frequent features of blended family life as biological and social relationships are balanced (Hetherington, 2003; Hetherington et al., 1998; Neale & Smart, 2000; Wise, 2003). Children generally rate their relationship with their step-parent as lower in quality than their relationship with their resident and non-resident parents, although the relationship is particularly salient for the child’s feelings of self-worth (Pryor, 2005a). Step-parents themselves tend to rate the relationship even lower than their step-children’s assessment of it (Pryor, 2005a). Nevertheless, in comparing step-fathers with non-resident fathers, there is evidence that the accumulation model, and not the substitution or loss model, operates enabling children to successfully add new adults to their lives (Pryor, 2005a). Children’s standard of living usually improves as well, although child support obligations across first-marriage and remarriage families, coupled with the extra costs of supporting children who move between two homes, can disadvantage the remarriage family significantly (Atkin, 2002a; Atkin & Black, 1999; Fleming, 1999).

Children in step-families carry the same risk of emotional and behavioural problems as do children living in sole-parent households (Booth & Dunn, 1994; White & Gilbreth, 2001). It is the tension in step-family relationships that accounts for this (Amato, 2004), with resentment and jealousy being significant characteristics of this complex living arrangement. It is best to give children time to adjust to post-divorce family life before adding a new adult to the household (Edwards, Gillies & Ribbens McCarthy, 1999; Hetherington & Kelly, 2002). Similarly, once a parent has repartnered, it is desirable for them to
preserve some one-on-one time with their children to avoid the feeling that the step-parent has replaced the child in the parent’s affections (Smith et al., 1997).

**Implications for the Family Court**

Reorganisation of family life is an inevitable consequence of separation and divorce, with profound personal implications for adults and children alike as previous relationships dissolve and new ones form. One idealised image of the post-divorce family is that of:

… parents living more or less separate lives, but with children moving happily to and fro between them, enjoying a relationship which is substantially unaltered from the time when they lived as one household. (Davis & Pearce, 1999, p. 147)

However, the reality is somewhat different as the challenges posed by adjustment to the transition, financial divisions, and proposed patterns of child care all influence the adjustment and well-being of the ex-partners and their children (Neale & Smart, 1997a; Smyth, 2004a). It is into the midst of this emotional and physical upheaval that the Family Court may become involved in assisting families to deal with and manage the reality of parental separation. The adults’ expectation of separate future lives (and possibly the opportunity to repartner) has to be tempered with the legal context that parents remain linked as parents via responsibilities as joint guardians, by a child support obligation, and possibly by an obligation to provide financial support to the ex-partner. Balancing this in a way that promotes the interests of parents and children alike can be difficult, but conciliation services offered by the Family Court can assist greatly. The research knowledge built up over the past 30 years about the impact of separation/divorce can play a useful role in counselling and mediation where the majority of family members fit the experience of separated parents and children in general. However, this knowledge base offers little in respect of that particular subset of separated parents who consume the most court and legal resources due to their inability to agree about the care and upbringing of their children and for whom the court must ultimately make the final decisions:

It is perhaps best to exercise caution in generalizing from the experience of (relatively serene) separated families in an attempt to impose those same patterns on families who are far from serene, and where the parents
may claim that a variety of special factors operate. The only evidence that
counts for much in these circumstances is that of other families whose
relationships are similarly fraught. Unfortunately, it is difficult to conduct
research which examines the long-term impact of different contact
arrangements amongst that minority of separated families who bring such
matters to court, these being in no sense a homogenous group. (Davis &
Pearce, 1999, p. 145)

Various models have been developed to explain the effect of separation and
divorce on adult and child well-being, including the divorce-stress-adjustment
model (Amato, 2000) and the transactional model (Hetherington et al., 1998).
Despite their incorporation of familial and extra-familial processes, including
social support systems within the community such as schools, friends and
extended family members, neither model directly addresses the role of legal and
Family Court interventions in families’ lives. Clearly family law processes can
be mediators (stressors) or moderators (protective factors), but to date
insufficient attention has been given to the impact such interventions have on
adults’ and children’s adjustment to divorce (Amato, 2000). Where divorce
policy and law is considered by researchers it is generally in the context of
successful innovations – like joint custody, mediation, parent education
programmes and parenting plans (Emery, 1999a; Hetherington et al., 1993) – or
concerns about lengthy court delays exacerbating the uncertainty and personal
distress of separated couples (Pryor & Seymour, 1998). The role that Family
Court processes play in facilitating, or further disrupting, family relations and
child/adult well-being in the post-separation phase is a fruitful avenue for
further research and needs to be explicitly built into models explaining the effect
of family transitions. My research study is an attempt to achieve just that.

Given the lack of research about the 6% minority of families who require
extensive Family Court intervention it seems somewhat paradoxical that much
of our family law process is preoccupied with the resolution of these disputed
cases. Richards and Ely (1998) argue that these cases should not eclipse the
procedures for the great majority of parents who co-operatively achieve highly
satisfactory residence and contact arrangements, or resolve any issues about
these through alternative dispute resolution and conciliatory processes. The
procedures for disputed cases which tend to dominate discussions about the
Family Court appear best placed on a separate litigation track, reserving multiple other lower-tariff pathways for the majority of separating parents who can resolve issues themselves or with minimal legal and judicial intervention (see chapter four).

Another significant implication for the Family Court of the research literature on the effect of parental separation on children’s adjustment and well-being is the need to focus programmes and interventions on strengthening the co-parental relationship and improving children’s relationships with each parent (Amato, 2004). Fostering an increase in contact between non-custodial parents and their children is especially important in achieving this (Pryor & Seymour, 1998; Smyth, 2004a, 2004b). The traditional model of maternal sole custody and reasonable paternal access (for example, on alternate weekends) is too limiting and rebuffs both children’s and fathers’ aspirations for meaningful contact (Smart, 2000a). A variety of creative and responsive post-divorce patterns of care, including shared care arrangements and more liberal access regimes, need to be encouraged by lawyers and the Family Court so that children’s bonds with each parent can be at least maintained and hopefully strengthened (Smyth, 2005). A standard one-size-fits-all approach to post-separation parenting arrangements, especially where this favours a legal presumption dictating a specified pattern of care, is unlikely to cater for families’ diverse circumstances following parental separation. Focusing on the frequency and duration of contact means that the more important variables of the nature and quality of the parent-child relationship have been overlooked (Smyth, 2004b). The Family Court, and parents, have been too preoccupied with allocating parental time, when the research literature suggests that it is the quality, not the quantum, of parent-child relationships which critically influences children’s post-separation adjustment and well-being (Smyth, 2004a). The family law system does play a significant role in holding together those “fragments of families” which can be “found in various households linked by biological and economic bonds, but not necessarily by affection or shared life prospects” (Smart & Neale, 1999, p. 181). By better utilising social science research findings, and child-inclusive models of practice, it could play an even more constructive role in promoting family well-being.
IV  Children’s Perspectives on Separation and Divorce

Research asking children directly about their perspectives on their parents’ separation/divorce has flourished since the mid-1990s in response to the influence of the sociology of childhood (see chapter five) calling for attention to be paid to the lived realities of children’s post-separation family experiences. This theoretical reorientation, incorporating new conceptual and methodological tools to investigate children’s subjective experience of family change, has proven to be a useful line of enquiry. Speaking to children directly in order to understand their own perspectives has confirmed some of the findings of previous studies asking adults to retrospectively consider what it was like for them when their parents divorced during their childhood. However, the contemporary approach of conducting research “with” children, rather than ‘on’ them, has shifted the focus away from the harms and risks of parental separation “towards the complex qualities of relationships that children experience” (Smart, 2003a, p. 125).

Qualitative studies examining children and young people’s perspectives on post-divorce family life have been conducted in England (Flowerdew & Neale, 2003; Neale, 2001, 2002; Neale & Smart, 2000; Neale, Wade & Smart, 1998; Smart & Neale, 2000; Smart, Neale & Wade, 2001), Scotland (Mitchell, 1983), Ireland (Hogan, Halpenny & Greene, 2003), Wales (Butler et al., 2002; Douglas, Murch, Robinson, Scanlan & Butler, 2001), Australia (Cashmore et al., 2005; McDonald, 1990; Parkinson, Cashmore & Single, 2005), New Zealand (Gollop, Smith & Taylor, 2000; Gollop, Taylor & Smith, 2000; Pryor, 2001; Smith & Gollop, 2001a, 2001b; Smith et al., 1997), Canada (Neugebauer, 1989), North America (Fabricius, 2003; Pruett & Pruett, 1999; Wallerstein & Kelly, 1980), the Netherlands (Van Wamelen, 1990) and Norway (Moxnes, 2003). Children have been found to be articulate and insightful commentators, with their perspectives pointing to “the diversity and particularity of children’s experiences of post-divorce family life and their active engagement within it” (Flowerdew & Neale, 2003, p. 148). Children’s own first-hand accounts have fleshed out adults’ perceptions of the benefits and challenges faced in the
aftermath of parental separation. The emphasis has shifted from a deficit model exploring the adverse impact of divorce on children, and how to avoid harmful risk factors, to a strengths-based model looking for those features which “have been helpful or positive to those children who have successfully navigated their way through family change” (Flowerdew & Neale, 2003, p. 148). Mayall (2000a) describes this process as “using children’s understanding of childhood to help improve the conditions of childhood” (p. 135).

While there is convergence in the research findings (Smart, 2003a), the children, unsurprisingly, report a widely divergent range of views, experiences and levels of satisfaction. What might be reported as a stress factor in one child’s life, may be regarded as a positive resource by another child (e.g. a new step-parent). However, the common themes emerging across this international research on children’s perspectives include:

- **Care arrangements** – children are able to readily identify their day-to-day care arrangements, even where these are quite complex. They generally prefer these to be organised so they have significant contact with each parent.

- **Contact with non-resident parents** - the frequency, duration and nature of the contact, and the value of quality time, are all issues raised by children. Those with a positive relationship with their non-resident parent are generally enthusiastic about contact, enjoy the time spent together and usually want more frequent or lengthier contact. Children dislike contact with parents who are disengaged, distracted, indifferent, abusive, or who let them down and disappoint them.

- **The quality of children’s relationships** – children’s perceptions of their parents’ relationship, and their exposure to parental conflict or cooperation, mediates the quality of the parent-child relationship. Children value affection, emotional support, having their parent take an interest in them and being involved in their lives in a meaningful way. They prefer to avoid hostile, coercive, distant, or detached relationships. Where parental conflict does occur it is clearly a source of distress and
unhappiness to children, with many using vivid metaphors to describe the experience of being caught in the middle – ‘torn apart’, ‘an elastic band’, ‘a tug of war’, ‘the eye of a cyclone, and ‘in the middle of World War Three’ (Smith et al., 1997).

- **Informing children** – children want to be informed about their parents’ separation and consulted about their future care arrangements. Many emphasise the desirability of flexible arrangements so their sporting and social commitments can be accommodated as they grow older.

- **Relationships with new family members** – a parent’s new partner can add a positive dimension to a child’s life, but most children generally prefer to still have one-on-one time with their parent. Some children feel that as the relationship between the new partner and their parent develops, their own relationship with their mother or father deteriorates. This can create resentment and add to the complexity of blended family life.

- **Consistency between different homes** – inconsistency between parents about discipline and rules makes it hard for children to adapt to each home context. Children prefer homes where the parent is flexible, rather than rigid, strict and authoritarian. Some children like the difference between homes as it provides a break from one parent and adds variety to their lives.

- **The physical environment** – children notice the adequacy of each parent’s home (orderliness, cleanliness, nice meals), their personal space and comfort (own room/shared space), the variety of activities on offer and opportunities to play and explore. Geographical proximity between parents’ homes will influence how convenient it is for children to regularly move between homes and manage their personal belongings.

- **Social support networks** – children do make significant adjustments when their parents’ separate, but there is also considerable scope for continuity in aspects of their life at home, school and in personal relationships with immediate and extended family members and friends.
Some children also benefit from organised education and support groups or professional counselling. Children generally make little mention of legal and Family Court processes.

- *Advice for separating parents* — children readily proffer advice for separating parents about the importance of informing children and giving them a say about their living and contact arrangements. They also recommend that parents not fight, argue or put the other parent down, avoid conflict and try to co-operate (Smith & Gollop, 2001b).

Children who experience multiple transitions are at particularly high risk of negative outcomes (Wise, 2003). It is important therefore to not just study children’s perspectives on separation/divorce, but to also take account of their cumulative life experiences. This may include changes in care arrangements brought about by custody and access alterations or parental repartnering, which are the more commonly discussed multiple transitions. However, all children face other changes and transitions in school, friendship, death, illness, sexuality, unemployment, financial hardship and housing, regardless of their parents’ marital status. Flowerdew and Neale (2003) undertook a follow-up study with 60 children (aged 11-17 years) three to four years after their initial research interview to ascertain how their lives had changed. While the experiences arising from their parents’ separation continued to perplex and preoccupy some of the children, most had worked through the transition and become accustomed to the losses and challenges it had brought. “What was an ‘extraordinary’ period of transition in their lives had become wholly ‘ordinary’” (Flowerdew & Neale, 2003, p. 151). The management, timing and pace of change were critical in determining how well the children coped with the transition. Where there was an accelerated pace and children were having to deal with multiple changes in different spheres of their lives (not just home, but also school and personal relationships) then children could find the experience overwhelming and uncomfortable. A period of emotional recovery time was important to cope with each major life change. The children also described a range of other issues they were dealing with in their lives which had no association with their parents’ divorce, and which they in fact insisted were far more important to them (for
example, same-sex relationships). The cumulative weight of these other life experiences meant that from their perspective divorce was “nothing compared to the difficulties posed by everything else” (Flowerdew & Neale, 2003, p. 157). Flowerdew and Neale (2003) argue that divorce needs to be decentred, because the view that it is just parental divorce which shapes children’s future lives “is too narrow a vision” and provides “only a partial understanding of the dynamics of their childhoods” (p. 159).

V Children’s Voice and Participation in Family Law

Ascertaining children’s wishes/views and taking them into account in family law proceedings is a well-established statutory principle in proceedings concerning their day-to-day care and child protection matters. Yet, while such legal provisions appear progressive and liberal in their child-centredness, uncertainty lingers amongst both parents and professionals about how, when, or even whether, to ascertain children’s views (Day Sclater & Piper, 2001; Murch, Douglas, Scanlan, Perry, Lisles, Bader & Borkowski, 1999; Neale, 2002; Ridley, 2003; Taylor & Henaghan, 1997). This stifling of children’s voices has occurred because of the overwhelming dominance of adults’ preconceptions about children’s maturity and competence to contribute to post-separation decision-making processes within the family and within the Family Court. Children have been shielded from the receipt of information and the opportunity to participate because of the burden of responsibility and compromised loyalties it is anticipated this would place upon them (Atwool, 2001; Gold, 1998; Smith, Taylor & Tapp, 2003; Taylor, Smith & Tapp, 2001a). However, such a focus is misdirected (Melton, 2000), taking little account of children’s own desire to contribute meaningfully (Neale, 2002), and the research evidence now linking children’s participation with their enhanced resilience (Pryor & Emery, 2004; Rayner, 2003).

Research with children asking them directly about their experience of their parents’ separation has revealed that ‘keeping them in the dark’ only further contributes to their pain and confusion (Smart, 2003a; Smith et al., 1997). Hence, it is not necessarily the separation itself that is problematic, but rather
the way in which it is handled by adults in their interactions with children. If no-one explains to children what is going on then they can find the transition very difficult:

... ignorance (including partial, partisan information) meant that [children] could not make much sense of what was going on. In turn this made children powerless in relation to their parents and sometimes they withdrew. Knowledge and understanding did not necessarily make them happy, but it could give them an emotional and cognitive map of the terrain they occupied. (Smart, 2003b, p. 34)

Children lacking information about the separation are also more likely to suffer from such symptoms as anxiety, depression and conduct disorder (Hawthorne, Jessop, Pryor & Richards, 2003), to exhibit distress and to blame themselves for their parents’ separation (Garwood, 1992; Richards, 1996; Wallerstein & Kelly, 1980). They cope better if they have appropriate information and involvement, and are helped to understand the changes and to participate actively in them (ALRC & HREOC, 1997; Gollop, Smith & Taylor, 2000; Piper, 2000; Pryor & Emery, 2004). Children’s participation in decision-making processes should start early (Alderson, 2000; Rayner, 2003) as it has many benefits for the development of personal identity, moral reasoning, competency, and increases children’s satisfaction with the outcome of any decision reached (Melton, 2000; Tapp, 1998a, 1998b). Participation also facilitates children’s legal and political socialisation (Covell & Howe, 1999, 2000; Melton & Limber, 1992; Tapp, 1998b), helps prepare them for their future independence and autonomous decision-making (Blackwell & Seymour, 2005), and is a vital foundation for a nation’s democracy:

Children need to be involved in meaningful projects with adults. It is unrealistic to expect them suddenly to become responsible, participatory adult citizens at the age of 16, 18 or 21 without prior exposure to the skills and responsibilities involved. An understanding of democratic participation and the confidence and competence to participate can only be acquired gradually through practice; it cannot be taught as an abstraction. (Hart, 1992, p. 5)

Despite the positive influence of participatory practices on children’s development and well-being, children are infrequently consulted about parental separation and this is especially so when their parents are in agreement about
post-separation arrangements (Chisholm, 1999; O’Quigley, 2000; Piper, 2000). Low rates of consultation with children over residence and contact decisions are reported in several studies in the UK (Butler et al., 2002; Day Sclater & Piper, 2001; Murch et al., 1999; Smart & Neale, 1997, 2000; Smart et al., 2001), Australia (Cashmore, 2001; McDonald, 1990) and in New Zealand (Gollop, Smith & Taylor, 2000) where only 19% of the 107 children in the sample reported being consulted about their initial custody arrangements, and 37% about their initial access arrangements. Around a quarter of the children had their access arrangements fully (28%) or mostly (24%) determined by their parents. Hence, just over half (52%) of the children had little input into access decisions. A minority of the children (16%) had their views prevail as the major determinant of their current access arrangements.

Research with family law professionals confirms children’s lack of engagement in dispute resolution proceedings. In a Welsh study, judges, solicitors and mediators expressed commonly held beliefs about whether children’s views on issues about their parents’ divorce should be ascertained (Murch et al., 1999). Twenty percent of the judges thought that children should not be involved at all and reasons cited for this reluctance included the pressure it would place on the children, or the disappointment they would experience if the decision did not match what they wanted. Children were also thought to not know what they wanted or that they might attempt to manipulate their parents. Over half of the solicitors (55%) believed the views of children ought to be ascertained, but 22.5% limited this to children aged 12 years and over. The 30% of solicitors who thought that children’s views should not be ascertained argued that it could be additionally traumatic to the children, risked the children being manipulated by their parents, and that it was wrong to expect children to make decisions about custody and access. There was a division amongst the mediators with some taking a children’s rights view with respect to consulting children, believing they had a right to be heard, and others feeling that children should not be expected to make decisions in relation to such matters. Situations where mediators consulted children directly themselves were rare, but 83% of
mediators did suggest to parents that they should consult their children about their views.

An American study with family law attorneys, trial judges and mental health professionals showed that children’s age mediates the asking of children’s wishes as well as the weight accorded to them (Crosbie-Curry, 1996). Children were quite unlikely to be asked their wishes in contested custody cases when they were under eight years of age, while over-14-year-olds were likely to be asked. The wishes of under-11-year-old children were given only moderate weight, whereas the wishes of 16-17-year-olds were given a great deal of weight, and were often determinative. Smart and May (2004) found that children were consulted in 24% of the 430 English county court files relating to residence and contact disputes which they reviewed. Where the children were deemed old enough to make informed decisions, the courts did listen to them. A similar pattern emerges in New Zealand studies as well (Smith, et al., 1997; Taylor, Smith & Tapp, 2001b).

Other research exploring children’s knowledge and reasoning about legal issues shows that children from a 7-12-year-old age group who were presented with legal information in a salient way, which was relevant to them personally, increased their understanding of legal concepts (Peterson-Badali, Abramovitch & Duda, 1997). Children’s knowledge and understanding of the law, legal processes and vocabulary generally emerges gradually and depends on the complexity of the legal concepts being studied (Maunsell, 1998; Melton & Limber, 1992; Schmidt & Reppucci, 2002). Misunderstandings and misinterpretations about the legal system are not uncommon, although this is not unique to children as many adults also demonstrate an imperfect grasp of legal knowledge (Maunsell, 1998). Children in a Welsh study about private law proceedings associated court with criminal wrongdoing (Lowe & Murch, 2001). Generally, children say they know relatively little about the legal process, although some work it out from watching television programmes and films like ‘Mrs Doubtfire’ (Douglas et al., 2001; Lowe & Murch, 2001; Smith et al., 1997). Many want to be better informed about the process so they can anticipate what lies ahead (Fitzgerald, Graham & Harris, 2003), but some ranked this
lower than their desire for information about other aspects of their parents’ separation/divorce (Lowe & Murch, 2001).

Most research on children’s conceptualisation and understanding of the law has focused on children as witnesses, which is a rather different context to that they may encounter as a result of parental separation. O’Quigley’s (2000) review of legal research literature did show that children have an appreciation of why decisions are made about their future and the implications these have for themselves, so their frequent exclusion from legal processes is particularly disappointing. Children’s knowledge and understanding of the Family Court is a fruitful area for further research, particularly given their anticipated greater involvement in this forum in the future.

One of the key findings in research studies with children is their overwhelming call for the right to freedom of speech and opportunities to express their views (Alderson & Montgomery, 1996; Biddulph, 2004; Cashmore & O’Brien, 2001; Gilbert, 1998; Morrow, 1999; Smith, Nairn, Taylor & Gaffney, 2003; Taylor, Smith & Nairn, 2001). Children whose parents have separated are no different, and place strong emphasis on wanting to be informed and consulted about their family transition and their future living arrangements (ALRC & HREOC, 1997; Buchanan et al., 2001a; Campbell, 2005; Cashmore, 2003b; James, 1999; James & James, 1999; Kaganas & Diduck, 2004; Lowe & Murch, 2001; Murphy & Pike, 2004; Neale, 2002; Pryor, 2005b; Smith & Gollop, 2001b; Smith et al., 1997; Trinder, Beek & Connolly, 2002). Many have developed sophisticated coping strategies and are aware “they are effectively denied a range of rights that adults take for granted” (Morrow, 1999, p. 167). Most want to have a say, but not necessarily take responsibility for the decision, and they recognise that compromises might have to be reached. This distinction between participation and choice is important, as children prefer to engage collaboratively with supportive adults in a democratic process of decision-making during family transitions rather than to make any decisions autonomously themselves (Bretherton, 2002; Buchanan et al., 2001a; Gollop, Smith & Taylor, 2000; Kaganas & Diduck, 2004; Law Commission, 2003; Morrow, 1999; Murch et al., 1999; Neale, 2002, 2004; Smart, 2000a; Smith,
Taylor & Tapp, 2003; Trinder, 1997). This process has been described as ‘assymetrical reciprocity’ whereby children like to share in an exchange of information and have their views respected, but adults take responsibility for the difficult decisions (Smart & Neale, 2000). However, children who are frightened of, or dislike, a particular parent, or have a negative or oppressive relationship with them, are much more likely to insist that they should be able to make an autonomous choice about residence and contact (Neale & Smart, 2000; Smart & Neale, 2000). It is similarly important to respect the fact that not all children who are invited to participate will want to do so, as their ability to participate is different from the desire to participate (Neale, 2004; Piper, 1997).

The legal system has traditionally been uncomfortable with the prospect of dealing directly with children in court processes (ALRC & HREOC, 1997; Cashmore, 2001; Cochrane, 2004; James & James, 1999; Kaganas & Diduck, 2004; King & Piper, 1990; Law Commission, 2003; Piper, 1997; Tapp, 2005; Trinder, 1997) and so their views have been ascertained, interpreted and filtered via a range of different professionals, fairly late in the overall process after conciliation services have failed to help parents reach agreement. The professionals include court-appointed report writers, children’s legal representatives, social workers and, sometimes, judges (Chisholm, 1999; Doogue & Blackwell, 2000; Goodwin, 2003b; Tapp, 2005). It is all too easy for the child’s view to come to the court in contested proceedings “as a narrative that has been edited and shaped by parents, counsellors and legal representatives” (Fitzgerald, 2002, p. 188). Children’s views are rarely determinative in family law proceedings and are usually regarded as only one of the number of considerations likely to influence the decision (Butler et al., 2002; Chisholm, 1999; Crosby-Currie, 1996; Sutherland, 1992; Taylor, Smith & Tapp, 2001a) – “one part of the jigsaw, the pieces which need to be assembled to provide the full picture” (G v B, 19 August 1998, FC Hastings, FP 020/420/95, p. 7). Crosby-Currie (1996), however, argues that while children’s views may be one of “the most difficult pieces of the best interests puzzle for both psychology and the legal system” they “may often be the most indispensable” (pp. 309-310). Despite this, children’s views readily run the risk in court of being discounted via the application of statutory ‘age and maturity’ criteria.

Blanket formulations … assume a commonality of children’s experiences, while glossing over the complexities and pluralities of real lives. If the law presumes to know in advance what arrangements are best for children, then the need to consult with them becomes somewhat superfluous. As a result, the child of legal discourse has become a somewhat generalized, theoretical child rather than a real, embodied, biologically unique and socially differentiated child. Family law thus operates according to a welfare paradigm that allows for a limited notion of children’s agency, one that recognizes children’s competence to speak but only in carefully prescribed circumstances and according to adult agendas. (Neale, 2004, p. 458)

The difficulty in operationalising the voice of the child within the family law system has meant that - despite the child-oriented rhetoric - children’s participation has really taken whatever circumscribed form adults think convenient or proper (Atwool, 2001; Fortin, 1998; James & James, 1999; Law Commission, 2003; Melton, 2000; Rayner, 2003; Smart, 2000a; Smith, Taylor & Tapp, 2003). However, the UNCRC’s influence, and the theory and research valuing children as social agents, are leading to a detectable shift in thinking and practice amongst Family Court professionals about the significance of children’s views and participation in family law proceedings. While this appears to be on the rise in the UK (Kaganas & Diduck, 2004; Lowe & Murch, 2001; Piper, 2000; Sawyer, 2000; Smart & May, 2004) and Australia (ALRC & HREOC, 1997; Attorney-General’s Department, 2001, 2003; Campbell, 2005; Chisholm, 2005; Family Law Pathways Advisory Group, 2001; HRSC, 2003; Mackay, 2001; McIntosh, 2000), it is even further advanced in Scotland (Rayner, 2003; Sutherland, 1992; Taylor, 1999) and New Zealand (Henaghan, 2002b, 2005; Smith, Taylor & Tapp, 2003; Taylor, 2005) where more liberal statutory provisions have been enacted. Section 6 of the Children (Scotland) Act 1995 requires adults exercising their parental responsibilities and rights to consult their children aged 12 years or older as they are presumed to be of sufficient age and maturity to form a view. Section 6 of the New Zealand COC
Act 2004 has pushed the boundaries even further by becoming the first common law country to delete any reference to ‘age and maturity’ criteria in the weighing of children’s views. Rather, any views expressed by a child (either directly or through a representative) must be taken into account.

Reconciling the traditional approach of the law with the reformulated view of childhood (encompassing children’s agency, voice and participation) certainly does pose challenges for the Family Court of the future. Compatibility has to be achieved between adults’ natural justice and due process rights, and the duties on professionals to consult with children, if the new participatory ethos envisaged in statutory provisions and child-friendly work practices are to become a reality (Chisholm, 1999; Goodwin, 2003b; Tapp, 2005; Taylor, 2005). There is a range of approaches to consultation with children in existence (Law Commission, 2003; Willow, 2004), as well as different models of participation identifying various levels for children’s engagement in decision-making (Hart, 1992, 1997; Shier, 2001). The lowest three rungs of Hart’s eight-level ladder - manipulation, decoration and tokenism – are all regarded as non-participation and children quickly become disillusioned if they regard their input to be tokenistic or ill-considered. Yet it appears that most lawyers currently operate around level three of Hart’s Ladder of Participation (Rayner, 2003), where children are asked to say what they think about an issue, but they have little or no choice about the way they express those views or the scope of the ideas they can express (Hart, 1992).

Shier (2001) adapted Hart’s model by outlining five levels of participation which incorporate three stages of adult commitment: whether adults are ready to share power with children (openings), whether procedures, resources and structures are in place to enable them to do so (opportunities), and whether there is an agreed policy requirement to do so (obligations). Developing a culture of participation and instigating age-appropriate child-friendly services should be occurring in all the settings important to children’s lives, including the family law system (Boshier, 2005b, 2005c; Lansdown, 1994; Leach, 2000; Mahony, 2003a; Taylor, Smith & Tapp, 2001b). Only by restructuring institutional environments and integrating children’s participation into routine working
practices will it achieve a taken-for-granted quality (Marchant & Kirby, 2004), or, as Davie (1996, p. 9) says, “an irreversible conversion to the practice.”

Children are talked about. What needs to change is how they are talked about and how children can connect with, and participate in, such conversations. (Roche, 1995, p. 36)

It is not just children whose emerging participatory skills need scaffolding, but also adults (parents and professionals) who need support, training and resources to help them engage with children. Consultation should ideally be a process rather than a one-off event (Chisholm, 1999; Neale, 2004), although there has been an unprecedented wave of the latter internationally as surveys, focus groups, interviews, conferences and workshops have been organised by government and NGO groups enthusiastic about incorporating children and young people’s views in the planning, delivery and evaluation of policies and services (Hodgkin & Newell, 1996; Willow, 2004; Woodhouse, 2004a, 2004b).

This is also true in New Zealand (ACYA, 2003; Biddulph, 2004; Human Rights Commission, 2005; Le Leivre, 1999; Office of the Children’s Commissioner, 2004; Smith, Nairn, Sligo, Gaffney & McCormack, 2003) where Action Area Two of the Agenda for Children (Ministry of Social Development, 2002) focuses on enhancing children’s participation, particularly in government and community decision-making processes that affect them.

In the Family Court context, it is likely that judicial interviews with children will be single occasions, although the child will most probably have had other earlier opportunities to talk with their lawyer or the report writer (Tapp, 2005). In the context of family transitions, consultation with children should be an ongoing process and allow for the development of rapport and trust before the sharing of sensitive information (Blackwell & Seymour, 2005; Bretherton, 2002; Doogue & Blackwell, 2000; Gollop, 2000; Marchant & Kirby, 2004). Atwool (2001) cautions that financial constraints can, however, impede this process. Children need opportunities to ask questions; receive, assess and impart information; evaluate options; and consider both their short- and long-term interests if they are to gradually make meaning of their changed circumstances (Chisholm, 1999; Smart, 2001; Smith et al., 1997; Taylor et al., 1999). The
Relationship between children and professionals is critical as children prefer to engage with professionals who are friendly, trusting, respectful and child-centred, and who make it easy for them to talk (Taylor et al., 1999; Taylor, Gollop & Smith, 2000a, 2000b). Children are not a homogenous group and adults must avoid presuming that all children think alike or will express similar views. Even siblings within the same family may hold quite different perspectives on their parents’ separation (Neale, 2001; Smith et al., 1997). Nor can we assume that adults always understand events in the same ways that children do (Rodgers & Pryor, 1998). The onus rests on adults to work in new ways to weave “notions of children’s citizenship – recognition, respect and participation – into adult thinking so that it is understood to be as crucial to children’s well-being as their welfare needs” (Neale, 2004, p. 179). This moves us away from our preoccupation with children’s competence (Melton, 2000) and instead highlights the role of skilled, empathic adults in facilitating warm, meaningful and productive adult-child communications (Garbarino, Stott & Faculty of the Erikson Institute, 1992).

Alderson (2000) believes that talking with children is not difficult or complicated and “requires the same skills as talking to anyone else of any age” (p. 74). However, others dispute this view (Blackwell & Seymour, 2005; Gollop, 2000; Lowe & Murch, 2001; Marchant & Kirby, 2004) and emphasise the need for professionals to develop core competencies so they can communicate effectively with children. Research on children and young people’s experiences of talking to professionals in private law proceedings in England, Australia and New Zealand certainly illustrates the problems which can arise when the adults are ill-prepared for this role (Buchanan et al., 2001a, 2001b; Campbell, 2005; Gollop, Smith & Taylor, 2000; O’Quigley, 2000). The children, especially in England, said their discussions with professionals felt like interrogations, the adults were judgemental and intrusive in their approach, and interventionist rather than supportive in style. They also disliked the fact their discussions were not confidential, although New Zealand children were much more likely to accept the disclosure of their views to the court as being a necessary part of the process (Taylor et al., 1999). Lack of feedback was another problematic area raised by the children (Cashmore, 2001; Taylor et al., 1999).
Children valued interactions where professionals demonstrated respect, interest and care; attempted to see the world from the child’s perspective; used clear and appropriate language; listened carefully and provided feedback (Marchant & Kirby, 2004; Morrow & Richards, 1996; Taylor et al., 1999).

Young children’s greater dependency and vulnerability, in comparison with older children, has traditionally curbed adults’ willingness to engage in participatory practices with them. Yet the feelings, ideas and views of infants and pre-schoolers can be clearly expressed, assessed or observed by competent adults (Blackwell & Seymour, 2005; Clark & Moss, 2001; Doogue & Blackwell, 2000; Gold, 1998; Marchant & Kirby, 2004; Neale, 2004; Pugh & Selleck, 1996; A. Smith, 2000; Willow, 2004). To avoid marginalising and ignoring very young children it is important that greater efforts are made to accommodate their Article 12 rights. Ascertaining the views of young children is one of the next challenges to be faced by the Family Court as attention is directed to their rich communications and not just the expression of views by older children where the emphasis has lain in the past.

VI Chapter Summary

Social and economic changes over the past 50 years have significantly influenced the patterns of family formation, dissolution and reconstitution within New Zealand. The increased rates of de facto unions, ex-nuptial births, separation and repartnering will alter the Family Court’s future case-mix and, along with new birth technologies, same-sex parenting and the living-apart together phenomenon, intensify any legal disputes over children’s care arrangements following parental separation.

As societal attitudes towards separation and divorce have changed these transitions have now come to be regarded as more normative experiences during the life course of many families. Relationship breakdown is no longer a pathological disaster, with especially deleterious consequences for children. Whilst children are initially exposed to a diminished quality of parenting, any long-term adverse outcomes apply to only a minority of children. Research
asking children directly for their perspectives on family transitions confirms that most are resilient as they adjust to the changes in their living arrangements and interpersonal relationships. Children value ongoing relationships characterised by love, warmth and affection and dislike being exposed to parental conflict, hostility, violence or detachment.

Patterns of post-separation parenting are now more varied, although the mother-sole-custody model still predominates. Nevertheless, shared care arrangements are increasing and more creative and diversified contact patterns are emerging to help sustain a more meaningful relationship between children and their non-resident parent. Fathers still report significant dissatisfaction with post-separation parenting arrangements and the extent to which their relationships with their children are mediated by their ex-partners. Legislative and policy changes are occurring to respond to this, and to children’s own calls for more frequent and lengthier contact with their fathers.

The distress, pain and confusion initially surrounding parental separation can be compounded for children if adults do not inform them about the separation and involve them in any decision-making processes over their future care arrangements. Children themselves say they want opportunities to express their views, both within the family and the family law system. Their increased visibility is now prompting a new era of child-inclusive practice in the courts.
Chapter Four

LITERATURE REVIEW

I Introduction

Complex human service institutions like Family Courts are difficult to evaluate (Davis, 2001a; Kuhn, 1998; Schepard & Bozzomo, 2003) and, as a result, there is little comprehensive research on how effectively they are undertaking their role, particularly from the perspective of the consumers of their conciliation and litigation dispute resolution pathways. Some ambitious large-scale research programmes (undertaken in Australia, England and Wales during the late 1990s) have enabled greater understanding of the impact of family law processes on family members’ lives, but our understanding has mostly arisen from snapshots of court service delivery and professional styles of practice. The Law Commission (2002a) has been particularly critical of the lack of information available on the New Zealand Family Court as this has stymied proper analysis of how the court is functioning and what reforms are necessary to make it more responsive to community needs.

When Family Courts were first initiated, their dual purpose was said to be efficiency and therapeutic justice (Beattie et al., 1978; Ontario Law Reform Commission, 1974). This chapter endeavours to establish whether these two goals have been achieved. It is, of course, far easier to measure the former rather than the latter (Schepard & Bozzomo, 2003). Increases in efficiency can be determined by using a case-tracking system to ascertain how fast a case moves through the legal system and whether the time to disposition has improved since the implementation of the unified approach. Comparisons between lawyer-negotiated, conciliated, mediated and litigated outcomes can also be evaluated, as can the number and cost of interventions required of parties. While these are all time, energy and money measures, they do, however, run the risk of confusing the quantity of cases processed with the quality of the justice delivered (Schepard & Bozzomo, 2003). Hence, attention has turned to the more complex and expensive measures of the delivery of therapeutic justice. These
are usually longer-term studies designed to measure the impact of Family Court processes on the lives of adults and children. The best research designs use a random-assignment model, splitting a single pool of subjects between an experimental track and normal case disposition. This can be unrealistic and unethical in family law cases, although it is currently being successfully used in Australia (McIntosh & Moloney, 2005; Murphy, Pike & Kerin, 2005). Measures of therapeutic justice can be acquired in other ways, including client and stakeholder satisfaction surveys, qualitative research (of which this thesis is an example), evaluations of service delivery components, and public submission processes.

This chapter reports on the research and commentary pertaining to the Family Court’s efficiency and delivery of therapeutic justice. The court’s workload, including the effectiveness of conciliation services and litigation, and the role of different professionals within its interdisciplinary team are reviewed. Key issues facing the court are also explored, including child-inclusive practices, cultural sensitivity, intractable and vexatious litigants, and the place of information, education and support networks and differentiated family law pathways. The chapter particularly explores the meaning of ‘therapeutic justice’ as this phrase encapsulates the tension, grappled with internationally, between the legalistic and therapeutic responses to separation and divorce. Their compatibility, or lack thereof, is the driving force behind reform processes worldwide. It is leading to the development of new initiatives to humanise the law and/or reorient the range and location of services (within or external to the court) offered in the aftermath of family transitions. More importantly, though, it is simultaneously fuelling the debate about whether the Family Court is primarily a court or has some wider mandate as a social agency. How this tension is resolved will ultimately have enormous implications for the future role of the legal profession, specialist services personnel and the Family Court in parenting disputes.

II Efficiency of the Family Court

The Family Court is universally regarded as a significant improvement over the traditional multi-forum system. Two lines of research attest to this. Firstly,
those countries which have adopted Family Courts credit them with achieving economic efficiency by consolidating family dispute resolution processes into a single organisation (Law Commission, 2003; Schepard & Bozzomo, 2003). This conserves both public and private resources and enables all related claims to be efficiently handled at the same time. The focus in these jurisdictions (such as Australia, New Zealand, and parts of Canada) has moved beyond arguments about the establishment of Family Courts to instead consider reforms to improve single-forum service delivery to better meet the needs of consumers.

Secondly, those countries yet to establish Family Courts (such as South Africa, several American states and England) devote considerable effort to proving the effectiveness of the unified approach (or variants on it) in the hope that it will drive reform of their state legal systems towards the resolution of family law cases within a single court forum (Babb, 1998; Burman, Dingle & Glasser, 2003; Kuhn, 1998; Masson, 2005; Schepard & Bozzomo, 2003; Smith, 1988; Westcott, 2002a, 2002b). In America, the sheer magnitude of family law cases - with divorce cases alone nationally constituting over 50% of all civil actions filed in trial courts - is prompting the introduction of UFCs to eliminate unpredictable decision-making, inefficient court administration, fragmentation and overlap (Babb, 1998; Schepard & Bozzomo, 2003). A survey of court records in three different sites in Oregon found that 41% of cases involving families had related actions in multiple courts and that these could have benefited from a single comprehensive jurisdiction (Flango, 2000). In England and Wales, three separate courts currently have jurisdiction in family matters, but concern has grown over the past decade about their ability to handle these cases (Masson, 2005). The Courts Act 2003 has recently paved the way for the establishment of a Family Court.

The specialised nature of the Family Court has had a positive influence on the civil law system more generally (Sturm, 2001). This is evidenced by the creation of other specialist subject-matter courts, such as business courts to handle complex commercial cases (Ad Hoc Committee on Business Courts, 1997; Eckenbrecht, 1996), adult drug courts (J. Brown, 1997; McColl, 1996), juvenile drug courts (Roberts, 1997), teen courts (Shiff & Wexler, 1996),
domestic violence courts (Downey, 1992) and custody courts (Burnham, 1997). Specialised courts with restricted subject-matter jurisdiction and/or state funded mediation services are also now utilised in New Zealand for issues concerning tenancy, employment relations, human rights, the environment, leaky buildings and Māori land claims (Law Commission, 2004).

An extensive research programme conducted from 1989 to 1994 on New Zealand custody and access proceedings (Hall, 1989; Hall & Lee, 1994; Hall et al., 1993a, 1993b; Harland, 1991a, 1991b; Hong, 1991; Lee, 1990) confirmed that the Family Court was an improvement over the previous procedures for dealing with family disputes and was generally well regarded (Law Commission, 2002a). Family members had been successfully diverted away from the damaging experience of the former adversarial approach to domestic disputes in multiple forums. The primacy accorded to conciliation processes was quickly reflected in the rapid growth in counselling referrals and the dramatic reduction (to around 6-10%) in the number of custody and access cases proceeding to a court hearing (Atkin, 1992-93; Boshier, 2004b, 2005a; Cartwright, 1989; Clarkson, 2002; Law Commission, 2003; Mahony, 1991a, 1991b; Sturm, 2001; Trapski, 1983). Only 6% of guardianship-related cases now require adjudication (Boshier, 2005c). A sample of custody and access cases, analysed between July and September 2000, found that 69% of the cases referred to counselling were resolved through that process (Boshier, 2004b). Of those unresolved cases that went onto to a judge-led mediation conference, 88% reached resolution in this forum. Only 6% of the cases exited the Family Court following a defended hearing. In all, 52% of the custody and access cases, once filed, were resolved independently from the Family Court’s formal processes (Boshier, 2004b).

The workload undertaken by Family Courts has increased enormously due to both their expanded jurisdiction and ever-increasing caseloads (Boshier, 2004a; Law Commission, 2004; Schepard & Bozzomo, 2003). Regrettably, this increased workload has not been matched by the financial and human resources needed to cater adequately for their growth (Atkin, 1992-93; Flango, 2000; Mahony, 1991a; Priestley, 1997; Schepard & Bozzomo, 2003). This has resulted
in major challenges to the court’s efficiency and effectiveness, as delays in dealing quickly enough with applications, particularly those pertaining in the New Zealand context to domestic violence and relationship property, have become highly problematic due to the unavailability of judge time (Law Commission, 2004). While the Family Court’s workload in the areas of paternity, separation and dissolution, and spousal maintenance has reduced over time (Law Commission, 2002a), this has been insufficient to compensate for increases in other areas of the court’s jurisdiction such as guardianship, care and protection, and domestic violence. The Family Court “has simply become too busy to do some of its core work effectively” (Boshier, 2004b, p. 13). As a result, consumers’ report the delays they endure as being one of the most dissatisfying and aggravating aspects of their involvement with the legal system (Boshier et al., 1993; Hall & Lee, 1994; Harland, 1991a, 1991b; Hunter, 2002; Law Commission, 2002a, 2002b, 2002c, 2003, 2004; Mahony, 1991a; Ministry of Justice & Ministry of Social Policy, 2000; Ministry of Justice & Ministry of Social Development, 2001).

Case management procedures to enhance the flow of cases through the litigation process and to manage their integration with alternative dispute resolution processes, like counselling and mediation, have been instigated in Family Courts. Australia initiated this from 1985 (C. Brown, 1997) and, in New Zealand, both caseflow management (the system for managing disposal of cases) and case management (what is done to progress an individual case) are actively facilitated to streamline processes and reduce delay (Boshier, 1997; Law Commission, 2002b, 2003). Previously only the parties and their lawyers initiated significant steps in a case, but case management places control in the hands of judges and registrars who now set the deadlines for certain actions to occur between the parties. Practice Notes govern the anticipated processes for resolving matters in court and enable delays to be measured against standardised timeframes. Since 2003 the Courts Modernisation Project, supported by new computerised information technology, alerts staff to critical dates for closer monitoring of case progress (Law Commission, 2003). Over time, Family Court case management processes have become more sophisticated with cases being
assigned to particular tracks according to the nature and complexity of the parties’ applications. Standard, complex and direct tracks have, for example, been identified in the Family Court of Australia (C. Brown, 1997). Timetabling orders, a reluctance to grant adjournments, and early judicial control over children’s cases, are other means utilised to ensure the timely disposition of cases (Dessau, 2005; Doogue, 2001).

While there is “a pressing need to address the workload” of the Family Court (Law Commission, 2004, p. 213), it is not just a commitment to better resourcing which is being called for internationally. ‘Doing things smarter’ by more efficiently and effectively maximising existing resources is now expected. This government-driven agenda is behind some current initiatives, including expansion of the role of lower cost Family Court registrars (instead of the more expensive option of increasing the size of the judiciary), redirecting judicial time into a narrower range of more complex cases, and encouraging separated families to utilise parent education, conciliation and mediation services rather than lawyers and the court.

Another measure of the Family Court’s efficiency (and effectiveness) is the durability of agreements and orders either negotiated between the parties or imposed by the court. Formal or informal modifications to care arrangements appear fairly common over time (Buchanan et al., 1996). A Californian study with 1,032 children, for whom custody orders had been made in 1991, found that 73% reported informal changes in their residence and contact arrangements within the first two years of the case going to court (Depner, 2002). By five years, 65% had changed residence at least once, and 40% of the children had changed their residence four times or more. Just over half the families in an English study had changed their residence and contact arrangements over a 4-5 year period, often because the parents’ views or their circumstances had changed (Smart et al., 2001). Multiple transitions were also evident in Flowerdew and Neale’s (2003) longitudinal study of young people whose parents had separated or divorced in the north of England. Australian research exploring post-separation contact patterns revealed that changes in parenting arrangements were common after parental separation (Smyth, 2004a). At least
32 of the 56 parents in that study were either about to move into a different parenting arrangement or had already experienced changes in their children’s care arrangements. The picture is little different in New Zealand, with only moderate stability being evident in children’s custody and access arrangements (Maxwell & Robertson, 1993a; Smith et al., 1997). Half the families in one study had varied their access arrangements over time (Smith et al., 1997). Maxwell, Robertson and Vincent (1990) and Lee (1990) also found a relatively high proportion of separated parents continued to report difficulties over access arrangements at later dates.

The longevity of orders and agreements, given the human and institutional costs incurred in initially reaching them, must be questioned in light of these findings about ongoing family change. The court’s preoccupation with determining final orders may therefore be “incongruous and unrealistic” (Caruana & Ferro, 2004, p. 104), and it may instead be desirable to regard court orders concerning the care of children as interim and benefiting from periodic review (Parkinson & Smyth, 2003). American children with rigidly fixed court-ordered contact visits were found to be more likely to reject further contact with that parent when they reached adulthood (Wallerstein et al., 2000). As Cashmore (2001) observed, children can ultimately ‘vote with their feet’ once old enough to refuse to comply. It thus appears that decisions made by courts, while mostly meaningful and highly desired at the time, may become merely symbolic as far-reaching decisions are actually made by families once the court’s interest in their lives has ceased (Piper, 1997). Empirical research is urgently needed to track the impact of court orders and agreements on all family members over time, as it does not follow that orders which do not return to court for variation or enforcement are being adhered to (Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law, 2001; Murch et al., 1999). Judges receive little feedback on the ongoing applicability of their orders in families’ daily lives (Hall et al., 1993a) and this is a serious gap in knowledge:

A decision made by a court reflects the circumstances at a certain point in time when the decision is made. As circumstances change in the lives of
either parent or the children, so there may be a need for changes in orders if the parents cannot agree. The family law system needs to be flexible and accessible enough to be able to deal with these post-order conflicts reasonably promptly and without undue expense. (HRSC, 2003, pp. 75-76)

### III Effectiveness of Family Court Services

Many parents have contact with the Family Court at some point prior to, or following, their separation. Over 80% of the families facing custody and access issues in one New Zealand study reported some involvement with the Family Court, ranging from counselling to a defended hearing (Smith et al., 1997). An earlier national study with 59% of the 980 people (480 couples) who obtained a dissolution of their marriage during the period 21 March to 30 April 1988, and who had children who were said to be affected by the dissolution, found that 43% of female and 44% of male respondents had had contact with the Family Court prior to their dissolution application, and that this mostly concerned counselling, custody and access (Lee, 1990). Interim and/or final orders had been made, usually within one year of separation, for around half the respondents who had had contact with the court relating to custody matters.

While there is little research reporting directly on consumers’ views of their court experience, those studies that have been undertaken report remarkably similar themes. Key amongst these is adults’ confusion and lack of understanding about the legal processes they have experienced. Davis (2001a) found English parents were confused about whether they had been subject to a trial or whether their dispute had, in the end, been negotiated by their lawyers. In New Zealand, parents were aware they had been to a court fixture, but were uncertain whether this was a mediation conference or a defended hearing (Harland, 1991a). Lawyers report briefing their clients beforehand (Hall et al., 1993b), but this appeared not to dramatically aid parental understanding – possibly because of the emotional turmoil parents may be experiencing when faced with court proceedings.

The opportunities parents are given to express their views and feel heard is another significant influence on their level of satisfaction with both the process
and outcome of Family Court proceedings (Harland, 1991a; Hunter, 2002; Pike et al., 2005; Ross, 1998). Closely linked to this is the amount of control and power parents feel they have over the proceedings. Harland (1991a) interviewed 61 parties who had received a final custody and/or access order in three New Zealand Family Courts in 1987. Where parents’ perceived level of importance was low, or they lacked sufficient information and opportunities to speak on their own behalf, they generally felt dissatisfied with their court experience. Procedural justice has also been shown to influence American parents’ satisfaction with child custody disputes (Kitzmann & Emery, 1993). The overall satisfaction of couples randomly assigned to mediate or litigate their child custody dispute was consistently affected by the favourability of their outcomes and by the fairness of the procedures used to determine those outcomes. Decision control was found to be more important to mediation than to litigation, while personal respect was more important in litigation than in mediation. Clients not feeling able to tell their story, to have their interests understood and given sufficient attention, or to be responded to in a meaningful and respectful way, is always a strongly emphasised theme in submission processes and law reform reports (HRSC, 2003; Law Commission, 2002a, 2003, 2004). Many parents who gave evidence to an Australian Parliamentary Inquiry expressed “their dissatisfaction with their own outcomes, how long it took to get them, the money they have spent and the anger and hurt that remains in their lives” (HRSC, 2003, p. 21).

Gendered perspectives on the Family Court have recently fostered a very public, but controversial, debate about the fairness and effectiveness of the family law system for mothers and for fathers (Hallett, 2002; Quaintance, 2001; Treadwell, 2004). Inquiries into New Zealand women’s access to justice (Law Commission, 1999; Morris, 1999), and their role as Family Court consumers (Neilson, 1995), have exposed women’s serious concerns about adversarial position-taking (particularly by lawyers), the court’s lack of power to restrict repeat (particularly groundless) applications and to enforce orders. Women wanted a child-focused outcome administered by more user-friendly professionals, instead of a legalistic and strategic approach. The court’s ability
to respond to family violence issues is another significant concern for women
and their children (Chetwin et al., 1999; Dixon et al., 2002; Doogue, 2004;
Henaghan, 1996a; Kaganas & Day Sclater, 2000; Kaye, Stubbs & Tolmie, 2003;
Maxwell et al., 2001).

It is aggrieved fathers, however, who have most vocally captured public
attention, and some parliamentary sympathy, with their claims of gender bias
and secretive decision-making within the Family Court (Hallett, 2002;
Langwell, 2003; Quaintance, 2001). Male respondents to several research
studies on residence and contact bemoan a family law system which favours
sole maternal custody and is therefore seen to relegate fathers to the fringes of
their children’s lives, regardless of the level of their pre-separation parental
Fathers generally believe they have little chance of being awarded generous
contact, or shared custody, although this is the childcare arrangement many say
they would prefer (Hallett, 2002; Smyth, 2004a). Other features of the family
law system which fathers find difficult include its inflexibility, high cost,
lengthy delays, and the lack of enforcement of contact orders arising from
mothers’ gate-keeping tactics (Hawthorne, 2005; Law Commission, 2002a,
Fleming, 1999; Hawthorne, 2005) and relationship property divisions (Atkin,
2002b) are also sources of aggravation for many fathers. The mainstream view
amongst non-resident fathers is that the Family Court is unfair, gender biased
and does discriminate against them (Arditti & Allen, 1993; Braver, Cookston &
Cohen, 2002; Frieman, 2002; Hallett, 2002; Hawthorne, 2005; Law
Commission, 2003). While this is firmly refuted by family lawyers (Family Law
Section of the New Zealand Law Society, 2001a, 2001b, 2001c), the tenor of
recent law reforms in Australia (Family Law Reform Act 1995) and New
Zealand (COC Act 2004) can be attributed, at least in part, to a desire to placate
the fathers’ rights lobby. A minority of men do, however, consider that fathers
themselves contribute to their own plight by their attitudes and behaviour
(Hawthorne, 2005), and this view is shared by many professionals (Hall & Lee,
1994), especially lawyers (Hall et al., 1993b).
Counselling Services

Free counselling has been available under the Family Proceedings Act 1980 to adult Family Court clients to explore the possibility of reconciliation (recommencement of the relationship), or, if this was not possible, to promote conciliation (settlement of issues in dispute). The effectiveness of this service in achieving these goals was evident right from its inception. In a six month period in 1982-83, shortly after the Family Court’s establishment, the National Marriage Guidance Council dealt with 790 court-referred cases: 19% (148) resumed the marriage; 39% (312) reached a full understanding; 16% (125) came back to court for resolution of some, but not all, matters originally in dispute; and only 26% (205) reached no agreement at counselling (Trapski, 1983).

This initial success rate has not, however, been sustained, although some research has shown that counselling can be particularly effective when it is an early intervention. A study of the Family Court of Australia’s resolution rates, in relation to voluntary and early court-ordered conciliation counselling and mediation, found that 74% of parents reached agreement on at least one substantive issue, whereas this dropped to 59% when counselling was ordered later in the litigation process (C. Brown, 1997). Maxwell’s (1989a) New Zealand study more forcefully illustrates this, as she found that a significant predictor of a successful outcome was the earliness in the dispute of a referral to counselling. In disputes over custody, access and domestic violence, agreement rates were 69% for those cases seen prior to any application, but 39% for those seen later.

The New Zealand Family Court counselling service was studied extensively from 1987 to 1989 to determine its operating style, the type of participants who went and why, and the impact and effectiveness of the counselling process on them (Maxwell, 1989a; Maxwell, Pritchard & Robertson, 1990; Maxwell & Robertson, 1993a, 1993b; Maxwell, Robertson & Vincent, 1990, 1991). A random sample of 528 people were interviewed shortly after their first approach to four Family Courts for counselling under section 9 of the Family Proceedings Act 1980, or to seek an order relating to custody, access, maintenance, domestic
protection or matrimonial property. Follow-up interviews were conducted with 429 of them six months later. Supplementary information was obtained from counsellors, co-ordinators, a postal questionnaire with 291 clients, and a file review of 492 cases. Those most distressed or affected by the separation were most likely to seek counselling and to attend a larger number of the six sessions. Counselling did hasten the recovery of their well-being, but not that of other clients who expressed dissatisfaction with their counselling experience. Only 6% of custody cases, and 14% of access cases, were decided in the counselling process, with 58% of custody cases, and 50% of access cases, being decided privately (Maxwell, 1989a). Family Court orders via mediation conferences or hearings needed to be made in 25% of the custody cases and 15% of the access ones (Maxwell & Robertson, 1993). These parents had a quite different profile from those who resolved matters through counselling. Generally, they were younger, had been together a relatively shorter time, were less likely to own their own homes, more likely to be in a de facto relationship, and more likely to be of Māori or Pacific ethnicity (Maxwell, 1989a).

The parents reporting the greatest levels of dissatisfaction were those whose cases (7% of custody and 14% of access cases) remained unresolved six months after they first approached the court (Maxwell & Robertson, 1993a). Conversely, the highest levels of satisfaction were reported by those parents who had been able to reach their own agreements, either before or after counselling. They mostly felt co-operative towards their ex-partner and had no concerns about their own or their children’s safety.

Client dissatisfaction essentially centred around the inadequate receipt of information, the lack of time and the counsellor not being sufficiently responsive, supportive or understanding of the client’s needs (Maxwell, 1989a; see also: Boshier et al., 1993). Frustration was also voiced about the statutory emphasis on reconciliation and conciliation, which appeared to negate much discussion of client’s personal difficulties, since those unrelated to the marriage were generally excluded from the counselling agenda (Maxwell & Robertson, 1993a). However, clients expressed a strong desire for professional assistance, as 45% reported having three or more personal issues about their future to sort
out as a result of their relationship breakdown (Maxwell, 1989a). The inconsistency between statutory policy and client need reveals the conciliatory, rather than therapeutic, focus of Family Court counselling (Boshier et al., 1993). This distinction can be misunderstood by parents who, unsurprisingly, anticipate that a service called ‘counselling’ will be a therapeutic process rather than a mere form of alternative dispute resolution.

One of the main drawbacks to early referral is adults’ lack of awareness about the availability of free counselling through the Family Court (Boshier et al., 1993). Educational programmes mounted by the counselling co-ordinator at the Christchurch Family Court during the 1980s did result in a higher proportion of section 9 counselling referrals by many couples still living together when they first applied to the court for assistance with their relationship (Maxwell & Robertson, 1993b). This was attributed to the greater awareness in that city of the counselling service and, compared with other court districts, this was reflected in a greater proportion of clients remaining together six months later.

The critical factors in counselling satisfaction appear to be people coming out of choice (Pritchard, 1991) and “having enough time in counselling, getting it at the right point in time, and being able to discuss a wide range of issues, especially personal issues” (Maxwell & Robertson, 1993b, p. 31). Client dissatisfaction is high when counselling is perceived as going round in circles, offering nothing new, or being a waste of time (Harland, 1991a; Maxwell, 1989a). Women are generally more satisfied with counselling than men (Lee, 1990), and the process is more likely to achieve parental agreement over access rather than custody.

There is an urgent need for up-to-date research on Family Court counselling services as most New Zealand data was collected 15 years ago. Counselling resolution and satisfaction patterns may have subsequently changed, particularly in light of the growth in de facto relationships during the last decade. The COC Act 2004 has enlarged the range of situations in which counselling can be used within the Family Court, and given a greater number of parties access to it (including same sex couples). Debate is now occurring over whether
counselling should continue to operate out of the Family Court as part of a new expanded conciliation service (Law Commission, 2003) or be removed completely away from Family Court oversight to help avoid misunderstanding about its purpose and to reduce delays in referrals (Boshier, 2004a, 2004c). Boshier (2004a) also believes that Family Court counselling should be renamed as ‘conciliation’, so that the term ‘counselling’ can be reserved for its more generally understood therapeutic function.

**Children’s inclusion in counselling:** The Family Proceedings Act 1980 does not expressly allow children to attend counselling, although judges have a discretion to direct this to occur (Law Commission, 2003). This narrow approach has been criticised for its inconsistency with the generous provision of free counselling sessions for adults, and for failing to meet children’s need for a safe forum within which to discuss their feelings about their parents’ separation (Boshier et al., 1993; Gold, 1996, 1998; Goldson, 2003; Hong, 1991; Johnston, 1996; Law Commission, 2003). Separated parents can find the cost of professional counselling fees prohibitive, and only a minority currently arrange private counselling for their children (Gold, 1996). A small research project undertaken with 12 families, referred for section 9 counselling, engaged children in some individual and joint sessions with parents (Goldson, 2003). This practice is likely to continue expanding given the recommendation that children should have greater access to counselling services (Law Commission, 2003).

Child counselling services are available in the UK for children older than four years whose parents have separated (Richards & Ely, 1998). These are not really therapeutic in nature, but rather an opportunity for children to express their feelings and be heard. Individual and group sessions, often based in schools, are available. The discussions are confidential and the counsellor cannot divulge anything the child has said without the child’s express approval, although there are procedures in place to deal with abuse allegations (Dasgupta & Richards, 1997). A recent study, nevertheless, found that few English children received any professional support in dealing with their parents’ separation or managing contact with their non-resident parent (Trinder et al.,
Children’s confidantes were primarily their parents, siblings, extended family members and friends, and only a minority talked to a counsellor at school or through their general practitioner. This limited use of counsellors has prompted calls for children’s improved access to post-separation counselling services, with its consequent implications for the up-skilling and accreditation of professionals to work with children (Gold, 1996, 1998; Law Commission, 2003; Trinder et al., 2002).

**Mediation**

Family mediation is a dispute resolution process designed to establish parental communication, facilitate conflict reduction, isolate issues, develop options, and enable parents to reach their own agreed solutions with the assistance of an independent third person (Leach, 2000). The mediator does not make or impose decisions, but encourages and facilitates a mutually acceptable settlement to the dispute, which is decided by the parties themselves. Mediation is usually a voluntary process, delivered as an alternative to litigation, via a community-based private sector or court-connected service (Kelly, 2000), although it is mandated in some American jurisdictions (for example, California) or in response to English legal aid applications (Davis, 2001b):

The arrival of institutionalised mediation, as a ‘third route’ to decision, alongside lawyer negotiation and adjudication, was undoubtedly one of the central developments in family law during the last quarter of the twentieth century. (Roberts, 2001, p. 266)

Mediation had always been available, but had been driven to the margins through the increasing domination of the courts and the emergence of lawyers as a specialised service profession. Once the courts adopted a new primary role as the sponsors of settlement from the mid-1970s, family mediation was able to re-emerge as an embryonic professional intervention (Roberts, 2001; Schepard & Bozzomo, 2003). This constituted a significant “shift in the paradigm of dispute resolution away from the law and lawyers” (Freeman, 1997, p. 416), although there has been a backlash from the legal profession who see the law as a long-established means of upholding people’s rights.
American research has shown that mediation increases the likelihood of agreement being reached between divorcing couples, and increases their satisfaction with the decision-making process (even if agreement is not reached), compared with couples utilising traditional adversarial processes to settle their divorce disputes (Emery, 1994; Kelly, 1996; 2000). Australian studies show a similar pattern (Bickerdike, 2005; Wade, 1997). Mediated settlement rates in America range from 50% to 85% depending on the setting, content and pre-screening practices (Kelly, 2000). Relitigation rates are much lower, and parents are more likely to comply over time with a mediated rather than a court-imposed outcome. Parents experiencing mediation also report feeling they had been heard (Emery, 1994), and better able to co-operate with each other and reach a joint legal custody agreement (Kelly, 1996). In a 12-year follow-up study, non-residential parents (mostly fathers) in the mediation sample were more likely to be significantly involved with their children than those from the litigation sample (Emery, 1999b). Mediation is also a cost-effective means of assisting families to resolve disputes, requiring significantly less expenditure than judicial processes. Women do not appear to be disadvantaged by mediation in either the custody stakes or financial outcomes (Kelly, 1996), although mediators must be sufficiently skilled to be able to provide for those clients unable or afraid to negotiate on their own behalf. The use of separate sessions, support people, protective orders and opt-out provisions for the victims of family violence, and those incapacitated by mental health or substance abuse issues, is critical. Kelly (2000) concludes that:

… custody mediation should be not only widely available but also mandatory as a ‘first step’ effort toward settlement for all parents disputing custody and access before proceeding to more adversarial processes. (p. 971)

However, others are more wary. Eekelaar (1995) argues that it is difficult to substantiate many of the claims made for mediation because of the variety of forms it takes and the almost self-selectivity of the samples. He believes that most of the characteristics claimed for mediation may also be claimed for the legal process. Concerns also abound about the role of mediation in the context
of domestic violence (Armstrong, 2001; Freeman, 1997; Graycar, 2003) and the impact of mediation on children (Freeman, 1997).

Most scepticism has been reserved for the English mediation policy promoted by the Family Law Act 1996. This set out to discourage the use of lawyers in post-separation matters and to provide a cheaper dispute resolution process via mediation to reduce mounting legal aid costs (Day Sclater & Piper, 2001; Piper, 1996). A large-scale research project, from 1997-2000, monitored its implementation through 4593 individual case monitoring forms, 1055 consumer and 646 solicitor interviews (Davis, 2000; Davis, Finch & Fitzgerald, 2001). Follow-up interviews were later conducted with 477 of the consumers, and 310 of the solicitors.

There was a wide variation in the monthly intake appointments between the 33 mediation providers, with an average of 10 per provider per month. Thus the number of mediation intakes remained at a much lower level than expected, particularly as it had been anticipated that a substantial number of people attending the information meeting pilots would follow through to mediation. The level of mediation activity continued to be disappointing despite the introduction of the section 29 requirement that parties seeking public funding for legal representation in family proceedings had to attend an intake meeting for a mediator to assess the suitability of their case for mediation. Despite the significant increase in case referrals this generated, only a modest increase occurred in mediation uptake. Over the course of the research, a shift occurred in the professional background of the mediation providers – not-for-profit agencies dominated at the start, but the balance later shifted towards solicitor providers, although the not-for-profit sector continued to undertake the bulk of the workload (Davis, 2001b). Cases involving disputes about children’s custody and/or access arrangements accounted for 85% of the cases referred to mediation providers, while 33% involved a financial or property component (Davis, Finch & Fitzgerald, 2001). Half the cases were confined to just the intake session and one mediation session, with the rest involving 2-3 mediation appointments.
The research confirmed that mediation works best when both parties feel able to negotiate directly with each other in good faith (Davis, 2001b). Only 11% of the consumer participants said they were personally unwilling to compromise, but 59% of them perceived their ex-spouse as uncompromising. While attitudes towards negotiation were generally fairly negative because of the lack of trust each party had in the other, their experience of the mediation process was rated more favourably, especially for those involved with not-for-profit sector providers. Consumer satisfaction was quite high, with 70% finding mediation either ‘very helpful’ (35%) or ‘fairly helpful’ (35%). Just over half the respondents thought their mediator had understood their situation ‘very well’, and a further 27% thought the mediator had understood ‘fairly well.’ Seventy-one percent said they would recommend mediation to others experiencing a dispute over their children. Women found mediation harder, but appreciated it more than men. Agreement between the parties was achieved in 45% of the cases involving children, and in 34% of the financial/property cases. Both groups had generally positive views about the agreement, with half declaring themselves ‘completely satisfied’ with it (Davis, Finch & Fitzgerald, 2001).

Solicitors were, however, regarded much more positively than mediators, with 60% of those mediating issues concerning their children rating their solicitor as ‘very helpful’ (as against 35% for mediators), and 69% deeming their solicitor to have understood the problems ‘very well’ (as against 51% for mediators) (Davis, Finch & Fitzgerald, 2001). Eighty-one percent said they would recommend that others in similar situations should use a solicitor, with men giving a particularly enthusiastic approval rating for solicitors. It therefore appears that mediation does not reduce expenditure on lawyers, but rather seems to primarily operate as an additional, rather than an alternative service (Bevan, Davis & Fenn, 2001; Davis, 2001b). Separating couples support the use of mediation in theory, but do not necessarily see it as an option for them personally. They rely on lawyers because the legal profession offers the knowledge, resources and authority which parties consider they need to achieve a fair outcome (Davis, 2001b). Solicitors are particularly valued for the protection and countering strategies they can provide when a party is faced with unreasonable tactics and behaviour (e.g. lying, evasion, threats, violence,
conflict) by their former partner. Thus, in England and Wales, it seems unlikely that mediation will divert parties away from lawyers as the 1996 reforms had anticipated, possibly because the degree of trust between the parties may be absent when a fault-based system of divorce still operates. Mediation may be a viable option for those separating couples seeking direct engagement on a non-legal pathway, but it is not an intervention likely to be preferred by those seeking a longer-term, more personal relationship with a lawyer able to negotiate authoritatively on their behalf.

A similar picture of mediation as an attractive idea in theory emerged in the research on the English information meeting pilots - 57% of people attending these meetings said they would consider using mediation if it was appropriate, but in reality there was only a modest uptake (Richards, 2002; Walker, 2000b). Some attendees reported difficulties in persuading their spouse to attend mediation, some feared meeting their ex-partner face-to-face, while others preferred to let their lawyers negotiate on their behalf (Walker, 2000b). The majority of attendees chose solicitors as their primary pathway through divorce (Richards, 2002). Trinder et al. (2002) also found a very low level of understanding about mediation in their sample of parents negotiating and litigating over contact arrangements. Many confused mediation with marriage counselling, and only 8% of families utilised out-of-court mediation.

Mediation is more established and accepted in North America, but, as in England, it is being ‘lawyerised’ with social workers being replaced in family mediation work by lawyers (Hayes, 2002). Counsel-led mediation has also emerged in New Zealand (Guest, 2004; West, 2004). There is now concern that the more therapeutic aspect of mediation will be lost or minimised. Mediation has itself become a settlement device within legal proceedings – a kind of hybrid (Davis, 2001b). It has been promoted as a foil to adversarial lawyers (Neale & Smart, 1997b), but “in the current state of our knowledge about divorce dispute resolution, it is not possible unequivocally to say that mediation is ‘better’ than adversarial negotiation, or vice versa” (Day Sclater, 2000, p. 70). Mediation has currently found favour with legislators, but this rests uneasily on a somewhat contradictory American and British research base.
**Judge-led Mediation:** In comparison with overseas mediation practice, New Zealand’s mediation process has some unique features (Barry & Henaghan, 1986; Blaikie, 1996, 2001; Seymour & Pryor, 1998). It is presided over by Family Court judges (not community-based mediators), the parties’ lawyers are usually present, and, as a key intermediate step in the court’s dispute resolution pathway, this form of mediation can scarcely be described as voluntary. The proximity of judge-led mediation to the Family Court means that parties have less control over the decision-making process and that the mediation can become blurred and confused with litigation. Its focus is much more centred around the likelihood of agreement being reached, rather than any concern for the parties’ emotional or therapeutic needs (Seymour & Pryor, 1998). Judge-led mediation is usually of a briefer duration (1.5 hours) than that offered in the community, with some 30 minute sessions being regarded as little more than an extension of case management (Guest, 2004). Mediation does, however, offer most parties their first opportunity for direct engagement with the Family Court (Blaikie, 2001).

Barry and Henaghan (1986) have conducted the only study devoted to judge-led mediation in New Zealand. They combined observations of 15 mediation conferences with questionnaire data from 27 consumers and interviews with 19 family lawyers and two judges in 1984-1985. All participants reported finding the authority the judge brings to the mediation conference helpful. Judges’ experience and knowledge of the law meant they were in a position to indicate to the participants the parameters of an adjudicated settlement and guide the couple towards a private resolution which the court would accept. Their judicial status made the parties more disposed to follow the suggestions and directions, although some disliked what they perceived to be a partial, doctrinaire approach which failed to let the parties themselves feel heard. Most participants looked to the judge for an authoritative decision, they regarded him as a judge rather than a mediator, and they surrendered to him the power and opportunity to resolve their dispute themselves. Many felt they were already in a court of law at the mediation, and they found it difficult to contradict the judge’s suggestions. Only three participants reported feeling able to fully and frankly express their views and opinions during the mediation, few played an active role, and none felt they
had control over the final decision. Most participants, particularly those who did not trust their ex-partner or were not on friendly terms with them, said they could not have coped in the mediation without the partisan support of their lawyer. However, they did not want their, or their ex-partner’s, lawyer to dominate the conference or adopt a rigid stance. Lawyers, on the other hand, regarded their role in mediation as very much that of an advocate for their client, and they appreciated the opportunity that mediation gave them to assess the strength of the other party’s case:

> Good lawyers run mediation conferences. They set up the entire framework … dictate what is discussed … and by cutting out the other person’s concerns you are going to promote your client’s interests. (Barry & Henaghan, 1986, p. 88)

Only one participant said the mediation had helped everyone work together, and less than half were satisfied with the outcome reached. Barry and Henaghan (1986) concluded that while judge-led mediation “has facilitated the speedy processing of many disputes”, the consensual and non-coercive qualities of community-based mediation practice “are diluted or lost altogether when the Judge assumes the role of mediator” (p. 87). This meant that the parties’ settlement failed to facilitate an ongoing process of empowerment or to improve communication and co-operation between ex-partners. Mediation in its accepted conceptual sense was not occurring, but rather a quasi-judicial ethic prevailed, along with its attendant adversarial effect.

Others also doubt that judge-led mediation represents mediation in the usual sense, as the skills utilised by judges frequently rely on judicial authority to encourage agreements that may not always be freely given (Harland, 1991a; Seymour & Pryor, 1998). Jefferson and Parsons (1998) believe that the mediation conference sits uneasily within the Family Court structure. However, judges are very positive about their role in mediation (Hall et al., 1993a), although lawyers are less enthusiastic (Hall et al., 1993b). Hall and Lee (1994) found that few custody and access disputes were resolved at mediation, but the process was regarded by professionals as valuable for making the parents more reasonable and for identifying the real issues. Some judges went further than
mediation, and persuaded parties to agree to certain arrangements and even made custody and access decisions (Hall et al., 1993a). Parents who were able to speak for themselves in the mediation conference were generally more satisfied with the process and outcome and felt they had greater control over the situation (Harland, 1991a). Nearly all lawyers said they encouraged their clients to speak at the conference (Hall et al., 1993b).

The mixed success and variable practice of judges conducting mediations has fuelled the debate about whether or not they should continue undertaking this role or instead devolve it to an independent mediation service removed from the court (Barry & Henaghan, 1986; Boshier et al., 1993). A new Family Conciliation Service, operating parallel to the Family Court, was proposed in 1993 (Boshier et al., 1993), although its cost proved prohibitive and the scheme was never implemented. Judges would have replaced their role in mediation with issues and settlement conferences. The Law Commission (2003) similarly recommended that judge-led mediation conferences be renamed as settlement conferences to emphasise their differing role and dynamics. This has been supported by Boshier (2004c) who feels that mediation conferences have not “enhanced the public’s respect for the authority of the Court” (p. 12) and have served to confuse the role of the conciliation process and the court as a final adjudicator. Boshier (2005a) has also expressed concern about the considerable delays parties experience in getting their case before a judge for a mediation conference.

In March 2005, a 12-month non-judge led mediation pilot project, costing $1.56 million, was initiated in four Family Courts to give effect to the Law Commission’s recommendation for contracted mediation services for court clients (Ministry of Justice, 2003, 2004). These pilots offer parties the opportunity to participate in mediation under the guidance of a professional mediator contracted by the court. They aim to assist parents to develop their own solutions to their children’s care, to resolve disputes faster (because the lengthy wait for judicial mediation can be avoided), and to provide for the participation of children in the decision-making process. Lawyers are also appointed to meet with the children to ascertain their wishes and interests and to
represent them at the mediation. Mediators are required to consult with these lawyers on the best way to include children in the mediation, and it is anticipated that in some cases children will attend all or part of the session. Others attending the mediation include each party, their lawyer and any third parties as agreed during the pre-mediation phase. The mediation session is conducted outside the court in a community setting and leads to a report stating the agreements reached (if any) and what matters remain outstanding. The court then issues an order to give effect to any agreements. Non-judge led mediation thus conforms more closely with standard international expectations for this process of voluntary dispute resolution between parents.

The pilot project is being fully evaluated, although some criticisms are already emerging about its applicability. Guest (2005) is concerned it is limited to custody, access and guardianship cases, as he considers these are the ones least likely to reach finality in mediation. He is also critical of an unnecessary extra step being introduced into the referral process, whereby a mediator is assigned but then has to report back to the court on the suitability of the clients’ issues for mediation before the mediation session(s) can be embarked upon. Guest (2005) regards the inadequate remuneration for mediators, being well below market rates, as the most serious issue. “It is disappointing to see a great idea get off to a less than promising start” (Guest, 2005, p. 7). The future of non-judge led mediation in New Zealand rests on the outcome of the pilot project evaluation. If it is successful then Boshier (2004c) anticipates legislative reform occurring in 2006 to substitute mediation by others for judge-led mediation as a matter of law. Judges would continue to utilise their mediation skills, but in the context of settlement conferences.

**Child-inclusive mediation:** It has been the exception, rather than the rule, to directly engage children in mediation services (Day Sclater & Piper, 2001; McIntosh, 2000; Murch et al., 1999; National Working Party on Mediation, 1996; Seymour & Pryor, 1998; Tapp, 1998c). Children’s involvement has largely been confined to indirect consultation, with their (presumed) viewpoints mostly being relayed via their parents (Leach, 2000). However, the crucial role accorded to mediation in the reform of Family Court services internationally has
meant that children’s inclusion in this process has had to be seriously considered beyond its previously limited basis (ALRC & HREOC, 1997; Day Sclater & Piper, 2001; Mahony, 2003a; McIntosh, 2000). New training schemes to accredit mediators to consult with children directly have been developed in Britain and America (Piper, 1996). Child-inclusive practice is now well-established in some agencies (Leach, 2000; McIntosh & Moloney, 2005), and about to be implemented on a trial basis in New Zealand (Law Commission, 2003; Ministry of Justice, 2004).

Those mediators with extensive experience and training in direct consultation with children are enthusiastic about its helpfulness (Garwood, 1992; Leach, 2000; Murch et al., 1999; Richards, 1996). Where children have been directly engaged, they report liking the opportunity mediation gives them to talk about their feelings to someone outside their family without hurting their parents (ALRC & HREOC, 1997; Garwood, 1992; McIntosh, 2000). In a Scottish study of 28 children who had been involved in conciliation, 24 indicated they had benefited from their attendance, particularly through an improvement in communication (Garwood, 1992). Parents also express satisfaction with child-inclusive mediation because it makes them more aware of their child’s feelings, which helps them to better focus on their needs (McIntosh, 2000; Simpson, 1989).

Three interrelated factors are thought important in influencing child-inclusive practice: agency policy; mediators’ attitudes; and their perceived skills in interviewing children (Garwood, 1992). Various options now exist for children’s engagement in mediation, the actual timing and format of which will be dictated by the purpose of the participation, the willingness of the children and their parents to engage in this practice, and the skill of the mediator to work creatively with the family group (Garwood, 1992; Law Commission, 2003). Ideally, children join in a mediation session with their parents once the future parenting plan is drafted and ground rules have been established for the encounter (Garwood, 1992; Leach, 2000). This family meeting provides children with an opportunity to comment on the proposals and to say how they might work for them. This option also has the advantage of allowing the
children to see their parents working together for their benefit, more explicitly acknowledges children as partners in the decision-making process, and provides a common focus for the parents which can aid co-operation between them. For children who do not wish to physically attend with their parents, a pre-arranged telephone call or meeting between the mediator and child, or having the child write a story, draw a picture, or provide comments via a trusted third party (relative, counsellor) who could feed this into the mediation process, can be especially desirable when children’s input is important prior to decisions being made by the parents. Parents sometimes prefer to discuss their plans with their children themselves and advise the mediator of their response at their next appointment. Another alternative is to hold a family meeting toward the end of the mediation process to communicate the actual decision to the children.

Those opposed to children’s involvement in mediation argue that mediation is predicated on parents’ taking responsibility for their own post-separation decisions (Day Selater & Piper, 2001). Others express concern about parental coercion or manipulation of the child to a particular viewpoint, leading to divided loyalties and the child’s direct involvement in the conflict (Simpson, 1989). There is also potential for children’s participation to destroy the neutral and independent role of the mediator (Garwood, 1992; Richards, 1996). As information provided by a child is used within the mediation context, the mediator’s role could be inadvertently transformed into that of a child advocate, thereby antagonising one or both parents. Some parents in a mid-1980s study found their children’s involvement unhelpful because of their belief it caused unnecessary distress and gave their children too much say in matters they were too young to understand (Simpson, 1989).

Australia is currently at the cutting edge of international developments through the *Children in Focus* professional development programme for mediators in Melbourne (Attorney-General’s Department and the Minister for Family and Community Services, 1999; Mackay, 2001). A separate child interviewer works with the children and then goes back into the mediation session to talk with the parents about the children’s perspectives on the family transition. This has had a dramatic impact on the way that parents in high-
conflict post-separation parenting disputes subsequently co-operate – a group that mediation has struggled to deal effectively with in the past (McIntosh & Moloney, 2005). It simultaneously helps to address the children’s therapeutic needs (McIntosh, 2000). Most parents felt supported by the process and expressed a sense of relief that their children were able to discuss their feelings with someone outside the family. The majority of the children, aged 5-16 years, reported “unequivocal benefits from speaking with the child interviewer and having their ideas, worries and questions conveyed separately to their parents” (McIntosh, 2000, p. 65). Half of the parents (mostly fathers) attributed a subsequent direct change in their behaviour to their child’s feedback. Further research is currently underway to compare child-inclusive mediation with mediation focused on the best interests of the child without including the child in the process (McIntosh & Moloney, 2005).

Careful assessment needs to be made by the Family Court, on a case-by-case basis, of whether and when to formally include children in the mediation process. While the complexity and cost of service delivery does increase, child-friendly mediation practices can enhance the decision-making process through the greater availability of relevant information (McIntosh, 2000). Parents’ arrangements are therefore more likely to be consistent with their children’s views, and this may increase the durability of any agreements and orders.

**Family Court Hearings**

When parents fail to achieve agreement through conciliation, their case is scheduled for a hearing in which the evidence of each party, any witnesses and court-appointed specialists, is led and cross-examined. The judge ultimately makes the decision and issues relevant orders. There has been a dramatic drop in full court hearings since the advent of UFCs. Shortly after the establishment of the New Zealand Family Court defended hearings were only necessary in 11% of contested custody cases (Trapski, 1983), and this has dropped even further to around 6% now (Boshier, 2004b; Ministry of Justice, 2003). Similarly, in Australia, only 5% of applications to the Family Court are ultimately determined by a judge (Nicholson & Harrison, 2003).
Just one study has included parents’ experiences of hearings in the context of custody and access disputes (Harland, 1991a). Parents disliked not being able to attend or participate in preliminary hearings relating to their case. Their lawyer would often deal with the matter at issue, even if the parents were waiting at the court. Lawyers explained this practice in terms of speed and convenience or routine procedures which did not require client input (Hall et al., 1993b). However, some judges preferred having a frank discussion about the case in the parents’ absence. When parents did get into the courtroom, they were dissatisfied if they were given no opportunity to speak for themselves or felt rushed (Harland, 1991a). The physical features of courtrooms were also considered to influence proceedings. Some parents found it stressful sharing the waiting room with their ex-partner. Most wanted smaller courtrooms with a more informal, relaxed atmosphere. Having the judge elevated above the parents particularly formalised the tone of the proceedings (Hall & Lee, 1994). Judges, too, were concerned about the variable quality of Family Court buildings around New Zealand (Hall et al., 1993a).

**Appeals**

Family cases rarely reach appellate courts (Ross, 1998). Of those that do, there is no empirical research examining the role of higher courts in New Zealand parenting disputes, other than case analyses of appeal court rulings (Caldwell, 1990; Henaghan, 1994; Tapp et al., 2001). Legal commentary has nevertheless canvassed the desirability of establishing a specialist Family Appeal Court as a division of the High Court (Henaghan, 1997). This would enable the exercise of specialist discretion within the Family Court to be reviewed by appellate judges with a similar degree of specialisation. Most judges in one study wanted such a court as they felt the High Court lacked the necessary expertise to deal with appeals against Family Court decisions (Hall et al., 1993a). However, lawyers were equally divided on whether or not appeals should continue to be heard in the High Court or transferred to a specialist appellate forum (Hall et al., 1993b). Australia already has a permanent specialist appellate division within its Family Court, with three or more Family Court judges constituting the Full Court. This is considered highly desirable as
the particular problems of family law may not be appreciated by generalist appellate judges who can produce judgments detrimentally affecting the operations of the specialist court (Nicholson & Harrison, 2003).

IV Family Court Professionals

The Family Court is reliant upon the services of a range of professionals, including lawyers, children’s legal representatives, specialist report writers and judges.

Lawyers

Parties’ expectations of, and their behaviour in, the family law system are closely affected by their point of entry (Dewar & Parker, 1999). This, in turn, significantly determines the pathways they travel to resolve contentious parenting issues. If their first point of contact is with a lawyer, then there is a higher likelihood that a legal solution will be sought (Dewar, 2000). Historically, there has been a heavy reliance by the public on lawyers to manage and resolve domestic disputes, such that for the past 150 years family lawyers have enjoyed almost exclusive control over the separation and divorce process (Roberts, 2001). Lawyers remain the gatekeepers of the family law system because divorce is still regarded as a legal process for which the parties need specialist legal assistance (Davis, 2001b). Ex-partners do not always behave reasonably in the immediate aftermath of separation and they may be drawn to lawyers because their deteriorating relationship has passed the point where negotiation can be considered realistic. Many disputes referred to lawyers do not actually require a legal solution, “but they do need a form of intervention that is marked by certain features that, in practice, are intrinsic to the processes of legal dispute resolution” (Davis, 2001b, p. 380). Clients are looking for someone in whom they can place their trust and champion their cause, knowing that their interests and rights are being protected and advanced, and any unreasonable behaviour by their former partner being contained.

The reliance on lawyers as the gateway to the family law system has been confirmed in many international studies and reports (Davis, 2001b; Davis,
There is a popular perception that ‘good’ lawyers (usually skilled family law specialists) “work to a welfarist /impartial /conciliatory model of legal practice, while ‘bad’ lawyers are non-welfarist /partisan /adversarial” (Neale & Smart, 1997b, p. 378). However, this polarisation of lawyers into the ‘good’ and the ‘bad’ is overly simplistic and only serves to obscure and devalue the complexities and skills involved in the practice of family law. Lawyers actually draw on a range of skills and styles (Day Sclater, 2000), and vary their approach to different aspects of their client’s case (Ingleby, 1992). While relatively few studies have been undertaken to observe and categorise various lawyering styles and to match these to client needs (Griffiths, 1986; Kressel, 1985; Mnookin & Kornhauser, 1979; Sarat & Felstiner, 1986, 1988, 1995), it is evident that negotiation has always been deployed much more often than litigation in family
law (Neale & Smart, 1997b). Settlement without adjudication is the goal of the vast majority of family lawyers. Their role includes providing information and advice, setting out the legal margins within which the parties can make their own arrangements, informing them of mandatory elements, pointing out oversights, mediating between the parties, negotiating with the lawyer for the other side, and encouraging and persuading their client to agree to a reasonable settlement (Griffiths, 1986). Most of these tasks are similar to those performed by lawyers acting in other court proceedings, but the duties to promote reconciliation and conciliation, and to work as part of an interdisciplinary social science team, are unique to the family jurisdiction.

Lawyers regard an important part of their role as managing their clients’ expectations and bringing them to an understanding and acceptance of what the legislation and court require (Dewar & Parker, 1999; Griffiths, 1986; Hunter, 2003; Sarat & Felstiner, 1986, 1988, 1995). They use the law as a way of ensuring that a client’s expectations are realistic, otherwise they run the risk of allowing clients to expect something beyond what can be achieved legally, and this could exacerbate dissatisfaction with their service. However, this desire to produce a rational client has led to concerns about just how lawyers translate their clients’ personal problems into legal categories (Neale & Smart, 1997b; Tapp, 2002), adopt a rights-based perspective and frame issues in terms of legal rather than social norms (Jacob, 1992). Tesler (2000) believes lawyers ignore the fact that family transitions are a multi-dimensional experience which begin long before, and end long after, the legal divorce by excluding many of a client’s actual concerns as legally irrelevant:

… we ignore, and often do irreparable harm to, the non-quantifiable human concerns that may well have far greater impact on the quality of our clients’ lives long after the legal divorce is over than any marginal gain we might achieve at trial. These concerns – which we would learn are of immense importance to our clients – if we would ask and then listen. (Tesler, 2000, p. 192)

A study of 16 English and Welsh solicitors showed they prioritise issues concerning children’s post-separation accommodation and financial support, but leave other aspects to their parents to sort out (Douglas & Murch, 2002). The solicitors thus compartmentalised their work on a case so that matters affecting
a child’s wellbeing were addressed separately. In addition, they expressed no desire to see their clients’ children in divorce cases themselves, as they considered the legal process stressful and likely to be harmful to any children caught up in it (Douglas & Murch, 2002; Murch et al., 1999). Their lack of training about how to communicate with children was central to this. While lawyers may not want to see children themselves, they nevertheless play a pivotal role in encouraging parents to discuss arrangements with their children. Murch et al. (1998) found that parents in uncontentious divorce cases were much more likely to talk with their children about the residence and contact arrangements if they had been advised to do so by their lawyer.

Lawyers “have a set of assumptions, values and shared practices” which are developed in family law practice and applied “with minimal consciousness” (Newberry, 2001, p. 1). This can mean that lawyers are also a great deal more adversarial in their thinking and behaviour than their clients need or want (Tesler, 2000). ‘Good’ lawyers are regarded as demonstrating a sound commitment to the best interests of the child, the promotion of parental co-operation and agreement, the avoidance of conflict and threats, and the maintenance of positive and meaningful relationships between parents and their children via realistic appraisals of the case and the use of an objective, fair and open negotiation style. At the other end of the spectrum, the ‘bad’ lawyer is perceived as a zealous advocate who is unduly aggressive, adversarial and litigious, with a weak commitment to children’s best interests, and a propensity for exacerbating parental conflict for commercial gain (Neale & Smart, 1997b). The opposition is thought to be outmanoeuvred with ‘rambo’, ‘barracuda’ or ‘gladiatorial’ tactics to maximise the outcome for the lawyer’s own client (Maxwell, 2000; Tesler, 2000).

However, most of the evidence linking lawyers’ combative attitudes and underhand style with a negative impact on co-parenting relationships is anecdotal and unsubstantiated by research (Maxwell, 2000). It mainly emanates from America, where family lawyers’ styles of practice may indeed be brasher than those in the Commonwealth. English research has established that such images of lawyers are mere caricatures and undeserving of further promotion.
(Davis, 2001b; Neale & Smart, 1997b). Recognition of the inappropriateness of the conventional adversary model of legal advocacy in domestic proceedings has instead led to the development of a different style of family lawyering (Atkin 1992-1993; Harland, 1991b). Family law is now a specialist field of practice with a specialist bench and bar, and talk of possible accreditation (Jefferson & Parsons, 1998). Family Court Associations, with members from all the professional groups involved with the Family Court, have played an important role in fostering professional links across disciplines and developing a sense of collegiality (Atkin, 1992-93; Boshier, 2004c; Mahony, 1991a).

Despite this specialisation, the consumers of legal and Family Court services still express considerable dissatisfaction with their legal representation and its cost (Law Commission, 2002a, 2003, 2004). A New Zealand study found that half the parents felt their lawyer failed to give them sufficient information, did not do what the parents wanted, or was slow, did not get things done and had to be chased up (Harland, 1991a). Three-quarters of the lawyers said they failed in this regard at least sometimes (Hall et al., 1993b). Counselling co-ordinators expressed concern about lawyers’ adversarial approach (Harland, 1991b), although lawyers held a different view, mostly perceiving any adversarial behaviour on their part to be the consequence of pressure from clients (Hall et al., 1993b). Forty percent of lawyers did think there should be less adversarial behaviour than there was, but most felt that such behaviour had already declined due to their growing awareness of the Family Court’s new philosophy, training and the development of a specialist bar (Hall et al., 1993b). Lawyers attributed difficulties in resolving custody and access disputes to the attitudes and behaviours of parents.

The possession of legal knowledge can transform the negotiating capabilities of some parties, especially women (Davis et al., 1994). However, New Zealand women’s access to legal services was marked by inadequate knowledge and insufficient regard by some lawyers of the appropriateness and importance of therapeutic intervention (Morris, 1999). Inequities arose where delays and the passage of time had exacerbated the underlying family dysfunction and, in extreme cases, had dictated the outcome. Lawyers’ interpersonal
communication skills (use of legal language, ability to listen, checking their understanding of the client’s situation, and providing advice the client could understand) were of utmost importance to women clients, yet diverse women, spanning the range of socio-economic levels and educational achievements, were highly critical of their lawyer’s abilities in these regards. The respondents also did not like the financial costs associated with lawyers’ involvement, and the lack of proportionality some lawyers bring to the equation of fees versus outcome.

An American study with parents, children and attorneys from 21 recently-divorced families found that most parents entered the divorce process with optimistic expectations of a fair and just decision from a compassionate court (Pruett & Jackson, 1999). However, the majority reported experiences that greatly contradicted their initial expectations. Negative experiences, and the resulting disappointment, disillusionment and dissatisfaction, were reported across all socio-economic levels and degrees of intrafamilial conflict. Only 12% of parents ended the process with the hopeful expectations with which they had begun. The most prevalent feeling was that the legal process left parents out of the decision-making and this further fuelled anger and conflict between them. Their attorneys failed to communicate pivotal information to them, excluded them from negotiations and did not even argue for what their client wanted. Twenty percent of parents thought the divorce process would work more smoothly if lawyers were excluded altogether because their current role only served to promote antagonism between ex-partners. Others wanted the role modified (more collaborative, less adversarial and more attentive to children’s concerns) so that parents were given more options, attorneys were better trained and monitored, there was less paperwork, and negotiations were conducted earlier so solutions could be reached more quickly. However, parents appreciated the assistance provided by their attorney about what to expect from the legal system and how to interpret the unfamiliar language and procedures. Emotionally supporting clients to calm and encourage them, helping them to stay rational and realistic, and standing up for them in court and when dealing with their ex-partner were all positive attributes of the attorney’s role. Many
parents were outraged about the cost of their legal representation, disappointed about their lawyer’s disinterest in their personal issues, and frustrated with the general disorganisation and lack of efficiency within the legal system. Most expected a shorter and simpler process than they experienced. The attorneys most often blamed the other party for difficulties in negotiations, and routinely attributed more excessive attitudes and behaviours to them as compared to their own client. One-third of the attorneys felt the legal system worked well for divorcing families, but the rest echoed parents’ sentiments that the legal system did exclude family members from the decision-making process.

One of the clues to the reasons for this dissatisfaction may lie in the fact that clients are usually in their least functional and/or most vulnerable state when lawyers take their instructions from them (Day Sclater & Richards, 1995; Tapp, 2002; Tesler, 2000). People in the midst of family transitions frequently feel a reduced sense of control over their lives, and this may magnify when lawyers introduce them to the unpredictability of a legal system which they had expected would actually provide some structure in their lives (Sarat & Felstiner, 1986). Asking parents to set major life goals when they are gripped by powerful negative emotions, and expecting lawyers to win these for them, may mean there should be less surprise that, later, clients do not appreciate their efforts (Tesler, 2000). Dissatisfaction arises not just for the minority of litigants who end up at trial, but can start much earlier with a broader cross-section of clients as they write and exchange affidavits, particularly those which are hostile and personally attacking. These can have enduring, damaging effects and are associated with more post-divorce conflict compared to the use of factual declarations (Kelly, 2001). Parents sometimes have a vested interest in presenting a selective perception of their involvement with their children (Gold, 1996). They may distort or discount their ex-partner’s parenting contributions or exaggerate their own efforts. Affidavits can become a focal point for continuing dissension (Trapski, 1981), and the fact they are committed to writing means they remain as a permanent record. “The affidavits from each party are partisan and selective, with half the truth from each side never adding up to the whole truth” (Ellis, 1995, p. 148). Yet the court’s first source of information is the evidence of the parties via their affidavits. Mahony (2003a) is also concerned
that a system based on affidavit evidence does not sit easily with families who have a very strong oral tradition of communication leading to consensus decision-making.

In recent times, mediation has been promoted on the basis that it provides a foil to adversarial lawyers (Law Commission, 2003; Neale & Smart, 1997b) and should reduce public expenditure on litigation (Day Sclater & Piper, 2001). Bids to reduce the role of the courts and lawyers in family matters have been evident in both Australia (Australian Government, 2004; HRSC, 2003) and England (Davis, 2001b; Eekelaar, 1995). The legal profession has responded by remodelling its practices to meet changing family law agendas (Neale & Smart, 1997b), including the increasing use of primary dispute resolution methods outside the Family Court (Altobelli, 2005) and qualifying as mediators themselves (Guest, 2004). Lawyers have been amazingly adaptive in transforming themselves to meet new legislative priorities (Roberts, 2001) and to capitalise on new opportunities (like mediation) presented by reformulated family law goals.

This is nowhere better illustrated than in England where the Family Law Act 1996 reflected a distrust of family lawyers and attempted to overcome their gate-keeping role by diverting separated parties to mediation (Davis, Bevan & Pearce, 2001). Lawyers, however, rejected the view that they encouraged otherwise reasonable people to escalate their family disputes, and instead claimed to have already adopted a conciliatory style of practice, to settle around 90% of their cases, and to endorse private agreements as better than court-imposed ones. Parties, themselves, continued to rate solicitors more positively than mediators and to value, if not rely upon, their input (Davis, 2001a; Davis, Finch & Fitzgerald, 2001). Davis, Bevan and Pearce (2001) therefore questioned whether it is plausible to expect a profession with an already principled way of working to promote mediation and pass clients onto a parallel profession also competing for public funds. Encouraging people to choose one process over another (lawyers versus mediators) at a time when they are facing a personal crisis “is to ask them to focus upon questions which they do not feel equipped to answer and whose import they do not understand” (Davis, Bevan &
Pearce, 2001, p. 267). It was thought wholly unrealistic to expect divorce to be transformed from a lawyer-managed process into one primarily controlled by the parties themselves as they obtained limited legal advice and then quickly resorted to mediators to negotiate their agreements (Roberts, 2001). Solicitors actually emerged greatly strengthened from the reform proposals, buoyed by the confidence parties placed in their traditional advisory and representative roles. Even the Family Advice and Information Network, established to enable people to access a range of services through a single reference point, is primarily serviced by lawyers, which only serves to further strengthen their role (Davis, Bevan & Pearce, 2001; Douglas & Murch, 2002).

While governments’ efforts to remove both lawyers and the law from separation and divorce proceedings may be stymied by the continuing preference of the public for legal advice and representation, and by lawyers’ own successful ability to remodel their style and range of services, it is important that lawyers develop a greater awareness of their legal culture and its impact on their clients (Newberry, 2001).

**Legal Aid:** Around 47% of the applications and grants for legal aid in the Family Court are for custody and access disputes (Law Commission, 2002a). While the number of legally aided cases has declined since 1999 as a result of stricter controls and restrictions on applicants and their lawyers, the average legal aid cost of each case has increased.

Hunter (2002, 2003) compared the legal services received by legally aided and self-funding family law clients in four Australian states. Lawyers perceived legally aided clients as unreasonable – demanding, less reliable, less grateful for the solicitor’s efforts on their behalf and less responsible. They attributed this to the fact the clients were not paying for their representation and were therefore unaware of the cost of their demands. In contrast, self-funding clients were regarded as reasonable – more selective with their demands, more considerate of the solicitor and appreciative of the service received, more willing to negotiate, listen to their lawyer’s advice, and to compromise. However, this dichotomy was found to be more perceived than real once client files were analysed. Contrary to solicitors’ expectations, legally-aided clients were no more
demanding than self-funding clients (both groups had the same mean number of demands). There was no significant difference at all between the volume of correspondence produced by the solicitor, the number of documents perused, the number of phone calls and personal attendances, the number of court attendances and documents filed. Neither did client survey data reveal any differences in treatment based on funding status. Legally-aided clients did, however, have much greater difficulty in obtaining and keeping their legal aid grants, and had fewer funds available to spend on their dispute (Hunter, 2002). One quarter of clients said they felt disempowered and isolated in the Family Court, 49% said they had no control over the result of their case, and the majority of clients did not agree the legal system had treated them fairly and were dissatisfied with the time taken to resolve their case (Hunter, 2002).

Self-represented Litigants: Internationally, there has been a proliferation of litigants representing themselves in family law disputes in recent years (Mahony, 2003b; Nicholson & Harrison, 2003; Pearson, 1999; Wilson, 2003). In some American states at least one party is unrepresented in around 80-90% of family-related cases (Chase, 2003), and in the Family Court of Australia the figure is over 40% (Mahony, 2003b). The primary factor contributing to the forfeiting or relinquishment of legal representation is cost and people’s inability to afford a lawyer (Law Commission, 2003). Other factors include distrust of lawyers, dissatisfaction with lawyers’ style of practice, the low ceiling for public funding/legal aid, educational disadvantage, and an eagerness to represent themselves - particularly when they think their case is simple or straightforward (Law Commission, 2003). Family law professionals generally regard self-representation as a retrograde step, and there is no doubt that it presents myriad procedural justice concerns within the courts. Its only significant advantage is thought to be the extended time it enables a judge to observe the parent in action throughout the case, particularly during cross-examination of their ex-partner (Wilson, 2003).

Self-represented litigants require more time and resources from judges and court staff than those parties who are legally represented. To help create a ‘level playing field’, so that neither side is disadvantaged, courts have instituted a
range of information and advice strategies to assist unrepresented litigants formulate, present and manage their cases. Family Law Information Centres and court-based self-help centres have been established in America (Chase, 2003) and Canada (Law Commission, 2003) to provide basic legal and procedural information, help with filling out forms and filing applications, starting cases, and making referrals to other community resources. In Australasia the emphasis has been on unbundling legal services, developing user-friendly websites and self-help resources, clarifying the role of court staff, judges and the other party’s lawyer and undertaking research to better understand the characteristics and needs of self-represented litigants (Law Commission, 2003). However, the Law Commission (2004) has recently recommended the use of court help-desks on a pilot basis in New Zealand.

**Children’s Legal Representatives:** Children’s legal representation has developed in a largely ad hoc manner and pursuant to a number of different models (Haralambie & Nysse-Carris, 2002). The debate in most Western jurisdictions over the past quarter-century has centred on the appropriate role of children’s legal representatives and, in particular, whether they should adopt the traditional legal advocacy approach (regarding the child as a client who is able to give instructions to their lawyer), or utilise the ‘best interests’ model (where the lawyer makes submissions to the court based on what he or she considers best for the child’s welfare), or adopt a hybrid role combining elements of both which, in some cases, may mean the lawyer’s perspective on the child’s best interests may be contrary to the child’s expressed views (Caldwell, 2004; Chisholm, 1999; Guggenheim, 1996; Kearns, 2005; Ludbrook, 2000a).

This prevailing international uncertainty about the role of child representatives has led to a worrying inconsistency of practice which poses a fundamental challenge to the rule of law. Caldwell (2004) believes “there can be little assurance that like cases involving children in New Zealand are treated alike” (p. 4), even though it is mandatory for children to have separate legal representation where a parenting dispute appears likely to go to a defended hearing. The selection, appointment and role of children’s lawyers are currently governed by statutory provisions and by Practice Notes issued by the Principal
Family Court Judge. The lawyer has a duty to put the child’s wishes and views before the court, and a further duty to inform the court of other factors that impact on the child’s welfare. This dual role conceptualises legal advocacy on behalf of children as different from that enjoyed by adults since the lawyer does not act as directly on client’s instructions, is appointed by the Family Court, and cannot be dismissed by the child. It has also meant that the role has been “guided largely by the personal philosophy of individual practitioners regarding the rights and needs of children” (Department for Courts, 1998, p. 18). While New Zealand legal commentators (Caldwell, 2004; Jefferson, 1993, 2001; Ludbrook, 2000a; Tapp & Henaghan, 2000; Taylor, Gollop & Smith, 2000a) find the dual role perplexing, legal practitioners appear relatively comfortable representing a combination of the child’s best interests and wishes (Hong, 1991; Gray & Martin, 1998).

The court regards the child’s lawyer as someone apart from the dispute who can offer “more rational and measured input” (Law Commission, 2003, p. 142). Their role is to “ascertain a child’s views, research relevant law, devise a strategy to promote the child’s case, negotiate on the child’s behalf, represent the child’s interests in any mediation or other dispute resolution process, gather evidence to support the child’s case, and act as advocate for the child if the matter goes to a hearing” (Law Commission, 2003, pp. 136-137). They also act to some extent as case managers, although their appointments have become more specific as the drive towards accountability and cost-effectiveness has intensified. In 2003, the cost of children’s legal representation was $13,164,454 for 3,182 appointments (Caldwell, 2004).

Lawyers regard their appointment to be more effective at an early stage in a case, prior to a mediation conference (Hong, 1991). Where their appointment comes too late, the parties’ attitudes have had time to harden and the chances of resolution are lessened. Most lawyers said they visited the children they were appointed to represent, although some limited this to only those of older ages (Hong, 1991). A more recent email survey found that 71% of the 198 lawyers were concerned about the lack of clarity in their role, although, paradoxically, 78% of them felt the current Practice Note provided them with helpful guidance.
The extent to which the traditional advocacy role has been diluted in practice was evident in the high ranking respondents gave to the task of investigating and assessing the child’s best interests. Advocating for the child’s views and wishes was ranked marginally lower, but there was a widespread acceptance of the importance of making direct contact with the child, regardless of the child’s age (Caldwell, 2004).

Only a small amount of international research has elicited children’s perspectives on the role of their legal representatives, and several of these studies have been concerned with care and protection, rather than private law, proceedings (Cashmore & Bussey, 1994; Masson, 2003; Masson & Oakley, 1998). Research with children involved in custody and access disputes reveals that lawyers can be significant people in children’s lives (Chaplan, 1996) and, in a New Zealand study, the majority of the children thought their lawyer had done a good job of representing them (Taylor et al., 1999). One quarter of the children expressed strongly positive feelings about their lawyer and particularly valued those relationships in which they were assisted to talk through their feelings, discuss options and have their views (rather than their lawyer’s perceptions of their best interests) presented to the court. However, just under a third of the children did not understand why their lawyers had been appointed, and two-thirds were unaware of what their lawyer had said on their behalf. Lawyers’ poor listening and communication skills, breaches of confidentiality, and lack of feedback about the court outcome were the children’s other main concerns.

Parents consider their child’s lawyer to be a powerful agent in determining the outcome of a dispute (Hall & Lee, 1994; Harland, 1991a). Over 75% of the lawyers in Caldwell’s (2004) survey also believed that the child’s legal representative significantly influenced the outcome. Yet criticisms of the role abound including inconsistencies, poor practice, confusion of purpose, and lack of quality assurance and cross-cultural competence (Department for Courts, 1997, 1998; Gray & Martin, 1998; Jefferson, 1993; Law Commission, 2002a; Pitama et al., 2002). Recent submissions added further concerns with respect to inadequate training to deal with children, lack of time to properly ascertain or
represent children’s views, and allegations of bias against one of the child’s 
parents (Law Commission, 2003). A non-legal child advocate was 
recommended in place of, or possibly together with, the child’s lawyer. 
However, the Law Commission (2003) felt it was not justified to add yet 
another player to the dispute resolution process and instead preferred to 
emphasise more comprehensive monitoring and training (in child development, 
family dynamics and child interview techniques) for children’s lawyers.

Despite this apparent retention of the status quo, Caldwell (2004) believes 
the current fusion of contradictory roles makes it unlikely this model of 
children’s legal representation will survive in the medium-term. A consensus 
has been emerging since the mid-1990s in favour of a traditional lawyer-client 
model, albeit with some modifications (Haralambie & Nysse-Carris, 2002). 
Judicial and legal endorsement of the dual role has been frowned upon by 
academic commentators in New Zealand, and internationally, who all agree that 
children’s legal representatives should treat the child as a client. “The child’s 
lawyer needs to act like a lawyer. Any departure from the traditional legal 
representation approach … will let the child down” (Caldwell, 2004, p. 34).

Specialist Report Writers

Specialist reports were non-existent in late 18th and early 19th century child 
custody litigation because the legal rules provided little realistic opportunity for 
women to challenge their husband’s superior claims (Shuman, 2002). Moral 
considerations rather than psychological ones guided these determinations, but 
this changed when the welfare of the child principle transformed the law 
governing child custody disputes. Influenced by the psychoanalytic writings of 
Goldstein, Freud and Solnit (1973), the special expertise and critical insights of 
psychologists and psychiatrists became an increasingly common feature of 
family law decision-making (Shuman, 2002). Their knowledge of theoretical 
models and empirical research in child development and family dynamics was 
not possessed by other family law professionals, but became accepted as a 
directly relevant component of the new team approach within the Family Court 
(Harnett, 1995).
Since 1981 the New Zealand Family Court has been able to obtain expert assistance from a medical practitioner, psychiatrist or, most commonly, a psychologist, on any issue on which a report is “necessary” for the disposition of the guardianship, custody or access issue before the court (section 29A, Guardianship Act 1968; now replaced by section 133 of the COC Act 2004 and extended to also include cultural reports). Usually the judge will set the brief, which the lawyer for the child prepares in co-operation with counsel for the other parties. A 2001 Practice Note on specialist report writers, and a handbook (Maxwell, Seymour & Vincent, 1996), guides their selection, appointment and role. The specialist report is prepared for the benefit of the court, rather than for the parties, to ensure it is objective (Boshier, 2004c). The judge may direct each lawyer to allow their client to read the report and discuss its content, but the parties cannot retain a copy (Law Commission, 2002a). The specialist is the court’s witness and can be cross-examined by each lawyer about the report’s contents. A dissatisfied party can, with the court’s agreement, obtain a professional critique of the specialist report from another psychologist who reviews the report and case notes, but does not interview or observe any family members (Law Commission, 2003). The Law Commission (2003) was critical of this practice and recommended that it occur solely for the purpose of cross-examination, rather than as new evidence, since its contribution to the case is limited to mere criticism of the process by which the report writer reached their opinion. Boshier (2004c), however, believes that scrutiny of the content of reports and the expertise of the report writer is a transparent means of avoiding a perception of collaboration within the court.

The High Court, in an influential recent case (K v K [2005] NZFLR 28) declared, obiter, that the practice of using specialist reports for the sole purpose of ascertaining children’s wishes was inconsistent with the role of the lawyer for the child and should cease immediately. The child’s wishes should instead be introduced primarily through their lawyer or via a judicial interview, and not through psychological assessment. This position is consistent with current Canadian judicial thinking and avoids report writers straying beyond the boundaries of their brief, solely obtaining children’s wishes, and providing recommendations on the ultimate issue for the court’s consideration (Caldwell,
The decision provides a helpful revisiting of roles as specialist reports are not designed to gather evidence, but rather to assist the court on matters requiring expert input (Boshier, 2004c). However, *K v K* does not mean that a specialist report cannot comment on a child’s views if this is necessary for the effective disposition of the case (Henaghan, 2005; Mahon, 2005).

Only one comprehensive study exists on parents’ and children’s views on the specialist report writing process (Buchanan et al., 2001a, 2001b). Conducted with a representative sample of 100 English parents and 30 children (aged eight years and over), the research explored their perspectives on the role of the Family Court Welfare Officer (FCWO). These children differed from other children whose parents had separated by virtue of the fact they themselves were the focus of their parents’ conflict and their levels of reported behavioural disturbance and emotional distress were much higher (Bretherton, 2002). All the children had met with the FCWO and generally understood this person’s role in preparing the welfare report for the court. Two-thirds of the children felt the FCWO listened to them and took them seriously, but only one-third believed the FCWO understood how they felt and knew what they wanted. Several children felt inhibited about what they told the FCWO and did not share all relevant information. When asked if they should attend court, the children reported mixed views, with the older children being more likely to feel positive about such a possibility. Parents’ perceptions of the welfare report varied, but over half were dissatisfied and voiced strong criticisms of the assessment process. They particularly felt that the investigation by the FCWO was not thorough enough. The best predictors of satisfaction were outcome and initial expectations (Buchanan et al., 2001a). Almost all parents, irrespective of the outcome, were dissatisfied with the court process believing it to favour their ex-partner’s gender and to ignore their own perspectives and needs. Parents whose cases settled prior to the hearing were more likely to be satisfied with both the process and the outcome, with contact being more likely to progress over the next year (Buchanan et al., 2001a).

Similar complaints about specialist reports have been voiced by New Zealand parents claiming that report writers’ failed to provide them with fair
opportunities to demonstrate their parenting ability, did not speak with the people they nominated, and produced biased reports (Law Commission, 2003).

Psychologists, however, dislike being at risk of dissatisfied clients filing complaints against them with the Psychologists Board, having to work under extreme pressure to prepare reports, and having to cope with the Family Court’s adversarial nature - especially aggressive cross-examination and no real team approach (Law Commission, 2003). They also consider that lawyers need a better understanding of the discipline of child psychology and the place of psychological evidence in court decision-making processes (Doogue & Blackwell, 2000; Mahon, 2005).

While the judge is ultimately responsible for determining what is in the best interests of the child, many litigants feel that the specialist report predetermines the outcome of their case (Law Commission, 2002a; Shuman, 2002). They particularly worry about the adverse impact any negative comment about them in the report may have on their application (Law Commission, 2002a). The influence that an expert’s report might have on predicting a judge’s decision does have some validity (Shuman, 2002). In Australia, specialist reports are ordered in 60% of contested cases, and in around 75% of these cases it is estimated that the court’s determination is in accord with the reports’ recommendations (ALRC & HREOC, 1997). An American case-file analysis of 282 disputed child custody cases also found that the major factor influencing judicial decisions was the counsellor’s recommendation (60% of the cases), followed by the child’s preference (15% of the cases) (Kunin, Ebbesen & Konecni, 1992).

Others question whether specialist reports should be required on the litigating adults (Newberry, 2001), and whether specialist report writers are being used to best effect within the Family Court (Cantwell, 2002). Boshier (2004c) believes psychologists are overused at the end of the court process to provide costly reports, when they may be better used during the initial phase to “help parents understand the issues that they face” (p. 11). Closer scrutiny of specialists’ methods and procedures is thought necessary as the reliability of some psychological tests, particularly those not specifically designed for use in child
custody evaluations, can serve to cloak “experts’ value judgments under the veil of science” (Shuman, 2002, p. 160). Concern has also been expressed about how effectively report writers are able to gain a full understanding of the whole family situation in order to achieve a sound assessment of the dynamics contributing to the parental dispute:

An expert looking at an individual member of an entrenched family conflict can be in the same position as the person who tries to follow a football match by just watching one player. All the running off the ball, tactical positioning, non-verbal exchanges and waiting in the wings – the subtle heart of intricate human interaction – is lost to view. (Cantwell, 2002, p. 546)

Cantwell (2002) recommends a ‘shared enterprise’ approach which acknowledges each family member’s expertise as every bit as important as the expert’s own. Only when the specialist understands what the family understand, or know already, can he or she make any use of their own, more general, expertise. This could then maximise the therapeutic value of the assessment process (Doogue & Blackwell, 2000), as it is clear that the constraints of the specialist report writing process usually fail to fully utilise the expertise and knowledge of the family built up by the expert. Judges, do at times, make use of this by inviting report writers to contribute to mediation conferences, or by extending their appointments to enable feedback and follow-up to occur once orders have been made (Law Commission, 2003; Taylor, Smith & Tapp, 2001b), but there is enormous potential for more effectively utilising the specialist and their report as the basis for future work with the family and ongoing support for the children (Pike et al., 2005).

Judges

Judges’ traditional role in adjudication has reduced significantly in Family Courts where the majority of cases (90-95%) are now resolved through lawyer negotiation, mediation and conciliation without going to a defended hearing or trial (Chisholm, 1999; Law Commission, 2003; Richards & Ely, 1998). Judges are very aware of the enormous responsibility they have in determining a child’s future, whilst also acknowledging the substantial limits on their ability to achieve the optimal outcome (Chisholm, 2003; Shone, 2004; Treadwell, 2004;
Wilson, 2003). It can, after-all, be very difficult to obtain the perfect solution in cases presented with very imperfect possibilities (Snow & Friedland, 1992) and to have to pass judgement on family dilemmas that the parents themselves and various professionals have failed to resolve (Johnston, 2000). An emphasis on process, not just outcome, can ensure that each party feels they have received a fair hearing with all their major issues and concerns clearly addressed (Wilson, 2003).

A 1988 questionnaire completed by 18 (64%) of the then 27 New Zealand Family Court judges to ascertain their views about the way custody and access issues were dealt with, found that half of the judges spent 70-80% of their time on Family Court work, with the remainder spending either more or less time (Hall et al., 1993a). They all made extensive use of the specialist services available to the court, with the exception of counsel to assist the court. Few interviewed children who were the subject of parenting disputes, although this practice has become more popular again recently (Cashmore, 2001; Tapp, 2005; Taylor, 1998a). Where cultural or violence issues were a factor the judges said they used different techniques, including a more important role for family/whānau and traditional Māori values in the former, and a tightening of orders to reduce risk in the latter (Hall et al., 1993a). The management of files and documentation was considered unsatisfactory and the judges made a number of suggestions to improve case management and the permanent allocation of Family Court staff within each registry. Over half the judges thought the court should be empowered to keep families under some degree of supervision after proceedings had ended, and a minority wanted specialist reports to be prepared on parents. Many lamented the lack of feedback they received on their performance.

It is departmental policy in larger courts for different judges to preside over mediation conferences and defended hearings (Hall & Lee, 1994), although views on this practice are mixed internationally (Babb, 1998). Some jurisdictions prefer the continuity offered by the same family appearing before the same judge each time they come to court on a family law matter (Babb,
This one-judge-one-family method of case management has been noted by the Law Commission (2002a).

Many Family Court judges are now paying closer attention to the actual life experiences and rights of children when determining the weight to be given to their views (Smith, Taylor & Tapp, 2003; Taylor, Smith & Tapp, 2001b). This has been enhanced by the COC Act 2004 which “requires them to focus more on the issues from a child’s perspective than the parties” (Boshier, 2004a, p. 15). In an increasing number of cases judges are also ensuring that the court’s decision is explained to children – either by the child’s lawyer, the specialist report writer, or sometimes the judge either directly or via a letter (Wilson, 2003).

The influence of judges’ perceptions and values on case outcomes can generate debate within a discretionary family law system. Chisholm (2003) argues that the legal context operates to constrain a judgment as “careful, thoughtful and rational rather than impulsive” (p. 12) since the judge has to apply the law to the evidence and indicate the reasons for the decision in the judgment. Furthermore, the decision is subject to appeal. The discretionary aspect of a judge’s role is therefore primarily in the task of attaching weight to the competing values in each individual case. While this process may well be influenced by the judge’s own personal beliefs, Chisholm (2003) considers these to have less importance for the decision because the legal framework leads to a highly structured decision. Such an analysis, however, takes little account of the pervasive influence of the conceptions of childhood on professionals’ decision-making capacities, as it is possible to discern the influence of judges’ preconceived views on children’s case outcomes (Tapp et al., 2001).

V Information, Education and Support

Many parents feel ill-equipped to navigate a major family transition and want to be able to seek help at several different stages – particularly at the time of separation, when making arrangements about the children, and in dealing with later transitions such as repartnering and the formation of step-families (Caruana
& Ferro, 2004; Smyth, 2004a). Their receipt of information about the impact of separation on themselves personally and their children, the different models of post-separation parenting, and the various dispute resolution pathways, is thought to assist them to achieve a consensual agreement and to avoid, or minimise, the use of the courts. Personal support and, where necessary, therapeutic or mental health intervention, is also considered an important means of helping family members cope with the emotional distress and readjustment occasioned by separation. The current lack of information and support, or its one-size-fits-all mode of delivery, has led parents to conclude the family law system is formulaic, and this frustrates those seeking more individualised information and support (Caruana & Ferro, 2004; Walker, 2001). The need for easier access to resources to assist families in post-separation family restructuring has therefore led to a number of initiatives to better inform, educate and support parents and children. These include information meetings; written, audiovisual and internet resources for parents and children; Family Court visits; parent education groups; children’s groups; and parenting plans.

**Information Meetings**

Information meetings have been most rigorously piloted and evaluated in England and Wales. The Family Law Act 1996 specified nine areas in relation to which information had to be given to adult attendees at information meetings, including the seriousness of taking steps to end a marriage, the needs of children, the divorce process, financial matters and protection against domestic violence. The Act was extensively amended during its passage through Parliament as compromises emerged to salvage the legislation from moral concerns that it would threaten the stability of society (Walker, 2000a). While there was little doubt that people facing divorce needed better information, there was less unanimity about how this was best achieved. The Government moved away from the initial concept of an information interview toward a group session which was thought to be more expedient, comfortable and cost-effective. However, by the time the Act was passed, this group session had reverted back to an individual meeting that could be attended by one or both spouses. The precise nature of these meetings ended up being determined by the Lord Chancellor’s Department, which took the opportunity to evaluate six
different models of information delivery in the 14 information meeting pilots established between 1997-1999 in 11 different localities.

During the pilots, 5961 people attended individual information meetings, 2460 attended a group presentation with two presenters (of varied professional backgrounds), 1468 people received postal packs, and 508 people attended a meeting with a marriage counsellor (Walker, 2000a). While the statute mandated attendance at an information meeting three months prior to the filing of a statement of marital breakdown, the pilots could only utilise attendees on a voluntary basis. The response rate for the evaluation varied between 54-73% of attendees depending on the nature of the model under investigation (Walker, 2001).

The 7863 people who participated in the information meetings “were overwhelmingly positive about the experiences” (Walker, 2001, p. 820), citing how the information had informed them about significant topics, changed their thinking, increased their confidence, and empowered them to take the next steps. However, the sessions came too late for most people to work on saving their marriage and few felt able to utilise mediation. This stymied the contradictory political expectations of the legislation (to save marriages while also promoting mediated settlements of disputes) and accounted for the Government and public perception that the new provisions had failed (Walker, 2000b). In hindsight, the concurrent combination of information about how to save marriages, or to divorce co-operatively, met the needs of neither constituency (Richards, 2002). The legislative framework had certainly dictated a constrained approach, with the information having to be delivered in a standard format without personal tailoring to the needs of individual attendees. This one-size-fits-all approach was intended to avoid presenters straying away from information delivery and into advice-giving, as the objective of the meetings was not to persuade people towards or away from any particular course of action (Walker, 2000b). However, the rigid script became a source of frustration for attendees and presenters alike because it failed to accommodate the varied agendas and needs of people in the process of marital separation. Attendees’ ability to absorb and utilise the information mostly depended on its
perceived salience for them, and receiving a standardised talk and an information pack was unfortunately “more akin to a technical guide than a service which sets out to be practical and immediately relevant to individual needs” (Walker, 2000b, p. 333).

Following the demise of the information meeting pilots, the Family Advice and Information Network was launched to deliver information to separating couples. This service is operated through solicitors who are paid to offer advice and information (Richards, 2002).

**Written, Audiovisual and Internet Resources for Parents and Children**

The UK Family Law Act 1996 also required separating parents to be provided with information about children’s welfare, wishes and feelings, and how they could be helped to cope with the breakdown of their parents’ marriage. Information about children was therefore imparted to parents attending the information meeting pilots via a leaflet indicating how parents could help their child, and by two leaflets for children that they could read themselves or with their parents (Richards & Stark, 2000). Parents were particularly interested in the material provided about children and felt much better informed about how divorce affects children as a result of attending the session and reading the information pack provided (Richards & Stark, 2000). For some it reassured them they were handling the situation appropriately or gave them new ways to think about children’s needs. Those parents who were less positive about the information felt that it only confirmed what they already knew, they had no need for the information, or they found it difficult to put what they were told into practice. Several found the information patronising, or lacking in some way (for example, about step-families and children with special needs).

The children’s leaflets lacked clear guidelines as to their appropriate age-range, but one was directed at older age-groups and the other at younger children. Only a small proportion of parents actually passed these pamphlets onto their children, although there was some evidence that parents were reading the children’s pamphlets themselves or discussing their contents with their
children (Richards & Stark, 2000). Some were unaware the leaflets were designed to be given to their children, while others felt it was inappropriate to do this because their child was too young or the time was not yet right. Other parents were concerned their children might become upset and unsettled as a result of reading the leaflets.

Focus groups, held with children to obtain their views about the leaflets, revealed that children found them dull and adult-looking, with a very prescriptive content (Richards & Stark, 2000). A working group then developed a new set of three child-friendly leaflets aimed at encouraging children to express their feelings about their parents’ divorce – a workbook for younger children designed to be used with a parent or other adult; a worksheet containing puzzles and a board game for children in middle childhood; and a diary-style booklet for teenagers. This new set of resources was evaluated via classroom-based discussion with children aged 8-18 and by a postal questionnaire sent to separated parents and their young children (Richards & Stark, 2000). Only minor suggestions were made to the leaflets for the youngest and oldest age-bands as these proved largely acceptable to their target audiences. However, the language and design of the middle childhood leaflet was less well received and it was to be further revised. The Law Commission (2003) recommended that New Zealand children be provided with similar materials to help them talk, write and draw about their family transition. The Ministry of Justice published two new brochures in 2005 as part of its resource pack for implementation of the COC Act 2004.

The fact that few English parents passed the children’s leaflets onto their children highlighted the difficulties associated with ensuring children gain access to helpful information (Richards & Stark, 2000). Direct means of access, through channels other than children’s parents, are currently being explored in several jurisdictions. Telephone helplines and websites have been identified as increasingly popular options (Australian Government, 2003; Boshier, 2004a), although evidence suggests they are not yet widely used by children (Richards, 2002). The Family Courts in Australia (www.familycourt.gov.au) and New Zealand (www.justice.govt.nz/family) provide information specifically for
children on their websites, and videos are also available for children, parents and professionals.

**Family Court Visits**

Hosting visits by groups of children to meet with a counsellor and judge is under consideration by the Melbourne and Adelaide Family Courts to aid understanding about what to expect during their family’s contact with the court (Campbell, 2005). This may also help to overcome current negative perceptions of professionals and the court.

**Parent Education Programmes**

Parent education courses for divorcing parents are widely available in many countries, most notably America where they are mandatory in some states and voluntary in others (Amato, 2004; Kelly, 2000; Pearson, 1999; Piper, 1996; Richards, 2002). Programmes are usually either offered through the Family Court or via community-based agencies (with or without the sanction of the court). Such programmes focus on using research knowledge to enhance parents’ understanding of the typical impact of divorce on children, alert them to the potential adverse effects of high conflict and other harmful behaviours on children’s adjustment, and outline authoritative parenting styles which can facilitate children’s adjustment (Geasler & Blaisure, 1998; Kelly, 2000). Programmes can also address adult adjustment to divorce, the importance of co-parenting and enduring relationships between each parent and their children, and describe court processes available to the parents.

Despite the paucity of research evaluating the effectiveness of parent education programmes and their impact on children’s well-being, it appears “that the great majority of parents find these courses to be useful, even when participation is mandatory” (Amato, 2004, p. 37). Parent education can significantly reduce levels of inter-parental conflict (Bacon & McKenzie, 2004), improve parental knowledge about the effects of divorce on children (Shifflett & Cummings, 1999), enhance parental satisfaction with their relationships with their children (McKenry, Clark & Stone, 1999) and help parents deal with the grief of separation, alter their mindset, reassess their priorities, and place their
children’s needs centre-stage (Garon & Whitfill, 2003). Of significance for the Family Court, it has been found that parents’ participating in divorce education programmes are less likely to engage in further litigation (Arbuthnot, Kramer & Gordon, 1997), although other studies have found no difference between the relitigation rates of parents in education groups compared with those in control groups (Kramer & Kowal, 1998; Thoennes & Pearson, 1999). Participation in divorce education programmes is more effective earlier in the legal process, and high-conflict couples benefit the most (Kelly, 2000). Programmes which incorporate skill-building demonstrations, role-plays, discussion, handouts, videos and some didactic presentations are more productive in inducing parental change than interventions which rely on just one format (Geasler & Blaisure, 1998). Participants indicate that attending these programmes makes them more willing to have the children spend time with their ex-partner, more likely to co-operate and less likely to place their child in the middle of their disputes (Kelly, 2000).

To supplement short-term parent education groups, some separated parents want the opportunity to attend mutual support or self-help groups to help them deal with the emotional impact of their separation and to discuss parenting and other related issues on an ongoing basis with those in similar circumstances (Smyth, 2004a). Professionally-led groups have the benefit of offering mutual support on a larger and more economical scale than counselling (Franzoni, 1992). The availability of a trained facilitator is thought to be crucial to deflect participants’ grief and anger from taking a politicised form, exacerbated by group reinforcement, as has occurred in some non-resident fathers’ rights groups (Smyth, 2004a).

Existing parent support and education programmes vary enormously in duration, timing and quality. Some interventions are very brief (a video followed by discussion), while others represent more extensive attempts to educate parents on a range of issues over a period of several weeks. Some operate out of well-developed multidisciplinary facilities (Garon & Whitfill, 2003) or integrate educational components with therapeutic interventions to maximise attitudinal and behaviour change. The *Mums and Dad Forever* (MDF)
programme in Western Australia explicitly aims to promote co-operative post-separation parenting and reduce litigation in the Family Court for what are essentially parenting issues (Dickinson, Francke & Murphy, 2003). Nearly 700 parents have now participated in the programme, which is free of charge, with the majority being referred from the court on a mandated basis. Individual counselling (up to four sessions for each client) is initially offered, followed by seven weekly educational workshops. Groups are of mixed gender, with former partners attending separate groups. Child-focused mediation, telephone support, children’s groups and information forums are on offer as well. The Family Court has reported significant breakthroughs, by way of negotiated settlements, with seemingly intractable parents following their MDF participation (Dickinson et al., 2003).

Parent education programmes have been rare in New Zealand, although *Children in the Middle*, a promising initiative of the Auckland Family Courts Association, commenced at the North Shore Family Court in 2004 (Gillard, 2004). It offers two sessions to separated parents, one week apart. Verbal and video presentations are supplemented by group discussion led by a psychologist or counsellor and a family lawyer. Feedback from participating parents is said to be “unequivocally positive” (Gillard, 2004, p. 12), with all rating the programme as worthwhile. It has led to an increase in parental knowledge about the impact of separation on children, a desire to keep children out of conflict, and to settle disputes in a more conciliatory manner. *Children in the Middle* is currently being extended throughout the Family Court nationally, thanks to a $6.2 million boost in the 2005 budget (New Zealand Government, 2005). It is expected that around 8000 couples will attend on a voluntary basis over the next four years.

The *Staying Connected* group programme utilises a modified family therapy approach in which children, mothers and fathers initially attend sessions in separate groups (Gould, 2003, 2005). As their knowledge and skills develop, children then join each group containing one of their parents. These combined sessions enable children to express their feelings directly to each parent and to receive appropriate support from them. This Auckland-based programme has
been found to reduce children’s self-reports about depressive symptoms, to enhance their ability to be heard within their family, and to improve their post-separation well-being.

More research is needed to evaluate which information, education and support programmes are the most effective in influencing parents’ attitudes and behaviour, improving outcomes for children, and reducing reliance on the courts (Amato, 2004). Parent information and education appears to be a promising and relatively inexpensive strategy, provided it is delivered somewhat more responsively than the English information meeting pilots. Piper’s (1996) cynical concern about such programmes serving to reinforce the current political ideology of the family (co-operative co-parenting across two independent households), thereby helping to reduce pressure on the court system, needs to be considered in the light of other jurisdictions, most notably Western Australia and various American states, where the whole point of parent information, education and support is to achieve these very goals.

**Support Groups for Children**

Some divorce education programmes incorporate separate parallel sessions for children of different age groups (Dickinson et al., 2003; Gould, 2003, 2005; Kelly, 2000; Mayes, Wilson, MacDonald & Gillies, 2003), but stand-alone children’s programmes are also becoming increasingly more common (Dowling, 2005; Lamb et al., 1997). In Britain, school-based discussion and intervention sessions are run by a variety of voluntary agencies, some on a semi-commercial basis, but it is unclear whether all the claims about their effectiveness are justified (Richards, 2002). School-based approaches, which have been carefully evaluated, have, however, shown some positive results (A. Wilson, 2002). *Seasons for Growth* is one such educational programme about change, loss and grief which uses a strengths-based approach and has now been accessed by over 60,000 Australian children (Dowling, 2005).

Where domestic violence is an issue, New Zealand children can be referred into programmes specifically designed to deal with family conflict (Dixon et al., 2002). However, the Law Commission (2003) has recommended that children
over the age of seven should be able to attend information programmes to help them express how they feel about post-separation arrangements to their parents and other professionals.

**Parenting Plans**

A parenting plan/agreement is a flexible tool designed to give separated parents the opportunity to consider the nature of their parenting responsibilities. It “sets out in writing how both parents intend to contribute to the care and well-being of their children” (Smyth, 2004a, p. 130), and usually covers how much time the children will spend with each parent, the practical arrangements to facilitate this, financial support, parents’ decision-making responsibilities (joint/sole), and processes for resolving any future parenting disputes. Preparing the plan has the added advantage of helping the family learn the skills necessary to resolve issues in a constructive and child-focused manner (Family Law Council, 1992).

Ideally, parenting plans are capable of easy amendment to meet the changing needs of children and to take account of potential transitions like repartnering and relocation (Lye, 1999; Spengler, 2001). Agreeing in advance how to deal with such contentious issues is thought to prevent future disputes and reduce the necessity for legal or court intervention (Family Law Council, 2000). They also have the advantage of avoiding abstract or ill-defined provisions like ‘reasonable’ contact (Lye, 1999). Plans can be prepared between parents, sometimes in consultation with their children, or with the assistance of their lawyers, counsellor or mediator. The presence of a neutral third party means difficult issues or specific details can be more easily negotiated (Family Law Council, 1992, 2000).

In Australia, parenting plans were first recommended by the Family Law Council (1992) as a means of fostering shared parental responsibility. Unlike the use of parenting plans in other jurisdictions, the Family Law Reform Act 1995 subsequently provided for their registration in the Family Court of Australia. Once registered, the provisions operated as though they were orders of the court. However, this process proved cumbersome as plans became too inflexible for
parents to readily adapt them to meet changed circumstances over time (ALRC & HREOC, 1997; Family Law Council, 2000). Parenting plans also proved unpopular with lawyers who continued to direct parties toward consent orders because they were cheaper and formed part of the lawyer’s stock-in-trade (Dewar & Parker, 1999). Parenting plans were therefore not well used in Australia, and registrations declined. The Family Law Council (2000) later successfully recommended that the registration provision be repealed. Unregistered parenting plans continue to be strongly recommended in the Australian family law system as an effective alternative to court orders and as a means of enhancing co-operation between parents (Australian Government, 2004; HRSC, 2003). A field trial of parenting plans focusing on children’s health and safety needs in the Family Court of Western Australia has found that the tool has great potential, although its use by mediators with parents is time-consuming (Murphy, Pike & Campbell, 2005).

A parenting plan, in the form of an A4 booklet, was given to English parents attending some of the information meeting pilots (Richards & Stark, 2000). It included information about children’s needs, as well as several pages where parents, either on their own or together, or in discussion with their children or a professional adviser, could enter the arrangements they were making for their children. The plan was not a legal document and could not be registered with the court. Research on its uptake and use showed that it was not widely filled in, very few parents took it to consultations with solicitors and mediators, and hardly any involved their children in its completion (Richards & Stark, 2000). This was primarily because the plan only reached people after they had already made arrangements for their children (Richards, 2002). However, half the respondents did find the plan useful as confirmation of what they had done (Richards, 2002), or as a checklist or aide-memoire for highlighting issues they could have otherwise overlooked (Richards & Stark, 2000).

The low uptake of parenting plans in both Australia and England shows how an attractive sounding idea can be problematic in practice. Research on the use of parenting plans in a New Zealand Family Court failed to materialise because of parents’ disinterest in the concept, although plans are promoted by lawyers
and judges (Adams & Townsend, 2004). Parenting plans are essentially directed to co-operative parents who share some degree of trust and civility. Their central role in current Australian family law reforms will be watched with interest.

VI Statutory Initiatives to Reorient Post-separation Care Arrangements

Information, education and support are one means of transforming the attitudes and behaviours of separating parents, but other initiatives take a more statutory form. These include rebuttable presumptions about primary care-giving and joint custody/shared care, as well as efforts directed towards containing intractable and vexatious litigants, the enforcement of court orders (particularly in respect of parent-child contact) and changes in terminology to reflect the new ideologies underlying post-separation parenting.

Rebuttable Presumptions

Dissatisfaction with the traditional sole-custody model has led some jurisdictions to return to a rules-based approach modelled on new presumptions concerning primary caretakers and joint custody/shared parenting.

The primary caretaker presumption arose from the work of an interdisciplinary team of experts (Goldstein, Freud & Solnit, 1973) who theorised that every child needed a single primary attachment figure and would suffer if this relationship was disrupted or undermined. The courts were encouraged to examine the childrearing history in the intact family to determine which parent had taken the primary role prior to the separation. It was considered an attractive alternative to the indeterminate best interests standard, as it focused on facts rather than personalities, and past parental behaviour rather than predictions of future conduct. The presumption also offered some degree of legal certainty as it was usually fairly clear from the outset which parent was likely to prevail.

West Virginia adopted this presumption in 1981, but few American states followed suit (Woodhouse, 1999). The New Zealand Commissioner for
Children proposed primary caretaking as a means of obviating the need for custody litigation to decide who is the most fit parent (Hassall & Maxwell, 1992a, 1992b). However, this presumption was criticised as little more than “a thinly disguised maternal preference” (Woodhouse, 1999, p. 823). The primacy of a single caretaker was also attacked, as evidence mounted that children’s relationships with the secondary caretaker – often the father – were equally crucial for children (Chambers, 1984). Contrary to expectations, the presumption did not deter litigation, but was instead found to encourage it as application of the presumption became highly fact intensive (Henaghan, 2002b; Woodhouse, 1999).

Since the 1970s joint custody has offered a competing vision of children’s interests to that prioritised by the primary caretaker presumption. Dissatisfaction with the award of custody to the primary caregiver to whom the child was most emotionally attached (usually the mother), with the right to reasonable access by the other parent (most often the father), together with increased paternal involvement in intact family life and concern about the diminishing role divorced fathers played in their children’s lives, led parents, courts and legislators to embrace the concept of joint custody (Woodhouse, 1999). This was lauded as serving children’s need to maintain their relationships with both parents following parental separation (Amato, 2004), as well as mitigating conflict by promoting a co-operative model.

Joint custody has been particularly common in America, with some states adopting a presumption in favour of joint custody when both parents agreed, and others merely adding it as one of the range of options open to parents and the courts (Woodhouse, 1999). The American legal context is, however, somewhat skewed by their operation of two forms of joint custody (Depner, 2002):

1. **Joint legal custody** – where both parents have the right to make significant decisions about their child. This equates to the English common law concept of guardianship.
2. **Joint physical custody** – where children spend substantial time in the households of each parent. Joint custody can be shared 50/50 between parents, but the concept also applies to different divisions of time such as 60/40. The arrangement can be a part-week or a week-about one. Joint physical custody equates to joint custody/shared care in the New Zealand context, where it remains a minority arrangement (Pryor & Seymour, 1998). Similarly, in Australia, around 6% of separated parents exercise shared care (Smyth & Weston, 2004).

Joint custody has been credited with increasing parental (especially paternal) satisfaction with post-separation living arrangements and increasing the frequency of communication between the ex-partners (Burrett & Green, 2005; Pruett & Santangelo, 1999; Smyth & Weston, 2004). Children and young people’s well-being can also be enhanced (Bauserman, 2000; Fabricius, 2003; Kelly, 2000; Pruett & Santangelo, 1999). A meta-analysis of 33 studies by Bauserman (2000) found that children in joint legal or physical custody (but especially joint physical custody) were better adjusted than were children in sole-custody households. They had stronger family relationships, higher self-esteem, and better emotional and behavioural functioning. Joint physical custody can achieve these positive outcomes when conflict between the parents is low and they can engage in at least a minimal degree of co-operative parenting (Amato, 2004). Geographical proximity is also desirable so the practicalities of the arrangement (movement between households and schooling) can operate smoothly. Joint physical custody is not recommended where a parent has a history of antisocial behaviour, substance abuse or violence, or where ongoing discord and hostility between the ex-partners would expose the children to the well-established adverse effects of conflict on their adjustment and well-being (Amato, 2004).

Californian longitudinal studies, conducted in the 1990s, have produced ambiguous results (Woodhouse, 1999). While more joint-custody fathers are sustaining involvement in their children’s lives, the fundamentally gendered nature of parenting patterns has not changed. Many children still reside with their mother and visit periodically with their father despite a court order for joint
physical custody. More worryingly, some courts have awarded joint custody as a compromise solution to resolve intractable litigation (Woodhouse, 1999). Joint custody can become a form of power without responsibility, as one parent usually shoulders a greater share of the child’s care than the other (Dewar & Parker, 1999).

The age at which joint custody should commence has also been a controversial issue. The traditional perception that infants and toddlers need their mothers has meant that fathers have only acquired a greater share of parenting as their children have got older. However, this approach has recently been discredited as support for fathers’ parenting competence and the importance of frequent contact (including overnight stays) has been identified as critical in facilitating father-child attachment in the early years (Kelly & Lamb, 2000; Lamb & Kelly, 2001; Pruett & Sandler, 2004). The age of the child no longer appears to be a factor which should restrict fathers obtaining joint physical custody or overnight visits (Amato, 2004).

An Australian Parliamentary Inquiry recently canvassed, but ultimately rejected, the introduction of a rebuttable presumption of equal parenting time (50/50 shared custody) as it was considered inappropriate to force this outcome via legislation (HRSC, 2003). Instead, their recommendation for a rebuttable presumption in favour of shared parental responsibility (joint legal custody in the American model) was accepted by the Australian Government (2004), although this would not apply in cases involving entrenched conflict, family violence, substance abuse, or established child abuse. This approach is actually no different to the concept of guardianship incorporated in New Zealand family law back in 1968 (Burns, 2004). Quite how this new legal mandate will be interpreted by the Australian courts and translated into the reality of day-to-day parenting is yet to be determined. However, the sharing of responsibility for children has prompted vigorous debate within Australia (Behrens, 1996; Chisholm, 2005; Smyth, 2004a), particularly in light of research showing that support for shared care is split along gender and residence status lines (Smyth & Weston, 2004).
In New Zealand, the creative use of section 13 of the Guardianship Act, as an alternative to the orders for custody and access more traditionally made under sections 11 and 15 of the Act, did initiate a controversial judicially developed policy which was a variation on joint custody (Austin, 1991; Hall & Lee, 1994; Tapp, 1990; Taylor, 1998b). However, our Parliament has firmly rejected the push by lobby groups vigorously seeking to impose a legal presumption of fully shared care and responsibility post-separation. Dr Muriel Newman’s Shared Parenting Bill was defeated at its first reading on 10 May 2000 because of the Government’s commitment to review the Guardianship Act 1968 (Ministry of Justice & Ministry of Social Policy, 2000). The general intent of the Bill was to presumptively require the Family Court, in cases where parents were unable to agree on the care of their child, to order a regime whereby the child would reside with each parent 50% of their time and parents were required to share all day-to-day and major parenting decisions, unless domestic violence was proved. This focus on the rhetoric of parental rights only served to misread or ignore the research about outcomes for children after parental separation, and would have seriously undermined the current individualised approach of the Family Court (Henaghan, 2002b; Mahony, 2003c; Tapp & Taylor, 2001).

Canada has also rejected a presumption of shared care because of its focus on parental rights rather than the best interests of a particular child, and the research evidence suggesting that shared parenting regimes have failed to significantly reduce conflict and litigation (Department of Justice, 2002). Kaganas and Piper (2002) have argued, in the English context, that a shared care presumption would be fraught with practical and doctrinal problems. Joint custody clearly means different things in different contexts and failing to distinguish between its legal and physical forms can skew the debate. Even American states with a rebuttable presumption of joint legal custody vary substantially in the division of children’s time with each parent from 30% to 50%, and Louisiana is the sole English speaking jurisdiction to have created a rebuttable presumption of equal time (HRSC, 2003). Joint custody does have its place, but its adoption should arise from a child-centred inquiry into its merits in each case - not the seductive attractiveness of advancing the rights and authority
of non-resident parents in their children’s lives in the context of continued international passion for presumptions around shared care.

**Intractable and Vexatious Litigants**

Intractable and vexatious litigants are associated with multiple characteristics including high levels of anger, bitterness, conflict and distrust, intermittent verbal and/or physical aggression, difficulty focusing on their children’s needs, an inability to effectively co-parent and communicate about their children, and a willingness to engage in repetitive litigation, even over trivial matters (Johnston, 2000; Lamb et al., 1997). The projection of blame, allegations of abuse, and sabotage of each other’s parenting time with the child are also hallmarks of these chronic disputes as it is the inter-parental struggle, not the children’s best interests, which assumes centre-stage. At the extreme end there will be parents with psychiatric or borderline diagnoses arising from personality and character disorders, substance abuse and serious psychological problems (Allen, 1998; Johnston, 2000; Kelly, 2001; Richards-Ward, 1999). Some of these will be temporarily disabling, prompted by the immediate distress or crisis of the separation, while others will have more permanent significance, possibly leading to complete alienation of the child from one parent:

This accumulating subgroup of high-conflict divorced couples has come to pose serious problems for society. These families clog the family courts, taking more than their fair share of available resources. Their children are substantially likely to be clinically disturbed. (Lamb et al., 1997, p. 396)

A high degree of conflict was found between those parents who brought their cases to court in a random sample of 430 English county court files relating to residence (253 cases, 59%) and contact (177 cases, 41%) disputes (Smart & May, 2004). Residence cases were resolved quickly, with almost half concluded within three months, and 89% within one year. Contact cases took longer to resolve, although 61% were dealt with within nine months, but 30% took longer than one year. Protracted residence and contact disputes lasting longer than one year mainly involved allegations of violence, harassment, drug use, inadequate care of the children and/or child sexual abuse. These allegations made by and
against the parents tended to escalate over time, social service agencies were frequently involved, and the family members lived quite difficult lives. Another form of long-standing dispute involved the 14% of cases (60) which kept returning to court despite having been previously resolved at an earlier hearing. Court returns were intermittent and related to the flaring up of conflict between the parents over the obstruction of contact or unreliable and irresponsible parental conduct.

The court process can be highly reinforcing for intractable litigants because their personal focus on their own needs and rights corresponds to some degree with the legal system’s focus on a person’s right to due process (Garon & Whitfill, 2003). This means the Family Court cannot just walk away from the families engaged with it, although the court’s powers to restrict repeat, particularly vexatious, applications without leave have been strengthened in recent times (Boshier et al., 1993). Courts need the ability to shunt high conflict cases into a system designed to deal effectively with them (Johnston, 2000). In Maryland, such families who have run the gamut of court services and hearings, are referred to a lawyer or mental health worker (or in really difficult cases to both working together as a team) to act as arbitrator on routine disputes that arise (Garon & Whitfill, 2003). Other American states send chronic high-conflict litigants to Special Master programs where experienced custody evaluators, mediators and family law attorneys are given limited and court-ordered authority to settle parenting disputes (Kelly, 2001). This dramatically reduces relitigation rates, with most parents feeling satisfied and experiencing decreased conflict with their ex-partner (Kelly, 2001).

While the court’s authority is thought necessary to contain the strong emotions evident in hostile family situations (Children Act Sub-Committee, 2001), English research is challenging the effectiveness of the courts in this field (Buchanan et al., 2001a; Trinder et al., 2002). Qualitative interviews conducted with 140 parents and children from 61 families who had been involved in contested and uncontested contact arrangements identified nine different types of contact arrangements within three umbrella groupings labelled ‘consensual committed’, ‘faltering’ and ‘conflicted’ (Trinder et al., 2002). Few,
if any, adults in the sample behaved perfectly to each other, and many experienced great difficulty in talking with their children about sensitive issues, including contact arrangements. Where contact did not work this was primarily due to parents’ lack of commitment to contact and the existence of parental conflict. Existing legal interventions were found to have limited capacity to facilitate contact or to reverse any deterioration in contact relationships. While solicitors were the most commonly utilised form of professional support for parents, they were rarely able to improve their client’s commitment to unwelcome contact arrangements, and applications for court orders tended to fuel, rather than resolve, conflict. Where the court did lay down a tightly defined contact schedule in the ‘ongoing battling’ group this, in itself, became a source of conflict and further entrenched parents’ positions. The only positive contribution of court involvement was with the ‘contingent contact’ group who found both solicitors and judges to be supportive of their concerns. The researchers concluded that the legal system not only has a limited capacity to repair or facilitate human relationships, but also has the potential to increase stress and conflict (Trinder et al., 2002). The time and money spent trying to impose solutions through the courts would, they thought, be better invested in therapeutic services directed toward improving relations between parents, and between parents and children, to assist them to find solutions themselves.

**Enforcement of Court Orders**

The enforcement of court orders has become a significant concern (Law Commission, 2002c, 2003), although it is an issue which has polarised the various sector interest groups. Some men’s groups express considerable frustration at what they perceive to be the passivity of the Family Court in the face of blatant non-compliance or obstruction by mothers over court orders for contact. Conversely, mothers express irritation at the court’s inability to encourage or force unwilling non-resident parents to establish and maintain a contact regime with their children. Women’s groups are also outraged at the prospect of harsh sanctions, including imprisonment, for mothers they perceive as caring parents who are unwilling to force reluctant children to participate in court-imposed contact with unsuitable or violent fathers.
Concerns about the breaching of contact orders and the insufficiency of existing sanctions to deter the gate-keeping parent has led to courts adopting a tougher stance to resolve the dilemma of demonstrating the law has ‘teeth’ and must be obeyed, whilst also acting in the child’s best interests and ensuring their protection (Bailey-Harris, 2001; Boshier, 2005b; Law Commission, 2003). Sturge and Glaser (2000) advanced a set of principles to guide the imposition of direct and indirect forms of contact. Other initiatives have been preventive (aimed at improving communication between parents and educating them about their responsibilities towards, and the benefit of meaningful contact for, their children); remedial (directed to resolving parental conflict); and sanctions including court action as a last resort when there is deliberate and persistent disregard for a court order. The imposition of warrants to enforce a parenting order, community service orders, good behaviour bonds, compensatory contact orders, substantial fines, costs orders, a finding of contempt, and (threats of) imprisonment have been proposed (Bailey-Harris, 2001; Boshier, 2005b; Children Act Sub-Committee, 2001; Rhoades, 2003, 2004). The COC Act 2004 increases the means by which the New Zealand Family Court “can enforce an order as well as the strength it can employ to do so” (Boshier, 2005b, p. 6). Punitive approaches (such as contempt, fines and a change of custody) are, however, often disfavoured because their imposition may have damaging consequences for the children and fail to address the complexity of the issues involved in the denial of contact (Pearson, 1999).

Changes in Terminology to Reflect New Post-separation Parenting Ideologies

The terminology governing post-separation parenting has been the subject of considerable international criticism and reform (Ministry of Justice & Ministry of Social Policy, 2000; M. Wilson, 2002). ‘Custody’, ‘access’ and ‘guardianship’ were particularly disfavoured terms because of their outdated connotations with the ownership and control of children. This language was thought to encourage notions of winning and losing, was generally disrespectful of children’s rights and collaborative parenting, and was associated with inflaming the tendency of separated parents to engage in disputes over their children (Ministry of Justice & Ministry of Social Policy, 2000). A 1988 survey
revealed that two-thirds of New Zealand Family Court judges considered these terms unhelpful and preferred the phrase ‘shared parenting’ (Hall et al., 1993a). Lawyers’ views on the language were similar (Hall et al., 1993b).

The UK Children Act 1989 reconstituted parents’ role as one of parental responsibility, rather than parental rights or guardianship and introduced residence and contact orders. Australia adopted the same terminology in 1995, and calls were made for New Zealand to follow suit (von Dadelszen, 1995). The language encapsulated the new ideology governing post-separation parenting and was regarded as much more than a mere semantic exercise (Fricker, 1996). However, the amendment to statutory language has been found to have little impact on parental and professional behavioural change (Davis & Pearce, 1998; Maccoby & Mnookin, 1992). Australian research has concluded that the Family Law Reform Act 1995 has not been successful in creating a new normative culture of co-operation between parents, but has rather instituted a new emphasis on the rights of non-resident parents, with a subsequent increase in the number of disputes over children reaching the courts (Armstrong, 2001; Dewar & Parker, 1999; Graycar, 2003; Rhoades, 2000a, 2000b; Rhoades, Graycar & Harrison, 1999, 2000; Smyth et al., 2001):

[The Act] seems to have intensified the pre-existing dispositions of parents. Therefore those parents who were inclined to agree now have a much richer range of resources with which to frame that agreement, while those parents who were inclined to disagree now have a much more powerful armoury at their disposal. (Dewar & Parker, 1999, p. 108)

The Australian Government (2004) has recently suggested replacing residence and contact with ‘parenting orders’, which is the same phrase adopted in the New Zealand COC Act 2004.

VII Therapeutic Initiatives to Humanise Family Law Proceedings

The combative, or gladiatorial, approach to legal dispute resolution, with its reformulation of personal difficulties in a way that distances them from the client’s lived reality, has led to much concern about the effectiveness of an
adversarial decision-making process (Anderer & Glass, 2000; Maxwell, 2000; Shone, 2004; Tesler, 2000). Buchanan and Bream (2001) found that 84% of all parents in their study experienced disruption to their normal functioning following parental separation, and that 38% were still having emotional problems at the follow-up interviews one year later. Complex social situations, including a history of domestic violence, poverty and a non-marital relationship with the other parent, were significantly associated with ongoing poor parental mental health. Children, especially sons and younger children, also showed heightened emotional and behavioural difficulties. Judicial processes were found to have had a lasting positive impact on some family members, while other parents’ stressful court experience contributed detrimentally to their well-being scores. These findings led Buchanan and Bream (2001) to question whether separating parents need a therapeutic, rather than a forensic, service given the myriad of events and challenges they face when a significant relationship disintegrates.

Supplementing procedural fairness with compassion, by humanising court decision-making, has been the focus of several new initiatives in the family law field (King, 2003). These strive to bring the process and the decision-making power closer to the people whose lives are affected, use interdisciplinary resources to advantage, and make effective use of social science research knowledge within the law (Taylor, 2003). Therapeutic jurisprudence (Wexler & Winick, 1996), and its off-shoots - collaborative law (Tesler, 2000), preventive lawyering (Anderer & Glass, 2000) and relational ethics (Shone, 2004) - provide a theoretical framework and practical tools to help people feel better, not worse, after dealing with the family justice system.

Therapeutic Jurisprudence

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent, with a particular focus on the law’s impact on a client’s emotional life and psychological well-being (Wexler & Winick, 1996; Stolle, Wexler & Winick, 2000). It regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that produces therapeutic or anti-therapeutic consequences. This enables the previously under-appreciated influence of
human, emotional and psychological factors to be explored in the legal process. Such values as sensitivity, an ethic of care, connectedness, interpersonal relations, and conciliatory outcomes are significant components of therapeutic jurisprudence, but do not trump other values like justice and due process (Brookbanks, 2003; Snow & Friedland, 1992; Wexler & Winick, 2003).

Therapeutic jurisprudence was initiated in the mental health field, but quickly expanded to employment law, criminal offending and sentencing, torts (compensation following accidental personal injury), and the military. Given the distressing impact of the adversary process in the context of divorce and child custody disputes, family law was also a natural environment for its application (Weinstein, 1997). Instead of encouraging the parties to expose what they considered to be the worst aspects of their former partner, as a means of increasing the likelihood of them being awarded custody, therapeutic jurisprudence looks for other, less damaging, ways to resolve these issues and preserve a meaningful relationship between the two parents (King, 2003). The temperament and skill of the professionals are critical in promoting dialogue rather than contentiousness, giving clients the opportunity to state their perspective, encouraging consideration of the parties underlying levels of satisfaction, and explaining the reasons for various decisions. Clients who feel the process was fair are also more likely to comply with agreements and court orders (Wexler & Winick, 2003).

The New Zealand Law Commission (2004) has given consideration to therapeutic jurisprudence as one of the influences on the restorative justice movement within the criminal justice system. However, its application within family law processes has, to date, been less prominent (Brookbanks, 2003; Taylor, 2003).

Relational Ethics

Relational ethics emphasises six key themes – mutual respect, engaged interaction, embodied knowledge, uncertainty and possibility, freedom and choice, and the environment – to enable a lawyer or judge to care about their clients while still behaving professionally (Shone, 2004). It recognises human
interconnectedness and the role the environment can play in encouraging or stifling trust, openness, participation and creativity in relationships and conversations.

**Collaborative Law**

Collaborative law emerged in the early 1990s as “the inspiration of a single disgusted [American] family lawyer” (Tesler, 2000, p. 199). It involves two clients and two collaborative lawyers working together to reach an efficient, fair, and comprehensive settlement of all issues in dispute between the parties:

> The process involves binding commitments to disclose voluntarily all relevant information, to proceed respectfully and in good faith, and to refrain from any threat of litigation during the collaborative process. (Tesler, 2000, p. 200)

Collaborative lawyers will not represent their clients if the process fails to reach a settlement and either party wishes to have the matter resolved in court. The case is then transferred to adversarial counsel. Experts can be utilised within the collaborative law process, but only as neutrals, jointly retained by both parties. They, too, are disqualified from further involvement if the case goes to court.

Lawyers need a whole new array of skills to practice collaboratively. They ‘retool’ how they think, speak and behave, how they relate to the client and the other party and their lawyer, and how they conduct settlement meetings (Tesler, 2000). The difference between a lawyer’s traditional role and collaborative law lies in the profound impact the formal written commitments made at the beginning of the process have upon the state of mind of the parties and their lawyers:

> Suspicion and paranoia decline dramatically; this is both because most of the process takes place in the presence of both parties, and because the explicit commitment on both sides is that Collaborative Law counsel will withdraw if they have any reason to doubt the good faith of their own clients. … Both parties and both lawyers enter a creative problem-solving mode in which all build on the ideas emerging around the table. In that situation, surprising solutions can emerge that would have been unimaginable in a conventional negotiation. The process encourages
imaginative lateral thinking at a high level among all four participants from the start. (Tesler, 2000, pp. 202-203)

**VIII Family Court-based Initiatives to Reorient Service Delivery Processes**

Family Court services are currently being reshaped in several jurisdictions (most notably, Australia) with significant implications for the professional locus of control over service delivery components (particularly intake and mediation). These initiatives vary in their magnitude from modest tinkering with existing court processes (for example, family care conferences, the Single Docket system in Auckland, the Majellan Project in Melbourne, and the Children’s Cases Program (CCP) in Sydney), through to the comprehensive reorientation of existing family law systems (for example, the Family Court of Western Australia, and Australian Family Relationship Centres). The complexity of these proposals is fuelled by debates over whether intake and conciliation services should be located within the Family Court, or externally in the community, and by how the roles of the judiciary and other professionals are envisaged in the new differentiated pathways.

**Family Care Conferences**

Family care conferences, modelled on the family group conference (FGC) concept pioneered in the CYPF Act 1989, have been proposed as an alternative means of helping family members reach agreement over children’s post-separation care arrangements (Atkin, 2003; Hassall & Maxwell, 1992a; 1992b; Jefferson & Parsons, 1998; Mahony, 2003a). They would align the Family Court’s practice in guardianship and parenting matters more closely with the essential role played by FGCs in the legal processes governing care and protection and youth justice issues. While international interest has been expressed in family conferences (Schepard & Bozzomo, 2003), the concept has not been without its critics in New Zealand who are concerned about the undermining of children’s rights and interests, the reduction in flexibility, and the increase in litigation and cost (Abrams, 1992; Austin, 1994; Family Law Committees of the Auckland (1993) and Wellington (1992) District Law
Societies; Henaghan & Ferguson, 1992). The COC Act 2004 has not adopted family care conferences, but rather continued with the existing legal processes for determining parental disputes over children.

**Single Docket System, Auckland**

In 2000, the Auckland Family Court Registry successfully implemented a single docket system allowing cases to remain with one judge, or a team of two, during their progress through the court (Law Commission, 2002a, 2003). A third of the existing files at the registry, and every third file thereafter, was randomly assigned to the two docket judges. The remaining two-thirds of existing and new files were assigned to the other judges rostered in the traditional manner.

At the first call of a matter, the judge would hear from both parties either directly or through their counsel, and also from the child’s lawyer. The primary purpose of this procedure was to explore settlement and to create a ‘face the facts’ culture for parties to understand the likely parameters of adjudicated settlement (Doogue, 2001). Parties valued this positive directional discussion with the judge, who was perceived as an influential authority figure carrying considerable weight in the parents’ willingness to consider a child-focused settlement. Often hearings were stood down to enable further discussion between the parties. A high proportion of cases settled at this point, but where they did not consideration was given to a referral back to counselling/mediation and the need for any reports or affidavit evidence. Psychologists were at times appointed by the judge under section 19 of the Family Proceedings Act 1980 to intervene in a therapeutic role to help settle the dispute. A hearing was allocated when matters still could not be settled.

Delays were avoided through the docket judges fiercely defending a no-adjournment policy and requiring compliance with timetabling orders. The timely and effective disposition of cases was achieved with the majority of guardianship matters being determined between 8-21 days of being set down for the preliminary or final hearing (Doogue, 2001). Very few matters required a long cause hearing (one day or more) compared to four times as many in the traditionally allocated group of cases. The judge’s status and knowledge of the
law, together with the exercise of judicial control of the process from the outset, were seen as critical to the docket’s success (Doogue, 2001). It has now been expanded to involve the six current judges at the Auckland Registry (Law Commission, 2003).

**Majellan Project, Melbourne**

The Majellan Project was initiated in the Melbourne and Dandenong Family Court Registries in 1998 as a judge-led multidisciplinary approach to essentially fast-track residence and contact cases involving serious family violence and child abuse allegations. Research on 100 contact disputes tracked through the project found that sexual abuse allegations were substantiated in 47% of cases, and half of those led to criminal charges being laid (Brown, Sheehan, Frederico & Hewitt, 2001, 2002). Allegations made by parents against each other were substantiated in most cases. Nearly all the cases were settled by agreement between the parties, with only 13% going to a full trial. Many cases ended in supervised contact or no contact between the child and the perpetrator (over half of whom were the child’s father).

The project achieved significant results in terms of time saved, agreed outcomes (consent orders) and reduced stress on litigants. The number of court hearings in the pilot cases was reduced by 50%, with consequent fiscal savings, and the breakdown rate of final orders was reduced from 37% to 5%. Most importantly, the numbers of highly distressed children were reduced from 28% to 4%. Early and thorough intervention by the Family Court was considered crucial in giving stability to the children at the centre of these disputes, and all participants expressed extreme satisfaction with the project.

**Children’s Cases Program, Sydney**

The CCP commenced at the Family Court’s Sydney and Parramatta Registries in 2004 to offer a simpler, more child-centred, informal and judicially active approach to the hearing of litigated parenting disputes (Boers, 2005; Dessau, 2005; Nicholson, 2004). Rather than the court acting as a forum for the rehashing of past grievances between the parents, the emphasis is instead placed
on the parents’ future plans for their children. The CCP was developed after the more inquisitorial approach of European civil law systems for children’s cases was adapted to the Australian legal context (Boers, 2005; Sandor, 2004). European judges take a much more active role in managing cases and determining what evidence is material to the decisions needed, and this has also been favourably regarded in New Zealand (Carruthers, 1996).

The CCP is targeted toward cases concerning children (with the exception of international child abduction, contempt and contravention proceedings) that have failed to be resolved during court-ordered mediation (Nicholson, 2004). Although the way the CCP case is heard is quite different, the substantive law remains unchanged. Participation is voluntary and requires the informed consent of all parties. CCP cases enter the hearing process more rapidly than those on the litigation pathway. The judge plays a leading role in relation to the issues to be determined, the evidence that is called and received, the witnesses appearing, and the manner in which the hearing is conducted (Dessau, 2005).

An external evaluation of the first 100 cases from each registry is currently being undertaken on the perceptions of parties, their legal representatives, and other stakeholders (Dessau, 2005). As well, the CCP’s impact on the children who form the subject of the proceedings is being evaluated (Sandor, 2004). Preliminary findings from the comparison with other cases proceeding along the traditional litigation pathway are already showing a reduction in CCP court time, with judges reporting they are better able to maintain the parties’ focus on the child and to obtain the information they need to make a decision (Dessau, 2005). CCP family feedback is also positive:

The parties feel as though they are being heard, as they get the opportunity to address their decision maker direct from the outset, and express their point of view. There is also an element of empowerment for the parties in this process in that they are not having an edited version of their story presented for them, and to an extent they control the agenda. The experience with the judge is interactive, and there is more of a chance the parties will come away feeling they have had a significant input in constructively resolving their dispute. (Boers, 2005, p. 11)

Lawyers, however, remain anxious about the waiving of the rules of evidence and their potential exposure to professional negligence claims because they no
longer control what issues go into the evidence presented. Boers (2005) argues that it is lawyers’ resistance to their loss of control over the proceedings that is leading them to be slow to accept the change in culture brought about by the CCP. If the final evaluation proves successful, it is likely the CCP will be extended into other court registries as the new model for the resolution of children’s cases within the Family Court of Australia (Australian Government, 2004; Boers, 2005). The New Zealand Family Court considers this “Australian experiment” to be “worthy of close consideration”, although its implementation here would require Parliamentary sanction since it goes beyond the mere regulation of judicial procedure (Boshier, 2004a, p. 13).

**Columbus Project - Family Court of Western Australia**

The Columbus Project, implemented in 2001, is an ambitious reorientation of Australia’s only independent state-based family law system. It grew out of concern that the court was not achieving optimum outcomes for separating parents and their children because of the increasing tendency to formalise proceedings within an adversarial framework. Building on the Magellan Project, the Columbus Pilot was designed to assess the efficacy of a comprehensive approach to expediting cases where there had been allegations children were at risk from child abuse, sexual abuse and family violence (Kerin & Murphy, 2003). Its conceptual framework is based around informality, therapeutic jurisprudence, individualised case management, a multidisciplinary approach, negotiation rather than litigation, and early intervention primary dispute resolution.

Magistrates alerted to violence or abuse issues immediately refer the case to the court counselling service where the parties are separately interviewed to assess the situation and level of risk (Murphy, Pike & Kerin, 2005). Eligibility for referral onto the Columbus programme, or into the control group receiving regular court services is then determined. Once a case is included in Columbus it is individually managed (not just fast-tracked like Majellan) through a series of family conferences until either a stable, safe contact regime is established or the matter is referred back to the general court system. Immediately prior to the
family conference, the parents meet again with their counsellor, who then briefs the registrar to update the parents’ applications and affidavits. Following the conference the parents debrief with the counsellor to check their understanding of the outcome. External education, support and therapeutic services (including the MDF programme) are essential components of the new integrated service delivery model.

The Columbus Project has been fully evaluated via a multi-method approach to track demographic and court engagement profiles of the sample families (Murphy & Pike, 2002; Murphy, Pike & Kerin, 2005), to compare the costs and outcomes of the Columbus and control groups (Murphy & Pike, 2003a, 2003b, 2004), and to ascertain the views of family members and professional service providers on their Columbus experience (Murphy & Pike, 2003a, 2004; Pike et al., 2005). The average time that a Columbus case took from identification to the first conference was two weeks, thereby achieving the benchmark of early intervention (Murphy & Pike, 2003b). A stable contact and residency regime was in place for 78% of Columbus clients, but only 54% of the control group, within 25 weeks of first filing (Murphy & Pike, 2002). A mapping exercise to track staff-time intensity and their imputed cost, based on relative hourly costs of judges ($395 per hour), registrars ($273), and counsellors ($100), calculated the average imputed cost of Columbus cases through to the end of the first two-hour family conference at $2544, and control cases at $1330 (Murphy & Pike, 2003b). However, half of the control group had not achieved a stable or acceptable outcome and were continuing with further court contact at an imputed cost of $3000 for each trial day. Thus the initial high cost of the Columbus process was justified purely in terms of avoiding this increasingly more expensive trial process (Murphy & Pike, 2003a, 2004).

Columbus parents most appreciated the informality of the conferencing process and the opportunity to tell their story and have their views acknowledged (Murphy & Pike, 2003a, 2003b, 2004). They liked their central (rather than passive) role in the process, and reported that the project focused them on their children’s needs (Pike et al., 2005). Many parents gained comfort from the early presence of the registrar and felt this impartial and
knowledgeable authority figure was important in reaching final outcomes. Interdisciplinary understanding and collegial support was reported by stakeholders as having developed between the judicial officers, counselling staff and external service providers (Murphy & Pike, 2004; Pike et al., 2005). However, the intricacies of competitive tendering, coupled with the growth in referrals, made it difficult for external agencies to respond to the additional demands being placed upon them by Columbus (Pike et al., 2005). Protocols for managing referrals, information sharing and collaborative practice, as well as secure funding, were vital next steps in the integration process.

Columbus has now been extended to include matters involving drug and other substance abuse allegations (Kerin & Murphy, 2003). A counsellor-led case assessment conference was implemented in 2004 (Murphy, Pike & Kerin, 2005) and parenting plans are underway (Murphy, Pike & Campbell, 2005). A new culture and model of practice has emerged in the court, which is more aligned with the original concept of a helping court (Kerin & Murphy, 2003), although, to date, little attention has been paid to child-inclusive practices and cultural issues.

**Family Law Pathways / Multidisciplinary Early Intervention Approach**

Since Family Courts were established there has been an emphasis on alternative (or primary) dispute resolution processes, but this has mainly occurred within the framework of court proceedings. Attention is now turning to the need for multiple pathways with different services and timeframes to resolve parenting issues in the aftermath of parental separation. An American model of differentiated case management has simple, standard and complex case processing tracks (Kuhn, 1998), while the Family Law Pathways Advisory Group (2001) identified three primary routes to match Australian parties’ needs with an improved range of services:

- *self-help pathway* for people able to reach their own agreements with basic advice and assistance;
- *supported pathway* for those unable to settle their own arrangements, but who could achieve this with assistance from appropriately targeted support services; and

- *litigation pathway*, the last resort and least preferred option, except for those cases requiring urgent protection due to family violence/child protection issues or those unable to resolve their disputes by any other means.

Ideally, these pathways should range across a continuum from voluntary and least coercive, to highly controlling and coercive (Children Act Sub-Committee, 2001; R. Freeman, 1998; Kelly, 2000). Parent education, self-help groups, legal information and representation, counselling, mediation, arbitration, settlement conferences and judicial determination are the ingredients identified in research literature and professional commentaries as being essential services (Kelly, 2000). With the current emphasis on children’s rights, a child-centred range of services should also be added (Steinberg, Woodhouse & Cowan, 2003). Specialised services and more intensive interventions would be reserved for the top-end high conflict cases, while low conflict, low stake cases would proceed on a simplified track with reduced lawyer contact and court involvement (Pearson, 1999).

A key issue is whether the ‘self-help’ and ‘supported’ pathways should be community based and independent of the Family Court, or connected with the court but based in the community. Some prefer the latter approach, so that cases requiring quick access to the court can be transferred across easily (Tapp, 2002), while others propose a separate gateway to divert separating couples away from lawyers or the court (Australian Government, 2003, 2004; Green, 2003; Howard, 2003, 2004; HRSC, 2003).

Australia is devoting substantial funding (A$397.2 million) into its current reforms, with 65 independent *Family Relationship Centres* being developed as new visible entry points to the broader family law system (Howard, 2005; Parkinson, 2005; Williams, 2005). The centres will be run by community-based organisations and will offer a range of free information, advice and dispute
resolution services to separated families through both individual, joint and group sessions with a parenting adviser. To achieve “a cultural change in the pathways people take” to resolve parenting disputes, the centres aim to reduce separated parents’ reliance on lawyers (Parkinson, 2005, p. 1).

Community-based multidisciplinary centres to assist separated families have been suggested, but never implemented, in Canada (R. Freeman, 1998) and New Zealand where they have been variously named as a reception centre (Beattie et al., 1978), Family Conciliation Service (Boshier et al., 1993), or community resource centre (Tapp, 2002). Multidisciplinary centres do exist in some American cities, but lack a state-wide or national presence (Kuhn, 1998; Woodhouse, 2002, 2004a). Multidisciplinary partnerships are sometimes promoted to avoid vesting sole responsibility with a court (Johnston, 2000) and to ensure complex family disputes benefit from an interdisciplinary approach (Bailey-Harris, 2001; Doogue, 2001).

Whatever the gateway into the family law system, there is agreement that interventions should start immediately following separation with the most benign and least expensive services, and step up to the most coercive and expensive forms of justice for those parents unable to reach agreement or whose cases are characterised by child abuse/neglect, family violence, substance abuse and mental illness (Kelly, 2000, 2001; Kerin & Murphy, 2003). Opportunities to obtain a settlement should be available at each stage of the hierarchy, together with the ability to move families between the community and litigation pathways as the need arises.

IX Cultural Issues

It is impossible to review the operation of the New Zealand Family Court without taking into consideration its impact on the tangata whenua, as cultural issues are intimately entwined in clients’ perceptions of the court’s effectiveness.
European colonisation during the 19th century led to the imposition of an English-derived legal system on both Māori and Pākehā alike (Beattie et al., 1978). The laws and procedures imported from Britain seriously impeded Māori access to the justice system, and undermined Māori beliefs and practices, since they incorporated “social perceptions alien and sometimes offensive to Māori” (Mahony, 1993, p. 7). The eurocentric culture of the legal system has continued to cause difficulties for Māori:

Through consultation with Māori, we heard a strong and universal view that the mainstream courts are failing Māori because the processes, language, and culture are mysterious and intimidating. (Law Commission, 2004, p. 53)

Particular concerns are evident with respect to the law governing domestic relations which is almost exclusively based on the Pākehā nuclear family model, and takes little account of the cultural values and practices of Māori (Cartwright, 1989; Chadwick, 2005; Hall & Metge, 2002; Ruwhiu, 2001; Somerville, 2005). While Māori customary law was not completely ousted in 1840, it has only really been since the Māori renaissance of the 1980s that orthodox family law has begun to recognise and accommodate Māori tikanga (Atkin, 1992-1993; Austin, 1994; Department of Social Welfare, 1986; Royal Commission on Social Policy, 1988).

This resurgence in Māori indigenous rights is based upon the special partnership that exists between Māori and Pākehā arising from the Treaty of Waitangi. Signed between Māori and the British Crown in 1840, the Treaty is regarded as the founding document of New Zealand, but was for many years largely disregarded by Parliament and the courts. More recently the Treaty has become part of our domestic jurisprudence (with its principles being enshrined in some statutes) and given rise to a policy of biculturalism – two peoples within one nation (Mahony, 1993). Māori rights of control over their taonga (including their land, fisheries and language) were enshrined in the Treaty. However, land confiscations, wars, urbanisation, Christian morality, Victorian values and racist education policies had a devastating impact on traditional Māori lifestyles (Cram & Pitama, 1998; Hopa, 1996). Māori grievances over breaches of the Treaty led to the creation of the Waitangi Tribunal and a systematic settlement
process to compensate iwi for past wrongs. The Treaty has now become part of official discourse and the Government has directed that it “must be a fundamental reference point for the development of family policy in New Zealand” (Ministry of Justice & Ministry of Social Policy, 2000, p. 5). However, the Treaty’s applicability to legal disputes concerning the care of children currently remains uncertain (Somerville, 2005).

Māori rarely use the courts to enforce their rights (Law Commission, 1999, 2001, 2004) and this appears true also of the Family Court. Māori are generally reluctant Family Court users and are not currently proportionately represented in guardianship and parenting disputes, or in relationship property applications (Advisory Committee on Legal Services, 1986; Law Commission, 2002a, 2003; Somerville, 2003). It is unclear whether this is “because they spurn this system or just feel they have no use for it” because they are utilising more traditional methods for resolving family disputes (Law Commission, 2002a, p. 61). Consultations with Māori have revealed their negative perceptions of the court as dehumanising, intimidating and culturally insensitive (Law Commission, 1999, 2003, 2004). Feelings of inadequacy, shame and embarrassment are likely impediments to participation given the central role of whānau in reaching important family decisions (Opai, 2003). Tamariki and rangitahi are regarded as the taonga of their community, and part of the sovereignty reserved to Māori by the Treaty is the right to determine issues affecting the welfare of their children within Māori institutions and processes (Austin, 1994; Law Commission, 2001; Pitama et al., 2002; Treadwell, 2002):

In Māori thinking, children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately or in association, outrage Māori sensibilities. Children belong not only to their parents but also to the whānau, and beyond that to the hapū and iwi. They are ‘a tatou tamariki’ (the children of us many) as well as ‘a taua tamariki’ (the children of us two). … Parents are expected and expect to share the care and control of their children with other whānau members. (Hall & Metge, 2002, p. 53)

While the Family Court’s emphasis on reconciliation and conciliation following relationship breakdown is consistent with Māori thinking (Hall & Metge, 2002), Māori have a major difficulty with the exclusion of whānau, hapū
and iwi from court dispute resolution processes. They prefer to resolve family law issues through a collective process of family and whānau consensus decision-making, rather than placing responsibility for dispute resolution with an externally powerful body like a court. The restrictive orientation of court services, as a private dispute between two adults, is thus contradictory to Māori collective values. The socio-economic position of Māori has also affected their ability to access legal services and the court. The assimilative policies arising from colonisation have resulted in socio-economic disadvantage, with many Māori (especially young sole mothers) trapped in poverty (Cram & Pitama, 1998). Māori women are most likely to be participating in the Family Court by virtue of their status as victims of domestic violence, or as mothers of children in need of care and protection (Law Commission, 1999, 2002a).

The effect of the Guardianship Act 1968 on family life was a particular focal point for protest about the cultural insensitivity of parenting proceedings (Austin, 1994; Hall & Metge, 2002; Hipango, 2003; Law Commission, 2002a; Opai, 2003; Pitama et al., 2002; Somerville, 2003, 2005; Treadwell, 2002; von Dadelszen, 1995). Since children are considered the responsibility of their whānau, the Act’s lack of recognition for their role in raising and nurturing children was inconsistent with tikanga Māori. The need to remedy this deficiency was a driving force behind reform of the Act (Ministry of Justice & Ministry of Social Development, 2001; Ministry of Justice & Ministry of Social Policy, 2000; Pitama et al., 2002; M. Wilson, 2002) and the Family Court (Law Commission, 2003). However, public views are mixed about the need for Māori values and aspirations to receive special attention in the law. Half of the submissions on this point in the review of the Guardianship Act considered that “all families should be treated the same way – the same responsibilities and rights apply within all families” (Ministry of Justice & Ministry of Social Policy, 2001, p. 30).

The CYPF Act 1989 is heralded as New Zealand’s most culturally responsive family law statute (Austin, 1994; Chadwick, 2005; Hall & Metge, 2002; Hikaka, 1998; Law Commission, 2002a; Mahony, 1991b; Somerville, 2005). It explicitly respects the “values, culture and beliefs of the Māori people” (section
and recognises the importance of maintaining and strengthening “the relationship between a child or young person and his or her family, whānau, hapū, iwi and family group” (section 5(b)). Family members are also authorised to participate in FGCs (sections 22-29). This recognition of the legitimate interests and concerns of Māori in the CYPF Act prompted the call for reform of the monocultural focus of the Guardianship Act toward a model based on the 1989 Act (Mahony, 2003a; Treadwell, 2002). Adapting the FGC to other domestic disputes, like child custody, was suggested as one explicit way of better incorporating Māori perspectives into private law proceedings (Atkin, 1992-1993; Chadwick, 2002; Hall & Metge, 2002; Hipango, 2003).

Unlike section 187 of the CYPF Act, cultural reports were never available under the Guardianship Act 1968 (although a cultural report via section 14(1)(f) was highly persuasive in Re T (Custody and Guardianship) [2000] NZFLR 594). This inconsistency was remedied with the COC Act 2004 which more closely aligns whanaungatanga with the Family Court processes concerning Māori children. The court must now take greater account of a child’s cultural identity and preserve and strengthen their relationship with their whānau. A wider range of family members can also now apply for parenting orders as of right or with the leave of the court, and parties can ask the court to hear a person on the child’s cultural background. The greater use of Māori cultural advisers in every case involving a Māori family has also been proposed as an interim stopgap measure until sufficient numbers of Māori work in the family law system (Chadwick, 2002; Somerville, 2003; Treadwell, 2002).

It is generally accepted that Māori need a family dispute resolution model more suited to their traditions and needs (Boshier et al., 1993; Cartwright, 1989; Chadwick, 2002, 2005; Hall & Metge, 2002; Hipango, 2003; Law Commission, 2002a, 2003, 2004; Mahony, 1991b, 2003a; Treadwell, 2002). The challenge is how best to “reconcile the differences when there is only one law, one Family Court and two cultures” (Chadwick, 2002, p. 92). There have been four instances in recent years of Māori defying the law and refusing to recognise the jurisdiction of the Family Court (Treadwell, 2002). The more radical sectors of Māoridom hold “a genuine and determined opposition to the existence and
authority of the Family Court” (Treadwell, 2002, p. 8), although public calls to sabotage the court and assert separate Māori sovereignty have been relatively infrequent in the family law field.

Most activity has instead focused upon adapting what has essentially been a monocultural family law system to incorporate Māori tikanga and encourage Māori participation. This is based on the belief that outcomes from Māori access to justice would improve “if the courts were more reflective of Māori culture and values” (Law Commission, 2004, p. 53). Efforts have therefore been directed toward reforming the substantive law, revamping Family Court services, retraining existing staff to better understand and meet the needs of Māori clients, recruiting more Māori staff, and contracting Māori service providers. On rare occasions, cases have been heard by judges on marae instead of in courtrooms (Atkin, 1992-93). The Family Court has also found various ways to take Māori cultural values into account, for example, by recognising a Māori child’s whakapapa and the importance of whanaungatanga in specific cases (Somerville, 2003, 2005), and by adapting counselling services to incorporate whānau hui (Law Commission, 2003). Treadwell (2002) has called for a Royal Commission of Enquiry to investigate how Māori cultural and spiritual values could be built into a single, unified system to overcome current disaffection. Chadwick (2002) and Somerville (2003, 2005) would like to see the system redesigned so that the different cultural pathways of Māori and Pākehā can be respected, but the positive aspects of each combined within the one framework. Demystifying legal jargon, teaching Te Reo and correctly pronouncing Māori clients’ names are all considered important steps (Chadwick, 2002, 2005; Law Commission, 2003; Ministry of Justice, 2003; Somerville, 2003). Amending legislation to enable whānau to attend counselling, settlement conferences, mediation and hearings at the judge’s discretion has also been proposed (Law Commission, 2003). Others prefer that alternative forums be developed alongside the Family Court to provide an option for Māori – for example, extending the jurisdiction of the Māori Land Court to cover family matters (Advisory Committee on Legal Services, 1986; Law Commission, 2003; Opai, 2003).
Another cultural challenge has arisen with immigrants from nations as diverse as the Pacific Islands, Asia and Europe now an important, and growing, part of New Zealand society. The Law Commission (2003) considers that difficulties in utilising the Family Court “are more likely to arise for first and second generation immigrants, who may have trouble with language as well as culture” (p. 173). The world view of these various ethnic groups, whether New Zealand-born or not, differs from that signified in Pākehā-dominated family laws which emphasise respect for the individual rights of family members. Pacific Islanders, like Māori, have a collectivist orientation and believe that children’s rights must be framed within the context of their family group, rather than independently of it (Suaalii & Mavoa, 2001). “The emphasis is on ‘us’ not ‘me’” (Perese, 2001, p. 5). To date, official efforts to accommodate New Zealand’s diverse multicultural society have revolved around the translation of court pamphlets into other languages (e.g. Hindi) and the preparation of resource manuals for professionals and court staff working with immigrants and refugees (Mahony 2003a). However, it is well recognised that research is needed on alternative dispute resolution methods (Boshier et al., 1993), and that specialist conciliation services should be introduced for those immigrant groups with sufficient local numbers (Law Commission, 2003).

Providing culturally appropriate services to meet the needs of Māori and the many other immigrant groups now comprising our multicultural society will be a key factor in the future success of the Family Court. Statutory provisions, and the processes which govern their application within the Family Court, currently undermine Māori concepts of whanaungatanga and tikanga (Chadwick, 2002, 2005; Somerville, 2003, 2005), and are alien to other cultures as well (Perese, 2001). Māori, as tangata whenua and as Treaty partners, are intensifying the assertion of their rights over many aspects of their lives, including the nature of their relationship with their children. When disputes arise it is clear that the Family Court must be in a position to respond more appropriately than it has in the past. Māori values and methods are not just beneficial to Māori (Hipango, 2003), and it seems likely that a more culturally responsive pathway will emerge from the incorporation of Māori concepts and practices into the delivery
of mainstream services. Most commentators want to ‘build bridges’ or pathways between Māori and Pākehā (Chadwick, 2002; Hikaka, 1998), by finding points of convergence between whanaungatanga and the Family Court (Somerville, 2005), whilst retaining an independent Family Court as a back-up for marae and iwi-based services (Law Commission, 2002a). Allowing whānau, hapū and iwi to participate in court proceedings, and placing emphasis on a child’s cultural identity (through cultural reports or cultural advisers) will be significant steps forward. However, it needs to be acknowledged that others find these adaptations insufficient and are seeking a more radical overhaul of the Family Court. For them, the Treaty will only be honoured when Māori have a true choice of forum within which whānau well-being can be protected and nurtured by Māori for Māori. Quite where the balance will ultimately lie between Māori self-determination (including possible constitutional changes) or the mere adaptation of mainstream family law is as yet an unanswered question. However, a shift in the weighting from one Treaty partner to the other is without doubt.

X Chapter Summary

A primary purpose of this chapter has been to assess whether the dual purpose of efficiency and therapeutic justice has been achieved by the single forum Family Court structure. It seems without doubt that Family Courts are more efficient than the traditional approach of multiple court involvement with the same family over marital and parenting issues. Much American research is still driven by determining the merits and potential application of UFCs within their court system, but in those other jurisdictions where Family Courts have now been operating for around a quarter of a century, this argument is long past and the focus has instead been much more squarely placed on how to improve the single forum system. Efficiency remains a key issue, particularly in light of the considerably expanded workloads faced by Family Courts over time. Case management, differentiated pathways and pilot programmes to evaluate new ways of resolving disputes over children have emerged to help avoid delay, reduce cost, contain intractable or vexatious litigants, and enforce court orders.
However, it is the therapeutic justice goal of the Family Court that has prompted the greatest debate as vocal interest groups, and ordinary consumers (including Māori), protest its partiality and personally dehumanising impact. Clearly, the availability of specialist judges and a specialist family law bar, conciliation processes like counselling and mediation, and interdisciplinary teamwork, have offered distinct advantages over the traditional approach of the law to family problems. Yet anguish continues to be expressed about the court’s inadequacy in achieving therapeutic justice, reducing the adversarial approach, and increasing information and support services for family members.

Lawyers have a long history as the gatekeepers of the relationship breakdown industry. Their, and the courts, domination of separation and divorce decision-making processes is currently forcing some major rethinking, particularly in Australia, about the ideal response to family transitions. Should it (or part of it) remain legally and court focused? Or should adults and children be directed toward community-based services where professional assistance can help them to achieve agreement over future arrangements as well as manage and resolve their personal distress? The phrase ‘therapeutic justice’ encapsulates the tension inherent in this dilemma. What we are witnessing internationally is the retention of the ‘justice’ component via legislative reform (to promote co-operative post-separation parenting and children’s rights) and the reorganisation of Family Court pathways (to reduce lawyer involvement and restrict the judiciary to their protective, enforcement and review functions), while, at the same time, the ‘therapeutic’ component is being embellished externally to the court through the new emphasis on community-based mediation, parent education and support groups, information meetings, and child-inclusive services. Whether this works in parallel with the legal system, or seeks to replace it, is an open question.
Chapter Five
THEORETICAL FRAMEWORK

I Introduction

This chapter discusses the theoretical approaches underpinning my research, which draw primarily on sociocultural and ecological theories of human development, as well as the sociology of childhood and the children’s rights jurisprudence emanating from the UNCRC. The Family Court can be seen to have utilised aspects of each of these theories, although this has probably been, for the most part, a fairly unconscious and piecemeal application of their principles. The one exception is Articles 12 and 13 of the UNCRC which have been highly influential in giving effect to children and young people’s rights to receive information, express their views and participate in the decision-making processes affecting them within the family law system. Generally, though, the Family Court appears relatively uninfluenced by theoretical approaches, and currently lacks an integrated theoretical framework to inform its practice and service delivery.

A sociocultural approach views development as occurring through children’s activities within their social contexts, especially their relationships and interactions with other people. Hence children’s development is profoundly affected by other people, culture and the tools of culture (particularly language), institutions and history (Smith, 1998). An ecological perspective emphasises “the systematic understanding of the processes and outcomes of human development as a joint function of the person and the environment” (Bronfenbrenner, 1992, p. 188). While family relationships may be the most intimate and influential on the lives of individuals, the broader ecology (encompassing the economic, social and physical surrounds) regulate the circumstances of the family, and, in turn, affect people’s interactions with each other. The centrality of context is therefore critical in understanding human development (Garbarino, 2000).
The sociology of childhood has initiated a significant rethink about the nature of childhood and the status of children. This theoretical shift has challenged the idea that children are the passive victims of harmful experiences, and instead focused attention on their role as citizens and social actors with their own views and strategies for active coping within their family and community. Childhood has now come to be regarded as a part of the human life course that is significant in its own right, not merely as a precursor to adulthood.

The final part of this chapter integrates the principles of these sociocultural, ecological, sociological and rights-based approaches through consideration of two key principles, common to all four theoretical domains, which have particular relevance for the family law system – participation, and the role of others in mediating people’s level of functioning.

II Vygotsky’s Sociocultural Theory

The Russian psychologist, Lev Vygotsky (1896-1934), whose writings were discovered by the West in the 1960s and 1970s, is credited with the development of sociocultural theory (Smith, 1998). Interestingly, Vygotsky himself seldom, or possibly never, used the term ‘sociocultural’. Rather, he and his followers spoke of a ‘sociohistorical’ or ‘cultural-historical’ approach to child development which gave primacy to children’s activities in the context of social interactions and relationships (Wertsch, 1991; Wertsch, Del Rio & Alvarez, 1995). Vygotsky’s focus on social processes ultimately led to the widespread questioning of those theories of child development, including that of his contemporary, the Swiss psychologist Jean Piaget (1896-1980), which emphasised the role of individual processes in cognitive development.

Piaget approached children’s learning from a biological perspective, based around the twin assumptions of naturalness and the universality of childhood. His empirical and theoretical work placed great emphasis on children’s internal mental activities that progressed through sequential stages of cognitive development to ultimately arrive at the high-order rationality and logic he deemed characteristic of adults. Piaget’s descriptions of children’s capabilities at various ages had a profound influence on societal expectations of normal
development. When expert-formulated concepts from developmental psychology began to influence the law, it was Piaget’s theory that dominated legislative initiatives and legal/clinical practices regarding children’s competence and the age of consent (Hendrick, 1990; Mayall, 2000a). Understanding his theory is therefore essential for an effective analysis of the law relating to children, as well as being an important precursor to identifying Vygotsky’s significantly different, but now more accepted, orientation to children’s learning and development.

Piaget theorised cognitive development as occurring through four pre-determined stages which progressed in chronological order:

1. The *sensori-motor* stage - birth to two years - “characterised by extreme egocentricity, since the infant sees the world only in her own terms” (Smith, 1998, p. 219).

2. The *preoperational* stage - two to seven years – which marked the beginning of representational thought in children, but involved significant limitations in their thinking as demonstrated by Piaget’s empirical studies of conservation. These required “children to judge whether two amounts (quantity, substance, number, weight, volume, length) are still equal even after their appearance has been changed” (Smith, 1998, p. 6). Children’s grasp of this measure of operational competence determined whether they were operating at a preoperational or concrete operational stage of development.

3. The *concrete operational stage* - seven to 12 years – where children’s stable mental structure meant they were no longer deceived by appearances.

4. The *formal operational* stage - 12 years to adulthood - which exemplifies logical process, scientific rationality, and freedom from domination by immediate experience (Jenks, 1996). At this highest level of cognitive development, the individual is able to think abstractly, to generalise, to deduce, to manipulate, to transform, and to analyse.
Each of these stages of intellectual growth is:

... characterized by a specific ‘schema’ or well-defined pattern and sequence of physical and mental actions governing the child’s orientation to the world. ... [T]he sequencing depends upon the child’s mastery and transcendence of the schemata at each stage. This implies a change in the child’s relation to the world. This transition, the compulsive passage through schemata, is what Piaget refers to as a ‘decentring.’ (Jenks, 1996, p. 24)

Two complementary processes, assimilation and accommodation, provide the dynamic interplay for decentring to occur. These are the key elements in Piaget’s theory of development (Smith, 1998). Assimilation is the process by which the child absorbs and integrates new experiences into existing and previously organised schemata. Accommodation involves the modification of existing schemata, or the construction of new ones, to understand some new environmental demand:

These processes are complementary in that accommodation generates new organizing principles with which to overcome the ‘disequilibrium’ produced by the new experiences that cannot be readily assimilated. Within Piaget’s demonstrations of adult scientific rationality, the child is deemed to have appropriately adapted to the environment when he or she has achieved a balance between accommodation and assimilation. (Jenks, 1996, p. 26)

As children’s abilities were firmly limited by their stage of cognitive development, Piaget considered learning to be subordinate to development (Smith, 1998). His theory is essentially an individualistic account of development with children regarded as active, but isolated, scientists trying to understand the world through their existing cognitive structures and interactions with people and objects in the environment (Bruner & Haste, 1987). Piaget was particularly interested in the development of intelligence, which is based on the individual’s adaptation to the pressures of the environment (Smith, 1998).

Since the 1970s Piaget’s theory has been criticised on several grounds. His ideal of adult cognitive competence is said to stem from a peculiarly Western philosophy based around the Kantian principles of time, space and causality (Archard, 1993). Piaget also underestimated children’s understanding because of the artificial and misleading way he conducted his empirical studies
Children have been shown to actually possess some competencies long before Piaget said they did. Researchers, who changed the way experimental tasks were presented to children, found quite different results to those obtained by Piaget (Donaldson, 1978; Light, 1986). Setting activities into contexts that were humanly intelligible to children, rather than in ways designed to trick them, significantly affected their competence (Donaldson, 1978). Piaget’s view of children’s play as non-serious, trivial activity – “Play is merely diverting fun or fantasy, it deflects the child from his true destiny and logical purpose within the scheme of rationality” - is also regarded as “specifically undervaluing what might represent an important aspect of the expressive practices of the child and his or her world” (Jenks, 1996, p. 27).

Implicit in Piaget’s model is an account of children as immature, irrational, incompetent, asocial and acultural. This conceptualisation has encouraged the view that children are marginalised beings awaiting temporal passage into the adult world where they will become mature, rational, competent, social and autonomous. The idea that children’s thinking progresses inexorably in stages towards some ideal logical level of cognitive development has been challenged, as has Piaget’s view that thinking emerges from inside the child’s head (Smith, 1998). His primary interest in children’s internal mental activity has been at the expense of grounding cognitive development in children’s social experiences. Socioculturalists instead see child development as being deeply embedded in the social context, with children gaining access to their language and culture through social interactions over shared activities (Vygotsky, 1978a, 1978b, 1978c). The social context is not just something which influences performance one way or the other, but is regarded as the fundamental determinant of performance (Ingleby, 1986; Morss, 1991, 1996; Walkerdine, 1988). Piaget did not suggest that social processes had no influence on the child, but rather that they could only do so after the groundwork had been laid by appropriate cognitive development (Wertsch, Del Rio & Alvarez, 1995). Despite Piaget’s acceptance of the importance of children’s social experiences, he believed that
most human environments met children’s minimum needs for environmental input, and hence all children had equal developmental potential (Case, 1996).

Another criticism levelled at Piaget has been the passive role he attributed to adults in encouraging children’s thinking. They are meant to stand back and wait for the child to develop, as learning follows on from development:

Teachers should intervene as little as possible, encourage children to think in their own ways rather than seek the right answer, ‘have faith’ in the children’s developmental pace … draw back from helping the child to understand new concepts [as] these are expected to emerge from the child in interaction with the environment. (Smith, 1998, pp. 222-223)

This approach is in sharp contrast to the sociocultural view that “learning leads rather than follows from development” (Smith, 1998, p. 223). Vygotsky proposed two qualitatively different lines of development which differed in origin: “the line of natural development, that is, the processes of growth and maturation; and the line of cultural development, or the mastering of various cultural means, or instruments” (van der Veer & Valsiner, 1991, p. 223). The history of child behaviour, from a Vygotskian perspective, is thus derived from the interweaving of “the elementary processes, which are of biological origin … and the higher psychological functions, of sociocultural origin” (Vygotsky, 1978a, p. 46). Despite this recognition that both maturation and the environment interact to create the dynamics of developmental change, Vygotsky regarded the former as secondary to the latter. An individual’s mental functioning could only be understood by examining the social and cultural processes and context from which it derived (Confrey, 1991; Wertsch & Tulviste, 1992). The essence of this process was the child’s interactions with others, as children gradually come to know and understand the world through their own activities in communication with others (Smith, 1998).

Vygotsky’s theorising, unfortunately cut short by his untimely death from tuberculosis at the age of 38 years, contributed greatly to advances in the understanding of human development. Russian scholars and students initially pursued his ideas (van der Veer & Valsiner, 1991) and, once his translated work became available in the West, American and European theorists developed it even further (Bruner, 1985; Bruner & Haste, 1987; Rogoff, 1990, 1995;
Wertsch, Del Rio & Alvarez, 1995; Wertsch & Penuel, 1996; Wood, Bruner & Ross, 1976). Sociocultural theory is based around the following key concepts:

**Internalisation** – This refers to the internal reconstruction of an external operation, as humans’ higher psychological functions first emerge “in the collective behaviour of the child, in the form of cooperation with others, and only subsequently become internalized as the child’s internal functions” (van der Veer & Valsiner, 1991, p. 317). The process of internalisation consists of a long series of developmental events by which an interpersonal process is transformed into an intrapersonal one:

> Every function in the child’s cultural development appears twice: first, on the social level, and later, on the individual level: first, between people (interpsychological), and then inside the child (intrapsychological). (Vygotsky, 1978a, p. 57, emphasis in the original)

The relationship between social and individual functioning is complex and “there are essential parallels and interrelations between the two planes in form and function” (Wertsch & Penuel, 1996, p. 417). It is through the use of ‘mediated action’ on both planes that individual developmental change is rooted in society and culture (Wertsch, 1991). A “cultural tool kit of mental processes” mediates human mental functioning (Wertsch & Tulviste, 1992, p. 554). Vygotsky believed the most important cultural instrument, central to children’s development, was language (Smith, 1998). He devoted considerable effort to studying the integration of speech with other mental processes like problem-solving and thinking (van der Veer & Valsiner, 1991), although Rogoff (1990) believes that other non-verbal forms of communication should not be forgotten. Language first occurs externally between people as a form of communication and is then converted into internal processes that can be used to solve problems independently, develop consciousness and self-regulation, and control behaviour. “It is by bringing action increasingly under the influence or control of sign systems that children come to be incorporated into a community” (Wertsch & Penuel, 1996, p. 417). Language carries messages from the interpsychological to the intrapsychological level:
What is spoken to the child is later said by the child to the self, and later is abbreviated and transformed into the silent speech of the child’s thought. (Tharp & Gallimore, 1988, p. 44)

Even psychological processes carried out by an individual in isolation are still inherently social, or sociocultural, because they incorporate socially evolved and socially organised cultural tools (Wertsch, 1991; Wertsch & Tulviste, 1992).

**Zone of Proximal Development** – Vygotsky developed the concept of the zone of proximal development to explain the assessment of intelligence and the organisation of instruction (Wertsch, 1991; Wertsch & Tulviste, 1992). He was critical of the standard approach to measuring intelligence, which focused on a child’s actual developmental level, and took no account of that same child’s potential development. Vygotsky argued that instruction should be more closely linked with the child’s level of potential development, rather than be tied to their level of actual development as measured by their independent performance, because the skilled help of a teacher working jointly with the child could greatly extend the child’s competencies (van der Veer & Valsiner, 1991). Vygotsky defined the zone of proximal development as:

… the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers. (Vygotsky, 1978b, p. 86)

It encapsulates the range between what children can do on their own and what they can achieve with the assistance of others who are more skilled in a particular domain of knowledge. In other words, it indicates the difference between independent solving of the task by the child, and aided performance. What the child turns out to be able to do with the help of the adult or more capable peer defines the child’s zone of proximal development:

This means that with the help of this method, we can take stock not only of today’s completed process of development, not only the cycles that are already concluded and done, not only the processes of maturation that are completed; we can also take stock of processes that are now in the state of coming into being, that are only ripening, or only developing. (Vygostky, 1956, cited in Wertsch & Tulviste, 1992, p. 550)
Learning therefore awakens a variety of internal developmental processes which can only operate when the child is interacting with people in his or her environment – “once these processes are internalized they become part of the child’s independent developmental achievement” (Vygotsky, 1978b, p. 90). This means that rather than waiting for developmental readiness, adults and peers actually stimulate a child’s development by challenging the child within their zone of proximal development. Teachers are thus accorded a much more interactive role in extending children at the outer limits of their capabilities. However, if the challenges are beyond the zone of proximal development then the child will not be able to benefit from the help offered.

Unlike Piaget, Vygotsky (1978c) considered play to have an enormous influence on children’s development. Play is instrumental in the creation of a zone of proximal development, extends children beyond their daily behaviour, and “contains all developmental tendencies in a condensed form. ... in play it is as though he were a head taller than himself” (Vygotsky, 1978c, p. 102).

**Scaffolding** – This refers to the guidance and interational support given to the child by a more competent other (adult or peer) in the zone of proximal development. These more skilled people act as ‘scaffolders’ to aid the building of the child’s understanding (Smith, 1998). The ‘scaffolding’ metaphor was originally coined by Bruner and his colleagues (Wood, Bruner and Ross, 1976) during their study of tutorial processes, to describe the help provided by an expert to assist a novice to accomplish a task. Interestingly, though, Vygotsky himself did refer to scaffolding to explain the role of adults in giving cultural instruction to very young children, thereby “anticipating Bruner’s later work by several decades” (van der Veer & Valsiner, 1991, p. 226).

Scaffolding permits children to do as much as they can by themselves, while what they cannot do is filled in by the adult’s or peer’s activities. The child moves from being a spectator to a participant and, with the support of the more competent other, gradually acquires mastery over the task. Bruner (1985) described scaffolding as “a vicarious form of consciousness ... to make it
possible for the child, in Vygotsky’s words, to internalize external knowledge and convert it into a tool for conscious control” (pp. 24-25).

The quantity (how high the scaffold is, and at what level and for how long it is kept in place) and the quality (the different ways the assistance is offered including modelling, asking questions or giving encouragement) of the scaffolding support have a crucial influence on the child’s acquisition of knowledge and skills (Smith, 1998; Tharp & Gallimore, 1988). With a new activity, the teacher initially takes the greatest responsibility and erects a scaffold for the child’s limited skills. However, this graduated assistance is sensitively adjusted over time as the child’s learning progresses within that domain:

[As] the scaffold gradually diminishes, the roles of learner and teacher become increasingly equal, and the point is finally reached where the child or learner is able to do alone what formerly could be done only in collaboration with the teacher. (Greenfield, 1984, p. 117)

This is not just a one-way process from adult to child. Instead children take an active inventive role as they reconstruct a task through their own understanding. Tharp and Gallimore (1988) used the term ‘guided reinvention’ to reflect the fact that children do not just passively absorb the adult’s strategies, but rather jointly construct their understanding and knowledge through a reciprocal partnership between the adult and the child. The child is not simply moulded by the environment - instead it is a mutual relationship (van der Veer & Valsiner, 1991).

Children - indeed people of all ages - learn developmentally by doing what they don’t know how to do. ... [This] requires the continuous creation of developmental situations where, following Vygotsky, the learning-leading-development process can happen. It requires jointly creating an experience of making meaning together. (Holzman, 1995, p. 204)

Vygotsky (1978b) regarded children as performing much more skilfully when they were collaborating with others than when they were working alone. He presented the role of the more competent other as always helpful, but this, of course, may not always be the case (van der Veer & Valsiner, 1991). It is
conceivable that those working with the learner could promote ignorance, or be potentially detrimental in other ways, if they fail to attend to both the quality and the quantity of the scaffolding being provided throughout the knowledge acquisition process. Conversely, the greater the richness of the activities and interactions that children participate in with adults, the greater will be their understanding (Smith, 1998). Tomasello (1999) has suggested that it is this intentional instruction that distinguishes humans as a species, building on Vygotsky’s keen interest in what differentiates us from animals.

**Intersubjectivity** – The relationship between the child and the more capable other has been explored by theorists following Vygotsky, even though this was not a feature of his original work (Smith, 1998; van der Veer & Valsiner, 1991). ‘Intersubjectivity’ describes the shared focus and “the mutual understanding that is achieved between people in communication” (Rogoff, 1990, p. 67). The term emphasises the fact that understanding occurs between people and cannot be attributed to one person or the other. This requires a shared context of meaning, purpose and experience to be established, so that communication – both verbal and non-verbal – can bridge the new understanding of a situation. Smith (1998) argues that intersubjectivity is important in allowing adults to judge how much the child already knows, in order that the appropriate scaffolding can be provided to stimulate and guide the child at the outside limits of their understanding and skill. Intersubjectivity is vital in episodes of ‘joint attention’ in which the participants in an encounter mutually attend to, and jointly act upon, some external topic. Developing intersubjectivity requires teachers to observe and diagnose “what children understand and do not understand because it is the task of the teacher to bridge the gap between the known and the unknown” (Smith, 1998, p. 234).

**Apprenticeship, Guided Participation and Participatory Appropriation** - Neo-Vygotskian scholars are critical of Piaget’s view that there is one path for development. Barbara Rogoff (1990, 1997) regards development as multidirectional and strongly influenced by the cultural values within a society at any historical point in time – “Each community’s valued skills constitute the local goals of development” (Rogoff, 1990, p. 233). She also believes that there
is no boundary between the individual and the environment, because the individual forms part of the environment and is linked with the past, present and future. “Acting in the present involves reference to prior events and activities as well as others that are anticipated in the future” (Rogoff, 1997, p. 272). It is children’s active engagement in a diverse range of rich and meaningful social interactions which will increase their repertoire of cognitive and social skills.

Rogoff (1995) has identified three related components of sociocultural activity, each of which requires the involvement of the others - individual development, social interaction, and the cultural activity in which social interactions take place. She uses the analogy of ‘apprenticeship’ to describe “how the development of skill involves active learners observing and participating in organized cultural activity with the guidance and challenge of other people” (Rogoff, 1990, p. 19). Local values, practices and institutions (economic, political, spiritual) are important components in considering learners as apprentices in thinking who observe, participate with more competent others, and utilise culturally available tools to construct new understandings. ‘Guided participation’ suggests that “both guidance and participation in culturally valued activities are essential to children’s apprenticeship in thinking” (Rogoff, 1990, p. 8). The guidance can be either tacit or explicit, but it helps to build bridges between children’s current and anticipated understanding and skills. The emphasis on participation implies the necessity for active hands-on involvement by both learner and tutor. The term ‘participatory appropriation’ explains how people’s participation in activities with others, transforms their understanding and enhances their ability to engage in related activities. It suggests that the skills and understanding involved in this enterprise of shared thinking become part of the individual’s repertoire “through their appropriation of social activity as they participate in the activities of their culture” (Rogoff, 1990, p. 22).

Community of Learners - Rogoff, Matusov and White (1996) have applied the above concepts to differentiate between three different learning models. The first two models cast learning as a one-sided process. ‘Adult-run’ instruction applies to the transmission theory of learning in that experts transmit knowledge to learners. It is this model which currently prevails in the Western schooling
system where children are ‘filled-up’ with knowledge without actively participating in their learning. ‘Children-run’ instruction corresponds with the idea that students acquire knowledge through their own active exploration, but without necessarily connecting what they learn with the goals of the adult world. This model most closely resembles Piaget’s views. The third model, ‘community of learners’, involves both active learners and more skilled partners working together on the basis that “learning involves transformation of participation in collaborative endeavor” (Rogoff et al., 1996, p. 388). This approach is grounded in a totally different philosophy, rather than being a blend of the adult-run and children-run models. It clearly involves the application of sociocultural principles:

In a community of learners, all participants are active; no-one has all the responsibility and no-one is passive. Children take an active role in managing their own learning, coordinating with adults who are also contributing to the direction of the activity, while they provide the children with guidance and orientation. (And the children sometimes do likewise for the adults). Adults support children’s learning and development through attention to what the children are ready for and interested in as they engage in shared activities in which all contribute. In a community of learners, children and adults together are active in structuring the inquiry, though usually with asymmetry of roles. Children and adults collaborate in learning endeavors; adults are often responsible for guiding the process and children also learn to participate in the management of their own learning. (Rogoff et al., 1996, p. 396)

While there appear to be few differences between the three models in terms of their impact on students’ academic performance, Rogoff et al. (1996) note that it is only the community of learners model which transforms the nature of learners’ participation:

In communities of learners, students appear to learn how to coordinate with, support, and lead others, to become responsible and organized in their management of their own learning, and to be able to build on their previous interests to learn in new areas and to sustain motivation to learn. (Rogoff et al., 1996, p. 410)

In my view, the different learning models delineated by Rogoff et al. (1996) have application beyond the classroom. The Family Court can be considered as an ‘adult-run’ institution in which experts in the form of lawyers, counsellors,
report writers and judges impart advice, but ultimately can dictate the outcome of a parenting dispute. Opportunities for client participation are minimised by the legal advocacy model currently employed to resolve family law proceedings – it is lawyers who speak for, and represent, their adult and child clients. However, an entirely new approach can be envisaged if one transposes the words ‘children’ and ‘adults’ to ‘clients’ and ‘Family Court professionals’ in the first Rogoff et al. (1996) indented quote on the previous page. The application of a community of learning model within the family law system would energise client and professional dynamics through the adoption of a more active role for clients within a collaborative enterprise. This would also build upon, and extend, those new initiatives, like Columbus, the CCP and collaborative law, which allow clients to more directly engage with lawyers and judges, and thereby enhance their voice and participation within the court. The ideal endpoint would be a true community of learners’ model within client-professional relationships and within the Family Court.

Sociocultural principles offer a unique opportunity to rethink the way family transitions are managed within the family law system and to re-orient the role of parents, children and professionals. Internationally, therapeutic jurisprudence has had some impact in humanising legal and judicial dispute resolution processes. However, this is not particularly focused upon children, being rather more concerned with improving adult parties’ experiences of and satisfaction with legal and court proceedings. While this is important, it is equally desirable to also promote a more child-inclusive mode of practice within the law, especially in light of the longstanding primacy of the welfare of the child principle. This has traditionally been narrowly interpreted, overlaid with adult presumptions about what is really in children’s best interests, and relatively isolated from the personal contributions of children themselves. Rigid assumptions about what children can and cannot do at different stages of development are now considered inappropriate, as this will depend not so much on their age as on the activities and social contexts in which they have participated. Socioculturalists have demonstrated that graduated assistance by more skilled adults (or peers), working in supportive reciprocal partnerships with children and adults, can greatly extend their capabilities. Scaffolding by
parents and Family Court professionals can therefore enhance the meaningful participation of children within family and legal decision-making processes. The onus is now on the adult to understand, support, have positive expectations, and, when appropriate, guide and assist the child (Garbarino et al., 1992), whereas in the past it has been the child’s cognitive capacity and level of development that has been regarded as determining their competence (c.f. Piaget). Children faced with parental separation initially struggle to make sense of their changed personal circumstances. They need parental guidance, information and support to help them construct and internalise the meaning, for them, of their new lived reality. If this scaffolding is unavailable, or inconsistent, then it needs to be provided by others within the extended family or by agencies and professionals external to the family. However, these people need to be tuned into the need to work sensitively with children, within their zone of proximal development, helping them to adjust to and manage the transition experience positively.

The same sociocultural principles applicable to children’s participatory roles during times of parental separation, also have relevance for Family Court professionals working with their adult clients. Parents, like their children, need scaffolding by those professionals they engage with during their journey toward divorce if their emotional distress is to be resolved and realistic child-centred decisions made for the future. Research evidence clearly reveals the diminished state of most separated parents’ emotional affect, self-esteem and parenting ability at the very time when significant decisions are having to be made about future care arrangements for their children (Day Sclater & Richards, 1995; Hetherington et al., 1993, 1998; Tapp, 2002). In reference to the zone of proximal development, Rushforth (1999) talks of ‘x’ being the level of understanding which a person can achieve alone, but ‘x + 1’ referring to what they can achieve with able instruction. Scaffolding by Family Court professionals can provide that ‘+ 1 factor’ to enable clients to achieve a much greater understanding of their personal situation and to more actively contribute to its resolution. Sociocultural theory suggests that people are a lot more competent in situations where they are given social support and guidance and where they feel secure and comfortable. This scaffolding is gradually withdrawn
as people are able to take on more responsibility for themselves. All participants are active with no-one taking all the responsibility and no-one being passive. This implies a model of learning where participants serve as resources for each other, build on the ideas of others, and take varying roles and responsibilities according to their understanding and expertise.

Regarding scaffolding as a reciprocal activity also enables attention to be focused on the expert, not just the client. To undertake their roles effectively, Family Court professionals need to work jointly with parents to acquire the information they need to help their clients best. There is thus an element of scaffolding by clients of professionals as they work in partnership to resolve parenting disputes. Mentoring of professionals by other professionals is also an important scaffolding component worthy of further consideration within an interdisciplinary context like that of the Family Court.

III Ecological Models of Human Development

_Urie Bronfenbrenner_ (1917-) first articulated an ecological model of human development during the 1970s to overcome the restricted scope of the then-prevailing tendency to “study the strange behaviour of children in strange situations with strange adults for the briefest possible periods of time” (Bronfenbrenner, 1977, p. 513). His model has since been refined several times (Bronfenbrenner, 1979, 1986, 1992, 1994; Bronfenbrenner & Morris, 1998), but essentially gives primacy to the developing person and their environment, and, particularly, the evolving interactions between these two domains. The ecology of human development is thus defined as:

… the scientific study of the progressive, mutual accommodation, throughout the life course, between an active, growing human being, and the changing properties of the immediate settings in which the developing person lives, as this process is affected by the relations between these settings, and by the larger contexts in which the settings are embedded. (Bronfenbrenner, 1992, p. 188)

_Bronfenbrenner_ (1979) differentiated his approach from those of his contemporaries by emphasising “the phenomenon of development-in-context” (p. 12). This highlighted the interaction of both biological and social forces on
human development, as well as the importance of conducting research in the natural environments in which people live (such as the home), rather than the laboratory. The model puts particular emphasis on how an individual’s immediate family experiences and systems-level family dynamics are linked to the different features of the community and cultural environment, or the larger social ecology in which families are embedded (Wise, 2003). The dynamic interaction of characteristics of the person with his or her immediate environment comprises the essential process of developmental change.

A distinctive feature of the ecological model is its highly differentiated conceptualisation of the environment from the perspective of the developing person (Bronfenbrenner, 1994). Based on Lewin’s theory of psychological fields, “the ecological environment is conceived as a set of nested structures, each inside the next, like a set of Russian dolls” (Bronfenbrenner, 1979, p. 3). Moving from the innermost (or most immediate) level to the outside (or furtherest) level, these structures are defined as follows:

1. The **microsystem** – refers to the settings in which the individual experiences their daily reality and includes parent-child, husband-wife, and child-teacher relationships. The microsystem is:

   … a pattern of activities, roles, and interpersonal relations experienced by a developing person in a given face-to-face setting with particular physical and material features, and containing other persons with distinctive characteristics of temperament, personality, and systems of belief. (Bronfenbrenner, 1992, p. 227)

The microsystem thus incorporates the relationships between the individual and his or her immediate environment. Interpersonal relationships which particularly facilitate development are those where there is a balance of power such that one partner in the interaction does not dominate the relationship, increasingly more opportunities are given to the child or developing person to control the situation, activities between the partners in the interaction are co-ordinated, and there is a feeling of warmth and reciprocity. Smith (1998) notes that this shift in the balance of power towards the developing person “is
comparable to the shift from external scaffolding to internal self-regulation in Vygotsky’s theory” (p. 13).

2. The *mesosystem* – “comprises the linkages and processes taking place between two or more settings containing the developing person” (Bronfenbrenner, 1992, p. 227). A mesosystem is thus a system of microsystems, and focuses on the connections between these immediate settings in which the developing person actually participates (for example, the relations between home and school, or home and the neighbourhood). The stronger and more complementary the links between these settings, the more powerful the resulting mesosystem will be as an influence on the child’s development.

3. The *exosystem* - involves “the linkages and processes taking place between two or more social settings, at least one of which does not contain the developing person, but in which events occur that indirectly influence processes within the immediate setting in which the developing person lives” (Bronfenbrenner, 1994, p. 1645). For a child, an example would be the relation between their home and their parent’s workplace.

4. The *macrosystem* – refers to the broad ideological and institutional patterns represented in the developing person’s culture. It:

   … consists of the overarching pattern of micro-, meso-, and exosystems characteristic of a given culture, subculture, or other broader social context, with particular reference to the developmentally-instigative belief systems, resources, hazards, life styles, opportunity structures, life course options, and patterns of social interchange that are embedded in each of these systems. (Bronfenbrenner, 1992, p. 228)

   The macrosystem is thus a societal blueprint which encompasses the overriding consistency in people’s shared assumptions about beliefs, values and accepted practices in any given culture or subculture.

5. The *chronosystem* – to extend the environment into a third dimension, Bronfenbrenner (1992, 1994) subsequently added the chronosystem to take account of the impact of time on the human life course. Previously the environment was regarded as a fixed entity and observed only at a single point
in time (Bronfenbrenner, 1992). However, a chronosystem “encompasses change or consistency over time not only in the characteristics of the person but also of the environment in which that person lives” (Bronfenbrenner, 1994, p. 1646). Particular attention has been focused on “developmental changes triggered by life events or experiences” (Bronfenbrenner, 1992, p. 201). These can originate within the individual (for example, puberty) or in the external environment (for example, birth of a sibling, divorce), but they alter the existing relation between the person and their environment, thereby initiating a dynamic that may instigate developmental change. Short-term chronosystem models enable data to be collected both before and after a life transition, whereas long-term models enable examination of the cumulative effects of sequential transitions across the life course and over historical time. The dimension of time was an important consideration in my own research design. I utilised a short-term chronosystem model by initially interviewing family members following their Family Court experience, and then following them up one year later. This enabled the developmental impact and sustainability of their court orders to be assessed over time.

The interrelationships both within and across the different systems in which people exist are critical in understanding human development. Bronfenbrenner (1992) believed that the strength of his person-context model lay in its capacity to identify ecological niches, or “regions in the environment that are especially favorable or unfavorable to the development of individuals with particular personal characteristics” (p. 194). This generated considerable research interest in ‘at risk’ or problem behaviour, and the pathways which could strengthen resilience. Bronfenbrenner (1979) also devoted attention to the phenomenon of movement through ecological space. He defined an ecological transition as occurring:

… whenever a person’s position in the ecological environment is altered as the result of a change in role, setting, or both. … Every ecological transition is both a consequence and an instigator of developmental processes. … Transitions are a joint function of biological changes and altered environmental circumstances; thus they represent examples par excellence of the process of mutual accommodation between the organism and its surroundings. … From the viewpoint of research, every ecological
transition constitutes, in effect, a ready-made experiment of nature with a built-in, before-after design in which each subject can serve as his own control. In sum, an ecological transition sets the stage both for the occurrence and the systematic study of developmental phenomena. (Bronfenbrenner, 1979, pp. 26-27)

Transitions can be normative (for example, school / workforce entry, marriage and retirement) or non-normative (for example, a death or severe illness in the family) (Bronfenbrenner, 1986). One non-normative ecological transition explored by Bronfenbrenner (1979, 1986) was the impact of divorce on the family life course. He was particularly impressed by the influential research of Mavis Hetherington who found significant developmental changes in both the children and parents from divorced families in comparison with a matched sample of intact married families. These disruptive effects peaked one year following the divorce, and although they declined during the second year, the divorced mothers never regained as much control as their married counterparts. The presence of a third person with whom a divorced parent had a positive relationship was found to promote more effective parental functioning and improved interactions with the children. Conversely, conflict between the ex-partners could disrupt the parent-child dyad and impair its capacity to facilitate ongoing development. Bronfenbrenner used the apt analogy of a three-legged stool to illustrate the significance of support factors and stress factors in family life:

… the capacity of a dyad to serve as an effective context for human development is crucially dependent on the presence and participation of third parties, such as spouses, relatives, friends, and neighbours. If such third parties are absent, or if they play a disruptive rather than a supportive role, the developmental process, considered as a system, breaks down; like a three-legged stool, it is more easily upset if one leg is broken, or shorter than the others. (Bronfenbrenner, 1979, p. 5)

More recent reviews of the profound effect that marital transitions can have on human development have emphasised the importance of compatible role demands and positive orientations between the settings in which the separated family members live (Smith, 1996, 1998; Smith & Taylor, 1998). Transitions need not necessarily be negative if they provide those affected with the opportunity to engage in a variety of relationships and activities characterised
by warmth, reciprocity and a balance of power. The stresses engendered by parental separation and divorce (including role overload, economic hardship, conflict between parents, and reconstituted family dynamics), can, of course, be ameliorated or exacerbated by other micro-, meso-, exo-, and macrosystem influences. Yet Bronfenbrenner, despite his concern with divorce, paid no real attention to the responsiveness of the family law system and other economic, social and religious institutions in supporting family members affected by parental separation.

Separated parents experience the Family Court as a mesosystem due to their personal involvement with its conciliation and adjudication decision-making processes. However, their children experience it as an exosystem since they do not participate directly in it, yet their ongoing development is profoundly affected by its influence. Garbarino et al. (1992) believe that much of the insensitive treatment of children in the legal system results from lack of knowledge about their development. Talking with children to establish how they interpret their family transition can be important in dealing with their anxiety and concerns, as well as yielding information useful to the decisions being made about their future care arrangements. Bronfenbrenner (1979) coined the phrase ‘ecological validity’ as an essential means of taking into account “in every scientific inquiry about human behaviour and development how the research situation was perceived and interpreted by the subjects of the study” (p. 30). The current emphasis on research exploring children’s perspectives on parental separation (see chapter three) thus has an ecological pedigree, although Bronfenbrenner, himself, did little to heed this aspect of his own paradigm (Smith, 1998). In my own study, the subjective perceptions of both children and parents in determining children’s post-separation care arrangements have taken centre-stage as a significant determinant of the interplay of the family law system in shaping human behaviour.

As studies of the impact of the environment on the development of children and adults proliferated over the past quarter century, Bronfenbrenner became concerned that he had downplayed his interest in the individual. His more recent reformulations of his theory have therefore emphasised bioecological processes
as a joint function of the person and the environment (Bronfenbrenner & Morris, 1998). The model has been made more complex and dynamic by refocussing attention on biological factors (including genetic inheritance), proximal processes, and the dimension of time, to restore its “centre of gravity” alongside those elements of human agency within real-life settings (Bronfenbrenner & Morris, 1998, p. 994). At the core of this emerging third-generation model are proximal processes that operate over time as the primary mechanisms producing human development. However, their influence on development varies significantly depending upon “the characteristics of the developing Person, of the immediate and more remote environmental Contexts, and the Time periods, in which the proximal processes take place” (Bronfenbrenner & Morris, 1998, p. 994, emphasis in the original). Three types of person characteristics are identified – dispositions (which initiate and sustain proximal processes in particular developmental domains), resources (of ability, experience, knowledge and skill), and demand characteristics which invite or discourage reactions from the social environment and can facilitate or impede the operation of proximal processes. It is not just people’s interactions with others, but also with objects and symbols, that drives development - which is now defined as:

... stability and change in the biopsychological characteristics of human beings over the life course and across generations. (Bronfenbrenner & Morris, 1998, p. 995)

Recognition of our human interdependency means that an ecological perspective is useful for understanding the ways in which contextual extra-familial factors can influence an individual's well-being (Hetherington & Stanley-Hagan, 2002). Garbarino et al. (1992) emphasise the importance of looking both inward to the individual’s developing capacities in the context of the family and other microsystems, and outward, to the forces that shape the social and physical contexts in which we live. The functioning of children and families can be enhanced and, consequently, human development can be improved, by strengthening the quality and quantity of interactions among the different ecological systems. This approach stands in stark contrast to the ‘autopoietic’ view of the law - a term originating with the natural sciences
where it has been used to describe closed self-sustaining biological systems. Teubner (1989, 1993) transposed this to refer to the law as a closed and self-referential social system which employs its own exclusive procedures and discourse. King and Piper (1990) further applied Teubner’s theoretical insights to analyse the relationship between the law and child welfare, but James (1992) criticised the robustness of their arguments and, consistent with the ecological model, questioned the extent to which the law can be regarded as a closed autopoietic system:

Law, by its very nature, is a social institution and the environment in which it ‘exists’ is a social environment. … Law is an inherently open system which is moulded by its environment, since it must and does change in response to its environment (albeit too slowly for some), whilst it also exerts pressure for external change. (James, 1992, p. 275)

Babb (1997), cognisant of the social character of the law, but concerned about its inconsistency with families’ real-life experiences, believes that the family law system would benefit from the application of Bronfenbrenner’s ecological model. Family law helps to shape cultural conceptions within the macrosystem of the expected or ‘proper’ roles for interpersonal relationships (Babb, 1997; Smart, 2003b). In the field of parental separation and divorce, it deals with the tangled mass of relationships and societal values connecting the child, family and their environment. Ecological theory emphasises the importance of the courts acting as a positive influence on the lives of these family members by seeking to increase the quality and quantity of their connections within and between the micro-, meso-, exo-, and macrosystems. Linkages can be better facilitated when a collaborative, interdisciplinary approach is instituted (most easily via a UFC) and there is a range of dispute resolution pathways (including negotiation, mediation and adjudication) so an appropriate balance can be struck between the parties’ own resources and those provided within the family law system.

An ecological perspective also recognises family law “as more than a mechanism for domestic dispute resolution” (Babb, 1997, p. 792), with a responsibility to foster an individualised therapeutic approach to create and sustain socially rich environments which minimise the risks arising from
parental separation. This can be achieved by having Family Court professionals use the various ecological systems as a social map to identify and assess the types and strengths of relationships in the microsystem (i.e. relationships between and among family members), mesosystem (i.e. relationships between systems which individuals move between, including neighbourhoods, schools and churches), and exosystem (i.e. for a child at the centre of a custody dispute, the time demands of parental employment relative to the time each parent has available for child-rearing purposes). The chronosystem is also an important marker of the need for flexibility and compromise in parenting arrangements over time. For example, contact schedules will need periodic amendment to take account of children’s development, and adaptation may be required to new family configurations as step-parents and step- or half-siblings feature across the life course. Revealing the linkages between the law, public policy, social science research, families and children can lead to more responsive family law decision-making. Lawyers and judges, better aware of the complex factors affecting families’ lives, could then more effectively use the law’s power and support mechanisms to enrich the relational structures affecting the well-being of separated parents and their children.

IV Childhood Studies and the Sociology of Childhood

Psychological interest in child development, which accelerated since the 18th century, came to dominate our knowledge base about children, but its focus was primarily on the individual, decontextualised and universal child (James & Prout, 1997; Mayall, 1994). This narrow context for the research and practice of Piagetian developmental psychology eventually led, during the 1970s, to a distinctive paradigm shift in the way in which children and childhood are conceptualised. The sociology of childhood marked out the independent “establishment of childhood as a separate empirical topic in both sociology and social anthropology” (James & Prout, 1996, p. 41) and gave birth to what we also know today as the interdisciplinary field of Childhood Studies. This seeks to rethink and explore how children “live in and across different social arenas and settings, where differences of ethnicity, age, gender, health, and economic
status combine to produce diversities rather than commonalities in their lives” (James, 2004, p. 26).

Developmental psychology’s attention to children’s biological and cognitive development meant that children’s active social engagement with their world was traditionally under-emphasised and under-theorised (James, 2004). Much of the academic gaze was centred on the mother-child dyad, to the exclusion of children’s social relationships with others. Children’s interests were considered synonymous with those of their parents, rendering them invisible behind the veil of family life:

The ingrained and inherited way of accounting for children as appendixes to the family hides many of the realities of children’s own lives behind the veil of the family institution. Opening up the secrets of family life and laying bare the life conditions of children ... might be a key for improving children’s own life situations. (Qvortrup, 1997, p. 102).

The sociology of childhood provided the key for setting children free from the constraints of the dominant theoretical paradigm which considered childhood as a transitional state of immaturity, irrationality and incompetence on the way to a rational, competent and autonomous adulthood:

Within such a conceptual scheme children are marginalized beings awaiting temporal passage, through the acquisition of cognitive skill, into the social world of adults. (Prout & James, 1997, p. 11)

The pioneering work of several scholars (Alanen, 1988, 1992; Alanen & Mayall, 2001; Hardman, 1973; James, 2004; James, Jenks & Prout, 1998; James & Prout, 1996, 1997; Jenks, 1982, 1996; Kessell & Siegel, 1983; Mayall, 1994, 2000a, 2002; Prout & James, 1997; Qvortrup, 1987, 1991, 1994, 1997; Richards, 1974; Richards & Light, 1986; Waksler, 1991) critiqued psychological accounts of child development and/or stimulated the conceptual extrication of children from parents, the family and professionals so that the social condition of childhood could be properly studied and children written into the script of the social order. Aries (1962) prompted the rethinking with his assertion that up to, and including, the Middle Ages there was no collective perception of children as being essentially different to anyone else. The ensuing
debate over the idea that childhood did not exist in medieval society eventually led to the adoption of the more moderate view that “children have not always existed in the way that we now know them, they have not always been the same thing” (Jenks, 1996, p. 63). This, in turn, gave rise to one of the essential tenets of the sociology of childhood paradigm - the *socially constructed character of childhood* - first noted by James and Prout in 1990 (James, 2004).

Understanding childhood as a social construction means it “is neither a natural nor universal feature of human groups but appears as a specific structural and cultural component of many societies” (Prout & James, 1997, p. 8). Ideas about what childhood should be like vary across time and in social space and help account for the wide diversity in children’s experiences both inter- and intra-culturally (James & James, 1999). Differing legal, social and cultural expectations about children will mediate their competencies, needs and perceived well-being (James, 2004). Such structural variables as “rates of mortality and life expectancy, organizations of family life and structure, kinship patterns, and different ideologies of care and philosophies of need and dependency” influence children’s particular social relationships and their various cultural meanings (Jenks, 1996, p. 69). To acknowledge this diversity it has been suggested that it is now more correct to speak of ‘childhoods’ rather than the singular ‘childhood’ (Freeman, 1998; James & Prout, 1997).

By shifting adult understandings of what it is to be a child (Mayall, 2000), and how this varies across time, as well as within and across societies, it has become possible to regard childhood as a stage in the life course that is significant in its own right. Children can now be conceived as having “childhood careers” (Moss & Petrie, 1997, p. 6), instead of merely being individuals in the process of becoming the future generation. Qvortrup (1994) aptly describes this significant conceptual difference as one of dealing with children “as human beings rather than as human becomings” (p. 4).

This involves moving on from the narrow focus of socialization and child development (the study of what children will become) to a sociology which attempts to take children seriously as they experience their lives in the here-and-now as children. (Morrow & Richards, 1996, p. 92)
Valuing children’s roles as citizens and family members in the here-and-now provides the platform for another key feature of the sociology of childhood – the **attribution of agency to children**:

Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and of the societies in which they live. Children are not just the passive subjects of social structures and processes. (Prout & James, 1997, p. 8)

Previously, children were considered “the passive recipients of culture, rather than active participants in it” (James & Prout, 1996, p. 42). Their agency was obscured by the focus on their socialisation within families and schools and by the dominance of biological and psychological explanations for their development and experiences. “The triangularity of childhood, the family and socialization” blocked “the possibilities of even imagining novel relationships between the three components” (Alanen, 1988, p. 54). There was simply no conceptual space for considering that children might be independent social actors and interactive agents. Ethnographic research in the 1970s was the turning point for yielding a child’s eye view on their feelings, thoughts and perceptions, instead of relying on adults’ interpretations of children’s experiences or adults’ recall of their own childhoods. Hardman (1973) initiated this “radical departure from traditional socialization studies” by engaging “directly with the vitality and visibility of children in the social world” (James & Prout, 1996, p. 45). Concerned that children were a muted group in society she shifted the perspective in empirical research to the study of children as people in their own right. From this has grown “the demand for children’s rights and their advocacy … [as well as] a collective desire to make children’s own voices and views audible and recognized within the adult world” (James, 2004, pp. 29-30).

The conceptual distancing of children from the adult-centred world ultimately inspired a new field of childhood research exploring children’s own part in the shaping of the social order (James & Prout, 1996, 1997; Mayall, 1994, 2000a, 2002; Smart et al., 2001; Smith, Taylor & Gollop, 2000). This new research orientation moved beyond observations, surveys and questionnaires to
instead elicit children’s own views through ethnographic and qualitative methodologies including interviews, focus groups and peer research (Prout & James, 1997). “The aim has been to do research with children rather than on or about them and, in the process, to give their views legitimacy” (Smart et al., 2001, p. 14, emphasis in the original). Whilst raising specific methodological and ethical issues (Alderson, 1995; Christensen & James, 2000; Gollop, 2000; Hart, 1997; Jenks, 1996; Marchant & Kirby, 2004; Morrow & Richards, 1996; O’Kane, 2000; Pufall & Unsworth, 2004; Solberg, 1996; Suaalii & Mavoa, 2001; Thomas & O’Kane, 1998b, 2000; Willow, 2004), such research has provided much richer detail about children’s subjective childhood experiences, set as it is within life course and ecological frameworks (Elder, 1994). Exploring children’s agency in negotiating their own childhoods has the advantage of enabling the immediacy of any transition between social environments to be captured, rather than it having to “be ‘read backwards’ from an adult standpoint – either their own or ours as researchers” (Flowerdew & Neale, 2003, p. 148).

Assumptions about what constitutes a major challenge in children’s lives may therefore need to be reassessed, as the imbalance between our over-reliance on adult accounts is redressed though sustained attention to children’s own perspectives (Rodgers & Pryor, 1998). The international research literature pertaining to children’s perspectives on parental separation and divorce, reviewed in chapter three, clearly shows how the sociology of childhood has enabled post-divorce family life to be understood from an entirely new perspective. There is no longer a presumption that a child will think or feel the same way about the transition as his or her siblings or parents. Rather children have been shown to be actively engaged in negotiating and sustaining their reconstituted relationships and in adjusting to their new living arrangements.

Understanding how children experience their daily social environments (home, street, school, playground, work) and social conditions (oppression, violence, poverty, discrimination) has facilitated a fuller understanding of both children’s and adults’ lived realities. This has broadened the discourse of childhood to include political issues such as power relations, organisational
structures and social inequalities (Brannen & O’Brien, 1996; Christensen & James, 2000; Mayall, 2000). Mayall (2002) particularly emphasises the fundamentally political nature of childhood. She believes that the documenting of children’s lives through studies of their own subjective experiences has been a central means of “raising concerns about the character and quality of their childhoods” (p. 23). As well as exploring what binds children together as a social group and distinguishes them from adults, the sociology of childhood is also concerned with children’s relations with adults in their daily lives. It is therefore impossible to isolate relational, generational and structural issues from sociological thinking which aims to raise the status of children and childhood. Hart (2005) argues that the primacy given to children’s agency and participation should, in the future, be matched with a focus on the structure and root causes of children’s marginalisation and victimisation. However, children’s current lack of influence over almost all the institutions and processes (including familial and legal ones) which have profound effects on them, makes it critical that the sociology of childhood is practised in a way which is sensitive to the political and ethical problems it inevitably raises (Prout & James, 1997).

Childhood’s social construction has meant that the various conceptions or images of childhood reflected throughout history (Hendrick, 1990; James, Jenks & Prout, 1998; Jenks, 1996; Sanson & Wise, 2001; Smart et al., 2001) can be traced in the character of the law currently applying to children. Conceptions are socially constructed generalisations. They offer convenient descriptions of children-as-a-class and provide an aura of predictability in assessing and deciding on individual children’s circumstances. Conceptions can be readily applied by professionals, including those within the Family Court, thereby avoiding extensive enquiry into a particular child’s circumstances and shortcutting any dispute resolution process.

As the modern view of childhood gained currency during the past two centuries, children came to be seen as a future investment requiring proper nurture, socialisation and education. Children were no longer just ‘little adults’ occupying an ambiguous place, but rather came to fill a defined childhood space, the structure and boundaries of which were shaped by psychological,
legal, educational, medical and welfare professionals. Hendrick (1990) notes that, over this period, several authoritative constructions of childhood could be observed in the following chronological order:

… the Romantic child, the Evangelical child, the factory child, the delinquent child, the schooled child, the psycho-medical child, and the welfare child of the era just prior to the first world war. Between 1914 and the late 1950s, further developments produced what might more accurately be described as two ‘reconstructions’, since they depended so much on their nineteenth century heritage, namely, the child of psychological jurisdiction …; and, secondly, the family child (which included the ‘public’ child, usually children in care). (Hendrick, 1990, pp. 36-37)

Smart et al. (2001) discuss four powerful images of childhood as a natural and universal condition which helps to reveal the transformations that have occurred in thinking about childhood: children as little devils beset by original sin where they are regarded as inherently evil, corrupt, wilful and in need of harsh treatment; children as little savages or barbarians, implying they are innately wild and uncivilised, rather than naturally bad; children as little angels where they are presumed to be naturally good, pure, innocent and kind; and, finally, children as embryonic adults whereby they are assumed to be in an emergent state with unfixed natures (neither inherently good nor evil). This fourth model had its genesis in early developmental psychology (Prout & James, 1997), which linked children’s social natures firmly to their biological growth and development. As children progressed in age they moved:

… from simplicity to complexity of thought, from incompetence to competence, from irrational to rational behaviour, gradually learning the cognitive skills involved with reasoning, logic, causality and morality until they eventually achieve the fully social state of adulthood. (Smart et al., 2001, p. 4)

The conceptions of childhood espoused by Hendrick (1990) and Smart et al. (2001) clearly remain intertwined in contemporary adult and legal thinking and account for why society has felt compelled to manage, control, protect, socialise or constrain children depending on the context or the particular social problem raising concern. The paradox of allowing a 10-year-old child to be prosecuted for murder in the criminal justice system, at the same time as children of similar,
or even older, ages struggle to have their views on care arrangements ascertained in the Family Court, is undoubtedly related to the constructions placed on children as deviant transgressors or the vulnerable victims of parental separation (Franklin & Petley, 1990; Henaghan & Tapp, 2000; Piper, 1996).

Hendrick (1990) expresses uncertainty about the conception of childhood dominating the past 20 years, although, like Smart et al. (2001) and Tapp and Henaghan (2000), he notes that it remains heavily laden with past interpretations whilst also flirting with the notion of children as persons/citizens/rights-holders within civil society. Neale and Smart (1998) characterise this conceptual ambiguity with two opposing, albeit interrelated, conceptions of childhood – children as active moral and social agents who can influence the shape of their own childhoods (one of the key principles of the sociology of childhood), or children as dependants whose lives are structurally determined for them. In applying this agency/dependency dualism to children within the family law field, they believe it is clear that the latter has prevailed over the former:

The child of legal discourse is primarily a dependant, who is defined within a developmental, welfarist and protectionist framework. Biologically, children are perceived in developmental terms as in the process of becoming and hence, their incompetence, irrationality and structural powerlessness are taken for granted. Legally they are minors … in need of protection and, therefore, justifiably subordinate to adults. …

The principle of the welfare of the child has a long history in family law, yet remains ill-defined, yielding to whichever conception of childhood is currently fashionable (Day Sclater & Piper, 2001; James et al., 2003; Kelly, 1997; Piper, 2000; Thomas & O’Kane, 1998a). Children’s needs in the aftermath of parental separation have, for example, been reformulated away from attachment and emotional security with their primary caregiver (Goldstein, Freud & Solnit, 1973) toward the maintenance of enduring and meaningful relationships with both parents (Smart, 2003b). Determining what is in the best interests of children has been elevated to the status of a science (King & Piper, 1990) and drawn heavily on the extensive research and clinical experience of
developmentalists, psychologists and psychiatrists (Fitzgerald, 2002; Mayall, 1994; Neale & Smart, 1998). Regarding children as welfare dependants has perpetuated the idea that they are the victims of separation and divorce, and objects of concern in any ensuing legal disputes over their care arrangements (Kaganas & Diduck, 2004; Piper, 1996; Smart et al., 2001). This has effectively silenced them and rendered them passive and invisible in both family and legal forums (James & James, 1999; King & Piper, 1990). Protecting children from further risk and sheltering them from any burden of responsibility has taken priority. The younger the child, the more strongly these presumptions have been applied. Only a very limited notion of children’s agency has been slotted into this dependency framework – “one that recognises children’s competence to speak in carefully prescribed circumstances, but which denies them any rights of self-determination” (Neale & Smart, 1998, p. 15). While the welfare principle does incorporate children’s views, rights and interests, these have, to date, tended to be defined and determined by adults – usually parents, but in the context of family law proceedings by lawyers, counsellors, psychologists and, ultimately, judges.

How children are regarded has significant implications for law, policy, professional practice and family relations. Family and legal decision-making will be approached quite differently depending on whether the adults conceive of children as dependant, incompetent, vulnerable, and in need of care, protection and guidance, or as agents, social actors and young citizens with strengths and competencies to help shape their own childhoods (Fitzgerald, 2002; Richards, 1996; Smart et al., 2001). An analysis of family law judgments from the 1990s reflects this polarity of views within the judiciary, influencing at times the very nature of the outcome of the case (Tapp et al., 2001). Judges who were prepared to enter the child’s world and understand it from that perspective gained a very different, and more nuanced, picture of the child’s life than those who merely applied a generalised conception of children as inarticulate, at risk dependants. Family law has, of course, begun to more readily embrace children’s agency (Neale & Smart, 1998; Tapp et al., 2001; Taylor, Smith & Tapp, 2001b), and this will be even further advanced by statutory amendments, shifts in professional attitudes, and the expansion of child-focused services.
within the family law field. Neither the agency nor the dependency paradigms are, of course, mutually exclusive (Alderson, 2001; Neale & Smart, 1998), and more fruitful avenues of contemporary thinking and practice may come from discourses which recognise the inter-relationships between welfare and justice.

The sociology of childhood has made it possible to identify and reflect on the conceptions which have so influenced our law, policy and practice. Rather than remaining captive by the “child development industry [which] has cornered the market in knowledge about children” (Mayall, 2000, p. 129), a whole new realm of possibilities has opened up as a result of acknowledging children’s agency and hearing their voices. Children are no longer just the objects of concern and intervention, but are instead beginning to gain a legal identity. Central to this reformulation is the child as a holder of participation rights, and the creation of opportunities for the honouring of such rights within the family law system.

V United Nations Convention on the Rights of the Child

At the end of World War One a non-governmental organisation, Save the Children International Union, was formed by Eglantyne Jebb, a children’s activist, out of concern for the horror of war inflicted on children. In 1923 this Union drafted the Declaration on the Rights of the Child, which was adopted by the Fifth Assembly of the League of Nations the following year and renamed as the Geneva Declaration (Cantwell, 1992; Levy, 2002). Members of the League of Nations were invited to follow its principles, which mostly emphasised children’s material needs.

In 1959 the United Nations (UN) adopted the Declaration of the Rights of the Child, which like the Geneva Declaration, was aspirational and not legally binding. The Declaration was little more than a proclamation of general principles based on the premise that ‘mankind owes to children the best it has to give.’

Implicit was an emphasis on duties to children, and, although the Preamble referred to rights and freedoms, the ten principles set out did not embrace children’s liberties (or freedom or autonomy) at all. Indeed the
Articles were vague, perhaps deliberately so, as to the rights children should have and, necessarily who was to bear the correlative duties. (Freeman, 1992, p. 4)

However, the Declaration did, at that time, represent the most comprehensive statement on children’s rights ever developed (Bennett, 1987). Some years later, in 1978, Poland - in anticipation of the International Year of the Child in 1979 - proposed the adoption of a children’s rights convention. The Polish Government submitted a draft text with 10 articles and implementing provisions to the UN Commission on Human Rights. The Commission then consulted with governments, non-governmental (NGO) organisations and various UN bodies, and established a Working Group. As a result of the feedback generated through these processes, Poland produced a new draft with 20 articles (Limber & Flekkoy, 1995). Over the next decade the Working Group engaged in lengthy debate and compromise and worked with numerous groups to reshape the Polish text into its current form. Given the focus of the document it was surprising that children had no opportunity to be involved in its development (Freeman, 1992). However, the Convention was finally adopted by the UN General Assembly on 20 November 1989, 10 years after the International Year of the Child and 30 years to the day after the adoption of the UN Declaration on the Rights of the Child.

The Convention is one of the six core international conventions and covenants aimed at promoting and protecting human rights. It has been acclaimed as a landmark in the history of childhood (Freeman, 1996) and as a turning point in the international movement on behalf of children’s rights (Lansdown, 1994). The significance of the Convention lies in the fact it is the first international instrument bringing together states parties’ obligations with respect to the protection, provision and participation rights of children under the age of 18 years. It provides an internationally agreed framework of civil, political, cultural, social, economic and humanitarian standards against which legislation, policies and practices can be measured and their ongoing compliance monitored. The Convention has had the fastest ratification process of any UN human rights treaty. By 2 September 1990 there were sufficient ratifications to put the Convention into force and it has now been ratified by all
but two countries – America (which is a signatory) and Somalia (Limber & Flekkoy, 1995).

Ratification means that a government has agreed to be bound by international law to adopt appropriate measures to achieve the minimum standards set out in the Convention and to allocate the maximum amount of available resources in order to ensure its implementation (Hodgkin & Newell, 1998). The New Zealand Government became a signatory to the UNCRC in 1989 and formally ratified it on 13 March 1993 (Ministry of Youth Affairs, 1995). Three reservations were entered relating to the non-provision of benefits to children unlawfully in the country (Article 28), the adequacy of measures to protect children in employment (Article 32), and the mixing of juvenile and adult prisoners (Article 37) (Ministry of Foreign Affairs & Trade, 1997).

While the UNCRC is the pre-eminent statement of children’s rights, it cannot override domestic law unless the convention has been enshrined in an enabling Act of Parliament (Tapp, 1998c). Nevertheless, a domestic statute should, where possible, be interpreted in conformity with the convention (Tapp, 1998a), and any official exercising a statutory discretion must have regard to New Zealand’s international obligations, including the UNCRC (Tavita v Minister of Immigration and A-G [1994] 2 NZLR 257).

Several UNCRC Articles are relevant to children whose parents’ have separated. These include Article 3(1) - the best interests of the child shall be a primary consideration, which is consistent with section 23(1) of the Guardianship Act 1968 and section 4 of the COC Act 2004; Article 5 - respect for the responsibilities, rights and duties of parents to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance; Article 9(3) - respect for the right of the child who is separated from one or both 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; Article 12(1) - the right of the child who is capable of forming his or her own views to express those views freely in all matters affecting the child, their views being given due weight in accordance with their age and maturity; and Article
18(1) - recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. The Convention is intended to be read holistically without any prioritisation of one right over another (Tapp, 1998c). It also firmly recognises the interdependence of children, parents and society, and in this respect is consistent with an ecological perspective. The maintenance of children’s relationships with each parent following separation or divorce is respected, as is children’s voice and participation in any family and legal decision-making processes.

Countries are required to report to the UN Committee on the Rights of the Child (a body of 18 experts elected by the States Parties which meets in Geneva) on their progress in implementing and complying with the Convention two years after ratification and every five years thereafter (Article 44). The Ministry of Youth Affairs (1995) took responsibility for producing New Zealand’s initial report to the UN Committee in November 1995. Action for Children Aotearoa also prepared a NGO report for the UN Committee setting out the issues facing children and young people in New Zealand. The Committee held separate discussions with both government and NGO representatives and published its non-binding concluding observations on New Zealand’s compliance with the UNCRC on 24 January 1997. The Government’s second periodic report was submitted to the UN Committee in December 2000 (Ministry of Youth Affairs, 2000), and the NGO report in March 2003 (Action for Children and Youth Aotearoa (ACYA), 2003). Again, the Committee met with NGO and government representatives during 2003 and shortly thereafter published its recommendations to enhance New Zealand’s compliance with the UNCRC (UN Committee, 2003). These included the need to harmonise domestic legislation and regulations with the principles and provisions of the Convention (para. 9) and the right of children to have their views taken into account according to Article 12 (para. 26). The next government report to the UN Committee will combine the third and fourth reports in one consolidated document due by 5 November 2008 (para. 54).

Concern has been expressed by leading children’s rights commentators that the New Zealand Government has failed to fulfil its basic obligations under the
Convention (ACYA, 2003; Freeman, 1996; Henaghan, 1996b; Ludbrook, 2000b; Tapp, 1998c). Several statutory provisions relevant to children’s day-to-day care and contact fail to comply properly with Article 12, including s5(d) CYPF Act 1989 and the Child Support Act 1991 (Ludbrook, 2000b), and the adult-centred conciliation and adjudication processes largely exclude children and dilute any expression of their views (ACYA, 2003; Tapp, 1998a, 1998c). In a review of 829 New Zealand family law judgments from the 1990s, it was found that the UNCRC was only mentioned in 22 judgments (3.2%) (Tapp et al., 2001). The references to the Convention were mostly in care and protection cases, although abduction and custody/access cases also featured. Six of these judgments were written in 1994, and 16 in 1998, indicating a small positive trend in citation of the Convention over time. The UNCRC has fortunately continued to gain momentum in case law because of its referential role as a specialist source of authority for lawyers presenting submissions and judges deciding cases (Hassall & Davies, 2003; Tapp, 1998b, 1998c). The development of international standards and the jurisprudence emerging as the courts give practical expression to the UNCRC’s principles are regarded as great strengths of modern family law (Boshier, 2004a, 2005b; Mahony, 2003a, 2003c). Recent legislation (for example, the COC Act 2004 and the Children’s Commissioner Act 2003) has also taken much greater account of the UNCRC (Hollingsworth, 2004), and its principles have filtered through into best practice guidelines governing the role of children’s lawyers, government strategies like the Agenda for Children (Ministry of Social Development, 2002) and the Youth Development Strategy Aotearoa (Ministry of Youth Affairs, 2002), and other publications promoting children’s rights and a whole-child approach (Gray, 2002; Institute of Public Policy at AUT, Children’s Agenda & UNICEF, 2002; Ministry of Social Development, 2004b; Ministry of Youth Development, 2004).

We are beginning to gain a better understanding of how children and young people conceptualise their rights, and place such considerable importance on their participation rights whatever the context: family, education, law, health, welfare or community (Morrow, 1999; Schmidt & Reppucci, 2002; Taylor,
Smith & Nairn, 2001). When children learn they have rights they become more aware of and supportive of the rights of others (Covell & Howe, 1999, 2000).

The minimal impact the UNCRC initially had on the laws and policies of States Parties (Freeman, 1996; Levy, 2002; Ludbrook, 2000b) is now changing. There needs to be greater recognition of the Convention’s holistic approach and interdependency – rather than the polarisation which can occur when it is just children’s rights which are emphasised. There is no intention to set children in opposition to their parents, nor to diminish parents’ rights and responsibilities, except to recognise that, over time, these do yield to a child’s right “to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision” (Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112, per Lord Scarman at p. 189).

Whilst the internationality of the UNCRC is championed, a lingering concern does remain about the impact its universality has on the conceptualisation of childhood (Freeman, 1998; James & James, 1999). The Convention adopts a global model for children’s rights and is heavily premised on Western and Christian thinking. Its implicit appeal to a universal child stands somewhat in contradiction to the diversity now so well recognised interculturally and in the sociology of childhood (Burr, 2004).

VI  An Integrated Theoretical Model

No-one has before endeavoured to link sociocultural and ecological theories, the sociology of childhood and the UNCRC, although some scholars (Freeman, 1998; Mayall, 2000b; Smith, 2002) have explored the overlap of interests and the congruence of visions between at least two of these approaches. Freeman (1998) noted that Childhood Studies emerged at broadly the same time as the modern children’s rights movement was sparked by the UNCRC. While “there has been little dialogue or collaboration between them” he argued the two disciplines “have much to offer each other” (Freeman, 1998, p. 433), and outlined several areas of common ground between them:
• Research should focus on children’s agency and the ways they construct their own autonomous social worlds;

• Children are persons, not property; subjects, not objects of social concern or control; participants in social processes, not social problems;

• Children should be treated as individuals, rather than being categorised as a collective and undifferentiated class;

• It is doubtful whether adulthood is more important than childhood, as is commonly assumed; and

• Childhood has been constructed as conferring rights to children for protection and education, but there is an absence of responsibility and no right to autonomy.

Mayall (2000b) has also addressed the relationship between the sociology of childhood and children’s rights. Since “psychological knowledge is relevant but not sufficient” (Mayall, 2000b, p. 244) in understanding the social condition of childhood, she argues that we need to study “children as a social group and childhood as a social phenomenon” (p. 247). This will shift adult understandings of what it is to be a child, recognise the inter-relationships between knowledge and policy, and help redress the wrongs children have suffered by promoting implementation of their rights.

Smith (2002) is the only author to have explored how sociocultural theories of development contribute to our understanding of children’s participation rights. She believes that Vygotsky’s work adds “a new theoretical dimension” to the children’s rights discourse (p. 74). Participation almost always occurs within a social context and the scaffolding provided by skilled partners can assist children to better formulate and express their views. Working jointly with children within their zone of proximal development will extend their skills and capabilities, as they will perform more competently with guidance than they can independently. This is particularly essential in societies where there has been no previous culture of listening to children.
All four theoretical domains are critical of the view that child development should be regarded as a sequential and orderly progression on a pathway from immature, irrational, incompetent and asocial childhood, to rational, competent and autonomous adulthood. They also all accept the social construction of childhood and the importance of a temporal perspective on development. While they all primarily relate to children’s development, well-being and rights, there are important signals from several authors that these theories have broader application to the processes governing adult functioning as well. Rogoff (1990) and Smith (1998) both note that while most development theories focus on infancy and childhood, development is assumed to proceed throughout the life course. Smith (1998) says that “there are sound theoretical reasons for assuming that joint involvement is a rich context for continuing learning at all ages” (p. 78), while Rogoff (1990) believes that individuals’ ways of thinking are reorganised across the life span and contribute to enhancing their own understandings, skills and perspectives, as well as those of their community. She also makes a direct connection between the impact of a transition (like separation/divorce) on development:

In addition to considering transitions occurring across the years of an individual’s life ... I consider development as including transformations in thinking that occur with successive attempts to handle a problem. (Rogoff, 1990, p. 11)

Ecological theory, too, reminds us that children’s life conditions are fundamentally embedded within and determined by the same economic, political, historical and social forces which shape the nature of adults’ lives. It is therefore conceptually sound to link sociocultural, ecological and sociological approaches to both children’s and adults’ development as they share the same social context and transform their thinking and skills through similar social processes. Bronfenbrenner (1992) himself acknowledged the influence of Vygotsky (and other Soviet psychologists) as “perhaps the earliest and most explicit theoretical conception of competence in context” (p. 204). In Figure One I depict the inter-relationships between these four theoretical orientations:
The family law system operates at several levels within this diagram and is clearly much broader than legislation and the courts. It also embraces the many service providers and individuals who help families to resolve the legal and emotional issues arising from parental separation and divorce. The lingering influence of Piaget’s theory of child development on family law is also noted in Figure One, as this has powerfully influenced the way adults have perceived the role children can play in family and legal proceedings. However, once the social nature of childhood was recognised, the inadequate explanatory power and relative inflexibility of Piaget’s approach made it “possible to think beyond the developmental/socialization framework for understanding children” (Smart et al., 2001, p. 12). Our rethinking of childhood has thus advanced cooperation between the disciplines interested in children and families, as well as leading to a change in the way theorists, practitioners and family members engage with each other (Pufall & Unsworth, 2004).

As can be seen in Figure One, I have identified two key principles, shared in common across all four theoretical domains, as the coherent threads for the
application of a new conceptual framework to the family law field. Firstly, *participation* operates across all four dimensions in the following ways:

- **Sociocultural theory** – regards development as a process arising out of participation in social relationships and interactions in particular cultural contexts.

- **Ecological theory** – learning and development is facilitated by participation of the individual in progressively more complex patterns of reciprocal activity, with a person with whom they have an emotional attachment and who can gradually shift the balance of power in favour of the developing person.

- **Sociology of childhood** – conceives of children as social actors and citizens with an active participatory role in family and community life.

- **UNCRC** – Article 12 assures all children of the right to participate by expressing their views freely, particularly within any judicial or administrative proceedings affecting them (either directly or through a representative).

The second attribute shared by all four theories is the role of others – adults, peers and professionals - in mediating people’s level of functioning:

- **Sociocultural theory** – the provision of scaffolding by more competent others, within the context of a collaborative partnership characterised by mutuality and warmth, allows for a gradual shift in the balance of power and encourages initiative, responsibility, and independence in the other. This way of working jointly with the person at the outer limits of their zone of proximal development builds their understanding and competence more effectively than is possible if they are expected to perform unaided.

- **Ecological theory** – an individual’s development will be affected by their relationship with the person offering guidance, the way they perform their role (whether or not it is characterised by reciprocity and a
gradual shift in the balance of power in favour of the developing person), and the environment or setting within which the interaction is occurring.

- **Sociology of childhood** – this has opened up new ways of theorising about childhood and transformed the construction of child-adult relationships. Children are now regarded as legitimate and valued contributors to family/community life with their own subjective perspectives on their life experiences. Adults have a responsibility to consult with children, listen to their views and take them into account.

- **UNCRC** – recognises the interdependence of family members and fits children’s rights within the broader context of parental, extended family and community responsibilities, rights and duties (Article 5) and state obligations to implement children’s rights to the maximum extent of the nation’s available resources (Article 4).

The New Zealand Family Court has, in recent times, recognised the significance of client participation, although its emphasis has primarily been on strengthening opportunities for children’s participation through the COC Act 2004 (Boshier, 2005c). Internationally, however, new initiatives have been directed toward the greater direct engagement of adult clients with lawyers and judges, and to the introduction of child-inclusive models of practice. Research findings on these new forms of participation within the family law system are promising, and indicate that clients are more likely to feel heard, respected and empowered. The professionals report that they are better able to maintain the parties’ focus and to obtain the information they need, leading to more satisfactory and durable case outcomes. Inherent in these new forms of participatory practice within the legal and court system are numerous opportunities for scaffolding, although this concept is probably unfamiliar to most Family Court professionals at this point in time. Nevertheless it has the potential to reorient client-professional relationships, thereby better achieving one of the original goals of the Family Court to assist people to more effectively reach their own decisions following separation.
VII Chapter Summary

This chapter has outlined the theoretical framework I have used to inform my research and to develop a conceptual basis for the significance of participation and scaffolding in the lives of family members facing family transitions. The key differences between Vygotsky’s and Piaget’s approaches to human development are depicted in Table One. While Wertsch and Penuel (1996) point out that it is too simplistic to regard these conceptual differences as evidence of a clear bifurcation between their respective views, it is evident that it has been Piaget, to date, who has had the most influence on the development of the law in relation to children:

In general, the theoretical frameworks of both Vygotsky and Piaget are too sophisticated and broad to fit into neat bifurcations of contradictory perspectives, but clear differences in orientation nonetheless do show through. One way to think of these differences is to view them as reflecting alternative ways to choose an ‘entry point’ into a swirl of complex and complexly interacting forces. We ‘have to start somewhere’ and Piaget and Vygotsky can be interpreted as choosing to begin from different sides of the picture in order to get their research enterprises underway. (Wertsch & Penuel, 1996, p. 427)

<table>
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<tr>
<td>Focus is on how individuals’ interactions with the environment might give rise to a set of universal logical structures that govern human action and thought</td>
<td>Focus is on how children’s cognitive development is embedded in the context of social relationships and sociocultural tools and practices</td>
</tr>
<tr>
<td>Primacy of individual processes</td>
<td>Primacy of social processes</td>
</tr>
<tr>
<td>Development drives learning</td>
<td>Learning drives development</td>
</tr>
<tr>
<td>Teaching should follow the maturation of cognitive development</td>
<td>Teaching can evoke and promote cognitive development</td>
</tr>
<tr>
<td>Individualistic orientation</td>
<td>Collective orientation</td>
</tr>
<tr>
<td>Process of learning is one of individual discovery by the child</td>
<td>Process of learning requires scaffolding and guided participation of the child by more competent others</td>
</tr>
<tr>
<td>Passive role of adults/teachers</td>
<td>Active, collaborative role of adults/teachers</td>
</tr>
<tr>
<td>Play is diverting fun or fantasy which deflects child from their purpose</td>
<td>Play is a source of development and can create the zone of proximal development</td>
</tr>
<tr>
<td>Development</td>
<td>Cognitive structures are the precursors to new thinking skills</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>Children-run model of learning</td>
<td>Community of learning model</td>
</tr>
<tr>
<td>Had no interest in societal reform and liberation</td>
<td>Wanted to reform society and the mental functioning that would go along with new societal forms</td>
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It is Piaget’s theory that has, for years, been uncritically absorbed into legislative and judicial pronouncements concerning children’s voice and participation in legal proceedings. The sociocultural approach offers an exciting alternative, as it regards human development and functioning as embedded within the context of social relationships and interactions. These social connections are also at the heart of the ecological model since it is impossible to understand the impact of transition on the family microsystem without also considering those laws, attitudes, values and customs which can either support or undermine individual and family functioning. The role played by an institution like the Family Court, operating at the mesosystem level, will also considerably influence the nature of the transition from intact to separated to reconstituted family.

Piaget’s narrow discourse, which constrained children’s voice and participation, has also more recently been challenged by the sociology of childhood. The conceptualisation of children now emerging acknowledges and promotes their agency and diversity:

Interest in ‘Childhood Studies’ is for many born out of frustration with the narrow versions of ‘the child’ offered by traditional academic discourses and methods of inquiry, especially a rejection of the way psychology, sociology and anthropology traditionally partition and objectify ‘the child’ as subject to processes of development, socialization or acculturation. The appeal of an interdisciplinary Childhood Studies is about a more integrated approach to research and teaching about children’s lives and well-being, a more ‘joined-up’ view of ‘the child in context’, which has become a priority for policy…. It [Childhood Studies] recognizes the multiple ways childhood is socially constructed and reconstructed in relation to time and place, age, gender, ethnicity etc. (Woodhead, 2004, p. x)
Sociocultural and ecological theories, the UNCRC and the sociology of childhood have sparked the emergence of a new concept of the child as one who has a role to play in shaping the nature of post-separation family life. They also have considerable relevance for a greater participatory role for adults within the family law system, and offer a promising conceptual framework for the reorienting of professional roles and decision-making processes for family members experiencing family transitions. In chapter eleven I synthesise the various theoretical approaches outlined in this chapter with the findings of my research participants to arrive at a new conceptual model for dispute resolution within the family law field.
Chapter Six

METHODOLOGY

I  Introduction

The objective of this study was to gain a greater understanding of post-separation family life and the Family Court environment, and more importantly the impact that interaction between these two contexts has on family members’ lives and court professionals’ practice. I was particularly interested in capturing the layers of meaning which arise when families face decisions about children’s care arrangements, and how the family law system impacts upon and, at times, shapes these. An in-depth qualitative approach was the obvious vehicle for such applied research (Donmoyer, 1990). The rationale for this methodology is outlined in this chapter, together with the research aims and the method.

II  Rationale for Methodology

The research is an in-depth qualitative study using a sample from three Family Court districts in New Zealand. I primarily employed a two-phase interview process with family members which enabled me to ascertain, over time, each parent’s perspective on their engagement with the Family Court over custody and access matters. These parent interviews were supplemented by interviews with their children, and by focus group discussions with Family Court professionals.

Qualitative research involves an interpretive, naturalistic approach to the world (Denzin & Lincoln, 2000a). It is primarily concerned with ascertaining and interpreting people’s perceptions and assumptions about the events, processes and structures of their lives (Creswell, 1994). The research is conducted in the field in close proximity to naturally occurring events in familiar settings (Maxwell, 2002; Miles & Huberman, 1994; Silverman, 2000a). The aim is to gain a holistic overview of the real lives of real people by explicating the ways they “come to understand, account for, take action, and
otherwise manage their day-to-day situations” (Miles & Huberman, 1994, p. 7). Both routine and problematic moments in individuals’ lives can be explored (Denzin & Lincoln, 2000b). The researcher endeavours to capture the perceptions of each participant ‘from the inside’ so that the meanings they attach to their ‘lived experience’ are set within the context of their particular social world (Huberman & Miles, 2002; Miles & Huberman, 1994).

The process of qualitative research is inductive, with concepts and theories being built from details (Creswell, 1994). It relies on an in-depth examination of how particular individuals make meaning of events in their lives and on how people might agree about, or vary in, their interpretations of shared experiences. Qualitative data “are a source of well-grounded, rich descriptions and explanations of processes in identifiable local contexts” (Miles & Huberman, 1994, p. 1). Participants’ contributions, collected over sustained time periods, can be organised into meaningful and vivid stories which preserve their chronological flow. This leads to a deeper, more finely nuanced understanding of human action and social phenomena (Gergen & Gergen, 2000; Silverman, 2000a). It also ultimately helps in the development or revision of conceptual frameworks and processes (Miles & Huberman, 1994).

In qualitative research, the researcher is the primary instrument for data collection and analysis and usually undertakes the fieldwork (Creswell, 1994, 1998; Denzin, 2002; Miles & Huberman, 1994). It is therefore especially important that the researcher’s values and assumptions are explicitly stated at the outset of the study and in the research report (Creswell, 1994). An intimate relationship develops as the researcher gets closer to the participants’ perspectives through detailed interviewing and observation. This is enhanced when several contacts occur and interviews are conducted like conversations, so that participants can initiate and ask questions as well as respond to the researcher’s line of enquiry (Creswell, 1998). It is preferable for interviews to be as open-ended and unstructured as possible, allowing participants to readily offer narratives about their lives and to structure their own interpretations. Qualitative researchers listen for how participants’ social experience is created and given meaning, including any gaps, inconsistencies and associations
They are mindful of their role in shaping the research encounter. In contrast, quantitative and experimental studies emphasise the measurement and statistical analysis of causal relationships between variables, not processes (Denzin & Lincoln, 2000a). Such research is more remote and less concerned with the socially constructed nature of reality and the detail of human experience.

While objectivity and truthfulness are critical to both research traditions, the criteria for judging qualitative and quantitative studies differ. Qualitative methods are more faithful to the social world than quantitative ones because they enable a rich array of perspectives to shape the enquiry (Gergen & Gergen, 2000). However, difficulties associated with the collection of qualitative data include its labour-intensiveness, the likelihood of data overload, the possibility of researcher bias, sampling inadequacies, the validity and generalisability of the findings and conclusions, and their credibility and utility in policy and practice (Creswell, 1994; Denzin & Lincoln, 2000a; Miles & Huberman, 1994). Criticising qualitative research as unreliable and impressionistic fails to take account of the coherence and insight which it is possible to bring to the themes identified in the data (Creswell, 1994). “Our raw material is inevitably the words written in documents or spoken by interview respondents” (Silverman, 2000b, p. 821). Most analysis is therefore done with words and images, rather than with numbers (Miles & Huberman, 1994; Silverman, 2000a). The researcher has to look for patterns across the text, develop categories and make comparisons and contrasts. This eclectic process of holding the data up for serious examination, out of the world where it occurs, to uncover, define and analyse its elements and structures according to some schema is referred to as ‘bracketing’ (Denzin, 2002). This process results in a higher level analysis, out of which a larger, consolidated and holistic picture can emerge (Creswell, 1994, 1998).

The validity and reliability of qualitative data relates to its accuracy, generalisability and replicability (Creswell, 1994; Gergen & Gergen, 2000). Early qualitative researchers felt compelled to utilise traditional notions of validity and reliability, but later scholars developed their own criteria (such as
‘trustworthiness’ and ‘authenticity’) to distance themselves from those with a positivist orientation (Lincoln & Guba, 2002). Replicating a qualitative study is difficult because its specific context mitigates against this (Creswell, 1994). However, statements about the researcher’s central assumptions and the selection of informants enhance the study’s chances of being replicated in another setting.

The accuracy of the information collected, and whether it matches reality, can be checked with participants to enhance a study’s internal validity. This feedback provides a logical source of corroboration to help the researcher determine how well the thematic analysis resonates with the interviewees (Creswell, 1994; Miles & Huberman, 1994). The factual accuracy of the researcher’s account of the data is important as any invention or distortion in what was seen, heard or inferred must be avoided (Maxwell, 2002). Data derived from tape recordings enhances the likelihood of intersubjective agreement since it can be independently checked to verify its descriptive validity.

The external validity of a qualitative study can be problematic because the unique interpretation of meanings, derived from participants’ experiences and perceptions, limits its generalisability to other persons, times, or settings than those directly studied (Creswell, 1994; Maxwell, 2002). Thinking of generalisability solely in terms of sampling and statistical significance is impractical (Donmoyer, 1990). Instead, qualitative researchers primarily focus on internal generalisability because they are more interested in ensuring that the interpretations they develop about their participants’ lives are understandable to these people, rather than to other communities, groups or institutions (Denzin, 2002).

Triangulation is a means of corroboration to support “a finding by showing that independent measures of it agree with it, or at least, do not contradict it” (Miles & Huberman, 1994, p. 266). It is a process of using multiple perceptions to find convergence among different sources of information. This helps to verify their meaning and to substantiate the conclusions drawn (Stake, 2000). The data sources, the methods, the number of researchers, the theory, and the data type
are all potential sources of triangulation in a particular study. I used different methods of data collection (interviews and focus groups), and multiple-voicing (through the ascertainment of parents’, children’s and professionals’ perspectives) to help triangulate the data.

Much qualitative research adopts a multi-method approach (Denzin & Lincoln, 2000a), and my study was no exception. **Focus groups** with a range of Family Court professionals were used to add complexity and richness to the findings. Focus groups grew out of ‘focused interviews’ in the 1950s (Madriz, 2000). They function as a well-designed discussion group, centred around a particular topic that is the ‘focus’ of the conversation. The contemporary focus group typically consists of 8-12 participants in a formal setting. They are under the direction of a moderator, who promotes interaction and ensures that the discussion remains on the topic of interest. Focus groups are similar to other qualitative research methods in that they enable researchers to have access to the opinions, viewpoints, attitudes and experiences of individuals. However, unlike individual interviews, focus groups involve not only ‘vertical’ interaction between the moderator and the interviewees, but also ‘horizontal’ interaction among the group participants (Madriz, 2000). This collectivistic approach capitalises on the social interaction and dialogue within the group to elicit rich experiential data.

Focus groups offer several advantages as a qualitative data collection technique. They enable a larger number of participants to be included in the research, promoting greater discussion and idea generation than would be possible in individual interviews. While the competency of the moderator is important, the influence this person has on the participants is decreased. Participants have more freedom to move the discussion at their own pace and in the light of their own knowledge and interests (Madriz, 2000). This more dynamic process encourages spontaneous responses from members of the group and avoids a ‘question and answer’ format. Focus group discussion is aided when the moderator and participants share a common specialist vocabulary, such as that used by Family Court professionals.
There is the potential for power relations to surface amongst focus group participants as not all people are equally articulate (Creswell, 1994). Focus groups are also unsuitable for the sharing of very intimate details about people’s lives, and some participants can become bored or be excluded by others. There is little current evidence about whether there a ‘group difference’ arising out of focus group research, although it does appear that participants find the collective experience more relaxed and stimulating than individual interviews (Madriz, 2000).

Qualitative methodologies are also ideally suited where children’s perspectives are being ascertained on important events in their lives (such as family transitions). Quantitative research methods generally stifle the expression of children’s own voices as they are based on the notion of children as research subjects. However, Vygotsky’s view of knowledge as something that is socially constructed through collaborative activity provides a theoretical foundation for conducting research with, rather than on, the participants (Woodhead & Faulkner, 2000). This has led to the sociology of childhood introducing a new line of qualitative research which elicits, values and respects children’s perspectives and feelings on their lived experiences (see chapter five). Most of the same qualitative methods used with adults (such as interviews and focus groups) can be used with children (Mayall, 1999), although specific peer research techniques are also developing.

Interviewing children for research purposes is not the same as interviewing them in clinical or legal contexts (Gollop, 2000; Hughes, 1988). Additional considerations which apply when investigating children’s views primarily concern ethical (especially consent) and power relationship issues (Morrow & Richards, 1996; Woodhead & Faulkner, 2000). As with all research, there is an obligation on researchers to ensure that the principles of informed consent, privacy, confidentiality and protection from harm are respected (Christensen & James, 2000; Davis, 1998; Munford & Sanders, 2001; Prout & James, 1997). Finally, the information sought must be necessary and contribute to improving the social condition of childhood and family life (Mayall, 2002; Munford & Sanders, 2001).
III Aims of the Study

The broad aim of this research was to assess family members’ experiences and satisfaction with Family Court procedures, and to ascertain the relevance of legal proceedings and orders for families over time. Perspectives on the range of court processes utilised by families endeavouring to resolve their custody and access arrangements – legal negotiation, counselling, mediation and defended hearings – were all explored.

While ascertaining parents’ perspectives at two points in time was the key objective, the views of their children and key Family Court professionals were also significant. To achieve these aims the study was divided into two phases which coincided with the main data collection periods. In Phase One the parents were recruited and interviewed, and their children were interviewed. Twelve months later, in Phase Two, follow-up interviews were conducted with parents, and focus groups held with the professionals.

IV Ethics

The research was approved by the University of Otago Ethics Committee at their meeting on 9 March 2001.

The principles of informed consent, confidentiality, right to withdraw at any stage and feedback to participants were incorporated into the research methods. A further important issue was to ensure that there would not be any harm caused to the participants. Experienced interviewers, knowledgeable about and sensitive to post-separation parenting issues, undertook all child and parent interviews.

Informed consent was a particularly central feature of the research design. Each adult (parent and professional) consented to their own participation. With respect to children’s inclusion in the sample, the consent of both parents (custodial and non-custodial) was sought. This was explained to each family member when they made their initial enquiry about the study. Where one parent
refused consent for their child’s participation then that child was not included in the study (even when the other parent was happy to participate and to have their child participate). The concept of ‘passive consent’ was utilised to address those situations where one parent simply did not respond, within a defined three week time period, to the invitation for them and their child to take part in the research. Provided the other parent (usually the one who initially expressed interest in the study) had given consent for the child’s participation then the child was included in the sample along with their one willing parent. This consent protocol was consistent with the ethical approach adopted for other research studies undertaken with children from separated families (Smart & Neale, 1999; Gollop, Smith & Taylor, 2000). Once parental consents were in place, each child’s own specific consent to participate in the study was also sought. This was preceded by an explanation to each child about the research.

The collection of information from several members of the same family meant that special care was required in writing up the data so that participants’ identities remained anonymous. I was particularly concerned to avoid ex-partners being able to recognise each other’s contributions to the study as this may have inflamed several already difficult family situations. Hence all the family members’ names used in this thesis are pseudonyms, and some details (family composition; sibling age/gender) have been changed at times to protect the identity of the participants. The three Family Courts are identified only as ‘A’, ‘B’ and ‘C’. The names of other people, localities and agencies (for example, schools, hospital clinics) mentioned by participants have been deleted. Professionals have been identified by their generic profession (such as lawyer, judge) rather than their names or pseudonyms. Quotes have been edited for ease of reading.

V Consultation with the Department for Courts and the Principal Family Court Judge

Research with Family Court clients and professionals requires the approval of the Principal Family Court Judge and the Research Manager at the Department for Courts. Preliminary correspondence informing them of the proposal occurred in late 2000, and was followed by a joint meeting in
Wellington on 24 January 2001. The full research proposal was then submitted to the Department on 1 February 2001. This was subsequently modified to meet their requirements (including simplification of the letter to parents; a three week, rather than the Ethics Committee approved two week, period for passive consent; and follow-up interviews to be 12, instead of nine, months following the initial parent interviews). On 4 May 2001 the Department gave permission for the research to proceed. I then met with the Family Court co-ordinators and jurisdictional managers at Family Court A (17 May 2001) and Family Court B (22 May 2001). They agreed to co-operate fully with the research and to assist with sample recruitment.

VI Sample Recruitment

Twelve families from each of the two Family Courts who had experienced a range of services, including legal negotiation, counselling, mediation and/or hearings, were sought for the study. Several criteria were developed to identify those families to whom the invitation to participate should be extended:

- Families who had made custody and/or access applications to Family Courts A and B, and whose cases had recently concluded by the issuing of a court order; a consent memorandum; or their case being withdrawn or struck out.

- At least one child in the family was aged five years or over.

- The parents had at least attended counselling (to ensure there had been sufficient contact with court processes to make the research meaningful).

- Re-applications could be included when a case that had been concluded some time ago had also had any subsequent reapplication concluded as well.

- One parent agreed to participate in the study themselves (ideally both parents would agree).

Two criteria were developed for the exclusion of certain families from the study:
- Families whose children were all aged less than five years, and those where insufficient consents were obtained to enable at least one parent and one child from each family to be interviewed.

- Any family seeking protection orders as well as custody/access orders. However, affidavits on court files raising domestic violence or care and protection issues did not exclude families unless they resulted in protection orders being made or court staff considered it inappropriate to invite them to participate.

The Family Court co-ordinators were also asked to use their discretion and not send information to family members whose participation in a research project would be untimely or distressing for them.

**Recruitment of Family Members**

Families were initially recruited in Family Courts A and B. Difficulties in achieving the preferred sample size led to a third Family Court later being included as a study site.

**Family Courts A and B:** A letter to parents inviting them to participate in the research was prepared for each court (see Appendices A and B), together with a brochure explaining the study in more detail (see Appendix C). Blank stamped envelopes containing a letter and a brochure were delivered to the Family Court co-ordinators in May and June 2001. They then addressed these envelopes and mailed them to parents (both applicants and respondents) meeting the study criteria. In addition, one co-ordinator offered to personally contact the families by telephone to discuss the research with them.

The co-ordinators identified the families from their personal knowledge of relevant files and from the court’s audit list that recorded the previous month’s concluded cases (including cases which settled at counselling and mediation). The letters were sent out in batches at three weekly intervals, and I maintained regular contact with the co-ordinators on the response rate in each area. They started with the most recently concluded cases (April 2001) and then worked
progressively backwards through each month of the court’s files, until the latter quarter of 2000.

The letter invited parents to contact me directly via a toll-free number if they were willing to participate in the study or wanted further information. When a parent telephoned, details of their family situation and involvement with the Family Court were recorded on a ‘potential participant information sheet’ (see Appendix D). The parent was told about the consent requirements and permission was sought to contact their ex-partner to enquire about their interest in participating in the study. I subsequently phoned each ex-partner and explained the study to them. This was followed up with a personal letter and a copy of the brochure as some had not received, or could not remember receiving, this material from the Family Court. Once a parent agreed to participate in the study the consent forms were mailed to them. One consent form covered their own participation (see Appendix E), and another concerned their consent for their child’s participation (see Appendix F). Where I was unable to contact the parent’s ex-partner by telephone then the consent form mailed to them about their child’s participation incorporated a ‘passive consent’ clause (see Appendix G). A separate form for children’s own consent was signed by them at the time of their interview (see Appendix H).

Unfortunately, despite 90 letters being sent out to families in Family Court A and 80 in Family Court B, it proved much more difficult than anticipated to recruit the 24 families. Many families either had children less than five years of age, or had had a protection order issued by the court. Others had settled at counselling and therefore had little contact with the court. In addition, some ex-partners refused to participate in the research when I contacted them and this meant I could not obtain both parents’ perspectives on their legal proceedings. Following discussion with the co-ordinators I relaxed the criteria in late June 2001 to allow families with children aged less than five years to participate (in
which case I would interview the parent(s) only and not the child) and to include cases where the protection order had been discharged.\footnote{One Family Court co-ordinator identified only one family meeting the research criteria in the April 2001 concluded cases. The other 17 cases that month were ineligible because they involved pre-school children or protection orders. February and March 2001 followed a similar pattern. By this time only two men from that court had contacted me, despite the co-ordinator having spoken to many families or left messages for them about the research. She was not surprised at the low response rate as she had also experienced difficulty engaging clients in domestic violence support programmes and research on parenting plans.}

**Family Court C:** It was clear that I needed to supplement the sample I had obtained in Family Courts A and B. However, I was reluctant to advertise in the media as the level of public interest in aspects of the Family Court during 2001 could have led to an over-representation of disenchanted clients offering to participate in the research (Ministry of Justice & Ministry of Social Policy, 2001; Law Commission, 2001; Quaintance, 2001). To avoid skewing the sample in this manner I therefore decided to ask family lawyers in Family Court C to assist with expanding the sample beyond the 10 families I had managed to recruit. In August 2001 I wrote to 40 lawyers (see Appendix I) asking them to help by sending out letters on my behalf to their clients fitting the study criteria (see Appendix J). Seven lawyers responded to this request and they mailed out a total of 58 letters/brochures to their clients during September 2001.

**Administrative Procedures:** As each participant was recruited for the study I established a family file containing their information sheet and notes of any telephone calls and email contact I had with them. Copies of any correspondence were also kept, together with the signed consent forms. These files, and the interview audiotapes, were kept in a locked cabinet in my office. To help ensure confidentiality I assigned codes that enabled me to distinguish between the three court localities, and between members of the same family. The participant master-list was kept separate from the coding profile.

**VII Sample of Family Members**

The sample of family members comprised 22 parents and eight children from 15 family groups. There were seven former couples in the sample. Five families included parents and their children – two families where both parents and their
children participated, two families where one parent and the children were interviewed, and one family where both parents but only the eldest child (and not her two younger siblings) participated.

**Parents:** The parent sample is outlined in Table Two:

- **Family Court A:** Five parents (three fathers and two mothers) from three family groups.

- **Family Court B:** Eleven parents (five fathers, five mothers and one aunty) from seven family groups.

- **Family Court C:** Six parents (five fathers and one mother) from five family groups.

<table>
<thead>
<tr>
<th>Parent</th>
<th>Occupation</th>
<th>Date of Separation</th>
<th>Children's Ages at Interview</th>
<th>Children's Care Arrangements</th>
<th>Family Court Involvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert</td>
<td>Business owner</td>
<td>1998 following 7 year marriage</td>
<td>6</td>
<td>Mother has custody; father has regular weekly access</td>
<td>counselling; protection order; mediation</td>
</tr>
<tr>
<td>Louisa</td>
<td>Airline industry</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greg</td>
<td>Builder</td>
<td>1999 following 4 year marriage</td>
<td>5</td>
<td>Child lived with father following separation; mother now has custody and father has regular access</td>
<td>counselling; protection order; mediation</td>
</tr>
<tr>
<td>Rachel</td>
<td>Beneficiary</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harry</td>
<td>Beneficiary</td>
<td>Never lived together</td>
<td>12 &amp; 5</td>
<td>Father has custody; mother has infrequent access</td>
<td>Protection order; counselling</td>
</tr>
<tr>
<td>Tina</td>
<td>Office Worker</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nick</td>
<td>Business owner</td>
<td>1997 following 8 year marriage</td>
<td>10, 8 &amp; 5</td>
<td>Mother has custody and lives overseas; father has access</td>
<td>counselling; mediation; defended hearing; higher court; appeals</td>
</tr>
<tr>
<td>Jane</td>
<td>Homemaker</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>Profession/Labour</td>
<td>Year</td>
<td>Ages</td>
<td>Details</td>
<td>Resolution</td>
</tr>
<tr>
<td>---------</td>
<td>-------------------</td>
<td>------</td>
<td>------</td>
<td>-------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>William</td>
<td>Professional</td>
<td>1993</td>
<td>4</td>
<td>Shared care</td>
<td></td>
</tr>
<tr>
<td>Madelaine</td>
<td>Professional</td>
<td></td>
<td></td>
<td>Mother has custody of 2 eldest children. Little contact with father. Shared care for youngest child – 58% of time with father &amp; 5 days a fortnight with mother &amp; siblings</td>
<td>counselling mediation (twice)</td>
</tr>
<tr>
<td>Gary</td>
<td>Agricultural industry</td>
<td>1998</td>
<td>15, 13 &amp; 11</td>
<td></td>
<td>counselling mediation defended hearing</td>
</tr>
<tr>
<td>Anna</td>
<td>Professional</td>
<td>1998</td>
<td>11 &amp; 9</td>
<td>Children live with mother during term-time; spend every third weekend and holidays with father. Arrangement to reverse from 2003</td>
<td></td>
</tr>
<tr>
<td>Phil</td>
<td>Business owner</td>
<td>1997</td>
<td>14 &amp; 11</td>
<td>Father has custody of son; mother has custody of daughter</td>
<td></td>
</tr>
<tr>
<td>Libby</td>
<td>Professional</td>
<td>1997</td>
<td>8, 7 &amp; 5</td>
<td>Mother has custody; father has regular mid-week, weekend and holiday access</td>
<td></td>
</tr>
<tr>
<td>Gordon</td>
<td>Professional</td>
<td>1997</td>
<td>9 &amp; 7</td>
<td>Mother has custody; father has weekly evening meal and 3 out of 4 weekends+ half the school holidays.</td>
<td></td>
</tr>
<tr>
<td>Tom</td>
<td>Business owner</td>
<td>1996</td>
<td>12</td>
<td>Mother had custody initially, but this reversed to father in 1998. Mother has access irregularly.</td>
<td>mediation</td>
</tr>
<tr>
<td>Tim</td>
<td>Office worker</td>
<td>2000</td>
<td>17, 15 &amp; 8</td>
<td>Mother has custody and relocated to new city; father has access to 2 eldest children twice a year, and to youngest child 4 times per year.</td>
<td>counselling mediation</td>
</tr>
<tr>
<td>Robbie</td>
<td>Beneficiary</td>
<td>2000</td>
<td>12, 9, 9 &amp; 8</td>
<td>Father has had custody since separation; mother has no contact</td>
<td>counselling mediation</td>
</tr>
<tr>
<td><strong>Kathy</strong></td>
<td><strong>Beneficiary</strong></td>
<td><strong>Several separations before final one in 1999</strong></td>
<td><strong>11 &amp; 8</strong></td>
<td><strong>Mother custodial parent since separation; supervised access with father</strong></td>
<td><strong>counselling protection order mediation scheduled, but agreement reached that morning</strong></td>
</tr>
<tr>
<td>-----------</td>
<td>----------------</td>
<td>-----------------------------------------------</td>
<td>-----------</td>
<td>---------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Stella</strong></td>
<td>Homemaker &amp; part-time student</td>
<td>Not applicable</td>
<td>10 (nephew)</td>
<td>Stella &amp; husband have custody of her sister’s child, as mother has mental health issues</td>
<td>counselling mediation defended hearing</td>
</tr>
</tbody>
</table>

There were 10 custodial parents (45% - five mothers, four fathers, one aunt), seven non-custodial parents (32% - one mother and five fathers), four parents with shared custody (18% - two mothers and two fathers), and one parent (5%) with split custody (father had custody of son, and mother had custody of daughter). The parents were spread socio-economically and included beneficiaries, tradespeople and semi-skilled staff (builder, flight attendant, truck driver, office staff), professionals (teacher, lawyer, engineer) and business owners. They ranged in age from their early thirties to late fifties. Seventeen parents (77%) were Pākehā, one (5%) was Māori, and four (18%) had immigrated to New Zealand from Europe. One former couple reached agreement about the custody and access arrangements following Family Court counselling, but the rest all proceeded to a mediation conference, and five to a defended hearing.

**Children:** The parents in the study had a total of 31 children aged from 4 to 17 years, but consent was given for only seven (23%) of them, from four family groups, to participate. One additional young person from another family group was added to the sample at the time of the follow-up interviews with parents in November 2002 - her father had refused consent for her initial participation during the interviews in 2001, but as she had turned 16 during 2002 she was then able to give her own valid consent. Her mother had been happy about her participation from the outset. The child in one family was only four years old and hence ineligible to be interviewed according to the study criteria. In nine other families one or both parents did not want their child(ren) to participate in the study.
• **Family Court A**: No child participants.

• **Family Court B**: Four child participants – siblings aged 11 and 8; one child aged 5; and one young person aged 16.

• **Family Court C**: Four child participants – siblings aged 11 and 9; and 10 and 7.

The child participants are described in Table Three:

**Table Three: Child Participants**

<table>
<thead>
<tr>
<th>Children</th>
<th>Day-to-day Care</th>
<th>Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andrew (11)</td>
<td>Mother is the custodial parent.</td>
<td>Fortnightly supervised access with father at half-sister’s home.</td>
</tr>
<tr>
<td>Eliza (8)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Daniel (5)</td>
<td>Lived with father following parents’ separation in early 1999, then mother obtained custody in September 2000.</td>
<td>Contact with father every second weekend, plus overnight weekly contact since mother obtained custody.</td>
</tr>
<tr>
<td>Ben (11)</td>
<td>Children live with mother during school terms, but in 2003, under the terms of the consent order, the arrangement reverses and they will live with father in another city.</td>
<td>Children spend every third weekend and school holidays with father. Following 2003 reversal they will have similar access with their mother in their original hometown.</td>
</tr>
<tr>
<td>Kate (9)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charlotte (9)</td>
<td>Mother is the custodial parent.</td>
<td>Weekly evening meal and three out of four weekends with father, plus half the school holidays.</td>
</tr>
<tr>
<td>Rose (7)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jessica (16)</td>
<td>Following parents’ separation initially remained at family home with father, but moved to live with mother two weeks later. Family Court proceedings centred on custody of Jessica’s younger sibling.</td>
<td>Very minimal level of contact with father.</td>
</tr>
</tbody>
</table>

**VIII Interviews with Family Members**

Once the appropriate consents were in place I telephoned or emailed the adult participants to negotiate a date, time and venue for their interviews. These
appointments were also confirmed in writing. The interviews with the children occurred at a slightly later date so that arrangements could be finalised once I had met with their parent(s). All the interviews followed a semi-structured format to maintain flexibility so the topics of interest could be adapted to the parent’s actual situation. I generally adopted a chronological approach as this enabled a natural flow from family life before separation, to the separation itself, and then onto the various phases of legal and Family Court involvement each participant had experienced. Following a chronology also gave some structure to the interview and assisted participants’ recall of past events. All the parent and child interviews were audio-taped to ensure their perspective was accurately recorded and to avoid the disruption of note-taking during the interview process. Each person was specifically asked at the outset for their consent to audio-tape the interview and no-one refused. Using the recorder meant I could fully attend to participants as they imparted sensitive information about their lives. Care was taken to only label the tapes with the participant’s code number.

**Initial Interviews:** The initial interviews were conducted with the parents during the period from September 2001 to January 2002. These took between 40 and 150 minutes, depending upon the complexity of the parent’s story and the extensiveness of their involvement with the Family Court. Twelve of the interviews were conducted at the parent’s home, four at their place of employment, two in an office, two in a hotel, one at a park, and one by telephone. Where two former partners agreed to participate in the study then they were each interviewed by a different researcher. I interviewed one ex-partner and either Pauline Tapp⁵ or Megan Gollop⁶ interviewed the other. This differentiation was considered important because it meant each ex-partner was assured that their perspective was being heard by one researcher, uninformed by the views of their former partner.

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⁵ Associate Professor Pauline Tapp is a senior family law academic at the University of Auckland.
⁶ Megan Gollop is a senior researcher at the Children’s Issues Centre.
The parent interview schedule (see Appendix K) focussed on their family’s decision-making processes prior to their separation and then moved to the time of their actual separation – their initial views on the care arrangements for the children and any contact they had with their lawyer and the Family Court. The interview then chronologically traced each phase of the court proceedings experienced by that parent. My knowledge of family law was helpful in assisting parents to differentiate between the various dispute resolution processes and the types of professionals involved in their case.

The children were interviewed by Megan Gollop between January and April 2002, and I interviewed one young person in November 2002 at the time of her mother’s follow-up interview. These interviews all occurred in the children’s homes, and took 30-45 minutes each. The child interview schedule (see Appendix L) began with family life prior to their parents’ separation, and, in particular, how much say the children felt they had in family decisions. They were also asked about their knowledge and understanding at the time of the separation, who informed them and what they said, and what input the children had into the initial care arrangements. The interview then explored the children’s knowledge of the Family Court proceedings their parents had engaged in, what interaction they had had with their lawyer, the specialist report writer, or judge, and how well they felt the decisions had worked out.

In June 2002 all the parents and children in the study were given the opportunity to receive a copy of their interview transcript and to amend it if they so desired (see Appendix M). Three parents asked for a copy of their transcript, and one of them also asked for the child’s interview transcript to be sent to her son. No additions or changes were requested to any of the transcripts.

**Follow-up Parent Interviews:** Follow-up interviews were undertaken with 18 (82%) of the 22 parents in November and December 2002. Four parents (18%) did not participate in these interviews as they had shifted overseas to live (one parent) or were not contactable at their original addresses and phone numbers (three parents). However, at least one parent was interviewed from each of the 15 family groups participating in the study and so follow-up data concerning all the family situations was obtained. Six interviews were conducted by telephone,
two by email, and 10 were face-to-face (six in the parent’s home, two at a hotel, and one each at an office and the parent’s place of employment). Pauline Tapp and Megan Gollop again assisted with the conducting of these follow-up interviews, which varied in length between 15 to 120 minutes. This time the interview schedule (see Appendix N) sought information on the key messages parents remembered being given by Family Court professionals; whether their agreements/orders had been implemented; whether there had been any changes in children’s care arrangements since the previous interview; what further contact there had been, or might be, with a lawyer or the court; reflections on the positive and negative features of the court process; and any advice parents might have for other families facing similar post-separation issues.

IX  Focus Groups with Family Court Professionals

A range of Family Court professionals contributed to the study by reflecting and commenting on the major themes that emerged from the initial interviews with the parents and children. This enabled the clients’ perspectives to be checked out against the general experience of the professionals. As well, the professionals’ voiced their own views on the nature of family law and the role of the Family Court.

Consultation with Principal Family Court Judge: Preliminary arrangements for the focus groups commenced with a letter to the Principal Family Court Judge on 23 May 2002. I had been asked to consult him about the judicial composition of the focus groups, and whether or not the judges invited to participate should be interviewed separately, or be included as part of the group of mixed Family Court professionals. When no reply was received I wrote again on 17 July 2002. On 7 August 2002 I received a letter advising which judges I could consult.

Recruitment of Family Court Professionals: During August 2002 I drew up a list of potential invitees to the focus groups. I wanted each of the professions associated with the Family Court to be represented and primarily drew upon my own knowledge of experienced practitioners in determining who to invite. A
Family Court co-ordinator also assisted me with this. On 6 September 2002 I wrote to each person inviting them to express interest in participating in the focus groups (see Appendix O). Everyone responded positively, and I then used email and telephone contact to finalise convenient dates and times. The focus groups were held in two New Zealand cities on 27 and 28 November 2002. Each participant signed a consent form (see Appendix P).

Sample of Family Court Professionals: Twenty-two Family Court professionals were invited to participate in the focus groups – 10 in one city and 12 in another. Six invitees were ultimately unable to attend due to their absence overseas, sabbatical leave or urgent matters requiring their immediate attention at the scheduled time (two judges, a barrister, counsellor, report writer and Family Court co-ordinator). Thus 16 professionals participated in the focus group discussions - see Table Four:

Table Four: Family Court Professionals Attending Focus Groups

<table>
<thead>
<tr>
<th>Type of Family Court Professional</th>
<th>City 1</th>
<th>City 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Family Court Judge</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Specialist Report Writer</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Counsellor</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Specialist Report Writer / Counsellor</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Family Court Co-ordinator</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Family Court Manager</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>5</strong></td>
<td><strong>11</strong></td>
</tr>
</tbody>
</table>

The focus groups were attended by three Family Court judges; five lawyers, of whom two were barristers, and three were experienced lawyers for children; three people who work as both specialist report writers and counsellors; two counsellors; one specialist report writer; one Family Court co-ordinator; and one Family Court caseflow manager. In the first city, all the professionals attended the one focus group, although one judge did request a further individual interview as well. This took place on 6 December 2002. In the second city, eight of the professionals attended the focus group, an individual interview was conducted with a judge, and another joint interview was held with two report writers who were unavailable at the time the larger group met.
Prior to the focus group, participants were sent a copy of a 15 page paper I had written reporting on the key themes that had emerged from the initial family interviews. These themes formed the basis for discussion at each focus group. The discussions were taped and took around 100 minutes each. Pauline Tapp assisted me to moderate the focus groups, and I wrote notes to aid transcription of the audiotapes.

X Limitations of the Research

There were three shortcomings associated with the research. Firstly, I did not achieve my desired sample size of 12 families in each of Family Courts A and B. Instead I recruited 15 family groups across three different localities. While the inclusion of Family Court C families did add a further dimension to the data it was disappointing, but perhaps not surprising, that it was so difficult to achieve the desired sample size. Secondly, the number of children participating in the study was low. Children’s knowledge and understanding of the Family Court has hardly been tapped internationally, and the small number of child participants in this study has really only enabled this topic to be addressed in an exploratory manner. The final limitation of the study concerns an aspect of the study design. The quality of the data collected could have been enhanced, and a further opportunity for triangulation given, had I been able to have access to the Family Court file for each family. This would have given a better sense of the family’s experience with the court and avoided some of the confusion which had arisen in their minds about dates, types of legal and court interventions, and their outcomes. The Department for Courts did not authorise my access to their files which was completely understandable from a privacy perspective. However, it would be desirable for future research in this field to utilise a combination of case file and interview data.

XI Data Analysis

The parents’ and children’s tapes were mostly transcribed by an experienced secretary who was informed of the confidential nature of the interview material
and did not know the participants’ identities. On receipt of her transcripts I checked each one word-for-word against the original tape, filled in any gaps, and amended any errors. My role in many of the interviews and my knowledge of the language used within the Family Court meant that I could decipher most of the tapes accurately. I transcribed some of the family members’ tapes and all of the focus group tapes. The written notes I had taken during the focus group discussions were invaluable in identifying which particular member of the group was speaking. Only a very small number of words remained indeterminable across all the tapes recorded in the study and these were marked by ### in the transcripts.

I next wrote up each family’s story using the perspectives of each member I had interviewed. This enabled me to develop the family chronology and, where I had multiple perspectives within the same family, to ascertain each person’s view of the separation process and their involvement with the Family Court. At times different family members shared similar perspectives, but on other occasions they held widely disparate views. Writing the family stories was an ideal way of becoming totally familiar with the interview material. As I wrote each story I developed computer spreadsheets summarising each participant’s background, children’s care arrangements, and perspectives on legal and court processes. This overview assisted me in identifying which people’s transcript data were relevant to certain results sections.

The coding categories I then developed were based on my research questions, the topics covered in the interview schedules and common issues raised by participants. I worked through each transcript and coded all the data according to the coding categories, utilising coloured tabs and notes in the margin to differentiate between them. Once this process was complete I created computer files for each major coding category and cut and pasted each participant’s transcript data into each relevant file. This meant, for example, that I had all the data concerning counselling or mediation or the cost of legal proceedings easily accessible in separate files. I printed these out, read and re-read them, and then coded them into relevant themes and sub-themes. This final level of analysis enabled me to write the results sections directly. I also prepared
a summary of the findings for the adult participants, and a simplified version for the children, which was mailed to them during 2004.

XII Research Questions

The key research questions underpinning this study were:

- Which factors influence family members’ expectations about and approaches to dispute resolution?

- What are family members’ perspectives on their participation in Family Court custody and access dispute resolution processes, and in particular do they feel heard, understood and respected?

- Do family members’ experiences during custody and access dispute resolution processes impact on whether or not they follow their agreements/orders over time?

- What are the views of professionals associated with the Family Court (judges, lawyers, specialist report writers and co-ordinators) on family members’ reports of their engagement with the court and the effectiveness of current dispute resolution processes?
Chapter Seven
FAMILY STORIES

I  Introduction

The interviews conducted with ex-partners’ and their children provided not just thematic data, but also an invaluable opportunity to combine their multiple perspectives into family stories (Creswell, 1994; Donmoyer, 1990; Eisenhardt, 2002). The primary purpose of what Stake (2000) calls an ‘instrumental case study’ is to provide insight into an issue. An understanding of the particularity and complexity of the cases selected can enhance our knowledge about a still larger collection of cases. “The qualitative researcher emphasises episodes of nuance, the sequentiality of happenings in context, the wholeness of the individual” (Stake, 1995, p. xii). The resulting descriptive narrative provides an opportunity to vicariously experience each case’s unique features and happenings. It makes “the reader an interactive partner with the writer in reaching understandings and drawing implications” (Lincoln & Guba, 2002, p. 214).

Along with much qualitative work, case study research shares an intense interest in the participants’ personal views and circumstances. Great care therefore needs to be exercised to preserve the anonymity of those whose lives and expressions are portrayed (Stake, 2000). This is particularly so when the research participants belong to the same family and have shared the distress of parental separation. Yet entwining each family member’s perspective within the one story candidly reveals the significance of relationship dynamics and legal processes in reducing or exacerbating any differences in shared meanings. Alderson (2001) has talked of the ‘third presence’ when two lovers meet:

… love itself, with its mystery, poetry and power. Love colours all the interactions between the two so that they see depths in their conversations which might appear banal to other people. (pp. 23-24).
Clearly, family law proceedings between litigious parents fall outside of Alderson’s lovers’ analogy, but her concept of a ‘third presence’ can, I believe, help to illuminate the rich layers of meaning so important in driving Family Court dispute resolution processes towards more successful outcomes. To date, family law has not been very concerned with deeper contextual issues or with shared familial meanings, yet a failure to address these has left many separated parents and their children bewildered and dissatisfied.

This chapter briefly outlines the 15 family stories, drawn from the interview data provided by the 22 parents and 7 children who participated in the research. Two family stories combine the perspectives of all the family members – mother, father and children – while two others involve just one parent (a mother in one case and a father in another) and their children. Eleven stories drawing on adult perspectives then follow. Five of these combine the perspectives of each ex-partner, while the remaining six stories are related by one family member only (five fathers and one aunt). These stories illustrate the widely varying family histories and relationship difficulties that prompt, and maintain, involvement with the family law system. They also illustrate the need for qualitative research to be conducted with Family Court clients otherwise the ‘third presence’ in parenting disputes is never given a proper opportunity to emerge.

II  Parents and Children’s Stories

1.  Phil, Libby, Ben (11) and Kate (9)

Phil and Libby separated when Phil said Libby “literally just walked out on the marriage and had a major personality change.” Libby and the children went to live with her parents, leaving Phil in a nearby rented home. However, he later moved back to the family home in a city 500 kilometres away. Libby engaged a lawyer to obtain custody of the children, and Phil then hired his own lawyer to oppose Libby’s application and seek custody himself. Phil and Libby had Family Court counselling, as well as private counselling, but no agreement was reached about the future care of the children through these sessions, nor at the mediation conference. Counsel for the children was appointed, and a specialist report prepared. Phil subsequently commissioned a private psychologist to
critique the report to try to give effect to Ben’s desire to live with his father. Minutes before the scheduled defended hearing was due to commence, Phil and Libby reached an agreement with the help of their lawyers. The children would remain with Libby during term time, and spend each holiday period, plus two weekends per term, with Phil. This arrangement would reverse two years later, when Ben and Kate commenced at schools in the city where Phil lived. Libby immediately regretted agreeing to Phil having the children for the school holidays each year and returned to court to try and obtain additional holiday time. She eventually dropped this application, vowing never “to go anywhere near the court again.” Phil also pursued an application to the High Court on a technicality concerning the Family Court judge’s alleged bias against him and his mishandling of “the proper [case management] process of the law.”

Ben (11) initially wanted to live with his father, but was later pleased his mother had “stayed firm” and not lost him for his “whole childhood.” He agreed with the decision (which he attributed to the judge) because it meant he had the opportunity to enjoy living with each of his parents. Ben knew about the Family Court proceedings and remembered talking with his lawyer, the report writer and the private psychologist, although he was confused about which person had performed which role. Kate (9) also initially wanted to live with her father. She knew about the court’s involvement because he had mentioned it. She could not remember meeting with counsel for the child, but did have a clear memory of the report writer talking with her at school. Kate was “a bit annoyed” with the custody decision, but said she did not “really mind too much” although “it would have been better if [the changeover] was a year earlier.”

At the follow-up interviews with Phil and Libby, the children’s living arrangements had reversed as planned in the consent orders. Both parents had repartnered, but communication between them was minimal. There was ongoing acrimony over the school holiday arrangements, and payment of the children’s private school fees and orthodontic treatment.
2. Greg, Rachel and Daniel (5)

Rachel and Greg separated after a four-year marriage when their only child was two years old. Daniel’s neonatal health problems (reflux, hernia and dairy intolerance) and Rachel’s severe post-natal depression had impacted negatively on their relationship. “We were living in a bus and we had no family round to help us. … Greg would come home and I’d still be in my dressing gown on the couch with this screaming kid. He’d been working 10 hours a day and he just couldn’t cope with it either.” Rachel initiated the separation by moving to another city and leaving Daniel in Greg’s care. Greg and Daniel subsequently shifted to the same city as Rachel.

Greg consulted a lawyer “to have something put in writing about [Rachel’s] visitation rights so that she couldn’t just bowl into my place at any time”, but Rachel refused to immediately sign this. A community law centre referred her to a lawyer. She later “felt compelled to sign the damn thing to try and keep the peace.” Rachel was having regular access to Daniel, but decided to apply for custody, prompted she says by Greg not “really having a clue how to look after [Daniel] properly.” Greg said Rachel had “decided that she wanted our son back … and she applied to the court saying I was a dangerous, violent person to get it through the system a lot quicker.” Greg cross-applied for custody.

Rachel found the initial Family Court hearing about the violence issue “a very scary experience”, but Greg was happy with the outcome as Daniel was left in his care and the male judge “actually quashed everything” that Rachel had said about him. Counsel for the child and a report writer were appointed, and both supported an increase in Rachel’s contact with Daniel. Rachel found the mediation conference, with a female judge, quite empowering as she was getting much stronger from “all of the counselling and through my doing self-assertiveness courses.” Greg, however, felt that he was not listened to - “I was telling the truth, but there was a lot of lies being said.” Two weeks later, Rachel received a letter from Greg’s lawyer advising that he would give Rachel custody of Daniel. Rachel thought this was because the mediation conference had indicated “that I was going to get him back”, but Greg said he had “had enough, so I just succumbed and gave my son up.” After living with Greg for nearly two
years Daniel returned to Rachel’s care. Greg was happy with his regular contact with Daniel, and felt that he and Rachel “get on all right now because she’s got what she wanted.” Rachel, too, felt that their relationship had improved as “Greg really changed and became quite friendly and co-operative and flexible - quite pleasant really.” Daniel (5) said he “liked living with Dad”, but was equally happy living with Mum as he liked “talking to her.”

Rachel still had custody of Daniel at the time of the follow-up interview, but had repartnered, shifted to a small town 400 kilometres away, and given birth to a second child. Despite the distance from Greg, the access arrangements were still working well, albeit less frequently than when they were all living in the same city.

3. Gary, Anna and Jessica (16)

Gary and Anna separated after a 16-year marriage. Their three children initially remained with Gary, although Jessica quite quickly moved, by agreement, to live with Anna. When her half-share of the matrimonial home was paid out, Anna purchased her own home near Gary’s residence (the former matrimonial home) where he was now living with a new partner. Anna was now in a position to implement the ‘week-about’ custody arrangement agreed at counselling, but Gary refused to co-operate. Their son subsequently moved to live with Anna, leaving Anna’s application to the court focused solely on custody of the youngest child. The other two children’s informal access arrangements with Gary were not contested. Gary “wouldn’t have a bar” of the ‘week-about’ arrangement at the mediation conference, even though the judge was encouraging him to trial it. Anna ended up with her daughter in her care for five days per fortnight, and a defended hearing was scheduled.

Gary later unilaterally enrolled this child in a private school after he had her tested for a learning disability following concern about her academic progress. Anna was infuriated that Gary had done this without any consultation with her, and sought an injunction from the court to remove her from the new school. This issue was determined, in Gary’s favour, at the highly adversarial defended hearing, although it meant she attended a different school to her other siblings.
The custody outcome was a retention of the status quo – the youngest child would remain living with Gary 58% of time and with Anna for the remainder (five days a fortnight). Following the issuing of orders, further difficulties arose as the initial order made no mention of Anna having her daughter for half of the school holidays. “[Gary] won’t negotiate with me on changing anything” so further submissions had to be made to remedy this.

At the follow-up interview Gary had moved overseas and his relationship with his partner had ended. He initially wanted his daughter to go with him, but later suggested to Anna that she live with her for 40% of the time and his ex-partner would pick up his 60%. Anna “was in a state of shock” at the proposal – “I’m her mother. I take full responsibility for my child. Why would I let somebody else, a complete stranger, you know, raise my child?” The case returned to court as Anna wanted to seek “full custody and fight against [Gary] and [his ex-partner’s] application.” Another specialist report was prepared and counsel for the child became re-involved. Anna was awarded custody and the child returned to live with her fulltime, although some weekends were still spent with the father’s ex-partner.

Gary had contact with his daughter (now aged 12) whenever he returned to New Zealand. Anna “didn’t have a problem with that, [although] I’ve always tried to reiterate to him you have three children, not one.” Gary had little contact with his older two children, either in person or by telephone. Further court involvement occurred, however, when Gary decided he wanted the youngest child to live with him, not just have access, when he was back in the country for periods of several weeks. A mediation conference was held, at which a week-about agreement was eventually reached. Detailed court orders were issued to control the timing and nature of these arrangements, and the child’s visits to Gary overseas. “Whenever she is away on holiday with him, he has to ring me at a certain time, twice a week. That’s the level of detail we’re getting down to in the orders!” Family dynamics were severely strained as a result of one child being so differently treated to her siblings:

The trauma of splitting the family, and the fact that all the court cases only ever related to her, has been an enormous wrench for us. She lives a life of
absolute privilege because of the pedestal that her father has put her on. She has private education. They have nothing. He rings up, he talks to her; he doesn’t even ask to talk to the others. We’re in a position where we almost resent her presence. Because she has been treated so separately all of the time, she doesn’t feel any closeness. (Anna)

I wanted everyone to understand that what happened to [sister] was going to affect [brother] and me as well. I don’t think they ever really thought about it that much. … Some of the court decisions like letting [sister] stay at [private school] when Dad moved her there for unknown reasons heightened the divisions between us. … It was an impossible time when she first came here. She was impossible to live with, she just disrupts the whole household. … But Mum didn’t want our relationship with [sister] to break down. Siblings are meant to be together really… Dad rings [sister] at least once a week. He usually asks to talk to her first, and if she’s not here he’ll then talk to me for a bit, but there’s not much of a conversation. I’m pretty over it. I mean, after it keeps going you just get used to it, but it still hurts. (Jessica, aged 16)

4. Kathy, Andrew (11) and Eliza (8)

Kathy’s relationship with Rex first broke up when Andrew and Eliza were pre-schoolers. Kathy was referred by the Women’s Refuge to a lawyer who assisted her to obtain a protection order. Rex claimed that Kathy was mentally unstable and an unfit parent. After several months the couple reunited, but the relationship “basically deteriorated again” under financial pressure from debtors and Rex’s contact with a prostitute. Kathy and the children left, she obtained another protection order (which Rex breached several times), and they both negotiated an access agreement through their lawyers.

Kathy then became alarmed at Eliza’s return from access visits with serious bruising, and later allegations of sexual abuse. She stopped access for five months while medical, Police and CYFS investigations occurred, but there was never enough evidence to finally determine the matter. Rex then applied to resume access, counsel was appointed to represent the children, and a specialist report was sought. Access resumed on a supervised basis, but Eliza’s urinary tract infections continued, and Rex hit Eliza again, prompting the children’s doctor to write to Kathy’s lawyer advising that access cease immediately. “I don’t think the kids saw him for over a year.” Rex later reapplied for access, and Kathy, under threat from counsel for the child that she would lose her children if
she did not agree, worked out an arrangement with Rex at the courthouse whereby his elder daughter would supervise the contact once a fortnight at her home. This would be reviewed after six months.

Andrew (11) and Eliza (8) could both recall the irregular access they had had with their father. Andrew said access “would start up and then it would just shut down again” but he “didn’t really care because I don’t really like my Dad.” Nevertheless, Andrew felt it was “better to see Dad than have nothing. … He’s my Dad and there’s nothing that I can do about that.” Eliza recounted various incidents of ill-treatment by her father and said “we didn’t want to be with him because it wasn’t safe - we wanted to be with our Mum.”

At the follow-up interview, the frequency of the supervised access had declined to once a month at Rex’s home or a local park. “The thing with his daughter ran out, so I just said directly to him, right, one hour, last Sunday in every month, accept it or don’t. I didn’t want to go back through a lawyer – I just thought we’d do it ourselves.” Now that the children were older, Kathy found access easier because “they can say what they want” and can protect themselves. The six monthly review by the Family Court was long overdue, but Kathy had heard nothing more about it.

5. **Duncan, Charlotte (9) and Rose (7)**

Duncan’s ex-wife, Justine, suffered from postnatal depression following the girls’ births and had difficulty coping. This had a detrimental impact on their marriage and Duncan did not like the way Justine “would lash out at the kids.” To his surprise, a policeman arrived at his work one day to inform him Justine had obtained protection and occupation orders against him and he was not to return home. “So it got swung around I was being the ogre and that was the end of seeing the kids for three months.”

Duncan “got access back to the children and had them every weekend” because Justine “wasn’t coping with them.” She eventually applied for custody and Duncan counter-applied. “We ended up going through the Family Court so there was something rigid in place that couldn’t be broken.” A report writer and counsel for the children were appointed, with a shared custody order resulting
from the mediation conference. Duncan had the children three out of four weekends, one night every week for tea and half of the school holidays. “It wasn’t what I was after, but it was still better than nothing. … I was hoping to get the kids to live with me … but it was still a good result for the girls.”

Things improved, but later reverted when Justine was investigated by CYFS over two complaints of physically injuring the children. It was suggested that the arrangements between the parents be reversed, but Justine refused to agree to this. She reapplied to the Family Court for six sessions of counselling because she wanted to reduce the amount of time Duncan had, but he “wasn’t prepared to back down” because the time the children were spending with him “was sort of going part way to countering the negative time that they were getting with their mother.” The girls’ behaviour and health was deteriorating, and several health and educational professionals were working with them. The general practitioner recommended that Duncan assume full-time care of the children, but it seemed unlikely that Justine would agree.

Charlotte (9) said she was “sad” when her parents separated “because I didn’t want my Dad to leave”, but her and Rose (7) liked their living arrangements. They both knew “that it was for the court” to work out who they lived with.

Little had changed at the follow-up interview, and Duncan felt he was “still between a rock and a hard place.” Justine had refused to allow him to have custody of the children because she did not want to change to an unemployment benefit. As a compromise he agreed to let the girls’ go to a health camp. “My children are still in a situation which is right on the borderline. I’ve backed off in the meantime, but I’m not sure I can leave them in that situation. I might have to bite the bullet again and see what can be done.”

III Ex-Partners’ Stories

6. Harry and Tina

Harry and Tina, who never lived together, are the parents of two children. They live in two different cities, 100 kilometres apart. Harry is Māori and has been previously involved in the criminal justice system – “I’m no angel and I’m
no Al Capone, but I was young once. … I’ve always been there for my kids though. From day one I have been in the picture. I have never relinquished my responsibility.”

The children primarily lived with Tina until their daughter, at the age of nine, asked to go and live with Harry when Tina decided to return to work. This arrangement was informally agreed between them. Later, Tina asked Harry to take their son (aged four) as well. However, Harry began to have concerns about Tina’s erratic pattern of access visits – “We didn’t know where she was half the time. Sometimes she would go two months without any contact and then just turn up. I just told her what I thought. Like, I mean, come back when you’re ready to be a mother, kind of thing.” Tina, however, said she found access problematic because Harry would “agree and then not agree.” Using legal aid, she consulted a lawyer to seek an access order “so it was something official he couldn’t say no too.” Harry first became aware of this when he received a letter from Tina’s lawyer. He felt he had no option but to engage his own lawyer. An agreement was then reached at counselling with Tina having the children “every second weekend and for part of the holidays.”

Despite this agreement, access problems continued, with each blaming the other for the breakdowns. After not seeing the children for six months and, in an effort to reinstate the fortnightly access initially agreed during counselling, Tina returned to her lawyer to “just get a court order for exactly the same thing, but starting at a later date.” Harry agreed to this when Tina “signed custody over” to him and consented to his appointment as an additional guardian. This significant turnaround enabled them to return to informally negotiating changes when Tina could not always afford the cost of travelling to see the children.

At the follow-up interview Tina had moved to the same city as Harry and the children to be closer to them. However, her access visits remained erratic. Harry still had custody of the children and said “nothing’s changed, just doing the same - we don’t see her that much.”
7. **Robert and Louisa**

Robert and Louisa’s seven-year marriage ended after two previous separations and several sets of counselling. Their son lives with Louisa and her extended family, and has weekly access with Robert. Louisa applied for custody because she “wanted to have something on paper” following Robert’s refusal to return their child after an access visit. The Police had told Louisa they were powerless to do anything in the absence of a court order. She felt that Robert “needed a lesson, and the only way that would touch him or hurt him was through his son.” Louisa also obtained a protection order because of Robert’s alleged emotional abuse of her. Robert, however, was considering seeking custody himself as he felt Louisa’s job interfered with her parenting, and he was concerned about his son’s manners, exposure to cigarette smoke and insufficient progress at school and sport.

Louisa finally obtained the custody order, but only learnt of it when a copy arrived unexpectedly in the mail – “I was so surprised when I got the custody order without even knowing that I had got it.” Robert, too, had been notified of the custody order by the Family Court. He still had regular contact with his son, but was annoyed at the way Louisa failed to inform him about important matters. His lawyer had told him that Louisa “should tell me, but I don’t want to upset her you see - I am afraid that she won’t let me see my son so often.”

Louisa had remarried by the time of the follow-up interview and remained the custodial parent. Robert still felt that the contact arrangements were under her control – “I suffer a lot because she’s got full custody and she can decide.” He was also upset about the role of Louisa’s new husband in his son’s life. Robert wanted to seek shared custody of his son, but had not acted on this because he thought he had “no show.”

8. **Nick and Jane**

After Nick and Jane separated, Jane and the three children travelled to Jane’s home country to spend several months with her parents. There was initial doubt whether they would return to New Zealand, but when the principles of the Hague Convention were explained Jane decided to return. She reoccupied the
matrimonial home and Nick moved out. In the two following years, Jane returned to Europe for a month and during this time Nick moved back into the family home and cared for the children.

Nick subsequently filed an application for shared custody when he became concerned that Jane was contemplating moving permanently to her homeland with the children. Jane then applied for custody and permission to remove the children from New Zealand. Nick felt that Jane’s determination to return to Europe restricted any resolution being achieved at counselling and mediation. Counsel for the child was appointed, and specialist reports prepared for the defended hearing. The Family Court refused Jane’s application to remove the children and issued a shared custody order. Further express conditions provided that the children were not to be removed without leave of the court, were to remain living in the family home, and could be taken on holiday to Europe only by agreement or the approval of the court.

Jane then returned overseas for two months, with the children remaining in Nick’s care during that time. By the time of her return she had decided she definitely wanted to live in her homeland, and her appeal in the High Court seeking to overturn the Family Court’s direction that the children could not relocate with her was successful. Nick, now representing himself, was turned down by the High Court and the Court of Appeal for a stay of execution of the orders pending appeal, and Jane and the children left New Zealand a few days later. Jane likened the court process to “a roller-coaster ride with incredible lows and highs.” Nick, unsurprisingly, thought the Family Court decision was “very good” and was critical of the High Court “not only because of the result, but the lack of clarity in the law.” It was “a lack of recognition for the children’s right to their father” that kept Nick going. He was also concerned that his eldest child was keen to return to New Zealand to live.

By the time of the follow-up interviews, Nick’s appeal had been allowed by the Court of Appeal and the matter referred back to the Family Court for rehearing. The Family Court judge’s reserved decision found that the children’s interests would be better served if they were to live in New Zealand with Nick. Jane’s application for removal was refused and Nick’s application for custody
granted. The judge anticipated the children returning for the start of a new school term, and set out a detailed access regime based on an 18 month cycle with the cost of travel being shared.

Jane was clearly distraught at this outcome and felt the judge gave little consideration to her happiness, her significance to her children, and the fact the children had already been living happily in Europe for several months. The High Court subsequently allowed her appeal and granted her application to relocate the children to Europe. Jane was given sole custody, subject to access in favour of Nick. While the court acknowledged that the outcome would be distressing for Nick, the judges felt that he needed to accept that the children had been living overseas for nearly 12 months and had made good progress there. Nick was devastated by this decision – “The children don’t have equal access to their mother and father, and travelling every 12 months [to New Zealand for access] is too tough. It’s a brutal 30 hour trip each way. The cost racks up. The children are getting short changed. It’s just an absolute nonsense.”

9. William and Madelaine

William and Madelaine, who have never lived together, have one pre-school child. William had regular twice-weekly access, although Madelaine had ongoing concerns about the child’s safety when William had been drinking. William applied for an access order (including overnight stays) and, following their failure to reach agreement at counselling, a mediation conference was held. Madelaine said she “just wanted to shut the door on more involvement with William than I had to have, so I gave in and said he could have what he was asking for.” William was “pleasantly surprised” about this as he was expecting the case to proceed to a hearing. However, he thought the consent order was “fair” given his involved role in his child’s life and his generous financial support.

Overnight access commenced, but shortly thereafter Madelaine was “called into the pre-school because [her child] had started acting out sexually, dropping pants, pulling down other kids’ pants, and playing a game called ‘check bottoms’.” It was subsequently alleged that this game was played with
William’s new partner’s teenage son. The pre-school had already notified CYFS, who convened a family group conference (FGC) at which William’s offer “to supervise the children closely” was accepted. However, Madelaine felt that William’s charm had enabled him to successfully argue this was just “a custody and access issue” and she made a formal complaint about the inadequacy of the CYFS investigation.

William later applied for joint custody, and counsel for the child and a report writer were appointed by the Family Court. A consent order for shared care was made at the mediation conference, and Madelaine also consented to a joint guardianship order. William now had the care of his child for six days out of 14. Madelaine again felt that her concerns about her child’s safety were not being taken seriously. “I feel like we got slam-dunked because we didn’t have hard evidence.”

Further litigation had occurred by the time of the follow-up interviews to resolve William’s application about which primary school their child would attend at age five. “The judge was critical of both of us for having to bring it forward” but the schooling issue was ultimately determined in Madelaine’s favour. Madelaine’s application to vary the terms of the shared care order, to include an additional condition that there be no contact with the boy at William’s house, led to the reappointment of the specialist report writer. The judge accepted his conclusion “there was no basis for the allegations or any grounds for concern about their conduct.” During this hearing William negotiated to have his child on a half-time basis, with an associated change in his level of child support. Madelaine felt that “by and large things have operated satisfactorily, except for relatively recently, [child’s] behaviour has regressed at school and there have been one or two incidents of mildly sexualised behaviour.” The report writer had become re-involved, by agreement, to help the school and prepare a further report.
IV  One Partner’s Story

10.  Tim

Tim’s marriage to Jacqui survived her extra-marital affair 10 years ago, but collapsed following his discovery of another more recent one. “I couldn’t face going home that night. I was scared what I was going to do because I was fuming.” Tim consulted a lawyer because he “was very confused and didn’t have a clue what to do.” Jacqui then dropped a further “bombshell” on him when she announced her plans to relocate with their three children to a city 1000 kilometres away. “It really annoyed me because all I had left at that stage was the children. I suppose they had become even more precious.” Tim obtained an order “to make sure [Jacqui] didn’t buzz off with the kids” and also applied for custody.

When Jacqui refused to continue attending counselling, Tim felt “she actually forced the hand going through the legal path.” Counsel for the children was appointed. While Tim’s goal at the mediation conference was to delay his children’s departure for as long as he could, “suddenly we were talking about when they were going, not about if they were going. It was like it was already decided.” Jacqui was awarded custody with the right to relocate immediately, but Tim disputed the proposed 50/50 split of access costs. Following further negotiation between the lawyers it was agreed that the two teenage children would travel twice a year to see their father, and the youngest child (aged eight), four times a year, because Tim did not want “to miss out on him growing up.” The cost of the airfares is split equally between Tim and Jacqui.

Tim greatly enjoyed the children’s visits, email and telephone contact, although he dreaded the thought of Jacqui’s new partner “being like a father to my family.” He felt the Family Court was “very pro-mother” and overlooked his contribution as a father - especially when he was not “even the guilty party in this whole scenario. … I cannot see the justice with my children being allowed to be taken away from me.”
The children’s arrangements remained exactly the same at Tim’s follow-up interview, although his level of child support payments annoyed him. Jacqui had remarried. Contact with the children was working well and his concerns about the impact of the relocation on the children had “settled down.”

11. **Robbie**

Robbie and Leah’s marriage ended one evening when Leah told him, during a television programme, that she did not love him anymore. Robbie told Leah “I’ll take the kids” and she said “good.” Robbie initially had a caregiver to help with his four children, but he later gave up work to devote more time to his family.

Robbie knew nothing about the Family Court when he first separated and got his initial advice from a mate. Then he engaged a lawyer. The custody and access arrangements were easily agreed through counselling because Leah had no objection to the children remaining with Robbie and he was happy for her to have access every second weekend. However, this became problematic when Leah entered into a relationship with a new partner – “It got messy with him on the scene and he’s driven a wedge between me and [Leah], and [Leah] and the children – she’ll have nothing to do with the kids, nothing at all.” Robbie pursued custody proceedings because he “wanted everything in writing” to avoid the uncertainty of Leah later seeking custody of the children. While Robbie was satisfied with the consent orders made at the mediation conference, he was annoyed at his lack of opportunity to speak openly with the judge. The relationship property settlement was a protracted affair due to negotiations over the division of household chattels and children’s belongings, Robbie’s superannuation scheme, insurance policies, and child support payments. Threats of violence between Robbie and Leah’s partner (involving the Police) were also significant. However, he was overwhelmed by the support he received from his local community. “It was a rough road to hoe, but I have got to the end of it now and it’s all nice and smooth.”

At the time of his follow-up interview, Robbie remained the custodial parent and his children still had no contact with Leah. Robbie said Leah was under the impression there was “a court order out stopping her seeing the kids”, but there
was no such order in existence. He regretted that she made no effort to see the children

12. Simon

Following Simon’s separation from Lynda he had regular weekend access with his pre-school son. Three years later, Lynda relocated to a town 200 kilometres away. This prompted them to attend counselling where they reached an agreement that their son would live with Lynda, and Simon would have regular monthly and holiday access. Their son later indicated that he wanted to live with his father and this “came to a head” when Lynda found herself unable to cope. At a meeting with Lynda and hospital representatives it was agreed that the child, now aged nine, would live with Simon and that the parenting agreement would simply work in reverse. However, Lynda misinterpreted this as a temporary change and she started refusing to return him after access visits. Simon then consulted a lawyer so he would have something “solid in place.” Lynda refused to sign the new agreement (based on the current arrangements), but a consent order for shared custody resulted from the mediation conference. Unfortunately Lynda failed to follow the order. When her lack of contact began impacting negatively on her son, Simon and his partner “wrote a four page letter” explaining this to her. He suggested they “stop fighting and just get on with it.” This had a positive effect – “We’ve actually been talking a lot better … and things have improved so much.” However, Simon was wary and “still sort of waiting for something to happen again.” If future difficulties did arise Simon said he would be reluctant to reinitiate legal proceedings because of the time, stress and cost involved.

At his follow-up interview, Simon said that there had been no change in the family situation and his son remained primarily in his care.

13. Tom

Tom’s ex-wife, Annie, unilaterally ended their five-year marriage against his will and retained the matrimonial home and business, as well as custody of their three children. “My whole world just crumbled around me.” Tom experienced a five year legal battle to obtain, and then enforce, an access order. As well, there
were numerous associated dealings with the Family Court concerning the property division, retrieval of assets from the matrimonial home, and trespass and protection orders. Tom was constantly frustrated by Annie’s behaviour in not turning up to court hearings or in hiding the children to prevent his access. Annie walked out of counselling, and no agreement was reached at the mediation conference either. Access was finally resolved following positive reports being given to the court by counsel for the children and the specialist report writer. Tom had had the children for two weekends out of three for the past year and this was working well, particularly as collecting them from, and returning them to, school meant that any contact with Annie was bypassed. While the access problems were resolved, Tom experienced ongoing difficulties with Annie over her recent assault of his stepdaughter at a local shop.

In his follow-up interview, Tom reported that his access to the children had declined to Sunday afternoon visits only because Annie had “started playing up again. … She takes the kids away so when I go to pick them up they’re not there.” He felt Annie was doing her best to cut him out of his children’s lives. Whenever he tried to talk with her about this “she’d just say ‘go talk to your lawyer, don’t talk to me’.” The Police had uplifted the children and delivered them to Tom for access on several occasions. He had gone back to court to enforce his access order and was contemplating applying for custody to counter Annie’s latest application to reduce his contact. The children’s lawyer had been reappointed, but Tom was still waiting for the report writer to see him before the matter returned to court.

14. **Gordon**

Gordon and Sarah lived in New Zealand until he received a job offer in his home country in Europe. Sarah and the two children relocated ahead of Gordon, and when he arrived he found Sarah with a new partner. Gordon and Sarah eventually agreed to remain living separately in the same house, but he returned home one day to discover she had unexpectedly left the country with his daughter. Interpol tracked them to Sarah’s home country in Asia and Gordon initiated legal proceedings in Europe. When the court made an order for his
daughter’s return, he travelled abroad to collect her. At a subsequent court hearing, the judge ruled that both children would live with their father.

The entire family later returned to New Zealand, with Sarah living separately. She then decided to seek custody of her children, and obtained an ex-parte order preventing Gordon from removing them from New Zealand. Gordon felt most aggrieved about this order, and it was his response to what he perceived as her exaggerated affidavit that led to their parenting dispute. Gordon consulted a lawyer and had several sessions with a counsellor, which he found helpful. He was unhappy with the mediation conference, disliking the control exercised by the judge - which he found to be a stark contrast to the more informal, child-focussed enquiry of the European court. The case was heading toward a defended hearing, but when his daughter said that she wanted to live with her mother, Gordon agreed to settle for the split custody proposed by the report writer. Gordon therefore became the custodial parent of his son, and Sarah obtained custody of their daughter. Weekends were meant to be shared so the children could spend time together, but Sarah’s unreliability over access and the total lack of parental communication meant that changes frequently occurred.

At Gordon’s follow-up interview there had not been any changes to the children’s care arrangements. Gordon wanted to have his daughter living with him, but he “couldn’t really afford” further proceedings, and still felt exhausted as a result of the court cases in Europe and New Zealand.

15. Stella

Stella’s sister, Lauren, has serious mental health problems, with periods of psychiatric hospitalisation and outpatient treatment. Despite considerable extended family support she was unable to care properly for her son. He has lived with Stella and her husband, Mark, and their children, from the age of five, although he returned to his mother for a period when he was 8-9 years old. He has never known his father.
Stella and Mark’s concern for their nephew’s well-being led to their initial application for an interim custody order. Lauren disagreed with this, but the judge granted it “because he felt there was sufficient reason.” However, the two subsequent years were beset with difficulties over Lauren’s erratic access and her persistent applications to regain custody - “then her health would fall back and we’d be back at square one.” A mediation conference was held to discuss Lauren’s application for custody and increased access. Stella felt a more permanent arrangement was needed for her nephew, but the judge could only make orders by consent and Lauren “just flatly refused.” Stella was “absolutely devastated” when the report writer recommended that Lauren be given the opportunity to care for her son again despite her repeated suicide attempts.

Stella and Mark represented themselves at the defended hearing where they were seeking additional guardianship and final custody orders. Their nephew’s counsellor supported their application, as did counsel for the child, who doubted the court would grant the orders because Lauren still would not agree to them. Stella found the defended hearing emotionally draining, especially having to cross-examine her sister, and her nephew’s teacher. However, the judge issued the orders sought, and agreed with Stella’s submission that no access orders be made so that contact between Lauren and her son could remain flexible. Contact occurred on a weekly basis, and at school and church functions.

“A huge turnaround” had been achieved by the time of Stella’s follow-up interview. Lauren’s health had improved, although her therapy remained ongoing. She was engaged and her fiancé was “fully involved” with her son, now aged 12 years. Every second weekend was spent with his mother:

At this stage it looks fairly positive that he’ll be returning to [live with] her in the holidays full-time. Slowly her and her partner are going to take more and more control over the situation. We can already feel that reversal happening. For a long time we’ve been his parents and she's been like the aunty. We’ve made all the decisions and had to push things, and now she’s initiating extra access, is taking authority and making decisions. It feels so good. … It’s like a little fairytale.
Stella and Mark planned to retain additional guardianship over their nephew as they had “fought long and hard for that” and expected to remain an important part of his life.

V Chapter Summary

These 15 family stories depict the diverse range of parenting disputes coming before the New Zealand Family Court. While the research was primarily focussed on legal dispute resolution processes, it was inevitable that, during the course of each person’s interview, their particular relationship dynamics - as parents and now as ex-partners - would be forthcoming. Combining parents’ and children’s perspectives on their family transition, and associated legal proceedings, has yielded fresh insights into the unique, personally significant factors influencing the course of their parenting dispute, its outcome, and their satisfaction with the dispute resolution processes invoked to assist them reach resolution.

The family stories traversed many of the legal and welfare issues common to post-separation disputes about the care of children, including:

- **Family violence and protection orders** – Kathy; Greg/Rachel; Duncan; Harry

- **Care and protection** – Kathy/Andrew/Eliza; William/Madelaine; Duncan/Charlotte/Rose

- **Guardianship** – William/Madelaine; Harry/Tina; Stella

- **Relocation within New Zealand** – Tim; Simon; Phil/Libby/Ben/Kate; Greg/Rachel/Daniel

- **Relocation internationally** – Nick/Jane; Gary

- **Child abduction** – Gordon

- **Mental health issues impacting on parenting capacity** – Duncan; Simon
- *Dispute between guardians* – William/Madelaine

- *Reversal of custody* – Phil/Libby/Ben/Kate; Greg/Rachel; Gary/Anna; Harry/Tina; Simon; Stella

- *Split custody* – Gordon; Gary/Anna

- *Shared care* – William/Madelaine

- *Supervised access* - Kathy/Andrew/Eliza

- *Enforcement of access* – Harry/Tina; Tom; Robbie; Simon

While confidentiality concerns limited the content of the family stories, using a case-study approach is an ideal means of ascertaining the similarities and differences between the perspectives of each family member. An adversarial system, revolving around the legal rights of each adult, is adept at giving effect to their individual aspirations, but less useful at capturing their shared meanings. There were numerous examples in these 15 family stories of ex-partners expressing similar sentiments about their shared past, current difficulties, and hopes for the future. Yet the bitterness of their parenting dispute invariably meant the lack of communication between them precluded much understanding of their ex-partner’s perspective.
Chapter Eight

FAMILY COURT PROFESSIONALS

I  Introduction

Lawyers were the Family Court professionals most commonly consulted by the families participating in this study, but many also had contact with children’s legal representatives and specialist report writers. (The roles of these professionals have been previously outlined in chapters two and four). This chapter primarily focuses on the parents’ and children’s perceptions of their experiences with these professionals, and reports on what the professionals’ themselves had to say about their roles. Some families engaged with staff from health, welfare, education and enforcement agencies and their interactions with these services are also briefly discussed.

II  Lawyers

All 22 parents (100%) were represented by lawyers. Fifteen retained the same lawyer throughout their legal proceedings, but six used two different lawyers and one father changed lawyers three times. Two parents ultimately represented themselves. This section explores why and how parents engaged a lawyer, and why some changed lawyers or later represented themselves. It also considers the tasks lawyers performed, including the writing and filing of affidavits. Parents’ satisfaction with aspects of their lawyer’s (or their ex-partner’s lawyer’s) performance are discussed, along with their views on the desirability of specialist family lawyers undertaking Family Court work.

Parents’ Engagement of Lawyers

Parents engaged a lawyer for one of two primary reasons. Firstly, some wanted to obtain legal advice, to initiate legal proceedings to confirm existing care arrangements via a court order, or to alter the children’s care arrangements in their favour:
I found getting access to them quite stressful because he’d agree and then not agree. Because it was so frustrating I decided I would go to the court so it was something official that he couldn’t say no to. And that’s what I did. I went to a lawyer. (Tina)

The final straw for me was when I found out about the way [ex-husband] was caring for our child. At that point I rang up and said ‘I’m filing for custody’ to my lawyer. (Rachel)

He said to me basically I was an unfit mother, and I’m going to take the kids off you. So I went off to the lawyer and started the whole process. (Kathy)

Secondly, other parents were prompted to consult a lawyer upon becoming aware their partner/spouse was leaving them or to respond to legal action initiated by their ex-partner. Receiving a letter from their ex-partner’s lawyer, or learning of a proposed change to the children’s care arrangements (for example, relocation / increased contact), spurred several parents to obtain legal representation:

When she started the process for visitation rights it was more or less the turn of the court. I had no option but to seek legal advice. … I had no choice, I was in the process whether I liked it or not. (Harry)

She said she was moving to [another city]. It was all new and exciting for the children so they were all set to go before I even knew about it. She actually forced my hand going through the legal path. (Tim)

I got a letter from his solicitor saying that he wasn’t going to implement the week-about custody arrangements. So he basically just kept [the children] and I was only seeing them once a fortnight. … I went back to our family solicitor and I just went berserk and said ‘how can this happen? I don’t know what to do.’ So that’s when I got a proper custody solicitor. (Anna)

She hired a lawyer immediately. She was just so determined to do her own thing. … I could either walk away from it or defend it. And I decided to defend it. (Phil)

Lawyers were recommended to parents from several different sources, including relatives, friends, CAB, Women’s Refuge and community law centre – see Table Five:
Table Five: Recommendations for the Engagement of Lawyers

<table>
<thead>
<tr>
<th>Recommendation for Engagement of Lawyer</th>
<th>Number of Parents</th>
</tr>
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<tbody>
<tr>
<td>By a lawyer previously engaged by parent</td>
<td>5</td>
</tr>
<tr>
<td>By a relative (parent, sister, father’s new partner)</td>
<td>3</td>
</tr>
<tr>
<td>By a friend</td>
<td>2</td>
</tr>
<tr>
<td>By the CAB</td>
<td>1</td>
</tr>
<tr>
<td>By the Women’s Refuge</td>
<td>1</td>
</tr>
<tr>
<td>By a community law centre</td>
<td>1</td>
</tr>
<tr>
<td>Looked around &amp; interviewed several lawyers before deciding on one</td>
<td>2</td>
</tr>
<tr>
<td>Do Not Know</td>
<td>8</td>
</tr>
</tbody>
</table>

I saw a lawyer named by my friend. He referred me onto a woman who specialised in family law. (Gordon)

I went to the free legal centre in town and got them to look over the parenting plan. They said it was a bit beyond them, so they gave me the name of a lawyer and I made an appointment with her. (Rachel)

I talked to quite a few before I settled on one – a family law specialist. (Phil)

Changing Lawyers

Seven parents (32%) changed lawyers over the course of their involvement with the family law system. In two instances this was related to a lawyer’s resignation, and each client was passed onto another lawyer within the same firm. In the other five cases the change was due to dissatisfaction with their initial lawyer’s performance:

The first lawyer I had they didn’t help me one little bit. So I changed lawyers and they didn’t help me one little bit either, so I’m on the third lawyer now. (Tom)

I had a lawyer, a woman, who was representing me and helped me with the separation agreement thing. She was completely and utterly bloody useless, really she was bloody atrocious. … When that was finished I just paid the bill and walked away, because as that was coming to an end I had made contact with another guy at a different firm and he was terrific. (Gary)
Two people were initially represented by lawyers, but later represented themselves in Family Court hearings and on appeal:

It wasn’t until I made contact with the Family Court co-ordinator and she said ‘well, you don’t actually need to use a lawyer.’ And from then on we said ‘well, we couldn’t afford it, we’ll do it ourselves.’ … I would recommend representing yourself to anybody. It was emotionally draining, but in a positive sense in that we were in control, we were involved. I always found it hard when we’d get a letter from our solicitor saying there was going to be a court date and he would appear in court and let us know the outcome afterwards. You’re totally excluded from that, yet we were the ones dealing with the consequences of whatever was discussed. (Stella)

**Legal Tasks**

The tasks undertaken, and the roles performed, by lawyers were, not surprisingly, typical of their profession. The parents described the lawyers as talking with them, offering advice, planning legal strategies, explaining the legal process, writing and receiving correspondence, contacting the other party’s lawyer and negotiating with them, facilitating counselling and other referrals, obtaining protection orders and injunctions, changing their will or insurance policy, arranging for children to meet with the judge, and representing them during court proceedings. Clients reported having no hesitation in contacting their lawyer when they faced a particular problem with their ex-partner over issues like contact arrangements with the children, overseas travel or alleged child abuse:

She’s done a few things like taking him out of the country without asking me, which I don’t think is legal. So I tell my lawyer about that. (Robert)

[Ex-partner] pulled [child] off the couch by his clothes and basically threw him on the floor and yelled at him. So I have reported that to the lawyer. (Kathy)

Just one example was given in the study of the lawyer for each parent working collaboratively to promote a positive outcome between the parties:

[My lawyer] and [ex-wife’s lawyer] decided it would be very good if we went back to counselling and tried it again. And so that was teed up and it was very beneficial - suddenly [ex-wife] was talking to me again. (Tim)
The *distancing* that lawyers can create between ex-partners was commented on by some parents concerned that communication became directed through the lawyers once each party was legally represented:

I tell my lawyer, who tells her lawyer. That’s the only way the law is. (Harry)

The Family Court thing was happening behind the scenes with the lawyers going directly and coming back with responses. (Tim)

The writing or receipt of *affidavits* was raised by 15 parents (68%), making this the most frequently mentioned legal task involving lawyers. Most parents were happy with the composition of their own affidavit and some specifically liked the way their lawyer converted their words into a style appropriate for the court:

She probably put it in more the legal side and probably more literate than what I could. (Greg)

I think she wrote it all. … Yeah. Legal jargon! But I was quite happy with what it said. (Harry)

However, many parents were very unhappy about the contents of their ex-partner’s affidavit, which they perceived as inaccurate or untruthful. Several felt compelled to respond to set the record straight, thereby escalating their dispute into the legal arena, but simultaneously giving themselves the opportunity to retaliate with factual evidence:

I felt extremely upset because her statement of facts didn’t paint the real picture. (Harry)

I had to respond to [ex-wife’s] exaggerated affidavit otherwise what she said would be accepted as true. … Most of the things she put in her affidavit I could prove, black and white, that they were untrue. So I wrote my affidavit which I actually substantiated with proof – with evidence – but nothing happens. (Gordon)

We wrote two or three affidavits each. His, all they contained was slinging shit at me. Mine contained all of the history and reasons behind why I left – about [child] being so sick and me being sick and all the rest of it. … I
was quite happy with my affidavits and getting to give the reasons why I left. (Rachel)

Every single point in that affidavit I prepared was based on our direct observations or something that could be verified by someone else. I went through it very carefully to make sure there was nothing emotional. It was all fact, it could be backed up. (Stella)

Inaccurate or emotive affidavits were, however, considered to have the advantage of portraying an ex-partner’s true personality. Several parents were therefore confident the judge would be able to ‘see through’ the contents of such affidavits to the detriment of their ex-partner:

She [judge] could really see what he was like. After reading all the affidavits, I’m sure she would have summed him up really quick. (Rachel)

My child’s mother had sworn a very acrimonious affidavit, and even though it was a series of complaints about me, my lawyer said to me, ‘[William], don’t worry about it, it says more about her than it does about you. We won’t get involved in answering it, her affidavit is completely counterproductive and we are not here to score points like that.’ And he was right. … I took the view that I had better advice than she did - because her lawyer shouldn’t have let her put that affidavit in. It wasn’t achieving anything - except it was indicating her personality type which I think was not irrelevant to the judge, even in mediation. (William)

In hindsight, William’s ex-partner was clearly aware of the emotive nature of her affidavit and regretted that her lawyer had not edited it more carefully:

I ended up writing my own affidavit. Now a lawyer should have gone through and gone ‘too emotive, cut that out, put this in, di-di-di-di-di.’ They didn’t do that. So here’s this really emotional affidavit before the court, and we had an emotive mediation with me pleading with him in tears. So, of course, I looked like an emotional cot case. (Madelaine)

Preparing affidavits could also be problematic where parents, despite their lawyer’s confidence in their ability, actually felt that their understanding of the issues was inadequate due to the significance of what was at stake:

A couple of times [lawyer] said to me, ‘oh, you have got such a good grasp of this whole thing [Libby], you just write your own affidavit and I’ll fix up anything if it’s not written in a way that’s clear enough’. And she said to me, ‘honestly you are doing this so well you obviously have a good understanding.’ And so probably I felt that I did understand it, and
actually in hindsight I didn’t understand it. It was so big and I had so many other things that I was really trying to focus on at the time, it was something that I didn’t really want to think about very much. (Libby)

She said to me on several occasions ‘oh, you’d be a better solicitor than I would.’ And I’m paying this woman to advise me! I ended up writing a lot of the things. You know, she would get me to write this stuff up. Look, you’re not in a state of mind to be able too. You’ve got so many things that you’re trying to deal with at the time, without having to deal with somebody who’s not actually, in a way, professional. (Anna)

While some parents were told by their lawyers that the affidavits would help inform the judge about their case, others felt that these ultimately bore little weight in court:

It seemed to me that the decision had already been made before I had any real input and that my affidavit and things didn’t bear any weight at all. (Tim)

A lot of it wasn’t brought up in the court what was on the affidavits. (Tom)

Four parents who had obtained affidavits or references from a doctor, a minister, a sister and sporting friends, in support of their case, also felt these had little impact on the outcome:

Our minister spent quite a bit of time and submitted a report at my lawyer’s request and no-one even looked at it I don’t think. It was just dismissed. (Tim)

The permanence of what is written in an affidavit was considered by one mother to be a very negative feature of family law proceedings:

And really writing all those affidavits and stuff I think is just a very dangerous, dirty negative. Who wants that permanent record in black and white. And you’ve said that, you can’t take any of it back. It’s always there. (Libby)

**Client Satisfaction with their Lawyer**

Twelve parents (55%) expressed satisfaction with their lawyer. This most often related to the quality of the advice and the nature of the support they felt they had received:
I was very confused and didn’t have a clue what to do. … She was very helpful just on a personal front. We had some lovely talks together about things. … Her legal advice would be half personal advice and half legal advice. … What I needed to do was to open up and I suppose she was the first person to actually get me talking like that. Because I had learned how to bottle it all up and not even tell anybody. (Tim)

All the way through she was ‘keep calm, keep cool.’ … As Family Court lawyers they have to sit down and listen to things and try and evaluate what’s going on. … She was good. She explained each step as it came in and how it would proceed. She said ‘always try and be positive and look forward. Looking back at the negative stuff doesn’t help anybody. Keep on a straight and narrow path and try not to deviate and get into side issues. You’ve got a certain thing to focus for.’ That was really positive. (Duncan)

The perception that their lawyer was strong and was ‘there for them’ was welcomed by some clients:

She’s a very strong, powerful woman. She’s a very good lawyer. (Rachel)

My lawyer’s really good. She’s more for me, more determined too. … I have got a lot more satisfaction out of her than the time I was with the other lawyer. (Kathy)

Having a lawyer who was a specialist family lawyer, or at least familiar with the Family Court, was another significant factor in clients’ satisfaction with their legal representation:

More than once my lawyer said to me ‘I don’t think I would advise you to do that.’ And I took the advice although my instincts were to say ‘to hell with this sort of thing, I’m not putting up with this.’ But he said ‘no, no, just accept my advice please’ and I did. I don’t know if I found it easy, but I certainly did it. … I have got a good lawyer who knows the system and knows the restraints that are required. (William)

He was at least interested. … He’d say ‘we’ll sit down and we’ll just talk. We won’t make any strategies. I just want to hear about what you’re about and what your expectations are, and what you want for your kids and we’ll talk about it. And when I’ve got your ideas and I’ve got an impression of where you want to be going, then I’ll have a think about it and I’ll put some options in front of you. (Gary)

She was more experienced. I think she had dealt with so much of it. Her main field of work was to deal with the family issues. (Kathy)
Anna was of the opinion that only experienced specialist lawyers should be entitled to work in the family law field:

I don’t think any solicitor should be allowed to go into the Family Court unless they’ve got a very experienced Family Court solicitor with them. … When you’re going to be making decisions that fundamentally change people’s lives, and it’s about the way a family is going to live for the future, and about the financial situation that they’ll be in, they [professionals] can’t just treat it as a job. I don’t mean they have to get emotionally involved, but they have to understand a lot more about all the different things that are affected by the decisions that they make. (Anna)

**Client Dissatisfaction with their Lawyer**

Seven parents (32%) expressed dissatisfaction with their lawyer. Three other parents (13%) were generally satisfied with their lawyers, but did highlight an aspect which concerned them. The nature of the personal relationship between the lawyer and the client was a common cause of dissatisfaction. Parents disliked lawyers they felt they did not get on with, or who provided insufficient advice and personal support, or recommended courses of action which the client thought too expensive or enduring:

My lawyer was very hard to get on with. She just seemed very strong-willed. Things just got worse and sort of snowballed. … She was hopeless. I think I’d shop around next time. (Greg)

I probably backed down a bit because I could see I wasn’t getting anywhere. All I was seeing was actually my children getting hurt over the whole things because Mum was trying to pull them that way and I was trying to keep them here. The children were getting torn apart in the middle. And the lawyers were saying ‘no, no, you can get custody [Tim], keep fighting it, you know, don’t worry, it’s money well spent.’ And I said ‘yeah, it’s all right for you to say that!’ But I could see all I was doing was delaying the inevitable. (Tim)

I said ‘well, what about this?’ And she said ‘oh, well, I don’t know really.’ I said ‘you’re a bloody lawyer, you should know.’ ‘Oh, I’m not very sure about that.’ I said ‘well, I’m bloody paying you good money to know these things.’ I gave her a blast, but I apologised the next day. But this ‘maybe we’ll try this or maybe we’ll try that’ was just a bloody pain, it really was. (Robbie)
Clients also expressed negative perceptions of lawyers they did not consider strong enough to represent them adequately:

She [second lawyer] didn’t seem to be as strong [as first lawyer]. She didn’t seem to be as up with the play. … She really didn’t sink her teeth into anything, she just sort of let it just flow. (Kathy)

I was getting quite frustrated with my lawyer because this stuff has been going on and on, but we haven’t had enough fire power. (Madelaine)

Conversely, other clients were dissatisfied because they felt their lawyer was too directive:

She wasn’t really interested in what I had to say, it was what her programme was. And I think, looking back, she was completely incompetent. She was always in a hurry. She had no time to listen to you. She was sort of a bit bulldozy. ‘This is the way we do this’ and ‘you’ll do this’, and ‘you’ll do that’ and ‘that’ll be the end of it’ … And I’m paying the bill. Looking back and reflecting over the whole episode there was no human content there at all. (Gary)

It would be good to be given the opportunity to suggest things. You couldn’t talk unless you were answering the legal question. (Harry)

Clients said they sometimes found it difficult to know what to tell their lawyer:

I told her things [ex-husband] had said or done and she was quite impatient with me, sitting there with her legs crossed and one leg bouncing up and down. And she said ‘you’re not giving me anything here to work on.’ And I’m sitting there ‘well, like, I don’t know what to say, what do you want?’ (Rachel)

Others became angry when they thought their lawyer was not listening to them or following their instructions:

I told the lawyer what to say, but he never opened his mouth. … I was really angry in that courtroom and I was writing it down for him to say, but he kept saying ‘oh, don’t worry, we’ll sort that out later.’ He didn’t listen to what I was saying. Just didn’t listen at all. … When we came out of court I said ‘why didn’t you say this? I instructed you to say that.’ And he said ‘oh, it really wasn’t worth it.’ And I said ‘it would have made a big difference.’ (Tom)
Having an inexperienced lawyer, or a non-specialist family lawyer, was a key source of dissatisfaction for several parents who felt the complex dynamics of family disputes required special expertise:

She didn’t specialise in family law. She was just a bit inexperienced. Okay, she has got to learn, she has to get the experience, but not in a domestic violence case, not with me. (Kathy)

You could tell immediately by the tone of his letters, which were so abrasive, that he was not a Family Court solicitor. You felt attacked! They need to understand children and the way family dynamics work. (Stella)

I didn’t feel very comfortable with [first lawyer]. She didn’t specialise in child matters at all. In fact, she’d only just started doing the matrimonial stuff. … She did make efforts to try and explain what would happen, but she did not know enough about dynamics at all. … I mean, you’re in their hands. You don’t really know. You have no idea of the consequences of some of those things. (Anna)

Three men held particularly cynical views about lawyers’ motives, describing them as self-interested and too wary of upsetting the judiciary:

It’s a system of lawyers supporting lawyers. If you’re a useless lawyer you become a judge and if you can’t make any money as a lawyer – decent money – you become a judge. … I was a bit naïve when I initially employed my lawyer. I didn’t realise they’re just looking for the cashflow and it’s a $100 million industry for lawyers and professional consultants. (Phil)

One thing I found out about 95% of the legal profession is they’re only interested in their own career opportunities and not upsetting the judges and people further up the ladder. … My impression of that aspect of the legal profession is they’re a bunch of gold-digging, disinterested wallies. They really are, with the exception I must say of [my second lawyer]. (Gary)

**Views on their Ex-partner’s Lawyer**

Only two parents (9%) commented positively about their dealings with their ex-wife’s lawyer:

I had no trouble when we were dealing with her lawyer. (Duncan)
Her lawyer was very nice and I think she was trying to get [my ex-wife] to think rationally about things. (Tim)

Most parents were instead rather displeased with the approach taken by the lawyer representing their ex-partner. Tom thought “the whole problem” was that his ex-wife had “a better lawyer” than he did, who “kept holding things up by not turning up, or just deliberately stalling it.” However, it was more common for parents to perceive that it was the other lawyer’s inexperience in family law work that either created delays or inflamed their ex-partner’s unrealistic expectations:

His lawyer was new at this sort of work. He just missed the point so often. Really what he ended up doing was encouraging [my ex-husband] to go off down a track that’s not going to achieve anything. (Anna)

She had a criminal lawyer acting for her. He didn’t serve her very well. (William)

Other parents attributed their dissatisfaction with their ex-partner’s lawyer to the escalation in their legal proceedings that resulted from the adversarial tactics utilised:

She hired this disgusting lawyer who hates children and men. And so the moment that happened then suddenly warfare broke out. … It went seriously fast downhill from there. (Phil)

If [ex-wife’s] lawyer could stop and think, [let’s] get the day to day stuff sorted out, get half the bills paid, and the house sorted out, and work her way to the top. But her lawyer started at the top and clawed her way to the bottom. Of course that was pissing me off, so I put every obstacle that I could in the road. (Robbie)

His lawyer is a Type A lawyer and he’s first out the gates and he comes down hard and heavy. (Madelaine)

**Professionals’ Views**

There was a strong emphasis in the focus groups on the importance of parents’ legal representatives being family law specialists. The professionals were critical of property lawyers or other inexperienced and un-mentored practitioners undertaking work involving parental disputes over children’s care
arrangements. The perception that family law was easy, or of low status, was particularly criticised:

There’s lawyers – generalists - out there who think ‘oh, it’s just domestic stuff, I can do it!’ Instead they should be butting out. (Lawyer)

Young lawyers are thrown in with no supervision – ‘this is the cheap end of the law, it’s easy work, so you do it.’ In fact they can’t see any of the issues. (Judge)

Firms get their junior lawyers to do family law, which is so undervalued – it’s almost like the poor relation of law. But that is selling clients short because you are giving them people who are inexperienced and haven’t got proper training and support. (Lawyer)

The case needn’t have gone to a fixture probably, but it’s gone there because they are inexperienced. They just flail around. (Report writer)

Specialist family lawyers make such a difference to people. The key to making the system work well for the client is having a lawyer who knows when to go for broke, when to pull back and facilitate counselling, when to access the various bits of the system. (Lawyer)

Parties’ point of entry into the family law system, usually via a lawyer, was regarded as having a significant influence on the direction of their case. One judge used a medical analogy to link legal/court engagement processes with the outcome:

If you have a knee injury, you’ll get a different result if you first go to a physiotherapist rather than an orthopaedic surgeon. Your first port of call often determines your direction. (Judge)

If somebody makes a lawyer their first engagement that person can often set the agenda, and that can cause a lot of problems. You have just got to be careful. For the lawyer the most critical thing is the decision you make after you first meet your client about what you are going to do because that can set in train all sorts of things, rightly or wrongly. (Lawyer)

Parents were regarded as consulting lawyers because they initially “started off thinking that it is a rights issue” or because they had received a letter from their ex-partner’s lawyer or had proceedings served on them:
People nurse the hurt and anger of the approach taken by the other side and their lawyer. They cart around the first letter – you know, ‘Dear Mr So-and-so, I act for your wife. She wants a) separation b) custody of the children c) all the property. If I don’t hear from you within seven days I’ll see you in court. Yours faithfully.’ Almost as brutal as that. And sometimes, of course, over the phone a week later the husband will say ‘but why did you get your lawyer to write me that letter?’ (Judge)

Some people come to a lawyer too when they wouldn’t have wanted to - but their other half has. And they think ‘hey, I thought we were sorting this out, I thought it was going okay’ and all of a sudden they decide that they have to get into the fight and get their own lawyer. (Lawyer)

Lawyers regarded their role as helping clients to “extend their life-skills to other scenarios” and assisting them to “choose their battles.” They enjoyed the “diversity of family law” and noted that the great bulk of their work goes nowhere near the Family Court because their clients often resolve matters themselves. Those cases that do require the court’s intervention are therefore “skewed” in that “one or both parties have some degree of dysfunction for some reason.” There was an acknowledgment that affidavits often “polarised the issue” and served “to filter the client’s story, putting it into a legal language which didn’t necessarily reflect the client’s perspective.” A lawyer’s first interview with a client was vital, with several setting aside 1.5-2 hours for this initial consultation. However, they recognised they “could not be all things to all people” and would “channel people into other avenues to deal with emotional issues.”

Remember your role – don’t exhaust all your energy and skills on getting that person right by sorting out all their problems. Define the issues – that’s your role as their advocate. (Lawyer)

We’ve got big legal aid constraints– we can’t afford to have a three hour meeting holding their hand and saying ‘poor you!’ We’ve got to cut to the chase because we’ve only got a certain amount of money to do their case. I think that has had an impact. (Lawyer)

Some lawyers who were now undertaking mediation work found this a promising alternative to litigation:

We’ve got this one opportunity today, here in the same room, to talk. You can choose whether you walk away with something you can live with, or walk away and go and get someone else to tell you what to do. By moving
them beyond the blaming and the lies, we can find a joint purpose to solve their dispute. (Lawyer)

Supervision sessions with allied professionals were increasingly being utilised by family lawyers to debrief during and after cases, particularly where these involved “personality disordered clients” or “where something wasn’t quite ringing true.” Supervision was considered a “self-care” mechanism for lawyers dealing with the challenges of family law work.

III  Counsel for the Child

Counsel for the child was appointed by the Family Court in 13 (87%) of the families participating in this study. Legal representation was not considered necessary for the children in the other two families because their dispute was resolved either prior to mediation (Harry/Tina) or following it (Robert/Louisa).

Meeting with the Child

Lawyers did not meet with the children they were appointed to represent in two family situations. This was due to the child’s young age (three years) in one case, but Duncan found it “surprising” that his children (aged nine and seven) “never actually talked to their lawyer.”

In the other 11 families (73%), lawyers met with the children they were appointed to represent. Jessica (16), Ben (11), Andrew (11) and Eliza (8) all remembered talking to counsel for the child, although some confused their lawyer with the report writer or were uncertain about the purpose of the meeting. Eliza, for example, thought it was because “Mum said things about Daddy, and Daddy said things about Mummy, but I don’t believe Dad.” Kate (9) and Daniel (5) had no recollection of meeting with their lawyer at all.

The interviews with the children mostly took place at a parent’s home, and on some occasions in the lawyer’s office. Robbie, however, felt the office was too distracting for his children and thought they were more forthcoming when they talked with their lawyer in a familiar home environment:
She came out home twice. The first time she talked to them for over an hour, and then the second time for about an hour again. And then I took them into her work, but it was too distracting for them. They wanted to look out the window. And then they got another room, but then they wanted to play with the toys. On the way in they had heaps [to say], but they got into that room and there was too much distraction. At home there was just the lounge and the lawyer went in there and they had a good chat. (Robbie)

The lawyer’s manner, interview skills and willingness to hear the child’s own views all influenced the success of their meeting with the child(ren). Being friendly, making the children feel comfortable, and letting them have a say were all considered important attributes:

He sort of went in like he was just a friend, you know, in the way he introduced himself and spoke to the kids. He didn’t actually say ‘well, I’m a lawyer - counsel for the court.’ He just sort of said ‘my name is Jim or Bill.’ (Tom)

I think the lawyer puts it so much on children’s terms that they can understand where they’re coming from. I really think they let them say what they want to say. (Simon)

Parents were less happy about the lawyer-child interaction when they gained the impression that the lawyer thought they had influenced their child’s views:

[Eliza] saw her counsel for child one day and then she came home and wrote all this stuff and then we took it in the next day. He said ‘oh, when did you write this?’ and she told him, after she seen him yesterday, and he sort of looked at me as if to say ‘you made her write that, didn’t you?’ It was about how she didn’t like Dad and things like that, because she is scared of him and he might hurt her. … He just didn’t believe that she could have written anything like that. (Kathy)

Eliza was well aware of her lawyer’s attitude and disappointed that he didn’t believe the views she expressed were her own:

I was writing things down about Dad and I photocopied it to show [lawyer]. And he was like ‘oh, who told you to write this?’ I said ‘me!’ But he didn’t believe me, didn’t even listen to me. He probably thought that my Mum wrote it down, but I did. (Eliza, aged 8)

Another child, who had previously not expressed a strong view to his lawyer, was said by his father to feel overwhelmed at the court’s decision that he was to
relocate overseas with his mother. He desperately wanted to talk with counsel to express his view that he really did want to stay in New Zealand:

I just don’t think he really articulated if he had a view until it became a reality. … As soon as [child knew he] had to go, he was off the fence saying ‘oh, hang on, I don’t want to go’ you know. … He wanted to get hold of counsel for the child and tell him that he wanted to stay. … But [counsel] had to be reappointed, and this dragged on for another three or four weeks. Then [child] rung me up one night and said ‘Dad, he hasn’t come yet, I’m getting desperate, where is he?’ (Nick)

Privacy issues were raised by parents and children alike. These related to the presence of other siblings during interviews, as well as the confidentiality of the information shared by the children during their meeting with their lawyer. Gary, for example, was concerned that his youngest child never had an opportunity to speak privately with her lawyer as she was always interviewed in the presence of her siblings:

They both used to dominate her. … I know [child] said to that guy repeatedly ‘I want to be with my Dad.’ … He never ever quoted [child’s] wishes, just her sister’s. (Gary)

Andrew and Eliza were also interviewed together while their mother “waited down in the [lawyer’s] waiting room.” Andrew hoped that the lawyer had kept what they told him “private.” Kate suggested that counsel for the child should only pass on information with the child’s consent:

If the child wants them to tell the judge what they think and stuff, they should. But if the child says ‘no’ they should not tell. (Kate, aged 9)

Other Tasks Performed by Counsel for the Child

Aside from meeting with the child they were appointed to represent, counsel performed a variety of other tasks including interviewing family members, offering advice, and participating in mediation conferences and defended hearings. They also acted as a mediator in two families, and assisted with the initiation of family counselling after the defended hearing in another case. Parents’ most frequently mentioned their telephone contact to update counsel
for the child about particular incidents, often with the expectation of immediate action:

I would ring the children’s lawyer and he’d get quite angry about it because [ex-wife] shouldn’t have been hiding the kids when I was due to pick them up. (Tom)

I was actually putting a lot of pressure on her because I felt that since she was [child’s] lawyer she had to be aware of these things. (Stella)

I rang the counsel for child and said ‘what do I do? Someone’s got to do something right now.’ (Madelaine)

I rang [counsel] and said ‘look, he just won’t go back to his father’s.’ Within a couple of days, letters were exchanged and [child] ended up staying here. (Anna)

It was not always the adults who contacted counsel for the child. Jessica said she liked being given an open invitation by her lawyer to phone him:

He wrote me this letter and said that if I ever needed to talk to him he’d always be there for me and I could always just call. That was really nice. I remember ringing him up one day and telling him that Dad was being mean to Mum again. He was very understanding, but then couldn’t really do anything about it you know. (Jessica, aged 16)

Several of the older children had very clear views about the role of children’s legal representatives in obtaining their opinions and fighting for what children wanted:

[The lawyer] kind of pictures what [children] want to do and what they think. When they’re at the court they kind of explain to the judge not like exactly what the child said, but in a different way, kind of like a summary. (Kate, aged 9)

He was fighting for me, fighting for what I wanted, and not what the parents wanted. It was on my side. The other lawyers were for the parents. … He came round and he had to ask me questions. Sometimes when I was playing rugby, he’d just go ‘is everything alright?’ And I’d say ‘yes.’ … He had to write a report on what I wanted and how I saw it, to check up on me and see if it was all going fine, see if I was happy about the situation. … In the Family Court he would have played as me, saying what I wanted. (Ben, aged 11)
Another significant task undertaken by counsel for the child was preparation of their *report for the Family Court*. While Rachel did not recall counsel “letting anything out to any extent”, all the other parents who commented on the report were unhappy about it – because they either did not see the report or they felt its recommendations overlooked significant family issues:

I’ve never seen the report. It was confidential between the lawyers apparently. I would have liked to have seen it. … The report sort of played quite a bit on the judge’s mind I suppose, and I wasn’t very happy about it. (Tim)

I was listened to, but nobody took me serious. I was taken as a disgruntled ex-partner as such. … It’s what came out in the counsel for child’s report. … He came up with that the kids should probably stay with their mother because they’d been living there for this length of time and it appeared to be stable enough. But then he hadn’t seen the negative side. (Duncan)

Two fathers were particularly annoyed that counsel for the child had done ‘u-turns’ and recommended the opposite in their report to what they had been told face-to-face:

Both [counsel for the child] and [the report writer] would interview me, and say things to me after the interview - ‘well, you know, this is what I think’ and ‘this is what I’ll be recommending’ and blah-blah-blah and positives and negatives, and then go and write out something completely different. Completely different! (Gary)

He actually said ‘I can tell you roughly what I’m going to recommend’ and then he came out and recommended that the children should relocate. It was completely opposite to what he was saying to me. He completely did a u-turn. (Tim)

Where counsel participated in mediation conferences and defended hearings, parents’ perceptions of their *influence* in these proceedings varied. Some perceived them as having little influence:

He sat there and didn’t have one word to say through the whole mediation. … The judge was mainly addressing me and [ex-wife]. He told him to leave in the end - he didn’t need him. (Tim)

However, it was more common for counsel’s role to be regarded as highly influential on the outcome:
The only thing the judge was interested in was asking him what he felt. (Gary)

It had been explained to us that the counsel for child has the most say in the Family Court. … We were told ‘if she supports the outcome, that’s the weight that the judge will place on it.’ (Stella)

**Satisfaction with the Role of Counsel for the Child**

Parents’ perspectives on the role performed by counsel for the child varied widely from highly positive (six parents, 27%) to very negative (three parents, 14%). Seven parents (32%) reported mixed views, regarding nearly all, or some, aspects of counsel’s role as beneficial while being less enthusiastic about others.

The six parents who were very satisfied with the role played by counsel attributed this to the level of their involvement and explanation, the support they provided, and their degree of insight into particular family dynamics:

The counsel for child was very good - he was very nice. He saw [ex-husband] and saw me – he might have seen us both together, I think, which was good because he saw the dynamics. … He was really positive and supportive. (Rachel)

He was quite good with the way he put things about explaining how he was going to deal with the children and the report and things like that. (Duncan)

Counsel for the child was brilliant, very considerate, very involved. (Stella)

Tom credited counsel for the child’s appointment as being the breakthrough in his quest for regular access with his children:

The lawyer acting for the children came out and interviewed me and the lady I’m with, and interviewed the children, and saw the children with us. And he gave a very good report back and I got the extra time then because they [finally] got a clearer picture of what was going on. (Tom)

Three parents were highly dissatisfied with the role counsel for the child had undertaken in their case. Kathy had a range of complaints concerning counsel’s threat to have her children removed from her if she did not agree to access, and his delivery of Christmas presents from her ex-partner to the children without
her consent. She did not perceive counsel to be “working for the kids” and disliked his “dirty tactics” in arriving at school unannounced to interview them. Kathy considered her children’s lawyer to be “all for the father and not prepared to listen to the kids or me.” Conversely, Phil was critical of his children’s lawyer as “very pro the woman’s position.” He felt that counsel was “an absolute wuss - he’s ineffective and hopeless. … He’d regularly say he wasn’t trained for this and didn’t know how to talk to children.” He believed that counsel for the child “was milking the system”, with similar, but stronger sentiments also being expressed by Gary:

Counsel for child was the only person the judge was interested in consulting [at the defended hearing] ‘Now what do you think about this Mr [counsel]?’ What the shit has it got to do with him? And then he’d give the judge one of his ‘well, you know, I think that it’s been argued both ways. And there’s been evidence put up here and it’s this and it’s that. And I’ll keep sitting on the bloody fence, you’re getting paid more than me, you make a decision. I just happen to have been following this for three months and I’ve got a whacking great bill I’m going to give the government and, you know, why should I want to make a decision, you’re paid more than me, you do it.’ … I think counsel for the child and [the report writer] were just pigs with their snouts in the trough as far as I could see. They wouldn’t commit themselves to anything. It was all sit on the fence. See who’s going to put the most pressure on here and we’ll side with them. That’s the way I read it. Loud and clear. … I’d bang their bloody heads together if I could get hold of those two. I mean Tweedle Dum and Tweedle Dee. … Once their appointments ended they took their 30 pieces of silver and vanished. (Gary)

Most of the parents with mixed views were generally positive about counsel for the child, but dissatisfied with one aspect of their work. Sometimes this dissatisfaction was related to a lack of resources to undertake the role properly. Greg, for example, thought counsel for child “seemed really fine”, but he only met with Greg “once for about an hour” and had insufficient time to contact the people on the list Greg had provided at counsel’s request. Anna felt counsel was “always too busy and had too many cases.” She and Madelaine both thought that little had come of their involvement. Gordon said “counsel for the child was okay”, but was critical that “he simply went along with the psychologist.” Robbie liked the lawyer representing his four children, but did not think she was direct enough with them:
She hasn’t told the kids what I believe they should be told – that their mother doesn’t want anything to do with them. Right between the eyes - I’ll pick up the pieces, I don’t care. But she says ‘I won’t do that.’ And that’s the only thing that annoys me. There was just too much beating about the bush. … I’d sooner them know. But it’s ‘oh, we don’t want to hurt their feelings.’ Well, Christ, she can’t hurt them any more than their mother walking out on them, can she? (Robbie)

Nick felt “quite disappointed” that counsel was “under-resourced” and had initially “erred very strongly” in favour of his ex-wife without understanding his side of the story:

He was very much in favour of her hand and that she would probably win. He was saying things to me in front of her like ‘that wasn’t a bad deal and I should take it because the court wouldn’t give me anymore - if I lost in court I wouldn’t get what was on the table now.’ … He just didn’t have the whole story at that time … But at the end of the Family Court hearing he had a lot more information to base his assessment on. (Nick)

**Improving Children’s Legal Representation**

There was general concern about the lack of resources (time and remuneration) impacting on a lawyer’s ability to represent children properly. Several parents suggested ways to improve the effectiveness of children’s legal representation and enhance counsel’s role. Many wanted these lawyers to be appointed earlier in a case, with Libby also suggesting they play a more powerful role in establishing with both ex-partners just which behaviours or tactics were appropriate in care proceedings:

I think it would be important for counsel for the child to have more power and respect just to say ‘you will not do that - do that again and these will be the consequences.’ For both parents there are always things that they’re doing that are stupid, and I’m quite well aware that I did some dumb things as well. (Libby)

They should have done it right from the very start. Get the counsel in for the children right away, rather than stalling it. (Tom)

Several parents would have liked counsel to be retained beyond the issuing of court orders to help ensure the decision was enacted and understood by the children, and to provide an independent, but familiar, point of contact should further difficulties arise:
Counsel for the child gets to the end of the trial and he is finished, gets his cheque and he is gone. That’s not good enough. He has got to come back. It should be facilitated in his appointment that he does post-contact – absolutely imperative, because it’s not until it gets post that the children really work it out. (Nick)

As soon as things are sorted out at mediation, really they’re not available anymore. So we’ve got no-one to turn too. (Madelaine)

The role of counsel for the child in establishing trusting relationships with children was also considered most important in effectively ascertaining their views. Only by establishing good rapport would children feel able to open up and discuss sensitive family matters with their lawyers:

The kids didn’t even have a chance to get to know him - the same with the report writer. They just sudden turn up, say two days before you go to court, and then expect these kids - after being traumatised or after having bad experiences - to talk to them about how they are feeling. … I’m not asking them to spend hours and hours getting to know the children, but they could actually go about it a different way. Get a good rapport going with the children first. And hopefully they can build on that trust to get the kids to really say what they are feeling. (Kathy)

Professionals’ Views

Family Court professionals liked the way that appointing children’s legal representatives enabled issues to be reframed from the children’s point of view:

Often there is a bit of a battle between the parents who are racing off to court, filing applications and saying all these ghastly things about each other. And counsel for the child can sort of say ‘well, hold on’ and refocus on the children to break the momentum of those proceedings. (Lawyer)

They also supported the earlier appointment of children’s lawyers and more frequent extension of their role following the case’s determination:

I quite often appoint counsel for child early, usually where seriously contested issues are apparent, and particularly if one party is unrepresented. (Judge)

Post-decision we walk out of the door and our appointment is finished. I have had people ringing me up with an access problem three months after there has been a decision. It puts me in a difficult position because I have to say I haven’t got a live appointment, there are no live proceedings, and
we’ve got to look at whether or not there should be a reappointment. The court has reappointed me on occasions, but I think it is a real disadvantage not being there regularly in a monitoring role, even for a certain period of time. (Lawyer)

IV   Specialist Report Writers

The Family Court appointed a specialist report writer to prepare a specialist report under section 29A of the Guardianship Act 1968 in 10 families (67%). Additional reports or updates were completed in three of these cases. Two fathers engaged a private psychologist to critique the specialist report and challenge its findings.

Involvement with Family Members

Report writers interviewed and observed the children and their parents in each of the 10 cases. These meetings mostly occurred at each parent’s home, but some were undertaken at the report writer’s office or the child’s school as well:

He came out to the homes and spent some time with us. And saw us separately in his office. I don’t think we saw him together. But he definitely saw [child] and spent some time with him. (Rachel)

I had to go in and see the psychologist with my child and he came out [home] to see how we got on and that sort of thing. … It seemed okay because he just saw what we were up too. (Greg)

She actually interviewed them with [their father] and she interviewed them on their own while they were living at his place, and then she interviewed them with me and she interviewed them on their own while they were here. I think she interviewed them at school as well and spoke to their teachers. (Libby)

The report writer met with Stella’s sister and nephew at a park since her sister lacked her own accommodation at that stage. While Stella did meet with the report writer at his office, she thought it most unprofessional that he never visited her home or talked with her husband and other family members - especially since “the report carries a lot of sway over counsel for child and the judge.”
Five of the children did not remember meeting with the report writer. Ben (11) knew he talked with two professionals, but was confused about which one was the report writer and which one was his lawyer. Only Kate (9) and Jessica (16) were able to clearly recall their interviews with the report writer:

This lady came to school and took me out of class and just talked to me. Then it happened to [my sibling] as well. … She drew like two pictures of houses, one with Mum at the front and one with Dad at the front. And she said ‘would you rather be here or here?’ Just stuff like that. … Some parts of it were just completely pointless. Some parts they were alright like drawing that picture because she did all this other stuff with it as well. … But some of the questions that she asked, it was like I had no idea what they actually meant. … All I wanted her to do was to tell the judge how I wanted to live with Dad – that, but nothing else! (Kate, aged 9)

Kate, however, had no knowledge about the use made of the information she shared with the report writer:

I think she just kept it somewhere. I don’t think it went to the Family Court or Mum and Dad. (Kate, aged 9)

Jessica remembered seeing the report writer at his office and during two home visits he made:

The last time I saw him was when he told us why he was talking to us. I never knew why we went to see him until then. He just talked to us about Mum and Dad, and I remember that he got [my siblings] to draw pictures. … I did say really important things to him that I felt really strongly about and I thought they would have been taken into consideration. (Jessica, aged 16)

Many parents mentioned that the report writer also interviewed other people significant to the child, such as extended family members (grandparents, adult step-siblings), family friends, and professionals (such as teachers).

The tasks undertaken by the report writer were varied, and included observations and assessment of bonding, attachment, parental attitudes and competence, and parental influence/coaching of children:

He picked up from the counsellor’s report that there was a lot of negative activity going on with [ex-wife’s] side of things against me. The psychologist didn’t believe me for a start, but then one day he was just
here observing the kids and away they went. Saw it for himself, and then he probed a little bit further. (Duncan)

He was given a brief by counsel for child, which we had a copy of too, so we knew what he was looking at. The brief was that he assess the attachment and the bonding between [child] and his mother, and [child] in this situation here. (Stella)

Report writers were also sometimes present at a mediation conference, and always attended the defended hearing. Parents said the report writers *offered advice* in some situations, particularly with respect to minimising the impact of the parents’ escalating dispute on the children. For example, one report writer suggested that the drop-off and pick-up for access occur at the child’s preschool rather than at each parent’s home. Another parent withdrew his custody application when the report writer informed him about the detrimental effect the legal proceedings were having on his children.

**The Specialist Report**

All the parents, except one, reported their views about the contents and conclusions of the specialist report, or the process by which these were reached. Six parents were *satisfied* the report was balanced, fair and truly reflected their child’s situation. Eight others, however, regarded the report as *inadequate, unsafe or biased* in one parent’s favour. *Ex-partners’ perceptions* of their report varied considerably – one former couple were both happy with the report because they each felt vindicated by its contents:

He seemed to think that my child was okay in either environment. He said he had no problems with the way I was bringing him up or anything like that. (Greg)

He had to be very in the middle. So there were a lot of positive things about me that he had written, but he also said some good things about [Greg] as well. He had to – yeah – not sway one way or the other. But he did express some concerns about [child’s] care with [Greg]. He recommended that [child’s] time with me should definitely be stepped up. (Rachel)

However, in two cases each ex-partner held opposing views on the merits of their report, with one parent quite happy with it while the other parent was most displeased:
I thought her report was really fair. They are not supposed to be inflammatory documents and I didn’t think it was. It did say there was no doubt that the children had been discussing the process with their father and that she felt that I was more likely to try and build a good relationship for the children with their father than the reverse - and they were the things that [Phil] was very angry about. (Libby)

Libby’s perception about Phil’s displeasure with the report was accurate. Phil thought the report writer was biased and only “stated the truth in the one area” concerning their son’s wish to live with him. However, Libby said that “every single person who has been involved with it have told him that it’s not sensible splitting the children up.” William, too, was very pleased with their report because it recommended joint custody:

He didn’t load the report - it was objectively expressed or whatever. He said it is clear that I have a very close relationship with [child] and it should be expressed in terms of joint custody. (William)

Madelaine, however, felt the report was biased in William’s favour and did not properly address the child’s interests or the resurgence in his behavioural problems:

It got very bogged down with [William’s] agenda and was very much swayed towards him being a very good parent. It focused a lot on father’s rights and how good contact with a boy and his father was important blah-blah-blah. And I agree with all that - he can be loving - but we felt there were other aspects which weren’t addressed appropriately. (Madelaine)

One ex-couple jointly held negative views about their report:

It was all very Mickey Mouse and double talk and it never really drew any direct conclusions. Considering how much he charged the system for it, you know, he should have been had up for fraud. … He concluded that the children should all be together. And there was nothing in the report about [child’s] wishes, yet she was going on for 10 and quite vocal. (Gary)

I couldn’t understand what the bloody report was recommending anyway. It wasn’t in plain English. … It didn’t make a recommendation. (Anna)

Another report was subsequently prepared when Gary unilaterally changed the child’s school and the court proceedings were accelerated. Anna felt that this incident led to the report writer “basically changing his whole tune”: 
He just couldn’t believe that [Gary] would do that. He was thinking ‘my God, what sort of man is he?’ It came down much more in my sort of favour after that. (Anna)

Six other parents also expressed negative perceptions of their specialist report, with their views ranging from mild dissatisfaction with an aspect of the report (two parents), through to displeasure with most/all of it. Gordon disagreed with the report writer’s recommendation that custody of his two children be split between the parents as the best option to keep everyone happy. Duncan thought the report in his case was fair, but he was concerned it failed to comment on whether or not his children were in a satisfactory home environment with their mother:

It just didn’t go that far - it went right up to the edge and then it stopped. It meant there was no commitment either way - whether ‘yes, they’re in a good environment, they should stay with [their mother]’ or ‘no, they need to leave.’ (Duncan)

Two women were very unhappy that the report had either lost the focus on the child or reached unfair conclusions about their parenting abilities:

The psychologist recommended that my sister be given the opportunity to care for her child again. … [I felt] absolutely devastated. … He initially said to me I had some valid concerns, but that we were dominating and controlling and she never stood a chance. So it was a focus on her and her needs. (Stella)

She only took what she wanted to hear. She didn’t actually take it down in my context as the way I wanted it to be put down. I had always struggled with parenting, and I wanted to take the smacking side out of it say 95%. Then [child] played up when she was here - she has got a bad habit of playing up when people come around! [Child] was on the computer and she wouldn’t get off, so I’d asked her twice and said ‘right, final warning, get off now’ and she wouldn’t get off. So I picked her up and put her in time out in the bathroom. The report writer said to me ‘oh, you handled that very well’ and I thought ‘oh good, I’ve done it right.’ And then she turned around and put in her report that although I handled it well this time in front of her I mightn’t do it next time. I thought, you horrible woman! (Kathy)

Most parents commented that they had seen the specialist report or were familiar with its contents. Some would have preferred to receive a copy rather than just have the opportunity to read through it at their lawyer’s office. In
Duncan’s case the judge took the unusual step of ordering that the report be released:

The judge made an order releasing the psychologist’s report - which is extremely unusual. … His report was made public to try and let [ex-wife] and her parents know that this negativity towards the children was just unhealthy. But it didn’t make any difference. Didn’t sink in. (Duncan)

Two fathers engaged private psychologists to critique the specialist report ordered by the Family Court. Their lawyers had recommended this course of action as a means of advancing their particular applications and neutralising any adverse comment or recommendation in the report for the court. The process was expensive ($9000 for Phil; $2000 for Gary). Nevertheless, each father was satisfied with the role played by the private psychologist, although their ex-wives were highly sceptical of their tactics:

When we ended up in the formal hearing, my lawyer got a guy in who was a psychologist and a lawyer as well. And he came in with some really hard evidence. He basically shot [report writer] out of the water in a nice, manoeuvred sort of a way. … [My lawyer] said it worked - ‘we’ve neutralised his arguments.’ (Gary)

Gary didn’t like [report writer’s second report] so he then commissioned another psychologist to investigate the method that had been used. … He just thinks all the time that he can go and do, unilaterally, whatever he wants. (Anna)

[The report writer] was so biased right from the start and wrote an appalling report that I had critiqued by a private child psychologist under the instructions of my lawyer. [Child] made his point of view very clear to him, and [the psychologist] recommended to counsel for child that [child] should stay with me until it got sorted out. … [The psychologist] effectively did a 29A in a private capacity. He understands father hunger and he did a most brilliant job. (Phil)

He had this 300 page review done on the psychologist trying to get her discredited - because she had seen what was going on, and he didn’t look very good when it was written down. So he wanted that out. (Libby)

Ben recalled meeting the private psychologist that his father engaged:

I saw a guy when I was with Dad and it was just after they had separated. … I said that I wanted to live with Dad then. (Ben, aged 11)
One other father would have liked a private psychologist to have been involved, but he could not afford it. His concern arose because he felt uncomfortable about the significance placed on the specialist report in the proceedings:

I don’t think it’s right that a decision like this mainly depends on the psychologist. … If a parent has some doubt about the 29A report he should be given an opportunity to get another person involved to do a similar assessment. … But [I was told] I would be financially responsible for the additional psychologist if it was necessary, and I said ‘well, that’s not fair, I can’t really afford it.’ (Gordon)

Satisfaction with the Role of the Specialist Report Writer

Parents’ perceptions of the role performed by their report writer ranged from very positive (five parents) to highly negative (seven parents). Two parents had mixed views. The parents who were very satisfied attributed this to the report writer’s experience, qualifications, “nice” personality, independence, and sometimes the fact that the recommendations were favourable to their application:

I felt very good with the psychologist … He’s supposed to be one of the top guys with kids in [city]. He’s got certificates on the wall and that. (Greg)

He was amazing - of all the report writers we could have got, he was the best. (Rachel)

Very, very happy. He spent a lot of time and he’s understanding, and I mean the report came down my way for joint custody so I suppose to that extent. He’s independent, very experienced, and he saw the light so to speak. (William)

Mixed views were expressed about the report writers’ roles when two fathers thought their report writer was “fine” and liked the way he interacted well with the children, and picked up on certain family dynamics, but were less satisfied with one aspect. Nick thought the report writer “got the wrong end of the stick. I don’t think he looked at the evidence hard enough, you know. They paint a picture which is not quite true.” Duncan felt the report writer was too inconclusive about the adequacy of his ex-wife’s parenting skills.
Seven parents with negative perceptions were most unimpressed with the report writer involved with their family. This seemed to be primarily due to personality differences, dissatisfaction with the way the report writer undertook their role (such as spending insufficient time interviewing people, disregarding former care arrangements), or making recommendations which a parent regarded as distasteful. Gordon found the report writer too analytical and said it felt like the psychologist was “ticking off boxes rather than talking with me as a person”:

He said what happened in [Europe] is in the past and it is the current situation which is relevant. I found that strange. … I think it’s bad that the psychologist is given such a short time to make an opinion, and takes no account of the whole history before. How can a psychologist get an opinion of a child in basically three interviews. I think the time is much too short. I’ve been in one interview and I see how he just touches the surface, but doesn’t go into depth. (Gordon)

Other parents accused their report writers of ineffectiveness, bias, incompetence and lack of interest:

That stupid woman who wrote it, she was just really biased right from the time she interviewed me. And I had no idea how unprofessional her interview technique was. (Phil)

He was the most double-talking, fork-tongued, bugger I’ve met for a long time. He’s just dangerous. … He was just plain bloody incompetent. … I don’t even think he’s a qualified psychologist. He’s one of these half cut sort of guys. (Gary)

I just don’t feel that his heart was really in it when he was doing the report. I just don’t think he was that interested. I didn’t like him personally. I thought he was far too namby-pamby. He didn’t spend a lot of time with the children. (Anna)

I don’t like her very much. She just seemed to be out to be negative about my parenting skills, the way I was, and any little detail that she could get her hands on that made me look bad she seemed to emphasise that in her report. … I thought it was pretty awful, too, the way she just hauled the kids out of class. It was a shock to them that this woman had suddenly turned up at school and was asking them all these questions. (Kathy)
Some parents reported their perceptions of the report writer’s relationship with the child as mostly positive - “they got on well” (Duncan). However, other parents were unaware how their child felt about the interview with the report writer and did not know what had been said between them.

**Improving the Role of the Specialist Report Writer**

Several parents would have preferred the report writer to be appointed *earlier* in the legal process and to remain involved *longer* beyond the issuing of court orders:

I did ring him when [child] started acting out saying ‘is there anything you can do?’ And he said ‘no, it’s too late I’m not involved anymore.’ (Madelaine)

The contribution by report writers to parenting disputes was recognised by most parents as being constrained by *insufficient time and resources*:

I think if the psychologist had more time he might be able to find out more things. I understand he currently only gets a limited time set by the court. (Gordon)

Section 29A had a timetable and budget to work too. It’s frustrating! He said I’m going to have you in for an hour and talk to you, I’m going to have [ex-wife] in for an hour, and I’m going to her house to spend two hours there, and then I’m coming to your house for two hours, then I’m going to speak to the children - I’m not sure this is correct, but in principle this is how it worked. Then I’ll write my report for x hours and then finished. But life doesn’t happen like that. I didn’t feel that he could, in that time, gather up nuances and encapsulate those in a six or seven page report. They have to do a better job - it’s as simple as that - because the children are so important. There was a whole realm of possible options that weren’t being explored. They have got to have more money and more time. (Nick)

Due to the varying *professional backgrounds and qualifications* from which report writers are drawn some confusion did arise for some parents about who they had actually been interviewed by. Greg assumed their report writer was a psychologist and felt very belittled in court when the judge challenged him on this:

I brought up with the female judge something about what the psychologist for the child had said. And the judge turned around to me and said ‘well,
that’s not a psychologist.’ And I’m like, well, you had this guy who is supposed to be a psychologist do a report on him and now you are saying that he is not a psychologist! I was thinking to myself ‘what the hell was he then? Why was it called a psychologist’s report?’ I was made to feel like a right pillock. (Greg)

Some parents wanted report writers to spend more time establishing trusting relationships with children so they could talk more freely about sensitive issues. Three parents also thought report writers should avoid doing u-turns in their cases and be clearer about what they tell parents they will be recommending.

**Professionals’ Views**

The report writing role was described by the professionals as “very narrow”, “tail-end Charlie stuff” and “quite frustrating” because of the limitations posed by the brief from the court and the fact the report writer is “not working therapeutically” with the family. Nevertheless, some report writers found there was “little resistance to moving outside the brief” to recommend further action:

In every second report I seem to be suggesting some further role, and by-and-large the court’s been quite receptive to doing that. The trouble is that often by the time it gets approved, it’s way past the time when you could have usefully done it! (Report writer)

I’m prepared to be more creative in how I use the specialists I’ve got confidence in and not just stick to narrow briefs. (Judge)

Concerns about specialist reports involved the delay of several months in “asking for the report and getting it” and the fact they are “an expensive resource.” However, report writers’ child-focused approach helped parents to focus on critical issues. One specialist said he looked for “the ‘wellness’ in people” although he “didn’t overlook their illness” either. Like lawyers, the report writers felt unable to “hear all the parties’ stories” or to interview all the people who parents recommended “otherwise I’d be there for years.” However, they did give opportunities for parents to “add anything” that they thought was “really important for me to know that I haven’t asked.” It was also thought important to remind parents that report writers were “not the judge” nor conducting “a mini-hearing” so they did not need to “collect all the evidence.”
Some report writers noted the pressure they felt at some hearings to give specific direction about the outcome of a difficult case – “It’s hard as an expert witness, but you have to remember you are not the judge and it’s not our decision to make, even if you feel tremendous pressure to do so.” Report writers perceived their reports as generally being influential on the court outcome:

Families do see us as having a significant effect on the outcome – probably their lawyers tell them that. There’d probably be quite a lot of similarities between the views expressed by the report writers and what the final judgments say. It’s not invariably certain, but I think lawyers probably correctly advise their families that we are playing a significant role in the proceedings. (Report writer)

“Conveying a particular impression to a parent and then writing the report differently” was not considered to be good professional practice, although this may have been a means of “softening the blow” or responding to the receipt of new information. Most report writers “who are long in the tooth are going to be very guarded about giving out lots of information about what they might be thinking along the way because they might just end up with a different view.” It was also thought problematic that parents could no longer have copies of the specialist report:

If you get 10-12 pages of detailed information and you get shoved into a little room at your lawyer’s office to read it, people can’t take it in. So if the report has a positive function about helping them to think about their children, they’re often really quite blank about what they’ve taken from it. (Report writer)

Several times I’ve had parents phoning me up incensed by something they say is written in the report. And I’ve gone back to the report and it’s really not at all accurate. Some of the words might be ones that I’ve used, but often they’ve got a very skewed idea. Whereas if they’d had the chance to have a more considered look over a period of time at it, they’d probably be able to revise their view. (Report writer)

Support was expressed by several professionals for report writers’ appointments to be extended beyond the court hearing:

Where there’s been a quite momentous hearing for a family, I’ve had a few situations where I’ve been kept on. It can be really effective in terms of implementing change and for the families to know there’s someone they can ring up when they start panicking that it’s not working. Just to
have that reassurance is really positive. In one judgment the parties could come back to me at any time in the next 12 months to ask for my help. So there’s been an enlightened approach to widening our brief. (Report writer)

A report writer recommended that psychological profiles be done of all the parents:

Instead of tacking on all this help for the mad, bad and disaffected, try to help them earlier. Look at the psychology that is driving them and the family of origin stuff which takes quite a lengthy interview. Often what is happening is nothing to do with the here-and-now; it’s because someone was hurt way back then. So what we do now is a wee bit sticking-plasterish until we get some more teeth and resources to investigate more thoroughly. (Report writer)

V Other Professionals

A range of other professionals and agencies were mentioned by the parents participating in the study. These included the Family Court co-ordinator, schools, special education services, health services, CYFS, the Police, churches, women’s refuge and a community-based mothers’ support group.

Two parents referred to the role of the Family Court co-ordinator. Robbie felt that the judge was better informed about his case because of his phone discussion with the co-ordinator. Stella was initially unaware of the co-ordinator’s availability - “It wasn’t until I actually looked in the telephone book and rang the Family Court and was put onto the co-ordinator … and that afternoon I had an appointment with her.”

Health services were the most frequently mentioned service external to the Family Court. Four parents (18%) had consulted their general practitioners concerned about their children over suspected sexual / physical abuse or for referrals to a counsellor / child psychologist. Robbie, overwhelmed by his new custodial role, sought his doctor’s assistance when he found himself “about half an inch from a nervous breakdown.” Duncan was called to several meetings with his ex-wife and daughters’ doctor over concerns at the mother’s ability to care for the children. Hospital services were involved in three cases (20%)
concerning the physical examination of a suspected sexual abuse victim, providing a Keeping Ourselves Safe programme for another child, and through the provision of psychiatric services for a child’s mother. Children from two families attended health camps. Plunket assisted one family with parenting skills and a public health nurse worked with a child whose unhappiness over his living arrangements had led to a deterioration in his behaviour at school.

Six parents (27%) mentioned the role of schools, either to note the support their children had received from teachers following the separation or to report on legal issues they had informed the school about pertaining to their children’s care arrangements. A school principal and a child’s teacher gave evidence in two defended hearings.

The Police were involved with five parents (23%). Tom’s wife called the Police when he refused to leave their home the evening she told him their marriage was over:

The Police said to me ‘you’ll have to go and find somewhere else to stay.’ And I said ‘it’s my house. Why should I move? My children are here. I’ve done nothing wrong!’ And one of the Police said to me ‘if you don’t move, we’ll have to handcuff you and take you out.’ And I said ‘well, do that, because I’m not moving. I’ve done nothing wrong.’ And they did. They got me outside and said ‘your best thing is to get a lawyer first thing in the morning, get it sorted out and pay her out. Move on with your life.’

(Tom)

The Police also enforced a court order enabling Tom to retrieve his personal possessions from the matrimonial home, and uplifted the children on several occasions when his ex-wife breached the access order. Louisa, too, called the Police when her ex-husband allegedly refused to let her collect their son following an access visit. Robbie was paid a visit by “the local cop” over “an altercation at the gate” when his ex-wife’s new partner had informed the Police that Robbie had threatened to shoot him. Robbie denied this incident, but handed his guns over to the Police. Kathy was similarly involved with the Police over an alleged assault by her ex-partner on her new boyfriend. Protection orders brought two parents into contact with the Police:
One day a policeman turned up at work and dragged me away saying ‘don’t go near the house, don’t go near the kids, don’t go near your wife.’ She said I was unbalanced, I had firearms [for hunting] and butcher’s knives [to carve up a cattle beast for the freezer]. We’d had a couple of arguments and she said in her affidavits that I came home and got all abusive every night. … Protection order, house order, furniture order. Basically I had what I was standing up in and that was it. And that was the end of seeing the kids for about three months. … It took two and a half years through the Family Court to find out that that was all a big crock. (Duncan)

In the reverse of Duncan’s situation, Kathy had obtained a protection order against her ex-partner and was annoyed when “the Police didn’t do anything” when he breached it three times. She was also disappointed with the Police response over her daughter’s alleged sexual and physical abuse – “they weren’t interested as there wasn’t enough evidence. They said I was being vindictive and wanted revenge.”

CYFS was involved in three family situations (20%) concerning allegations of child physical or sexual abuse. The parents all expressed dismay at the inadequacy of the Department’s response:

CYFS is just under-funded, under-budgeted - it’s that badly resourced at the moment it may as well not be there. I took the children to the doctor with heel marks on their bodies from the beating of a shoe. That took a year for CYFS to investigate. By that stage, any trace of proof was well and truly healed. (Father)

CYFS became involved in one complex family situation following a referral by a pre-school over a child’s sexualised behaviour. At the FGC it was agreed the child would be more closely supervised during access visits. The mother felt no-one took her concerns seriously and criticised the lack of follow-up with the alleged teenage perpetrator:

It felt like nobody wanted to know what was going on for [child]. Everybody got lost in the adult issues. [Child’s father] told them this was an access and custody issue and that I was trying to fight him by creating malicious complaints. Nobody took me seriously. The care and protection system has let us down badly. (Mother)
VI Discussion

The key themes that can be identified from this chapter are: clients’ point of entry into the family law system; professionals’ roles, styles of practice and perceived influence on case outcomes; children’s knowledge and understanding; and the significance for families of professionals external to the Family Court.

The study reaffirms the centrality of lawyers in post-separation decision-making processes (Davis, 2001b; Family Law Pathways Advisory Group, 2001; Hall & Lee, 1994; Hall et al., 1993b; Harland, 1991a; HRSC, 2003; Law Commission, 2002b; Lee, 1990; Roberts, 2001). All the participants were legally represented and appeared to regard their parenting dispute as a legal process requiring specialist legal assistance. Their engagement with a lawyer did, fairly quickly, set them on a legal and court-directed pathway – even where there was evidence of ex-partners’ successfully negotiating their own previous agreements. The receipt of written legal correspondence, especially an affidavit, from an ex-partner’s lawyer triggered several parents to retaliate through their own lawyers to set the record straight and to ensure their own interests were advocated. There was a general lack of awareness of the Family Court coordinator or the ability of a parent to access counselling without first consulting a lawyer. Many parents still wanted to have their own say in mediation and defended hearings despite being legally represented. Some were concerned about the distancing and minimal communication which occurred between them and their ex-partner once they had engaged a lawyer. This has also been found in other research (Green, 2003; Tesler, 2000).

Specialist family lawyers were preferred by both parents and professionals alike. The need for a different legal style in family disputes has been acknowledged since the Family Court’s inception (Atkin, 1992-1993; Harland, 1991b) and accounts for the development of this specialist area of practice within New Zealand (Boshier, 2004c; Jefferson & Parsons, 1998). Some parents felt their court involvement was too adversarial as a result of the inexperience of either their own, or their ex-partner’s, lawyer. Professionals, too, were critical of the practice of law firms to assign family law work to junior staff. They wanted
to enhance the status of family law as a specialty field and to continue
developing their skill base via supervision and mentoring opportunities. There
has been much less impetus within New Zealand to replace lawyers with an
expanded range of conciliation and mediation services, so lawyers’ central role
in parenting disputes over children does seem more assured in this country –
unlike Australia currently (Australian Government, 2004; Parkinson, 2005) and
England previously (Davis, 2001a, 2001b; Neale & Smart, 1997b).

Parents’ satisfaction with Family Court professionals was often mediated by
the *nature of their personal relationship*. Parents were able to clearly
differentiate between their level of satisfaction with their, or their children’s,
lawyer and the specialist report writer, and the outcome of their case. Even a
parent who was highly dissatisfied with their court order, could nevertheless
speak positively about the role performed by a particular professional. Those
personal attributes of professionals which were most liked by clients included
having a nice personality, taking an interest in them and their children,
providing explanations and quality advice, being supportive, talking with and
listening to them, discussing options, having some degree of insight into family
dynamics, and holding appropriate qualifications. In addition, parents preferred
a lawyer who was a strong advocate and could represent their interests, while
the independence of children’s lawyers and report writers was also highly
regarded. Professionals who made recommendations favourable to parents’
interests were often considered more positively.

Dissatisfaction with Family Court professionals was related to poor
interpersonal skills, the provision of insufficient advice and support, a lack of
interest, and a failure to listen to parents or, in the case of lawyers, to follow
their clients’ instructions. Perceptions of bias, incompetence, ineffectiveness,
and inexperience were also significantly associated with client dissatisfaction.
Negative views were held of professionals who were either overly directive or
too weak, or who disregarded a parent’s previous or current role in their
children’s lives. Nearly all the parents were dissatisfied with their ex-partner’s
lawyer, and disliked any recommendations by their own lawyer to pursue a
course of action they considered out of proportion with the cost or likelihood of
a positive outcome. Some lawyers also over-estimated their client’s competence and failed to take account of the pressure and role overload faced by recently separated parents (Amato, 2004; Day Sclater & Richards, 1995). One-third of the parents, mostly by choice, changed their lawyer during the course of their legal proceedings.

Parents seemed to perceive *professionals’ styles of practice* as falling on a continuum between ‘good’ and ‘bad’ (Neale & Smart, 1997b), and this was closely associated with whether or not they were satisfied or dissatisfied with a particular professional’s role and performance. Parties’ lawyers were mostly not considered to work collaboratively (Pruett & Jackson, 1999; Tesler, 2000) or therapeutically (Wexler & Winick, 1996; Stolle et al., 2000). There was only one example given in the study of two lawyers working together to assist a parent and his ex-wife to reach agreement, and little evidence more generally of a co-ordinated interdisciplinary team approach. Considerable displeasure was voiced with children’s lawyers and report writers who performed u-turns and reported the opposite to the court of what they had told the parent. The professionals also considered such conduct inappropriate.

The Law Commission (2003) has already noted the *resourcing issues* facing the Family Court and these were confirmed in my study. Professionals were considered to have insufficient time to devote to their clients, and to interviewing others closely associated with the case (for example, extended family members). This was often acknowledged as being the result of a restricted brief and onerous workload, but parents found it frustrating that the court’s investment in lawyers for children and specialist report writers was too late and too minimal to maximise their potential significance for their family. Ideally, clients wanted these professionals to be appointed earlier and to have their role extended beyond the issuing of court orders. This was supported by the professionals who thought that their role in monitoring the implementation of the orders could be helpful in encouraging compliance with them. Professionals in one city felt that their recommendations for an ongoing role with families were often received sympathetically by the Family Court, but the length of time to process their continuing role often negated its usefulness.
Report writers lamented the narrowness of their role and their consequent inability to use their appointment to work more therapeutically with families (Doogue & Blackwell, 2000). They felt their input enabled litigating parents to refocus on their children’s needs and interests, and, like the parents, wanted the specialist report to be better utilised to improve post-separation family functioning. Undertaking psychological assessments of parents was also suggested as a means of identifying those clients in need of therapeutic assistance. This would require a more expansive role for specialist report writers, but one that would capitalise on their existing skills (Cantwell, 2002; Newberry, 2001).

Lawyers for children and report writers were both perceived by parents in this study as highly influencing the case outcome. As one parent said, they “carry a lot of sway.” The professionals similarly believed that their reports had significant status in the proceedings and that judges were most often likely to adopt their recommendations. The influence of these professionals on case outcomes has also been found in other New Zealand studies (Caldwell, 2004; Hall & Lee, 1994; Harland, 1991a; Law Commission, 2002a) and internationally (ALRC & HREOC, 1997; Kunin et al., 1992; Shuman, 2002). The engagement of private psychologists to neutralise any adverse comments in a specialist report is an example of the costly lengths some parents will go to in order to try and restore their credibility before the court. Parents reported mixed views of their specialist report with six believing it to be fair, but eight regarding it as inadequate, unsafe or biased. Buchanan et al. (2001a, 2001b) also found that English parents were critical of their specialist report and the inadequacy of the assessment process.

Children in the study were at times confused about which professional they had seen, and found it particularly hard to distinguish between their lawyer and the report writer. Five children did not remember meeting with the latter, although those who did could easily recall some of the questions they were asked and the pictures they drew. Children were mostly unaware of the use made of the information they disclosed to professionals, although some had no problem with it being given to the court. Parents emphasised the importance of
professionals establishing rapport and a trusting relationship with children. They especially wanted their children to meet with the lawyer appointed to represent them. The Practice Note and the COC Act 2004 now require this to occur unless exceptional circumstances apply. Duncan’s daughters, who never met with their lawyer, would therefore definitely have personal contact with their advocate under the current policy. This approach is consistent with lawyers’ own widespread acceptance of the importance of making direct contact with the child (Caldwell, 2004), and with children’s aspirations (Buchanan et al., 2001a; Campbell, 2005; Cashmore, 2003b; Kaganas & Diduck, 2004; Lowe & Murch, 2001; Neale, 2002; Taylor et al., 1999; Trinder et al., 2002) and judicial expectations (Boshier, 2005b, 2005c).

It is not just Family Court professionals with whom family members come into contact following parental separation. A range of other health, education and welfare professionals and Police personnel provide investigative, diagnostic, therapeutic and support services to adults and children. In my study, health professionals (general practitioners, hospitals, health camps, Plunket and public health nurses) were the most frequently mentioned service-providers external to the court. Schools were also mentioned by 27% of parents. Parents generally appreciated the involvement of external agencies and welcomed their role in helping to resolve personal distress and adjustment difficulties prompted by the separation. However, agencies with an authoritative function, like the Police or CYFS, who became involved due to serious allegations about the personal safety of family members were less favourably regarded. Indeed, they were criticised by parents for the inadequacy of their response to child abuse allegations and protection order breaches. Conversely, Duncan disliked what he considered to be the excessiveness of the Police response when his ex-wife obtained a protection order against him. The level of external agency involvement in family life clearly escalates once abuse and violence issues are raised, and the dynamics of the family situations in which these feature pose much greater complexity for the Family Court (Law Commission, 2003; Sturge & Glaser, 2000).
VII Chapter Summary

Family Court professionals play an important role in post-separation family life and this chapter has reviewed the tasks they perform and clients’ levels of satisfaction with their performance. Lawyers remain the professionals most immediately consulted by parents following relationship breakdown, and into whose hands many place the management of the dispute resolution process over the future care of their children. Children’s lawyers and specialist report writers become involved further down the litigation pathway when parents have failed to reach agreement through the court’s conciliation services. While dissatisfaction was expressed about the constrained role of these professionals, there was some acknowledgment that it was due to the limited time and resources at their disposal and the restricted nature of their role. There were, however, some encouraging comments identifying those elements of professional-client interaction which parents and children found helpful. A broader range of community-based agencies became involved in the families’ lives when violence and abuse allegations were made, or specialist health and education services were required.
Chapter Nine

FAMILY COURT DISPUTE RESOLUTION PROCESSES

I Introduction

This chapter outlines the parents’, children’s and professionals’ views on the services provided by the Family Court (and in some instances higher courts) to assist families to resolve disputes about the care of children. (The nature and timing of these dispute resolution processes have been previously outlined in chapters two and four). The utilisation of counselling, mediation, and defended hearings within the Family Court, as well as higher court hearings, by each family is outlined in Table Six:

<table>
<thead>
<tr>
<th>Family Court Counselling</th>
<th>Mediation</th>
<th>Defended Hearing</th>
<th>Higher Court Hearing</th>
</tr>
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<tbody>
<tr>
<td>Phil &amp; Libby</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Greg &amp; Rachel</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Harry &amp; Tina</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Robert &amp; Louisa</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Nick &amp; Jane</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>William &amp; Madelaine</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Gary &amp; Anna</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Duncan</td>
<td>Yes</td>
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<tr>
<td>Tim</td>
<td>Yes</td>
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<td>Robbie</td>
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<td>Simon</td>
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<td>Tom</td>
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<td>Gordon</td>
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<tr>
<td>Kathy</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Stella (aunt)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Counselling and mediation were the two most commonly utilised services – each being used by 87% of the families participating in the study. Defended hearings occurred in a quarter (27%) of the cases, with just two cases (13%) involving appeal court hearings.
II Counselling

Counselling was undertaken by all the parents in the study (see Table Seven). Twenty (91%) were referred to counselling via the Family Court, with eight of them receiving a second or third referral through the court on later occasions. One father received private counselling only, and a further eight parents (36%) also availed themselves of this option either prior to, or following, their state-funded counselling sessions. Two fathers were offered counselling by their employers. Only one participant in the study, Stella (an aunt), received no counselling at all, although she very much regretted that the court had not informed her of her eligibility for this service.

Table Seven: Utilisation of Counselling Services via the Family Court, Privately or through Employers

<table>
<thead>
<tr>
<th>Name</th>
<th>Family Court Counselling</th>
<th>Private Counselling</th>
<th>Employee Counselling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phil &amp; Libby</td>
<td>Yes</td>
<td>Yes</td>
<td>-</td>
</tr>
<tr>
<td>Greg &amp; Rachel</td>
<td>2 referrals</td>
<td>Yes</td>
<td>-</td>
</tr>
<tr>
<td>Harry &amp; Tina</td>
<td>Yes</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Robert &amp; Louisa</td>
<td>3 referrals</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Nick &amp; Jane</td>
<td>Yes</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>William &amp; Madelaine</td>
<td>Yes</td>
<td>Yes</td>
<td>-</td>
</tr>
<tr>
<td>Gary &amp; Anna</td>
<td>2 referrals</td>
<td>Yes</td>
<td>-</td>
</tr>
<tr>
<td>Duncan</td>
<td>2 referrals</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Tim</td>
<td>2 referrals</td>
<td>-</td>
<td>Yes</td>
</tr>
<tr>
<td>Robbie</td>
<td>Yes</td>
<td>-</td>
<td>Yes</td>
</tr>
<tr>
<td>Simon</td>
<td>No</td>
<td>Yes</td>
<td>-</td>
</tr>
<tr>
<td>Tom</td>
<td>Yes</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Gordon</td>
<td>Yes</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Kathy</td>
<td>Yes</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Stella</td>
<td>No</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Referrals to Counselling by the Family Court

The most common form of counselling undertaken by the study participants was that offered through the Family Court. Twenty parents (91%) availed themselves of these six free sessions, either by approaching the court directly for assistance or through a referral by their lawyer:
Pretty much the first thing the Family Court did was send us to counselling. We had a few sessions. We had a couple together and some separately. (Rachel)

My lawyer said ‘you need counselling, it would be good for you talk’ and she teed up this thing through the court so I would get six free ones. (Tim)

Eight parents (36%) received an additional set of state-funded counselling through the Family Court, with one of these ex-couples going on for a third referral:

We went the second time around to the same counsellor. Then the last time when I decided to apply for custody I had to go through another set of counselling, and we went to a different person. So I had to explain the whole story again. (Louisa)

**Privately Funded Counselling**

Simon, whose separation had occurred some years previously, approached a marriage counselling agency in a private capacity for counselling with his ex-wife when she planned to relocate. The couple reached agreement at counselling, but Simon later regretted agreeing to his child’s shift because of the ensuing contact difficulties.

Eight other parents (four ex-couples, 36%) engaged private counsellors in addition to the state-funded counselling they had received through the Family Court. Two of these ex-couples started out with private counsellors and subsequently moved to court-referred counselling. During the early stages of their marital difficulties, Anna and Gary found a counsellor by looking “in the Yellow Pages.” Their next referral to a female counsellor occurred through the Family Court. The other couple’s initial use of a private counsellor arose following Rachel’s outpatient treatment for post-natal depression:

Through all the counselling, and everything, I just grew and changed a lot, and grew out of [my marriage]. It was just counselling for me at that stage and then I started seeing a family counselling person. She did have a few sessions with [Greg], but he basically blocked out and wouldn’t go in the end. I carried on seeing her and I just decided one day I couldn’t stay with him anymore. I felt like I was drowning big time. I needed to get out and sort out my own confidence and self esteem and get my own life back on track. (Rachel)
Two other ex-couples utilised Family Court counselling, but also made extensive use of privately funded counsellors. This helped one woman come to terms with the ending of her relationship, while another mother felt that her ex-husband switched counsellors when his role in their relationship breakdown came under scrutiny:

As soon as the man started asking questions [Phil] said he wanted me fixed. And the counsellor sort of said ‘well, she’s not actually a broken car. We are not talking about fixing a person, we are really trying to fix a relationship.’ [Phil’s] view was that there was nothing wrong with the relationship, there was nothing wrong with him. It was, you know, ‘[Libby’s] got a lot of problems.’ So every time they tried to talk about that with him, we switched counsellors. (Libby)

**Employer Provided Counselling**

Two fathers (9%) took up their employer’s offer of counselling. Robbie had three free sessions which he found beneficial, while Tim only bothered going for one of his two free appointments:

I thought I might as well use them because I had lots of issues I had to just get out of my system. I found it very unhelpful. It was just a session where I said what had happened. I thought it was a total waste of time. (Tim)

**Counselling Outcomes**

Six parents (30%) reported reaching an agreement through Family Court counselling. However, it was only in one case that this agreement endured over time:

I went in and chatted to the counsellor, then [ex-wife] went in, and we went back for a joint counselling thing. And he says ‘I’ll ask [ex-wife] these three questions again. Is there any chance of reconciliation?’ ‘No.’ ‘Do you want the children?’ ‘No.’ ‘And do you mind if [Robbie] has full custody of the children?’ ‘No.’ That’s it, finished. Boom. I filed for custody for the kids and she just signed it over, not a problem. She didn’t want the kids - it cramped her lifestyle. (Robbie)

The five other parents who had reached satisfactory agreements at counselling later became very disillusioned over their lack of enforcement and court applications ensued:
The access was agreed to through counselling and I’d taken time off work. But two days before when I rang to confirm everything he said ‘no, you’re not having them. I don’t like your attitude.’ I was devastated. I thought if it was something that we both agreed to through counselling that’s what stands. But it’s not. If the other person changes their mind there’s nothing you can do about it. (Tina)

At the counselling we agreed that when we separated we would trial week-about custody and that was built into the legal document. But once we separated he wouldn’t let me have the children as we’d agreed. … I honestly thought that the agreement that we had was binding, but it didn’t seem to mean anything. (Anna)

The majority of the parents reported that no agreement was reached at counselling. The most abrupt endings occurred in the three families where one parent simply walked out of a counselling session and refused to return:

Half way through the first session, she got up and told the counsellor that she didn’t know what she was talking about and walked out. That was the end of it. She never went back to another one. (Tom)

In joint counselling sessions I felt that I was on the defensive all the time. And there was one time there where they were both laughing at me because I got that angry - and that was it! I just got up and walked out. (Greg)

The possibility of resolution being achieved at counselling broke down in the remaining cases because of the (alleged) non-compromising attitude of one of the parties:

He just wasn’t willing to co-operate at all. He was saying ‘it’s either my way or the highway.’ It was just a waste of time. (Louisa)

I had my toes dug in to what I believed and that was going to be the end of it. (Gary)

**Satisfaction with Counselling**

The parents were fairly evenly split in terms of their satisfaction with counselling, with around half finding it of value and/or enjoyable, and the other half feeling dissatisfied or frustrated with their experience.
Nine parents (43%) were highly satisfied with their counselling experience, despite the fact that, in some cases, agreement was not achieved. They generally described the counselling process or the skills of the counsellor in glowing terms – as “excellent”, “down-to-earth”, “marvellous”, and “really great.” Some parents also liked their more in-depth involvement with the counsellor, and two women found their counsellor so helpful they continued seeing her privately:

I found the chap very good. He was in an awkward position, but he could see where I was coming from and he could see where she was coming from. (Robbie)

I felt a lot more comfortable talking to the counsellor because he spends a lot more time [with you]. (Gordon)

We had [the counsellor] who may be one of the very best in New Zealand. I had full confidence in [her]. (William)

I actually still see [the counsellor] now. I just carried on seeing her. We’ve developed a really good relationship. (Rachel)

A further two parents, who had not found their initial counselling helpful, did find their second set much more satisfying because the counsellor was either of the same gender as them, or more neutral in their approach:

The first guy [private counsellor] we went to wasn’t very good – even I felt he was a bit unfair - because he really just completely blamed [Gary]. … And then we got those six sessions, with the court, through the solicitor. And I found her excellent. I felt that she was really neutral, that she really understood her stuff, and that she really tried to reconcile and look for the differences and say ‘well, how can we come up with something that’s going to help?’ … I was very comfortable with her. I trusted her. (Anna)

Ten parents (48%) expressed dissatisfaction with aspects of their counselling experience. They described it as “ineffective”, “pointless” or “a waste of time” because they either did not believe in counselling, failed to reconcile with their ex-partner or to achieve an agreement over the children’s care, or were unable to subsequently implement what had been agreed:

You’re just there to fill up the time. It wasn’t any point. (Robert)
Just a joke. I went to two or three counselling sessions and then the woman wouldn’t have us back together, because it just turned into, you know, real nasty stuff. So there was never anything positive out of that. (Gary)

To me, really, nothing was achieved out of it. The marriage never got back together and I still didn’t get proper access to the children. (Tom)

I myself don’t believe in it. I’m one of these people who let bygones be bygones. I don’t dwell on the past and that sort of crap. (Greg)

Simon suggested that the term ‘counselling’ was off-putting for men as it did not accurately reflect the type of service provided by the court and needed to be renamed:

Counselling could be a word taken out of it too. I think men shy away from that word. Mediation sounds like meeting a middle person. A counsellor sounds like someone that’s actually trying to find out what’s wrong - lie down on the couch or something like that. Words like that should be taken away I think. (Simon)

Children’s Counselling

Children from three families (20%) received counselling following their parents’ separation, but this intervention was relatively brief. Two children (from different families) each saw a specialist child counsellor – one child went for two sessions and the other child for an assessment phase followed by three sessions. Another four siblings had a combined session with a counsellor accessed through the health system. Referrals to a child psychologist occurred in a further three families, relating to a child’s educational difficulties, the sexualised behaviour of a pre-school child, and another child’s reluctance to leave his father at the end of access visits.

Family counselling was instigated through the Family Court on the recommendation of an innovative specialist report writer for one family where the parents barely communicated and there was considerable ongoing conflict over the care of the youngest child – “She was really good. We got a lot out of it because we learnt how to deal with things a lot better” (Anna); “When the court
gave us the opportunity to have counselling that was really good” (Jessica, aged 16).

Two parents expressed concern at the lack of availability of free counselling for children whose parents have separated:

I think [my child] would benefit from having someone to talk to as well. Counselling should definitely be available for children. (Rachel)

I can get counselling for me, but not the kids. I can get it if I want to pay for it, but I had that much expense coming out, I just couldn’t afford it. … I just can’t get free help for the kids - no-one seems to wants to know. (Robbie)

Professionals’ Views

Counsellors work with a range of clients, including those motivated to resolve the issues arising from their separation through to those ordered to attend by the court:

Quite a few people who separate that I see are very committed to not going to court – often because of cost. They decide it is a cheaper option to come and work out a parenting plan for their children without having to see lawyers and the court. (Counsellor)

You do get parents who are at counselling because that’s the step they have to take before they get to the real thing. They have to do it because the judge makes them. But that’s okay. It’s like sending kids to lessons – they’re there because their parents made them be there. You can still work with them despite that level of resistance. I always say to parents ‘it won’t be about agreement, it will be about compromise.’ (Counsellor)

A Family Court co-ordinator thought that “six counselling sessions isn’t enough for all families, particularly those with complications.” Concern was also expressed by several professionals about variability in the quality of counselling and the lack of well-qualified counsellors:

The court’s current engagement process is often essentially with a counsellor, but they can be so variable and take so long. Some choose to dispense legal advice in the course of their counselling, or disempower one or other of the parties by telling them ‘well, the wife is going to get custody anyway.’ We then get a legacy of delay, frustration and inadequate information, and we’ve got to mediate with that three or four months after they first wanted an acceptable engagement. (Judge)
Some of them are very good and the parties will tell you that and they’ll want to go back. But, as often as not, counselling is a non-event or they didn’t get on with the counsellor. (Judge)

Getting counsellors “to adopt the right approach early” and “up-skilling them to get a more consistent response” were considered essential. The court’s inability to order counselling for children was also regarded as problematic, with the counselling provisions of the Family Proceedings Act considered “anachronistic in the modern world.” There was general support for children’s counselling services to be introduced, although the creative use of adult referrals sometimes enabled children to be included:

There’s a real push to get children’s counselling and, while we don’t advertise it, we flick in the odd child. Children may be included in a family session, but we try to still keep to the letter of the law. (Coordinator)

Recently there has been more court-ordered child counselling, even though it doesn’t fit into the Act. The Act’s so wrong - it’s just madness that child counselling is not specified. I still do quite a lot of section 9 child counselling though – see the parents, see the kids a couple of times, give feedback to the parents. That’s really good use of section 9 if the parents both want to do that. But there definitely needs to be some open child counselling. (Counsellor)

III Judge-led Mediation Conferences

Twenty parents (91%) from 14 families (i.e. everyone except Harry/Tina) were scheduled for a mediation conference presided over by a Family Court judge. Kathy’s case settled immediately prior to this occurring when counsel for the child’s threat to remove her children from her care prompted Kathy to agree to her ex-partner having supervised contact. Seven parents reached agreement at the mediation conference and consent orders were made. No resolution was achieved for the remaining 12 parents and their cases were scheduled for a defended hearing.

Prior to the mediation conference, lawyers and friends gave advice about what to expect. This was particularly helpful for people who had never been to
court before, although the emphasis on not speaking to the judge until asked dismayed several parents:

My lawyer went through how we’d go in and [my ex-wife’s lawyer] would have a talk and then my lawyer would have a talk, and possibly [ex-wife] and I would have a talk, but that would sort of depend on the judge and how he’s read our case to date. She said ‘if he’s annoyed with you he will bang his palm and he’ll tell you what is going to happen.’ I said to her ‘well, doesn’t he really want to hear what the situation is?’ She said ‘he will have heard via all the affidavits and lawyers’ letters that have been filed. He will have read them before the case.’ (Duncan)

My mate says to me ‘don’t talk to the judge unless he asks you to, otherwise what will happen is you’ll upset the judge - let your lawyer do the talking.’ (Robbie)

**Satisfaction with Mediation Conferences**

Five parents (27%) had a positive perception of their mediation conference, while 12 (63%) held negative views about it. The perceptions of two participants (10%) were unknown. Those expressing *satisfaction* attributed this to the judge being fair to both parties, the process being well-managed, and the parent (or their lawyer) being able to say everything they wanted said:

I found it quite good. I found the judge to be sort of putting it on both of us, so no-one really got a kick in the bum. (Simon)

It was very well done and the judge was very nice. I didn’t need to talk because the lawyers were talking. (Robert)

Each lawyer had a brief opening position on behalf of each of us. Then the judge said ‘now what else do you want to tell me?’ He asked us both a range of questions and he certainly maintained an even hat. I thought it was a very fair process overall. … Our mediation was conducted very well. It is much less confrontational [than a defended hearing] and I think it’s a much more positive experience. (William)

This stuff just fell out of me, this huge speel to the judge, about things that [child] needed and what he wasn’t getting, what I’d noticed happening with him and things that [Greg] was doing. Until that point, I really felt that I hadn’t been heard at all. But with her I very much felt I had a chance to have my say. (Rachel)
Conversely, the 12 parents dissatisfied with their mediation conference considered it was either too narrowly focused, too brief, the process was unfair or biased, the judge did not set sufficient boundaries for the other party’s conduct, the ex-partner’s lawyer was too adversarial, the agenda was unclear, the judge did not agree with one party’s viewpoint, or the judge did not listen and there were insufficient opportunities to speak freely:

It was sit up, shut up, and speak when spoken to. That was it. It wasn’t a very good feeling. I was made to feel like I was the cause of all the trouble. I felt I was the guilty party. … I didn’t have a chance to chew the judge’s ear. That was the annoying thing about it. You couldn’t talk with the judge and just say some of the things that really concerned you. I went to say something and he just waved his hand up and was like ‘no, heard all that. I don’t want to know anything about it.’ In other words ‘shut up!’ I think he had already made up his mind and he just flagged me off. If he had of said ‘look, I’ve had a lengthy talk with your lawyer and she’s filled me in on everything - to me this is an open and shut case, but is there anything new to add?’ I would have thought ‘well, no, you’ve said it all mate.’ What irked me is I’m paying the lawyer good money to do all this, but I would still liked to have had my say. So my day in court was short and sweet. (Robbie)

I didn’t get a chance to say anything, but [ex-wife] was speeling off all this rubbish. … Here I am telling the truth – and all these lies are coming out about me. The judge just didn’t want to listen. She wasn’t interested. (Greg)

Mediation was really just a waste of time. I don’t think we would have had any more than an hour in there - have a morning tea talk, see you later - and so what! We didn’t achieve anything. (Nick)

The judge could have laid down the law a lot more at that stage. I had really high hopes that he was going to say ‘look, I really think this is what should happen and can we see if we can work from that?’ But he didn’t. It was very airy fairy. (Libby)

**Satisfaction with the Role of the Judge**

Parents’ perceptions of the judge presiding over their mediation conference varied enormously, and were equally split between positive and negative opinions. Most people’s degree of satisfaction with the mediation conference coincided with their view of the judge i.e. if they perceived the mediation quite positively then their view of the judge was also positive, and vice versa. Only
five parents held contradictory perceptions of the mediation process and their view of the judge’s role in it. Anna, Gary, Nick and Libby were dissatisfied with their mediation conferences (although for different reasons), but they all expressed mild approval for the judge’s approach. Conversely, Duncan had a positive perception of his mediation conference (primarily because he thought the outcome was realistic), but mixed views about the role played by the judge. While he considered the judge to be fair and said what the parties needed to hear, he disliked the judgmental personal style:

I did feel that the judge looked down his nose a bit at people. But then that’s just probably one thing he has to do with the position that he’s in. Sort of a controlling aspect thing. … He gave everyone a fair chance, but he was pretty blunt and straight to the point. I did have a little feeling that he had already made up his mind before we had our talks, but then that was just my personal opinion. He was saying that we shouldn’t have been dragging it out and arguing so much about it - which is probably what we both needed to hear. (Duncan)

Eight parents expressed satisfaction with the role played by the judge in their mediation conference because he/she was “reasonably understanding” (Simon), “very nice” (Robert), “made some good points” (Nick), let the parties speak freely and listened (Rachel), “made an effort to try and get things out in the open” (Gary), “could see that there was wrongdoing and was trying to reconcile us” (Anna), “was fair” (Libby), and conducted the mediation well (William).

Seven parents were dissatisfied with the style adopted by the judge in their mediation conference. The reasons for this primarily related to the way the judges spoke to, and interacted with, the parties. They were described as too controlling, not listening to or allowing parents to speak freely, pressuring for a settlement, and not being forceful enough with a recalcitrant party. Four fathers also had the impression the judge had already made his mind up before they discussed the issues:

It seemed like I was fighting an uphill battle with him. I thought I had a very good argument. I went into quite a bit of detail saying why I wanted [ex-wife’s proposed relocation] delayed for a year and why the children should stay here. And they were all very valid points, but in the end it didn’t seem to make one spot of difference. … My strong objection to them even going seemed to have just been overstepped and pushed out the back door. We were talking about when they were going, not about if they
were going. It seemed to me that the decision had already been made before I had any real input. I couldn’t believe the way he talked to me. (Tim)

The moment [judge] was involved I had no positive expectations. When you go to a mediation conference, he immediately lays down the law - there’s no mediation at all. … He was totally dominant and unprofessional. (Phil)

Mediation Conference Outcomes

Seven parents (37%) reached agreement at their mediation conference and consent orders were made. These settlements mostly concerned custody and access matters, but resolution was also reached on other issues including guardianship, property division and relocation within New Zealand. Four parents explicitly said they wanted court orders so they had something in writing to protect their custodial status:

I wanted everything in writing because there was no way in six months or a year’s time I wanted her coming back and saying ‘I want my kids back’ and then having a hell of a battle. … So now if she changes her mind, I have this bit of paper to say ‘here, piss off!’ (Robbie)

We agreed that we would just reverse the agreement that we had in place in for several years. … It wasn’t actually a judge put the hammer down order, but it was a custody order in my favour. (Simon)

We ended up going through the Family Court so there was something rigid in place that couldn’t be broken. … The result came out quite well from my way of thinking. Not what I was after, but still a good result for the [children]. (Duncan)

I consented because I didn’t have anything to go on with in terms of a fight. (Madelaine)

No resolution on the substantive custody/access applications occurred for 12 (63%) of the study participants, although in some of these seven cases more minor issues were resolved (for example, impending holiday arrangements):

Nothing got resolved. All we managed to agree on was what was happening that particular Christmas holidays - and that only got resolved because I said ‘all right’ to everything that they said! (Libby)
Because it was a mediation conference the judge could only make orders based on agreement and she [sister] just flatly refused. (Stella)

It was obvious that they - the solicitor, the judge - were trying to get [Gary] to accept that we should trial this week-about arrangement - what he had originally agreed! But [ex-husband] wouldn’t have a bar of it. … I wanted the judge to say ‘look, you’ve got an agreement, stick to it, give it a go, and then let’s come back to the table and see what is or isn’t working about it.’ … But they could see that if they pushed him, he would just completely abandon all of the kids. So I think they were considering him all the way along. (Anna)

There was only a moderate relationship between parents’ perceptions of the mediation process and the obtaining of an agreement in their case. Simon, Duncan and William, who were satisfied with their mediation conference, achieved an outcome they were happy with. Rachel and Robert, who both had a positive perception of their mediation conference, did not actually achieve any resolution at that stage. Tom, Greg, Gary, Anna, Phil, Libby and Nick, who held negative perceptions of their conference, did not reach agreement and their cases were all scheduled for defended hearings. Yet Robbie, Tim, Madelaine and Gordon, who were dissatisfied with their mediation experience, nevertheless did reach agreement, although, with the exception of Robbie, they were not particularly happy with the outcome.

Two ex-couples did not reach agreement over their child’s custody at their mediation conferences, but did shortly thereafter. Louisa and Robert, however, were unaware that a final order granting custody to Louisa had been made until the Family Court co-ordinator contacted her about this research project:

I was so surprised when I got the final custody order without even knowing that I had got it. The [co-ordinator] told me about it when she contacted me about this research. I’ve got a copy of the custody order, so [child’s] mine now. Just the peace of mind that I have that in hand - it’s good for me to actually have the comfort of knowing that I can protect my [child] this way. (Louisa)

I got a letter that she had got full custody from the court. We continue to have the same relationship, and she allows me to see my [child]. I’m not unhappy. (Robert)
Rachel and Greg followed a more orthodox pattern. Soon after the mediation conference, Rachel received a letter from Greg’s lawyer advising that he agreed to her having custody. Greg said he did this out of frustration with his treatment in the legal system (“I’d had enough!”), but Rachel put it down to his realisation that the court was probably likely to award her custody if the case went to a defended hearing:

At the end of the mediation it looked like it probably was going to go on to the full-on hearing, with evidence and all that sort of thing, and witnesses, which I was petrified about. But two weeks later I got a letter from his lawyer - because I think it was pretty certain that I was going to get [child] back. (Rachel)

Improving Mediation Conferences

Several parents offered suggestions about how mediation conferences could be improved. Two wanted an explanation to be given to the parties, either by the judge or a lawyer, or possibly via a pamphlet, about what the consent orders meant and what would happen if they were not complied with. Others suggested that at the mediation conference key issues should be identified and discussed to avoid every small point being argued. Some wanted to see mediation used more often. Nick recommended that it be utilised more effectively by enabling parties to avail themselves of more than one session through the Family Court and by judges being more directive and giving the parties (and their lawyers) some guidance about how the court would ultimately view the matter:

Judges need to be more proactive with both participants and their counsel in mediation. To give it a good crack really. Identify the key issues and perhaps point them in the direction where they can get some guidance on how the court views these matters. I think there is a window in there that’s not really being used enough. … Mediation as it stands is really just a waste of everybody’s time. The idea of going in and having an hour before a judge is a nonsense. I think the judges should be more proactive with counsel to make sure people are utilising mediation. … Say to counsel that ‘you need to go away and make sure your client understands this, this and this.’ I think [parties] should have two or three rounds of it, then there is more likelihood that there would be more mediated settlements. (Nick)
Six parents discussed the *venue* used for their mediation conference. One liked the smaller, more user-friendly setting:

The room the mediation was in was sort of plainer and less ominous and overbearing than what I expected. It was user-friendly, you know, a nice wee room that kept it sort of intimate to try and facilitate a resolution. If it’s a great big traditional courtroom it’s going to cause anxiety before it starts and set one off against the other before you’ve even had a chance to try and come to some arrangement. So the Family Court was good like that - the lawyers’ chatted to each other and you were encouraged to say ‘hello’ to [ex-wife] and to be nice. Before you even started the proceedings it was trying to facilitate a good end. (Duncan)

However, the others found the room problematic – there were no windows or plants, and the seating arrangement was too formal:

It was quite a big room, and it had a big, huge round table with the judge in the centre at one end. And I was sitting on one side with my lawyer. And my ex was sitting with her lawyer on the other side. Counsel for the child was there, but not the psychologist. So it was very confronting. I think it should not be so official. … We should be talking to the judge in a nice friendly environment so people can open up a lot easier and feel more relaxed to talk about things. (Gordon)

One ex-couple was surprised to find themselves in a traditional courtroom for both their protection order hearing and their mediation conference. They each found the huge space and formal layout too intimidating, and would have preferred to be in a smaller, more informal, setting for discussion of their personal issues. In addition, Greg’s hearing disability made communication difficult for him:

Why should a Family Court room be so huge? I found the room so intimidating. It was so big and there was so much space behind you as well. The judge is sitting a long way away and like everybody is spread. And, of course, the other lawyer and my ex-wife were on my right hand side - which is my deaf ear - so I could hardly hear what was going on. I even said so to the judge at the time. The judge actually spoke louder, but I couldn’t hear anything that was going on to my right. Struggling to hear made things even worse. (Greg)

[My lawyer] had originally told me it would be in an informal room sitting round a table with the judge and just having a chat. But it was a courtroom we were in. And the judge was up there and we were down here behind our desks and counsel for child was there and it was a very
scary experience really. Very formal. I was expecting to sit round a table! (Rachel)

**Professionals’ Views**

Judges felt that mediation conferences offered them “the best opportunity to get involved in a process which moves beyond the strictly legal”:

It requires quite a different mindset from the rest of our work as judges. Mediation is very tiring work with 3-4 per day. You just get a file and don’t even know how many people will be there. The ground can have changed completely, so you might be walking into a minefield and have to quickly pick up the nuances of what is going on. (Judge)

The short duration and one-off nature of most mediation conferences was criticised at both focus groups, as was the confusion caused for the clients about the role of the judge:

I’m a judge and I’ll do what is required of a judge. I think there are just unhealthy expectations of the court. Mediation is an essential tool, but to ask lay people to understand that you’re a judge yet you can’t exercise any judicial function is extremely difficult. They have waited so long for an answer that, by the time of the hearing, I see the look on their faces when I say ‘look, I am not here to determine who is telling the truth and who is not.’ (Judge)

I don’t like the informality with the judge. I don’t like the way the parties talk to the judge – they can be quite rude. How do you move someone who has been in that mediation environment and then take them into the court where they have got to shut up? The judge is the authority there. An important part of making the orders work is having respect for the person who is making the decision. (Lawyer)

We’ve only got 1.5 hours allocated for each mediation, so it is very difficult to offer clients more than one mediation. They have to wait at least 6-8 weeks to get a mediation slot. There is a certain rigidity built into the system, but parents want to be heard and to have some control over the process. (Judge)

The mediations that work “really well are where the judge just sits there and lets people talk.” Two judges talked of the importance of bypassing lawyers to speak directly with the parents about their concerns:
I will often talk to the parties past their lawyers. I get so much better sense and they feel that they actually got a chance to talk to the judge. I will do that in a conference and in a hearing, even if I have heard evidence. You can see the visible relief that somebody has actually asked them directly what they want to say. And often it is so much less complicated and less adversarial than has been presented on their behalf by their lawyers. (Judge)

Unless you deal with those issues of concern to both parents you don’t get far. One may come in with A, B and C, and the other has D, E and F. If you’re only getting at A, B and C during the mediation then those other issues will inevitably resurface later. You’ve got to devote time to dealing with both parents’ agendas. (Judge)

Those mediations held in courtrooms were “hated” by lawyers, one of whom said “all of a sudden they are in a scary environment with the judge sitting up there, and I think it is entirely inappropriate for mediation.” One court manager said their court was introducing counsel-led mediation as well as “an extra session in pre-mediation about the process to make sure people are aware it is not pure mediation.” Judges’ mediation skills were also critical to the success of this dispute resolution process. “If you are going to have judicial mediation, then at least you have to have judges with mediation skills, who want to do it, and are going to do it really well.” The lack of a “common approach” to judicial mediation created problems for lawyers preparing their clients for the mediation conference:

The judges’ styles are so different and you don’t know until two minutes before the thing starts which one you’ve got. It’s very difficult trying to advise a client. The models being used are so disparate that you can’t. There is not even a standard – it comes down to ‘this is a process you have to go through. It may be really good or you may find the whole thing terrible, in which case don’t agree to anything and get out the other end.’ (Lawyer)

IV Defended Hearings

Defended hearings were held with four (27%) of the families. One other case settled immediately prior to the commencement of their scheduled defended hearing when Phil and Libby, and their lawyers, negotiated a shared custody agreement:
The risk I would have taken in a defended hearing is that the children’s mother would have had a serious breakdown. My lawyer – and that’s where he was really good – said ‘look, I’ve been doing this for 20 years, there’s a huge risk here that she’ll just break down. She’s in a real mess already. The judge will feel sorry for her and you’ll end up with half the holidays and no term time. Let’s do a deal.’ So that’s how it was compromised minutes before the defended hearing was to start. The judge was waiting in the court to see us. We were in a meeting room and hammered out a deal that he then signed off. (Phil)

[Phil] agreed two seconds before we went into court. … I had let myself get into a situation where they said ‘look, he’s never going to sign it if you don’t just agree to this.’ This was my lawyer and his lawyer and counsel for the children saying this to me. And I thought I just want out of here right now, I’ll bloody well sign it. And I signed it and then I was really sorry I had done that because it’s been very difficult not getting any of the holidays with the children. (Libby)

**Injunction**

In the phase between the mediation conference and the defended hearing, Gary removed his child from her local school and enrolled her, without her mother’s knowledge, in a private school. Anna, on discovering the change, immediately consulted her lawyer and applied for an injunction. The schooling issue was then decided contemporaneously with the custody application at the defended hearing:

I put [child] into [private school] and day two her mother found out. She rang me up and raved down the phone that I had no rights to do this and she should have been consulted so that she could have stopped it. Then the next thing I know her lawyer applied for an injunction to have her removed immediately. So my lawyer went back and answered that and said ‘no, we don’t agree, this is all in the best interests of the child.’ So [child] stayed because the removal order was to be heard at the same time as when the custody issue would be heard. (Gary)

[Gary] just whipped [child] out of the local school and enrolled her at a private school. The first I knew about it was when the headmaster from the local school rang me up and said ‘I’ve been requested to send all [child’s] files to [new school]’ and I said ‘what?!!’ I knew nothing about it, so then I rang up my solicitor. By the time we went to court the decision was about custody of [child] and about her schooling. Of course she was all settled into her new school, so the judge said that changing the arrangements now would be tinkering. He didn’t feel it would be worthwhile. (Anna)
Giving Evidence and Cross-examination

Giving evidence and being cross-examined at the defended hearing remained a vivid experience for Stella, Tom, Gary, Anna, Nick and Jane, who all recalled the adversarial nature of these proceedings. Despite advice from each party’s lawyer to keep the focus on the child, rather than on trying to discredit their ex-partner, Gary and Anna had completely opposing perspectives on the role each other’s lawyer played in court. Gary said his lawyer emphasised what was best for the child, but Anna experienced his approach as adversarial and hostile towards her. She claimed that her lawyer was the one who was focused on the child, yet Gary felt that all she did “was stand up and discredit me - or attempt to.” Each parent also remembered tactics used by their ex-partner’s lawyer to show them in a poor light:

My lawyer said to me ‘we’re going in here to tell the truth and we’re going into this court situation in the interests of the children and don’t forget that.’ He gave me big lectures about my body language, because I’m inclined to get a bit laid back about these things. Not about the gravity of it, but just, you know, ‘you must sit up straight and don’t sit with your hands behind your head.’ He also said to me ‘we’re not going in here to point score off [Anna]. This is about the children and I’m not heading down that track.’ … Because I said to him ‘I’ve given you plenty of ammunition - you can really discredit this woman’s ability as a mother. I don’t really think she’s a bad mother, but I think she’s lost the focus on the children’s best interests.’ And he said ‘no, I won’t do that. That’s not what it’s about. It’s about what’s best for [child].’ So I said ‘okay, you’re the boss!’ … I’d had a blazing row with [Anna] on the phone and she’d taped it. And I’d effed and blinded at her, and she’d screamed at me. It had been a real beauty and gone on for about 20 minutes. She’d taped it without my knowledge and given it to her lawyer. I heard it, because she sent a copy to my lawyer, but she’d edited [Anna] out of it and it was just me. She took it into the court and basically just threatened me with it. The big palava - bringing in the tape recorder and flashing the tape and ‘would you like to hear this Mr [surname]?’ And I said ‘well, you know, please yourself. I don’t care.’ I’m not saying I didn’t say it, but I said ‘if we’re going to listen to it, maybe we should listen to the whole tape and not just the edited version.’ She never played it. … I felt that the whole court process was just an exercise in character assassination. All she was trying to do was poke negatives at me. (Gary)

I felt as though I was on trial because his solicitor was just focusing on my character and my relationship with [Gary] and not what was best for the children. … The day before the hearing I was reading through the affidavits and I thought ‘now what sort of things is this guy going to pick
on?” And in one of the affidavits [Gary] had submitted this evidence that I hadn’t signed [child’s] homework book off sometimes at night. So I did a bit of analysis and, sure enough, this guy, he raised it! And I said to him ‘in actual fact, 19% of the time I hadn’t signed them and 16% of the time your client hasn’t signed them. So ‘what are you trying to prove?’ sort of thing. There was so much of that. (Anna)

By the time of the defended hearing Stella was representing herself, so she had the added challenge of leading evidence and cross-examining her sister:

My sister was called to give evidence and she just lied. We couldn’t help ourselves just sitting there shaking our heads. It was obvious to everyone that her interests were not about the child. It was just simply she was not going to agree because she thought we were manipulative, controlling, and would take her child away from her. I queried her about a few things that she’d said in her affidavit and the judge got a bit stroppy with me. Then I realised I could have gone through her affidavit, step-by-step, but that I wasn’t going to gain anything from it. The judge had already made up his mind and all I would do is lose esteem in his eyes, because I’d just be seen as argumentative. So I actually stopped at that point and said ‘no, I had nothing more to say.’ (Stella)

Witnesses

School personnel (including a principal and a child’s teacher) were the most frequently mentioned non-family members called as witnesses at these defended hearings:

[Child’s] teacher came along to court. Counsel for child began asking questions and we felt that she covered everything we would have wanted to raise. Then the judge said that we had time to ask questions. So I just sort of said ‘how is [child]? Does he have a good time at school?’ Then my sister was given the same opportunity and she started off by introducing herself to the teacher. And the teacher said ‘oh, fine.’ And the judge goes ‘hang on a minute - is this the first time you have met [child’s] mother?’ And he was going ‘yes, yes, until today I’ve never seen her before.’ And my husband and I looked at each other and thought ‘that said it all.’ So we actually relaxed a lot at that point because we thought ‘well, that’s it.’ (Stella)

A child’s counsellor refused to be called as a witness in one case, but a private psychologist commissioned by a father gave evidence in another. Both Gary and Anna found the interchange between this psychologist and the report writer too specialised and overwhelming for them to comprehend:
I don’t really understand what they were on about quite frankly. It was, you know, quoting cases and specialists and dates and places and it was all very legal and technical. By that stage I was pretty fizzed out really. I was on overload. (Gary)

When the psychologists were in the court I said to [my lawyer] ‘I don’t understand a bloody thing what they are saying.’ And she said, ‘don’t worry about it, there’s two conversations going on here’ because the psychologists were trying to talk in turns directly to the judge, I guess. (Anna)

**Satisfaction with the Judge**

Nick and Stella were both satisfied with the role played by the judge during their defended hearing:

I thought [the hearing] was very good. My single biggest memory of the Family Court judge is that he seemed to me to place weight on children’s need’s today and tomorrow and he was primarily looking at their future needs. … It is a specialist family law court. You don’t sit there and listen to that all day, every day, without building up some useful ability in family law. (Nick)

The judge was very compassionate, he was very understanding. (Stella)

Stella also appreciated the judge’s willingness to allow the presence of extended family members during the defended hearing as this provided her with much-needed emotional support and also ensured her wider family was informed about the proceedings:

We were scared to go through the whole thing again. Emotionally it was a very big step. … Right through to the defended hearing we requested that family [my mother and siblings] be allowed to come in and witness what was happening so that there would be no misunderstandings. And so that [child], later on, could also go to different family members and say ‘well, what happened?’ so he didn’t need to hear it just from his mother or myself. (Stella)

Conversely, both Gary and Anna were very dissatisfied with their judge. Anna thought he was “too old” and felt he imposed his own beliefs about private versus state education:

I felt that he judged everything by the values of his own beliefs. The reason why I say that is because of the whole business of [child’s]
schooling. It was so obvious in the court hearing that he felt that going to a private school was probably very good for her, that it was actually a far better thing, even though the local primary school has an immaculate record. (Anna)

He was just an ignorant, bad tempered, old shit. I couldn’t believe this guy had been put there to pass some sort of judgement on the future of my children. … I wouldn’t give him a job looking after lambing ewes. He’d got no humanity that guy. … I just got the impression that he was bored stupid. He made no comments. He didn’t seem to take any notes. Half the time he sat with his seat back looking at the ceiling. I think he was just filling in the day. He never interrupted the proceedings and said ‘get back on track.’ He never said ‘where is the relevance to this little [child]? Why isn’t this more balanced?’ when it was so obviously out of balance. (Gary)

Gary and Anna were also critical of the judicial interview with their children, which had been arranged by the children’s legal representative. Gary disliked that “this was all the children, altogether, in chambers” as he thought the judge should have talked with each child individually. Anna, and Jessica too, were unhappy with the judge’s insistence in the interview that Jessica loved her father:

The children went in thinking they were going to talk to somebody who was actually interested in hearing their point of view. … [Jessica] came out in tears, because he kept telling her that she loved her father, you see. But he had no idea that the reason why she didn’t like her father was because of the way he treated her. He didn’t understand any of that. (Anna)

I was only 12 when it all started happening. I remember that I got to meet the judge and I think I was a little bit too young to do that. I just think that I said silly things. … I remember getting upset because he kept saying I loved Dad, sort of reminding me that I loved him. And I was like ‘leave me alone.’ And I just remember [my siblings] were pretty quiet. He didn’t really ask us any questions - it was all pretty up to us really. And when you’re little you need to feel comfortable to talk, but he didn’t really provide that I don’t think. (Jessica, aged 16)

Two women raised the continuity of judges between mediation conferences and defended hearings. Stella very much appreciated having the same judge involved throughout, while Anna - who had two different judges - thought the lack of continuity was “ridiculous.” She used an analogy with doctors and
childbirth to emphasise the desirability of having the same judge across all family law proceedings:

When we got there we thought it was going to be the same judge who had done the mediation conference. And suddenly we were told that it would be a different judge. I understand that’s because they don’t like people to develop a relationship with a judge. I absolutely think it’s the most ridiculous idea I’ve ever come across - because you’ve got to start from the beginning again and that person has got no idea, especially when it’s over such a long period of time, of what has actually been happening. You can read a report, but you don’t get the real picture. … It’s like when you have a baby, you want the same doctor because you build a trust in them, and a faith I guess. It’s so important. They understand you and what’s been happening with your body and they know what your comfort zone is. To me it’s the same sort of thing. It’s really important to have the same people in court. (Anna)

The professionals agreed that an adversarial family law system had a detrimental effect on clients and could set the approach to their case on a litigious track. Work pressures and client-professional distancing also contributed to dissatisfying client experiences:

Adversarial processes are often ill-suited to making decisions in children’s best interests. The process itself often sets people on a particular train and there are very few stations along the way. … There’s no room for saying anything positive about someone that you might have actually quite loved at one point. (Report writer)

The constraints of cost and overheads and work pressure and the like drive the process and it can come out further down the track that there are actually a whole lot of other issues here. But the client didn’t ask for them to be addressed, the lawyer didn’t have the time, the confidence, the experience, or whatever, to say ‘what is actually going on and what do you actually want?’ (Judge)

There’s a real distance between what parents think is important and the track us professionals go on. I don’t think there’s much sense that this is a good fact finding process for people who rend their way through it. (Report writer)

**Defended Hearing Outcomes**

Orders were made following each defended hearing. Tom received an access order in his favour – “The court finally got fed up with it and told me to pick them up at school and not have any contact with her.” Jane’s application to
relocate the children was refused and a shared custody order made with Nick with several express conditions:

I think the Family Court got it right. The judge said the children need two parents and the status quo. He identified reasons why the children are better here. (Nick)

Stella was uncertain whether her application would be successful because of her sister’s refusal to agree to the proposed arrangements. Counsel for the child also thought it was unlikely that the judge would grant orders contrary to the mother’s wishes. Stella was therefore overjoyed at the outcome of the defended hearing when she and her husband were awarded custody and additional guardianship of their nephew:

It was like a huge relief for everyone - a decision had been made. It was the end. Counsel for child had tears in her eyes. … In the [judge’s] summing up, he said that he was very impressed with the dignity and the way that we had actually conducted ourselves. He had actually found it a very moving experience to have the family there together supporting each other. … At one stage he said to my sister ‘I think it’s time to get real.’ And I just sat there because that’s exactly how we were feeling. He made it very clear that his judgment was not a reflection of her in a negative way, it was simply to say ‘okay, this is the best thing for [child].’ (Stella)

After a two day court hearing and several weeks wait for the judgment, Gary and Anna found that the judge had “basically upheld the status quo” with respect to their youngest child. Unfortunately the orders did not cover the school holiday periods which led to Anna and her lawyer subsequently making a further submission to the court seeking clarification about how this time was to be divided between each parent:

When the court orders were put out they only related to the weeks and didn’t cover the school holidays. These were coming up and [Gary] wasn’t going to let me have [child], so we ended up having to put in a submission to court. Eventually that got sorted out as well. But now I’m in the position where he won’t negotiate with me on changing anything. Everything has to go through a solicitor. (Anna)

Gary had contemplated an appeal, but said he couldn’t afford it:
I haven’t got any money left. It’s taken me 18 months to finish paying off what [legal bills] I’ve got. And anyway, I’ve been told you can only appeal on a point of law. I mean, what’s it going to cost me to drag the whole exercise out again. I just say to [child] ‘until such time as you tell your mother to get stuffed and walk, there’s nothing I can do.’ I don’t want to have this constant battle and aggravation in the background - because it really is, it’s still disrupting everybody’s lives - because the system basically didn’t do what it should have done I believe. (Gary)

Four other parents anticipated further court proceedings would be filed in their cases. Libby expected her ex-husband “to fight it again and say he wants more holiday time with them.” Simon was “still sort of waiting for something to happen again” and said he’d “be very surprised if there’s not.” Madelaine had already consulted her lawyer in a bid to stop contact between her child and William’s step-son. She was also aware that further litigation was looming over which primary school her child would attend. She preferred one school, while William preferred another in a neighbouring suburb. William confirmed that “we’re back in court” as he had “just filed an application” over the schooling issue:

We just can’t agree on what school [child] goes to. So I’ve asked for mediation. … I was going to throw in the towel on this one saying it just isn’t worth the aggro. But I’m persisting - I’m going to hold out. She’s enrolled him at [her preferred school] behind my back in breach of my rights of guardianship. (William)

V Higher Court Hearings

Two families experienced higher court hearings – Phil “went to the High Court on a technicality” to seek clarification of the Family Court judge’s alleged bias against him and his failure to follow regular case management procedures during the ruling on Libby’s application for holiday time with the children. Phil felt this appeal “was a waste of time” because the High Court judge did not examine any new material and simply endorsed the Family Court judge’s approach:

High Court judges all support the brotherhood unless it’s an extreme injustice. … The High Court judge can only be advised by the previous proceedings - he can’t look at new material. So the judge listens to what your lawyer presents, which is more detail on the previous material. I was
possibly heard more, but not being able to bring new factual material in, you’re limited. He showed his bias really towards the status quo - he supported [the Family Court judge] effectively. … The result wasn’t exactly what I wanted, but it wasn’t anything particularly much worse than I had by then. I didn’t make any progress, but I did everything I could. (Phil)

Libby found the High Court experience, and Phil’s litigious attitude, daunting and expensive. This prompted her to drop her application for extra time with the children:

It was just hideous, because I didn’t really realise that it was all going to get so out of hand. It was really arguing the most pathetic technicalities. Oh, there’s boxes full of the garbage. … I’ve got better things to do with my time and money and effort, and I only had like another year of [the current arrangements] anyway. (Libby)

Jane successfully appealed to the High Court to overturn the Family Court decision preventing her relocation. The judge decided that the children’s best interests would be promoted by accompanying their mother to live overseas, but Nick thought this decision was “an absolute outrage”:

It’s a disgrace. He didn’t even have the decency to tell me, as their father who all I want is for the children to be happy, why they have gone. All I have got is that the children’s need for a mother is paramount and that’s the bottom line. Well, that’s not good enough. Tell me why? … The [Family Court judge] identified reasons why the children are better here – [the High Court judge] didn’t, and that is what gets me. Give me some hard facts - are they going to be better at school there? How can they be when they have got to learn [another language]? (Nick)

Nick preferred the specialist nature of the Family Court and felt aggrieved that the High Court did not remit the case back there for another hearing:

The problem is the High Court does it on papers and you don’t get the nuances that [the Family Court judge] got. We had four days in the Family Court and the judge listened to [Jane] and I for a long period of time. I think it is very difficult to get that out of papers. … The High Court had a few hours in the afternoon, went away and said ‘let’s change someone’s lives again shall we?’ A one day appeal on the papers. It’s fundamentally wrong that the judges make decisions of such magnitude without hearing the players. That’s what makes me really angry. (Nick)
The “lack of recognition for the children’s right to their father”, his honest belief “that the children are better here in terms of their development in the short-term” and the “absolutely repugnant nature” of the High Court access orders were key determinants in Nick’s decision to seek leave to appeal to the Court of Appeal and to apply to the High Court for a stay of execution of the orders. These applications were unsuccessful and the children left New Zealand with their mother a few days later. Nick was clearly very disappointed with the outcome and wanted greater clarity in the law governing parental relocation:

There must be more clarity in the law because we are damaging children. I’m not unhappy about my life - I’m big enough to deal with my problems, and I’m not worried about [Jane’s] life really, but I am compassionate about the children - my children and other children. … You just can’t sit there and say ‘oh, each case is different.’ I mean that’s crap. There are themes that run through all family law and we need the Court of Appeal to put up some goal posts, some sign posts, so that parents can say ‘well, this is what they think.’ It would save a lot of time and energy. Because I literally went to a law library one night and I sat and read through family law reports. I got out the last Court of Appeal case and I thought ‘okay, that is the law in New Zealand.’ I worked from that basis and I now get to the end of the process and I find that [the High Court judge] is of the view that the law is [an English case]. What gets up my nose is that we have got judges in different New Zealand courts competing on that principle. … There should be some principles here in terms of relocation – ‘this is the law, nice and simple, and if you want to achieve this you are going to have to convince us of A, B and C.’ (Nick)

VI Other Court Proceedings

It was not just Family Court and appeal processes which assisted families to resolve their parenting disputes. A variety of other applications, some without notice, also occurred with respect to protection orders and occupation orders. However, none were current at the time the research was conducted as families whose cases involved domestic violence were specifically excluded during recruitment of the sample (see chapter six). It was therefore somewhat surprising to discover just how many incidences of violence were reported between ex-partners or between parents and children in the study. As well as the six cases (40%) involving protection orders or anger management courses, there were 10 parents (45%) who also related other incidents of physical, emotional or sexual abuse, none of which resulted in family violence proceedings. Two
thirds of these incidents were directed towards children, with the other third directed at adults.

The child-directed violence ranged from one-off incidents through to serious abuse allegations, with the alleged perpetrators including parents, new partners and a step-sibling. The alleged behaviours involved kicking a child, “screaming matches in driveways” after access visits, bruising from parent-child tussles and ill-treatment, the use of excessive physical discipline, inappropriate sexual conduct, sexual abuse, and attempted strangulation. Adult-directed violence was mentioned by three men, one of whom had threatened to shoot his ex-wife’s new partner. Two others said they had been the victims of violent episodes by their wives during their marriages when knives and objects (like dictionaries) were thrown at them - “the children still talk about it!”

Eight parents (36%) recalled the use of ex parte (now called without notice) orders in their cases. In five instances these related to the obtaining of protection orders, but in the other families they concerned actions designed to protect one parent’s rights with respect to their children. Examples included the use of ex parte applications to enforce a child’s return from an access visit, and to prevent another parent from leaving New Zealand with a child. The parents on the receiving end of these orders thought they were “appalling” because “the process was unfair” and “the other side isn’t even heard.” Professionals agreed that “ex parte applications can set things on a legal course” but considered them a necessary part of risk management:

We have to make judgment calls all the time. I always find those first interviews really difficult because if you don’t go in with all the whistles, bangs and bells - the ex parte and get custody and stop access - and then things happen, it is a terrible thing you’d have to live with. If there’s issues of safety the facts can justify you making the application, but at the same time you’re thinking is it all adding up? It’s risk management. But looking back on some cases you do think, if I hadn’t gone in with guns blazing, would the result have been different? (Lawyer)

Two fathers were not natural guardians because they were not married to or living with the mother at the time of each child’s birth. In both cases they
successfully applied to the Family Court to be appointed guardians when their children’s care arrangements were being resolved:

I was happy for him to have additional guardianship. Like to me, he should have had that all along. (Tina)

My lawyer knew that I wasn’t even a guardian. She said ‘look, the first thing we need to do is get that sorted. [Tina] didn’t oppose that at all. (Harry)

William felt that he “screamed out as qualifying to be a joint guardian” because of his active involvement with, and financial support for, the child. He felt frustrated when he was denied information or time with his child because of his lack of legal status. Despite feeling pressured by William and anxious about her child’s safety in his home, Madelaine nevertheless acknowledged William’s role and agreed to his appointment as a guardian:

I couldn’t get information from [educational agency] on the basis that ‘sorry, you don’t actually have any status other than you’re his father.’ I said ‘well, what sort of status do you think I could earn?’ And he said ‘well, you’re not a guardian and you don’t have custody.’ So I thought, well, that’s the end of that - I’m getting this fixed right now! I felt that I was getting crumbs that were being dropped on the floor by the mother from time to time. I’m now joint guardian and joint custodial parent, so the power balance has shifted. (William)

VII Discussion

Consumers’ views of their court experiences have been notable for the confusion and lack of understanding they have of legal processes (Davis, 2001a). It was evident during my research interviews with the participants in this study that some were confused about the order and purpose of the various hearings and professional interactions they had experienced. Uncertainty about who had made the final decision, and whether that had been achieved by legal negotiation or judicial determination, was also apparent. However, of more critical importance to many of the parents were the opportunities they were given within the Family Court to have their say or to tell their story. Consistent with other studies (Harland, 1991a; Hunter, 2002; Kitzmann & Emery, 1993; Pike et al., 2005; Pruett & Jackson, 1999; Ross, 1998) and submission processes
(HRSC, 2003; Law Commission, 2002a, 2003, 2004), the opportunity to express their views and to feel heard was strongly associated with the level of satisfaction parents had with both the professionals with whom they interacted and with the Family Court services they utilised to resolve their parenting dispute.

It was not surprising that counselling was such a frequently utilised service in this study. The thrust of the Family Court since its establishment in 1981 has been to initially offer separated (or separating) couples six sessions of state-funded counselling in the expectation that this professional assistance will help them to clarify their relationship status and to resolve any issues in dispute. All of the parents in the study participated in counselling, 91% of them through the Family Court. Eight parents had second and third referrals, and 10 undertook private or employer-based counselling as well. Despite this high utilisation of counselling, only 30% of the parents reached agreement through this process – and only one of these agreements endured over time. Disillusionment about the lack of implementation of counselling agreements led to court applications being filed by the other five parents. The 70% of parents who failed to reach agreement at counselling attributed this to either the non-compromising attitude of one party or their refusal to continue participating in the process.

Whether or not agreement was possible, 43% of the parents were satisfied with their counselling experience. This was particularly so when they were impressed by the counsellor’s skills or neutral approach. Some also appreciated the opportunity that counselling gave them for more in-depth engagement with a professional. However, counselling was described as ineffective or pointless by 48% of the parents. Similar attitudes about counselling being perceived as a waste of time have been found in earlier studies by Harland (1991a) and Maxwell (1989a). The parents in my study who were dissatisfied said that counselling did not assist them to reconcile with their ex-partner or to reach an agreement – or to enforce it if they did. One man did not believe in counselling, and another felt that the process was misnamed because ‘counselling’ usually implied a therapeutic intervention. His frustration about the statutory emphasis on reconciliation and conciliation, and the lack of attention to personal issues
related to the separation, has also been highlighted in other New Zealand reviews of Family Court counselling services (Boshier et al., 1993; Maxwell & Robertson, 1993a, 1993b) and may lead to a renaming and/or relocation of the service (Boshier, 2004a; Law Commission, 2003). The professionals participating in the focus groups thought that six counselling sessions were inadequate for some complex family situations, and, in one city, they were particularly critical of the variability in the quality of the counselling on offer.

Few children had the opportunity to attend privately arranged counselling, and where this did occur the number of sessions was minimal. A similar picture emerged in an English study (Trinder et al., 2002). Parents in my research expressed concern at the lack of free counselling for children through the Family Court, although some professionals did note the creative use they sometimes made of adult referrals to incorporate children. Rather than stretching the law in this fashion, they, like the parents, wanted to see counselling services made routinely available for the children of separated parents. There is already strong support for such an initiative within New Zealand (Boshier et al., 1993; Gold, 1996, 1998; Goldson, 2003; Hong, 1991; Johnston, 1996; Law Commission, 2003). Interestingly, no participants in my study mentioned children’s inclusion in mediation processes. While this is now an expanding area internationally (McIntosh & Moloney, 2005) it had no prominence within New Zealand at the time my research interviews were conducted in 2001-2002. This may account for the absence of this issue in my findings.

New Zealand has a uniquely judge-led mediation service within the Family Court (Barry & Henaghan, 1986; Blaikie, 1996, 2001; Seymour & Pryor, 1998). This has constrained the development of community-based mediation services for family law disputes - which are so common internationally (Bickerdike, 2005; Emery, 1999b; Kelly, 2000; Leach, 2000; Roberts, 2001; Wade, 1997) - although mediation is widely available in other areas of our law (including employment and commercial disputes). The primary debate in New Zealand has centred around whether or not judges should continue in their mediation role or transfer their skills to settlement conferences (Boshier, 2004c; Law
Commission, 2003). Non-judge led mediation is currently being piloted within New Zealand (Guest, 2005; Ministry of Justice, 2003, 2004), and counsel-led mediation is becoming a more popular option as well (Guest, 2004; West, 2004).

The ineffectiveness of counselling in assisting parents to achieve durable agreements meant that 87% of the families in my study were scheduled to participate in a mediation conference at the Family Court. As with Barry and Henaghan’s (1986) research, more were dissatisfied (63% of parents) than satisfied (27%) with this experience. Those with a positive perception found the mediation to be a well-managed process, with a judge who was fair and willing to let the parents (or their lawyer) say everything that was important to them. The 12 dissatisfied parents thought the mediation conference was too narrowly focused, too brief, had an unclear agenda, was unfair or biased, with insufficient opportunities to speak freely. Parents disliked the way some judges either spoke to, or failed to listen to, them. Some thought their judge was too controlling or pressured them to reach an agreement. Conversely, others felt that the judge was not forceful enough in delineating boundaries for reasonable parental conduct. Consent orders were made for the 37% of parents who reached agreement at the mediation conference, and several commented on the security they felt in having their status in respect of their children now protected by a court order. Twelve parents (63%) did not achieve any resolution, although two settled shortly afterwards.

Suggestions made by parents to improve mediation conferences included clearer explanations about its purpose and the status of consent orders, as well as firmer guidance on how the Family Court would ultimately view their case. The one-off nature and short duration of mediation conferences was regarded as problematic by parents and professionals alike. Some wanted more than one session for mediation (as occurs in many community-based mediation services), although the judges noted that their high workloads would currently preclude this. Nick, in particular, thought that mediation should have more prominence in the dispute resolution process because “there’s a window in there that’s not really being used enough.” The room used for judge-led mediation conferences
could be problematic when it was windowless and formally arranged. The use of traditional courtrooms for mediation was vehemently disliked by both parents and professionals. Hall and Lee (1994) also found that parents had concerns about the physical features of courtrooms, particularly their large size, formal atmosphere and the elevation of the judge above the parties.

Parents made no comment on the potential for role confusion inherent within judge-led mediation – possibly because they had no experience of any alternative mediation processes and therefore just accepted the parameters of what was on offer within the Family Court. Professionals, however, spoke of the confusion that clients could experience over the role of the judge. They came to mediation expecting an adjudicative process because of the judge’s presence. This quasi-judicial ethic was also noted in Barry and Henaghan’s (1986) research and lies at the heart of criticism that the mediation conference concept sits uneasily within the Family Court system (Harland, 1991a; Jefferson & Parsons, 1998; Seymour & Pryor, 1998). However, the judges participating in my study liked their involvement in mediation, because, as one said, it provided an opportunity to directly engage with parents and to be “involved in a process beyond the strictly legal.” This echoes similar sentiments in earlier New Zealand research with Family Court judges (Hall et al., 1993a). Lawyers, however, bemoaned the diversity of judicial approaches to mediation, and the difficulty this posed for adequately briefing their clients beforehand. This less enthusiastic approach to judge-led mediation has also been found in another study with New Zealand lawyers (Hall et al., 1993b).

Four families (27%) in my study were scheduled for a defended hearing, although one settled immediately prior to this occurring. The parents’ strongest memories of this court experience related to its adversarial flavour and the efforts made by their ex-partner’s lawyer to discredit them during cross-examination. The parents satisfied with the role of their judge attributed this to his or her compassion, understanding, clear focus on the best interests of the child, and willingness to allow extended family members to be present. Dissatisfaction primarily related to their perception that judges imposed their own values, were uninterested in the case, bad-tempered, or lacking in humanity
and a focus on the child. Two mothers were critical of the fact there was no continuity of judges between their mediation conference and defended hearing. The one-judge-one-family policy operating overseas (Babb, 1998; Flango, 2000) has been noted by our Law Commission (2002a), but never really implemented within our larger courts. However, the Auckland Docket system was at least a means of reducing a client’s contact to a pool of just two judges (Doogue, 2001). Harland (1991a) is the only researcher to have previously studied parents’ experiences of defended hearings in the context of New Zealand custody and access disputes. She found that clients who had no, or only a limited, opportunity to speak for themselves were more dissatisfied, and this was also true for my participants.

A judicial interview with the children occurred in one family, although this could hardly be regarded as an exemplary illustration of this practice. The parents, and their eldest child, were critical of the fact the siblings were interviewed together by the judge and they felt uncomfortable about his insistence that they loved their father. Judicial interviews have again found greater favour within the New Zealand Family Court as a result of the K v K case (Boshier, 2005c; Henaghan, 2005; Tapp, 2005; see chapter four).

Only a minority of family law cases proceed onto the higher courts (Ross, 1998) and my study was no exception. Just two families pursued appeals, and both criticised the restrictive grounds of appeal and the narrower focus of the High Court and Court of Appeal. The lack of specialist family law judges at these levels was also considered problematic, as has been previously noted (Hall et al., 1993a; Henaghan, 1997; Nicholson & Harrison, 2003). Nick raised an important point about the role of the higher courts in setting “sign posts” to provide clients with greater clarity about the law governing children’s proceedings. His disappointment that this was not achieved in his case is testament to the discretionary approach that operates in family law cases (Dewar, 1997; Henaghan, 1998).

Violence issues have been repeatedly found to be central to families with multiple problems and complex legal issues (Pleasance, Balmer, Buck, O’Grady
Protection and occupation orders featured in 40% of the cases in my study. Ten parents and two children also reported other incidences of parent-parent and parent-child violence which did not result in family violence or care and protection proceedings. Without notice orders were detested by the parents against whom they were directed, but professionals regarded them as an essential risk management tool. The perceptive remark by one lawyer that “the result” might have been different if he “hadn’t gone in with guns blazing” was, however, indicative of the gladiatorial tactics so disliked by collaborative lawyers and by many clients (Maxwell, 2000; Tesler, 2000).

**VIII Chapter Summary**

The New Zealand Family Court has a fairly standardised dispute resolution track, commencing with counselling, followed by judge-led mediation conferences and, finally, defended hearings and any subsequent appeals. This chapter has outlined the experiences of family members and professionals with these processes. It has also assessed their effectiveness in meeting clients’ needs and in achieving durable agreements, and consent and court orders. The complexity that violence issues add to families’ lives and to Family Court proceedings was identified, along with the central concern of parents to have an opportunity to feel heard, understood and respected.
Chapter Ten

FACTORS AFFECTING THE MAKING OF AND COMPLIANCE WITH PARENTAL AGREEMENTS AND COURT ORDERS

I  Introduction

Various factors significantly affected family members’ satisfaction with their family law proceedings, and, at times, also influenced the outcome of their case or their degree of conformity with the agreements and orders reached. These included the cost of their legal proceedings, the delays they experienced, perceptions of gender bias, parental characteristics and behaviours, parental knowledge and understanding of family law, children’s knowledge and participation in family law proceedings, and aspects of the family law system itself (particularly the terminology used and the lack of enforcement of court orders). Changes in family circumstances over time – which the follow-up interviews were designed to ascertain - were critical in determining whether or not parents remained capable of complying with their agreements and court orders.

II  Cost of Legal Proceedings

The cost of legal proceedings was the concern most frequently raised by parents about the family law system. Fifteen parents (68%) complained about the amount they had spent on their legal fees, and other expenses such as court costs, a contribution to the cost of the specialist report, or payments to a private psychologist. Four parents (18%) were prompted to settle their disputes at their mediation conference, or shortly after it, because of the financial implications of pursuing cases they felt, by that stage, were unlikely to be determined in their favour:

My lawyer was telling me ‘stick by your guns and this sort of thing’ – but then the bills started mounting up. … It had cost me so much money as it was and I was just getting sick of paying out money for nothing. (Greg)
In contrast, William’s high legal costs did not act as a deterrent to him, and he felt he was getting value for money from his financial outlay:

It’s cost a lot. I think, in total, I’ve paid my lawyer about $23,000, but it hasn’t deterred me. (William)

The costs cited by parents for their legal proceedings were significant amounts - $25,000 (Tom); $29,000 – “bloody horrendous” (Gary); $30,000 – “It’s a hell of a lot of money” (Madelaine); and $51,000 - “the expense of it has just been horrific” (Anna). Phil estimated that he and Libby, combined, would have spent $90,000. The impact on parents’ financial resources was mostly quite immense, with some describing its effect as crippling:

I’ve had a guts full of spending money. It has crippled me. The property settlement gave me just a bit of cash to pay my legal bills so I’m still paying off the last ones. And I think all that money and what did I actually achieve out of it? (Tim)

It shouldn’t have cost that much. … I’m not a rich man! I’m working 18 hours a day, 7 days a week now to recuperate. I have to, otherwise I’ll never get back on my feet. (Tom)

Oh, the fees were terrible. She charges! Of course a good lawyer is very expensive, but I didn’t realise that there was an hourly fee for everything - even for small phone calls. So every time she received a letter about me, that’s a fee. Anything, absolutely anything, and on top of that it’s GST. … Actually I had to write to her and say ‘you know, I’m not just an ATM giving you money!’ (Louisa)

Five parents (23%) said they were still paying off their lawyers’ bills, and one had had to rely on a new partner to fund the debt. Five parents also regretted that the money they, and their ex-partner, had spent on legal proceedings was money that was now unavailable for the direct benefit of their children through the payment of private school/university fees, sporting activities and mortgage repayments:

That is money I would far rather have put into my children. I could have paid half my mortgage off with this money. (Anna)
We could have put [child] through probably three years at university for close to what I’ve paid, let alone what she paid as well. (William)

Simon had reached the conclusion that it was more cost-effective to deal with the enforcement of the access order directly with his ex-wife, rather than ring his lawyer and spend “a couple of hundred bucks for a follow-up. … It’s probably easier to write a letter myself and just use a 40 cent stamp.”

Two parents thought lawyers should be able to provide a clearer idea at the outset as to how the likely cost of their legal proceedings would develop over the course of their case. They wanted various options put to them which canvassed different scenarios from a relatively quick settlement through to a more drawn out or complex case:

Sit the person down and tell them what usually happens in these cases. Your bill, if it’s easily sorted out, will be $5000-$6000 worth of legal fees on average. But if the other side digs in, it’s going to go higher. Give the person a bit of insight as to what they’re going to be up against. (Robbie)

Three parents had received legal aid for aspects of their proceedings, but only one felt that this had impacted negatively on the quality of her legal representation:

My first lawyer got the bulk of the money I think. [When she left] this other guy had to take over with a little bit of what was left of the legal aid. So he wasn’t very helpful. (Tina)

Where the other party had legal aid, two privately funded litigants felt that they were at a disadvantage:

We were not liable for legal aid, so we were funding ourselves. And my sister, of course, had legal aid. So every time she could put an application in and withdraw it she had no financial implications. We felt it was misused and there was no accountability - no restriction on wasting the court’s time with these applications. (Stella)

Another financial issue that greatly concerned 14 parents (64%) was child support. Eight parents in this study received child support, and six parents paid it. While those on higher incomes did not complain about this, three others
found their assessed amount burdensome. However, there was no evidence this influenced the nature of the custody arrangements agreed upon between parents:

I pay child support which is 24% of everything I earn, plus I have the children for quite a lot of time, but not enough to qualify for a reduction in child support. … So I am financially tied … I am sort of in a situation where it’s hard to go forward because I’m just trying to maintain a lifestyle that’s good for the children. … It’s going to keep being a difficult part of life until they are 18. (Duncan)

Complaints by the parents receiving child support concerned the ability of their ex-partner to minimise their income so they only had to pay the minimum payment each week, the low level of the maximum cap, child support commitments negating a parent’s ability to travel to visit their children, and inadequate financial contributions towards the purchase of children’s clothing or the payment of school fees and sporting costs.

III Delay, Frustration and Exhaustion

The next most commonly identified factor affecting parents’ ability to reach agreement was the length of their proceedings. Eleven (50%) of the parents (six women and five men) complained about this and were particularly critical of the delays they experienced within the Family Court. The duration of their case created enormous frustration, and, for several parents, their ensuing exhaustion meant they simply gave up on their applications and agreed to their ex-partner’s demands. Waiting for a date for a mediation conference was noted as especially problematic. The parents’ considered that the court process was “too slow”, “dragged on” and took a lot longer than they (and sometimes their lawyer) had expected. Several mentioned time periods ranging from 18 to 30 months for the full resolution of their disputes, when they had thought (or hoped) it would it be finalised within three, six, or possibly 12 months. One father waited five years to finalise his access order and its enforcement. Those who suggested that Family Court proceedings be modernised and resolved more efficiently felt this would enhance parent-child relationships, reduce cost and lower stress:

It took a long time even though we had such a mild case really. Even that was just enough to make you realise it’s not an efficient system how it is
at the moment. You want to get things done reasonably quick, but they tend to leave it simmering for three months and then just turn it over a wee bit and let it simmer for a little bit more. Six months maybe a fine term, but 18 months was too long. I couldn’t make any solid decisions for him because I never knew what his future was going to be with me. (Simon)

I said to my lawyer I thought I’d be able to get the whole lot sorted out in about three months, but she says ‘oh, no, it will drag on for another three months.’ … I was wanting it to work a bit faster – go in at 9.30am, you know, we’ll get it sorted out, finished. Go into a shop, buy a pie and you walk out, it’s finished. But no, it was not like that at all. It was just messy, too much fluffing around. … I thought ‘oh, just get it over and done with, let people get on with their lives.’ (Robbie)

It was all in the lawyer’s hands, but it was sort of stuck in the court process and that can be months and months and months. It can be so slow. (Kathy)

Just to get that mediation hearing we had to wait months and months. It dragged on and on and then, of course, the court closed down for the Christmas period. (Tim)

Four participants acknowledged that the duration of their proceedings had been exacerbated by either their own, or their ex-partner’s, actions. The length of their case was therefore not entirely the fault of the court system, although some of the delays they experienced were the court’s responsibility (including continual adjournments when one party repeatedly failed to attend hearings; stays to accommodate psychiatric counselling or family meetings).

She’s got a better lawyer than I have and they kept holding things up by her not turning up, or him not turning up, or just deliberately stalling it. … The magistrate should have ruled on it whether she turned up or not. He shouldn’t have kept adjourning it - ‘oh, okay, we’ll set another date.’ That went on far too many times. It shouldn’t have taken five years to sort out - two years at the most! (Tom)

We could see it wasn’t the court prolonging this process - it was my sister and her solicitor. … [The defended hearing] was delayed time and time again because of her counselling. She’d be given another three months stay. (Stella)

Libby compared the slowness of Family Court proceedings with the speedier processes in other courts and tribunals and felt that family matters should be run
along similar lines. The Family Court would then be reserved for the more complex cases or for reviewing decisions that a parent was unhappy about:

I can’t help think with things like the Employment Tribunal and Disputes Tribunal, if you apply there, it’s heard pretty well instantly. And a decision’s made and if you really, really don’t like the decision maybe then you could go to the Family Court and say ‘look, I’m really unhappy with this decision. Is there any point in pursuing this?’ (Libby)

Six fathers (27%) said they felt exhausted and/or frustrated from their involvement with family law proceedings. They said they had “really had enough”, “it was too much”, “it was just a waste of time”, “I am exhausted” or “fed-up” and “I can see why a lot of men just give up on it.” These feelings led some men to ultimately relinquish their applications:

That court session was the last straw. … You get to the point where you’ve really had enough. So I just succumbed and gave my [child] up. … My health was running down - so I just went ‘stuff it, I can’t handle this anymore!’ (Greg)

It seemed like the whole process I’d gone through for months with my lawyer and everything was just a waste of time. I just thought ‘how about me and my children? I’m left here now with nothing and what have I done wrong?’ You know, I still can’t understand it. … Hopefully I never have to go through that again. (Tim)

If you believe in something you must pursue it – that’s the bottom line, because that is my responsibility. I can’t get out of that. I would like to get out of it, I would like to just forget about it, walk away. I’ve had enough, I’m tired - you know, half past 12 last night I am walking around thinking about what I am going to say in court. … I am exhausted I tell you - it’s very hard. (Nick)

I don’t wish this on anybody. I feel sorry for any man that has got to go through what I’ve had to go through. I really do. … Until the court system is upgraded, or something done about it to bring it to a head quicker, people just suffer through it. … I can see why a lot of men just give up on it. You know, they just get frustrated – just fed up with it. It’s only my kids that have kept me going. (Tom)

Two mothers spoke of “the continued emotional drain” (Anna) “and the roller-coaster ride with incredible lows and highs” (Jane) from their court proceedings. A judge voiced concern about clients settling cases out of despair
with the family law system, while a report writer felt that some degree of anxiety about the court was natural:

If they settle because of exhaustion, or despair, or a feeling of not being heard, or lack of money, then that is not a good way of them settling. (Judge)

Any of us going into new or different environments are going to feel a degree of anxiety or trepidation because it is strange. And when people enter the Family Court system it is usually when pretty grim things have happened in their lives. Essentially most people coming in are going to be on the back foot. And having been through the process they’re probably not going to have a helluva lot of good thoughts or feelings about it. (Report writer)

IV Gender Issues and Perceptions of Bias

Accusations of gender bias within the Family Court were expressed by seven parents (32%). Five men felt that they were discriminated against during their cases because they were males in a pro-mother court:

I felt that the court system is very pro-mother still. Even though I have read that fathers are getting a much greater hearing now - it didn’t seem [that way] with [our] judge. Not trying to be personal, but it seemed like I was fighting an uphill battle with him. He was still very much the old school pro-mother type, although he may not agree with that. … It wasn’t so much about getting an order in my favour, it was more about having a better consideration for me as a father. I thought it would be a fair process, but it was against me right from day one. The big feeling I got out of it was ‘hey, I’m a father, what I say doesn’t matter one iota.’ (Tim)

The Family Court wasn’t a balanced system. It wasn’t out there geared up for male and female being equal, and the more you went through it the more you found out it still focuses on the mother, unless there’s severe reasons why custody should change. [Ex-wife] went in and got all the court [protection] orders and things. You had no recourse. Like you’re supposed to be innocent until proven guilty – in the Family Court if the woman says you are, you’re guilty until you can prove yourself innocent. And I think that puts a lot of men off going through the system because they’ve got a perception that they’re beaten. (Duncan)

I knew nothing [about the Family Court] at the start, nothing. But I quickly realised that it was full of feminist women. It’s appalling how badly men are treated. They don’t get a word in. The court is completely
out of touch and men are certainly on the back foot. I didn’t realise how hopeless it is being a man trying to just be a Dad. (Phil)

Ben, too, thought there was gender bias in the Family Court:

The court gives women the better say - like the mother always gets the upper hand or the benefit of the doubt. It’s not automatic – they see the evidence, but it’s like if they can’t decide I think they’ll usually give it to the woman because they’re the mother. I think that’s a little bit unfair on the father. But then I know they see it’s the mother that’s the one that’s usually around. But it’s sort of changed now and fathers can share the role as well. So let it just be more even. And if the father does look like a real loser, of course let the mother have the children. But if it’s pretty even, well, don’t be so like kind to the women by always giving them the benefit of the doubt. Just be a bit more even. (Ben, aged 11)

The fathers’ rights movement was only explicitly mentioned by one parent, but its role was central to his beliefs about securing justice for men in the family law system. Phil thought the adoption of a presumption of shared parenting in custody cases should be the logical starting point in family law:

We have an escalation of violence, of fatherless families, of graffiti tagging and unprecedented rates of murders. Fatherlessness is very much part of the breakdown of society. ... A starting point in all breakdowns is shared parenting, which will just have such a huge, powerful [effect]. It’s so sensible, it’s just what children want and deserve and need. If they can’t have Mum and Dad living together, they should live in the same neighbourhood and share. On-going contact in a management sense is a win/win for the children because they see both parents equally. (Phil)

Two mothers, however, thought the increasing emphasis on fathers’ rights meant they were caught up in a system that was anti-mothers:

The Family Court is anti-mothers at present. Fathers have a lot of sway there. I’ve not been heard or believed. (Madelaine)

The judges and lawyers are trying to achieve one thing - what’s best for the Dad. I’ve got nothing against kids seeing their father as long as they’re safe. But at the moment the view seems to be that Dads are missing out all the time. But what have these Dads done that they are missing out all the time? Get this idea out of your head that not all mothers sit there and bad-mouth the children’s father. These judges that have been on the bench for 30 odd years, they don’t seem to be going with the way society’s changing. I wish that judges could actually come out and see how a household runs when a father has been abusive to the children, and see how the family is actually dealing with that. (Kathy)
Other parents had *more moderate perceptions* of gender bias within the court, attributing these to isolated incidents within the course of their proceedings rather than systemic faults. Four fathers (18%) disliked the *unbalanced advice they received from Family Court professionals* about the likely outcome of their proceedings. Lawyers and a counsellor advised clients “that fathers don’t have a chance of getting custody” (Gordon), that “children need their mothers” (Harry), and that “I haven’t got any chances because usually the courts are judging in favour of the mother” (Robert). Phil felt that their report writer “was just biased right from the time she interviewed me.”

Four other parents raised concerns about the *gender imbalance at counselling sessions or court hearings*. They felt much less comfortable when they were in the minority, or of a different gender to their counsellor, lawyer or judge:

I got a male [counsellor] the second time which was much better. Because every other time the courts had been allocating female counsellors, which as a male you sort of feel ganged up on when you have got two females in the room. (Greg)

The first judge was a male and I felt at that session he got on better with [Greg]. Whereas the second [judge] - whether it had anything to do with the fact she was a woman or not I don’t know – but I felt a hell of a lot better coming out of there after talking with her. (Rachel)

My lawyer was a man and I really felt that at the end of the day he wasn’t understanding of me at all. (Louisa)

One father *remarried* because he felt the court would be more likely to order regular contact between him and his children if he had a wife who was able to help care for them.

Another father considered that young children, from *birth to six years*, needed to be in the care of their mother:

Nought to six is very much what I call ‘the apron strings’, and naturally children are biased to the mother. And I understand that - I agree with it. … I believe adamantly that mothers and fathers are complementary, but different. I have no problem with gender bias. Parenting, if it is complementary, there must be bias. I think it is eminently sensible that
nought to six, roughly, there is a strong bias to the mother, and that bias should be reflected in the court judgment. (Nick)

V Parental Characteristics and Behaviours

Several parents felt the agreements or orders they reached were influenced by, or at times directly attributable to, either their own or their ex-partners personal characteristics or behaviours. Mental health issues and personality disorders were raised in four cases. Two other mothers described themselves as the ones who compromised to reach resolution:

Everybody saw me as the soft touch. … It only got resolved because I said ‘all right’ to everything that they said, which was dumb. (Libby)

In the end somebody has to give on various matters to get a resolution and I think that I’m probably that person. Well, I know I’m that person. In the end I think that I gave a hell of a lot in order to get out. (Anna)

Lawyers, too, spoke of the pressure they exerted on reasonable parents to reach a compromise:

The more reasonable parent is the one that as the lawyer you often put the most pressure on. A lot of reasonable parents that come into the court don’t do very well, and the bastards do quite well. They are so demanding you almost feel like saying ‘give them it and get out of here’ sort of thing. It’s a shame because it causes a lot of unhappiness down the road and it’s really hard on the person who tries hard. Once again they feel that they are giving in. (Lawyer)

Three women regarded their ex-partner’s plausibility and charm as “taking a while for people to see through them”:

He is very plausible, he’s very charming - he comes across as a really good image. And I can see that - I was married to him! … I was quite lucky because every time he went to court he said things that revealed what he was actually thinking quite clearly. (Libby)

Seven people (32%) complained that the other party had told lies in their affidavits or during the hearings, which they found distressing and demoralising:
[Ex-wife] told lies the whole way through it. She came across [in court] as sweetness and light. [My lawyer] said to me ‘answer with the truth because you’ve got nothing to hide and you won’t get tripped up then.’ (Gary)

He sat there and lied all the way through the hearing. Even in the court I managed to slip [my lawyer] a note that said that he’s lying. What did she do? Nothing! She just carried on her merry way. She didn’t sort of take up on that and ask me ‘what’s he lying about?’ (Kathy)

When I got my sister’s affidavit I just could not believe what I was reading – it was just twisted, manipulative – blatantly not true. (Stella)

Two parents believed that their ex-partners moved between professionals in an effort to locate people who would support their particular viewpoint:

He just goes and looks for somebody who will listen to him and who might, you know, have the same opinion as him. (Anna)

She will not persist with anybody once they are not singing her songs. As soon as they start saying things she doesn’t want to hear then she doesn’t go back. (William)

While one father thought his children should “realise what sort of cow their mother is”, six other parents (27%) mentioned the importance of not denigrating their ex-partner to their children:

I don’t say anything bad about her in front of the children. (Tom)

I never ever run his father down in front of him. (Louisa)

However, four parents alleged that their ex-partner, and sometimes their ex-partner’s parents, had made derogatory remarks about them to the children:

I’m very sure that their mother and their grandparents ran me down and swayed their minds. They’ve come out with all sorts of things, but it was all Mum’s words coming out, so that really annoyed me. (Tim)

His parents have been very negative about me. And I’ve had to give my mother a tune-up too because I have heard her saying things that were negative about [Phil] and his family in front of the children. And they love them and I don’t think it’s really helpful. (Libby)
VI Parental Knowledge and Understanding of Family Law

Prior knowledge about family law proceedings was non-existent amongst the parents in this study. None had previously been involved with the Family Court, although one man’s employment had brought him in contact with the legal system, and two men had previous experience as defendants in criminal justice proceedings. Some parents said they “had a fair idea what the court was there for” but others were unaware they could even initially approach the Family Court itself for assistance and referral:

The counsellor said ‘well, instead of going to the lawyer, you know, it could have all just started here first off.’ (Greg)

I’d never been to a court sort of thing before in my life. I had no idea what to expect. (Tim)

Two parents consulted library books to increase their knowledge about family law, while others relied on professional advice to gain an understanding of such key legal concepts as guardianship, parental conduct, or the welfare of the child principle:

I don’t know that much about the law, but the lawyer, the counsellor, they all mentioned that it is the child’s welfare that is paramount - that is the number one priority, that’s the rhetoric that’s spoken. It’s the legal jargon. Always keep in mind the tamariki and what’s best for them. (Harry)

They’re not concerned with who’s in the right and who’s in the wrong [because] that doesn’t bear any relevance. (Tim)

Guardianship was the most frequently mentioned legal concept (by six parents), most of whom understood the significance of their role as guardians and were anxious to continue playing an active role in major decisions about their children’s lives, especially schooling. Some felt they were thwarted in this by the attitude of their ex-partner:

I’ve arranged to have [school] reports sent to me. I get the weekly newsletter sent to me because he won’t tell me anything that’s happening. I’ve become involved, but not to a high degree, because I find it very embarrassing to be there when he’s there with his partner and he’s so incredibly rude to me. (Anna)
I lose that direct control over my children when they’re away from me. I’ve just got to hope that their mother is doing the right thing. I’m making sure I do the right, responsible thing here. … It’s just not having that fatherly influence - I hate, dread, the thought of this other guy being like a father to my family. (Tim)

Misunderstandings influenced three parents’ ability to comply with agreements and orders. They were confused about the status of agreements they had entered into with their ex-partners or their ability to set aside court-ordered childcare arrangements by agreement. Tina believed her access agreement would automatically apply because it had been jointly agreed during counselling, but found she could not enforce this when Harry later changed his mind. Anna thought the week-about custody agreement was binding because the lawyers had attached it to their property settlement, “but then it didn’t seem to mean anything.” Gordon was under the mistaken impression that since he and his ex-wife had court orders in place they had to go back to court to vary the custody arrangements, even if both he and his ex-wife agreed to the changes. Gordon had suggested his daughter come to live with him because her mother’s hours of employment were causing difficulty. His ex-wife suggested he consult his lawyer about this as neither of them realised that parents could reach new agreements without re-involving the court:

The court has ordered that [son] will stay with me and [daughter] with her mother. … I didn’t know that parents can just agree and you don’t have to go back to court. Nobody ever mentioned that to me. (Gordon)

Two parents thought it would be desirable for a Family Court representative to talk directly with the parties in a preliminary meeting to offer some early advice about acceptable parental conduct and to clarify the merits of their case. They felt this advice had the potential to be more neutral than that offered by their lawyer:

It would have been good with the Family Court if they were able to put down very strict guidelines for both parents – like ‘look, if you say things like this to the children it’s effectively harming them because it’s giving them the wrong message and it will stand you in very poor stead in the custody hearing.’ I think people need a huge amount of guidance on what should and shouldn’t be happening. Maybe that’s where the Family Court could be helpful - when people say to them ‘oh look, my lawyer says I
should do this’ and they could say ‘no, you shouldn’t. Don’t waste your money, try and work out something else.’ (Libby)

I think there should be some earlier representation from the Family Court - like an early mediation conference or whatever. Not necessarily with the judge, but with a Family Court representative. It would really help because someone should be saying, really early on, even without the lawyers there, ‘this is what it’s about, this is what’s going to happen, this is what you should be doing.’ (Simon)

The idea of separated parents having an early meeting with a Family Court representative was strongly supported by the professionals. This had in fact been done in one court in the 1980s when the counselling co-ordinator interviewed everyone for around an hour:

That interview with the co-ordinator was absolutely crucial. It took the couple in crisis further down the track in a shorter period of time than probably anybody else could later on. They’d go very, very quickly in that hour because it was a crisis-based interview and they were really there for help. (Counsellor)

You could tell when they came to counselling that they’d had that interview, because the child-centred stuff she was talking about had become embedded. It was just so powerful to have someone at the first port of call sit down with you for an hour. It was just fantastic for giving people some really strong ideas about what they need to look at, children’s needs, and how to approach it. It was just so, so invaluable. It set the course for counselling because parents had it in their head to think about the children. When the Family Court resources got cut and the co-ordinators couldn’t do that, it was much harder to capture that point of view of being child focused. I can’t see why the co-ordinators couldn’t have their role doing something like that again. (Report writer)

Pamphlets were also suggested to educate people about what to expect from the court:

Education wouldn’t hurt, especially before going to counselling and mediation meetings - even if it was in a pamphletled form, two pages whatever, or something in layman’s terms perhaps that people can understand a bit more than the legal jargon. (Simon)

You don’t have a chance to actually look into it before you end up in the situation of needing the Family Court - you can’t plan a year ahead and research it. There needs to be an information sheet to say ‘this is what it entails, your children get this and you get this, you’re not entitled to change the children’s lawyer or report writer.’ It just needs to be set out in
a simple form so it’s not too much information for a woman in distress, but just enough so she can feel comfortable that hopefully this court will help her out and be beneficial for her and her children. (Kathy)

VII  Children’s Knowledge / Participation in Family Law Proceedings

The parents varied considerably in their reports about what they, or their ex-partner, had told their children about the legal proceedings. Seven parents (32%) said they had deliberately not told their children very much, either because they were too young or they needed to be shielded from such information:

I never mentioned it to them. I just said like ‘I’m doing this because I want to see you more often’ and that’s basically it. (Tina)

I don’t say anything about court or anything in front of the children. I keep it completely separate. (Tom)

I don’t talk to the kids about the split-up or the matrimonial property or things. They’re too young to be involved in that process. I’ve put everything in a box – if they ever want to know, it’s there. (Duncan)

Another third of the parents said their children were well informed by them about the court proceedings over their custody, and that this sometimes included sharing affidavits and other information with them:

There’s a lot of things that I did tell the kids which I shouldn’t have. But I believe they should have known to a certain extent what was going on. They don’t need to know everything. It’s a bit hard to [avoid] telling the kids something when you’re packing away half the sheets and blankets and all this sort of stuff. (Robbie)

I actually have shown [child] quite a few of the documents, and she can’t believe some of the affidavits that her mother wrote. (Gary)

Three parents reported that it was their ex-partner who had fully informed the children:

Their Mum was telling them everything - that she’s got to go through this court process because I was the big horrible ogre stopping the relocation and upsetting everyone. (Tim)
Sometimes they would tell me things about the court process and I would think ‘oh, my God!’ You know, like, [child] said to me ‘what are you going to do with that money Dad had to pay?’ And I said ‘what money?’ He said ‘you know, he had to pay you.’ And I said ‘well, it just goes on legal fees.’ But I thought, gee, I wouldn’t have mentioned that. If they asked me questions about it I used to say ‘well, look, there’s a proper way to do things and we have to follow the proper procedures. It’s not your decision to make - it’s Dad and me, and we get a lot of help from people who are experts who help make the right decisions about it.’ (Libby)

Six of the eight children interviewed (75%) said they knew the Family Court was involved in assisting their parents to determine the care arrangements in their family. One 5-year-old had never heard of the court, while another 8-year-old said she only found out about it when her mother told her about this research interview. The children who knew about the court all said this was because usually one, or sometimes both, of their parents had mentioned it:

- My parents said that it was for the court to work out who me and [sibling] lived with. (Charlotte, aged 9)

- Mum first told me when I was only about six. I didn’t really understand it then, but I learned about it as I went through. Mum explained it to me. (Andrew, aged 11)

- Dad told me. He wanted me to live with him and I was keen on that idea then. He said Mum wouldn’t let me and he’s going to take it to the court. (Ben, aged 11)

- Dad said ‘do you want to tell me anything that I can say to the judge or do you want to write a letter that I can give the judge?’ And I was like ‘not really, as long as you just say what you know that I know.’ (Kate, aged 9)

Children’s understanding of the Family Court was rather obscure, although, like the adults, four were able to figure out its role in resolving parental disputes:

- It helps Mum and Dad, but I don’t know where it is. (Rose, aged 7)

- The judge could let me go and see my Dad or decide that I had to live with him. (Eliza, aged 8)

- I just kind of figured it out really. Mum and Dad, or the judge or someone, discuss what’s happening in your family and where the children are going to be for all the different times. (Kate, aged 9)
I sort of knew what a court was, so a Family Court I could just work it out. I know a court is where two people go and decide upon a matter and I just thought it would be exactly the same deciding about what happened with us. … The two parents go along to the court and they decide who gets custody, and who gets the children over the holiday periods - just decisions about how the children get shared between the two parents. The parents each have a lawyer, and the judge, they all talk it out and see what would be right for the children. … Each parent’s lawyer would discuss what their client would want to happen. They’d tell the judge and then the judge would have listened to both cases and he would decide what he’d think would be best for the child. (Ben, aged 11)

Charlotte “didn’t know” what happened at the court, while Andrew only “had a fair idea … because I haven’t been in there to see what they do.” Kate thought that the experience obtained by professionals made them knowledgeable about family law issues and highlighted the advantage of an interdisciplinary approach within the court:

If they’ve got that job they must be good at it because they have to have a degree to be a lawyer and stuff. … All of them have different opinions and ideas so if you put all of them into one, then they would know everything. Say, for example, Mum’s lawyer, she might not know something that Dad’s lawyer knows and she might pick it up. And then Dad’s lawyer might not know something that Mum’s lawyer does. They can pick it up and put it together like a jigsaw puzzle. … They’ve all been children before so they pretty much know what it’s like to be a child. (Kate, aged 9)

Ben had no difficulty telling the various professionals how he felt. Nor was he concerned at the use made of that information as he realised it helped the court make the best decision:

If I had to tell other people I did and I was just fine about it. They made it easy for me because I sort of understood what happened, but I wasn’t entirely sure about it. So I just answered the questions like this now. Some of the things I had to say to some of the lawyers, or people that interviewed me, got passed back to the court so they could decide on it. I wasn’t really too concerned what happened with it. (Ben, aged 11)

Jessica, however, thought that the professionals did not put her views across well:
I don’t think the people that were meant to talk to us to get our point of view did a good job putting it across or it wouldn’t have ended up the way it did. (Jessica, aged 16)

The importance of opportunities being given for children to express their views in family law proceedings was raised by three parents (14%), who also emphasised the skill required of adults in eliciting children’s perspectives during interviews:

For older children I think they need to have their say. From what I can gather it is uncommon for children to be asked their perceptions of what’s going on or what they want. Although they say children are too young to make up their mind, they can usually have some valuable input if interviewed the correct way by an adult. It could be quite positive for them. (Duncan)

I just think that the kids should be listened to more. Probably from 10 years old up, they could be involved that wee bit more. Take more time, listen, and understand where the kids are coming from, how they are feeling. It’s what the kids have lived through and seen, and it’s etched in their brain. (Kathy)

Children of 9, 10 and 11, many of them have really strong, formed opinions, and a balanced point of view, if you know how to talk to them. I’m just amazed how grown up they can be on so many subjects. Children that are quite advanced in their thinking processes should be entitled to be heard. (Phil)

This approach was endorsed by five (63%) of the children. They also wanted children to play a much greater role in family law proceedings and, at times, be offered the opportunity to speak directly to the judge, rather than (or as well as) through an intermediary like their legal representative:

They should always listen to what the children think, because if they don’t listen they could go to court and the judge could say ‘what did this girl tell you?’ And they’d go ‘uhm, I can’t remember because I didn’t listen to her.’ (Eliza, aged 8)

I think they should just leave it up to the kids actually, because it’s really their decision if they want to go and see the other parent. They’re the ones that have to go. … It’s not their family - they don’t know what we’ve been through. Children should just be able to make their decisions on their own. (Andrew, aged 11)
I thought it would have been better if I actually got to go to the court, so I could actually say it in my words to the judge what I wanted. Because then he’d really understand what I wanted, not just what someone else relayed from me. Some children might get a bit scared being there seeing their parents argue over something. But I’d be fine because at least I’d know it would be what would be best for me. I think someone should ask the children if they do want to go or not. They should have the choice, because if you’re not going there you don’t notice it. All you do is you just get asked questions. (Ben, aged 11)

Ben (11) and Kate (9) attributed the decision about their care arrangements to the judge, even though it was actually their parents who agreed immediately prior to their hearing – “It was the Family Court or something” (Kate); “It was pretty much the judge, because he’s got the final say” (Ben). Daniel (5) did not know who was responsible for the decision in his case. However, the other five children all said the arrangements had been decided by their parents with minimal, or mostly no, input from them – “Mum wanted both of us here because it wasn’t safe with Dad” (Eliza, aged 8). The two youngest children both said they did not really want to be asked about such significant decisions. The children were all satisfied with their current care arrangements, even where these had changed dramatically. For example, Daniel (5) “liked living with Dad”, but was equally happy now living with his mother. Ben (11) and Kate (9) both initially preferred to live with their father, but were very happy with the decision that they stay with their mother and then shift to live with their father in two years time:

I just accepted that I was going to stay here and I really enjoy it. It’s not just about what the child wants to do – it’s what’s best for the child. So they took that into account. (Ben, aged 11)

The professionals were all very positive about encouraging children’s participation in family law proceedings:

Children can come up with creative options that nobody else has previously thought of. Part of that is the fact that children are the ones who live their parents’ realities. They know their family situations inside out – more so than can counsel for the child or a report writer. (Judge)
The report writers mostly interviewed children “from three or four up”, although they acknowledged that some of their colleagues lacked confidence in knowing how to talk with children and “obliquely used play or drawings” instead. A key issue concerned the use of children’s information with parents and in the specialist report:

I’ll talk with children about how they feel about me raising what they have told me with their parents. Often I find the parents are quite unconnected with what their children might be thinking because they are so caught up in their own stuff. They’re really quite surprised, sometimes quite shocked, to find their child’s been saying that. It can be a wake-up call for some parents to have that said to them. They didn’t have any idea that’s the way their kids were feeling. So conveying that information from your report enquiries to the parents can be extremely helpful. Maybe it encourages a more empathetic response by both parents towards their children. Often it can be used to resolve things. Kids can be very perceptive about what’s going on in their family dynamics and the battles between their parents that the parents don’t even twig onto themselves. (Report writer)

VIII The Family Law System

Several parents and professionals expressed concern about the ‘custody’ and ‘access’ terminology. They felt these terms were outdated, implied that children were parental possessions, and contributed towards a perception that the parent with custody had ‘won’ the child or could make decisions without consulting the other parent. They suggested introducing the word ‘shared’ to promote future parenting arrangements:

The parent that the children are living with has all the power and it shouldn’t be like that. I think every child has two parents and each parent should, without having to go to court, have rights to see their children. … Like, in his mind, he’d won - he’d got the power because he’d got custody. (Tina)

The biggest problem was this ‘access’ word. It’s so outdated. And ‘custody’ sounds like someone’s been locked up. When you’ve got ‘custody’ of something it’s yours. It’s a belonging thing, which is not the right word - it’s not an ownership battle whatsoever. The terminology needs to be changed. (Simon)
Her perception of the joint custody order is she can do whatever she likes, and then inform me of what she’s done because she believes that she’s got custody and I’ve only got access. (Duncan)

‘Custody’ and ‘access’ seem to me to be words that encourage conflictual positions. (Counsellor)

Australia and England have got ‘shared care’ or ‘shared responsibility’ and I think those sort of labels are helpful. (William)

One father and a report writer thought the Family Court was also misnamed:

It’s an appalling word ‘Family Court.’ All children know about court is that Judge Judy [American television programme] and dealing with bad people. … So the word ‘court’ would be perceived pretty negatively. There’s a winner and a loser and there’s punishment. (Phil)

It is called the Family Court, but hold on, we actually are functioning legally in an adult court. So let’s call it the adult court and get some changes made. (Report writer)

However, one lawyer with experience working in England felt that new terminology would be pointless:

I was working in England when the Children Act came in and they changed their terminology to ‘residence’ and ‘contact’ but people still got hung up on ‘I’ve got the residence order, you’ve only got the contact.’ So changing the words didn’t make a blind bit of difference. (Lawyer)

Five parents found the lack of enforcement of court orders caused compliance difficulties in either getting the visiting parent to exercise access, or in getting the parent with day-to-day care to conform with the other parent’s right to access. Tom’s situation was the most extreme as he had resorted to having the Police pick up his children for access visits after his ex-wife hid them when he was due to collect them:

It’s happened three times that the Police have picked the kids up and brought them round to my place, which is not good for the kids. The judge should stipulate ‘you do it again, we’ll lock you up.’ Be a bit harder on it. But they don’t. (Tom)
Three parents wanted to modernise the Family Court, updating it to make it more consumer-friendly and efficient:

It was pretty much a regimental government department. … It still seems to be a ‘name, number, place’ sort of thing. It needs to be more approach friendly and come up to the 21st century. (Simon)

I quickly realised that it was the epitome of the civil service. … They’re just completely out of touch with modern society and with children. (Phil)

Professionals acknowledged the importance of identifying complex cases earlier, particularly those involving personality disorders, violence and drug/alcohol issues:

What we are looking at now is spotting the complex cases as soon as that first cross-application comes flying in, followed by the next one. Picking that then, pressing the alert button, and seeing what’s going on – how we can help within the court system to get something that will move things forward. (Manager)

Many cases don’t have a lot of legal elements – the outcomes are always factual, credibility findings, safety decisions. The more input done to address therapeutic issues outside the courtroom the better. (Judge)

We can identify very early on what some people want is a determination of the facts and a decision. And if that is what they want then we shouldn’t be putting them through all these incredibly protracted processes where we try and make them all feel very good about one another. (Judge)

Some cases need to get to a fixture and just get a decision. A lot of people respond to the court situation rather than facing years and years of bickering. Half our clients wouldn’t come to an education meeting. They’ve either got drugs and alcohol, psychiatric, sexual abuse issues – most of the hard cases. The easy cases get solved really quite quickly. It’s the other ones – the personality disorders, the liars - and I don’t know whether a court can fix that. (Co-ordinator)

There was a general feeling that there was “now a culture of people viewing the Family Court as providing a panacea for their problems.” While this was an unrealistic expectation of the court, the tension it created between the judicial role and the court’s social obligations was a source of frustration for those working within it:
I find myself increasingly saying to people in mediation conferences ‘this is not a problem that we can sort out here – you know, whether your change-over on Christmas Day is at 2 o’clock or midday. There is no right answer here. You’ve got to go and sort this out. This is just part of the territory of being parents – it’s harder when you’re separated, but parents who are together have to sort these things out too - like who’s going on holiday, who’s going to look after the kids. Go away, go out of my court and sort it out somewhere else. Sometimes it comes as a surprise to people – they kind of feel that they can just pour all this out and that you will kind of wave a wand and somehow or other the right answer will emerge. Well, there is no right answer! (Judge)

There is a tension between providing a service, having it flooded, and seeing it grow to become a self-generating industry. The alternative approach is to keep the service trim and tight, and provide other ways of addressing this phenomenon of family break-up. We have, perhaps in some cases, allowed there to be a dependence on the court when there shouldn’t have been. I would like to see a reversion back to the far more clearly delineated demarcations between the processes before you enter the court and the processes you have after you have entered the court, for that reason. (Judge)

Parents often want to come back to court six months later – but it is not part of our role for them to come back every year. I tell them the orders cover their current situation, but are bound to need changing - and you can do it yourselves! We’ll provide court resources to encourage you to take responsibility for your parenting, but on the other hand we don’t want people to feel they are left abandoned. (Judge)

More money, more resources, more people won’t help. There’ll be things the court can’t do. We can inadvertently reinforce an external locus of control. Because all families have problems - and a lot of the problems that go through the court that I see are nothing to do with the court. It is very easy to think of divorce in a pathologising context and prematurely attribute problems to the divorce – therefore the court can solve it. (Report writer)

A community-based specialist family law centre was suggested by one lawyer as a place where people could “access information and education about their situation, their options and their rights before their situation escalates.” Others thought the Family Court itself should be doing more to provide “a more transparent information-providing service - perhaps through the co-ordinator.” The professionals also wanted to maintain and extend their own interdisciplinary networks and training opportunities, primarily through the
Family Courts Association as “the key to the Family Court is the connections between disciplines.”

The lack of feedback received about professionals’ recommendations or decisions was particularly bemoaned by them:

A lot of stuff just drops into a black hole once you make your report, you never hear back. There is meant to be a requirement on the courts to give us feedback about our reports as nobody can ever learn if they’re doing things right if they don’t get feedback. It’s a rare lawyer or counsel for child that ever tells you what’s going on, and if they do it’s probably by way of a chance meeting - not because they actively set out to keep you up to date. Judges certainly need feedback too - six months down the line, what has happened? Otherwise how can they know whether what I picked as being best for the child was right. (Report writer).

There’s minimal opportunity for feedback for judges. We don’t get it unless parents come back when their orders have failed. (Judge)

It’s hard to get an accurate analysis of success. We may get interim/final orders which last a week, or we may get no orders or agreements but the spadework we’ve done through the Family Court may lead to agreement being reached a bit later. (Judge)

The “sheer volume of cases” created “a constant tension” for judges “to get through the work and give people the feeling they have been heard”:

I frequently have five cases in one and a quarter hours so I simply can’t give clients the time they are wanting. Case management techniques can ameliorate this a bit, but there is really an impossible fit between available resources and need. (Judge)

Only one parent raised the issue of openness of the Family Court:

The Americans are more enlightened and their court is completely open. They encourage all the families to come in, and friends, and to be much more open. Here it’s totally secret and it’s not transparent at all. So judges can get away with anything. They’re a law unto themselves. (Phil)

Another parent suggested that new clients be paired with mentors who had previously experienced family law proceedings and could provide support:

When I started off I felt so alone - it’s a daunting thing, and you think ‘am I ever going to get through it?’ Mentors, or people like that, who have been in the system – it would be really good if they could turn round and
say ‘hey, you’re okay, I’ve been through it, let me help you.’ Just a pillar to be there - a little beacon of hope - to give them something once they hit rock bottom, and to say ‘it’s okay to poke your head up - you’re going to get it hit back down every so often, but you’re doing great.’ (Kathy)

The exclusion of extended family members (especially grandparents) from New Zealand family law proceedings was criticised by three other parents:

They weren’t allowed in. … I was virtually told they were closed hearings. … It would have been good being able to have support there as well. (Greg)

The system is too confined. It doesn’t look at the wider picture. To me it didn’t acknowledge the role that grandparents can have and the wider concept of whanaungatanga. Look at it holistically and bring in what’s going to benefit the child. … It’s like there was no legal status for them to be in the picture. … My parents – they’re in the history there. They’ve shown that. Sometimes I wanted to take them along, but there’s no room allowed under the law for them. (Harry)

In this country, grandparents have no rights. Many are cut out of their grandchildren’s lives. And they are semi-retired or at a stage in life where they can do heaps for their grandchildren. It’s just unhealthy. (Phil)

Extended family/whānau members played a significant role helping 12 parents (55%) with child care, financial assistance, temporary accommodation, attendance at lawyers’ and doctors’ appointments, and participation in family meetings and FGCs. Many also appreciated the advice and informal support offered by their parents, siblings, and, at times, their ex-partner’s family:

I got lovely Christmas cards saying they were missing me and that I was always going to be their brother-in-law no matter what happened. So that was nice. (Tim)

We never lost contact with the grandmother on the father’s side - she’s always had contact with the grandchildren. I was very strong about that. Just because him and I are having differences of opinion, it doesn’t mean the kids and her have got to suffer as well - because it’s not her fault that her son and I don’t get on. (Kathy)
IX  Changes in Family Circumstances Over Time

One of the most significant influences on parental compliance with the agreements and court orders reached during the legal proceedings was whether there had been any change in their family circumstances over time. The follow-up interviews with each of the 15 families enabled their conformity with the court outcomes to be tracked over 12 months.

There had been dramatic changes in care arrangements in four families (27%), only one of which was in compliance with the consent order. Phil and Libby’s children had moved from their mother to live with their father as previously agreed. Custody had reversed, or was likely to do so, in the other three situations. The child over whom Gary and Anna had a shared care order was now, after further bitter litigation, living with her mother as her father had moved overseas. Nick obtained a Family Court order for the return of his children to New Zealand, but Jane’s subsequent successful appeal saw the High Court reinstate the status quo. She and the children remained living overseas, with Nick having access and contemplating the possible return of his eldest child for secondary schooling. Stella was also on the threshold of major custodial change, with her nephew about to return, by agreement, to live with his mother and her fiancé.

More modest changes in family circumstances occurred in five families (33%). In four of these cases, the visiting parent’s contact with their child(ren) declined in frequency and duration. Rachel had relocated with her child and new partner to a town 400km away from Greg. Access was now less frequent, but was nevertheless still occurring regularly and satisfactorily. The same could not be said for Tom, who was still experiencing considerable difficulty enforcing his access order because of his ex-wife’s attitude. Kathy’s children were now, at their request, only seeing their father for one hour once a month. Tina’s contact with her children remained intermittent because she had shifted. Harry said “we don’t see her that much.” Finally, William had moved from a 40/60 to a 50/50 shared care arrangement with Madelaine.
There was no change in the parenting arrangements in the other six families (40%). While this meant their agreements and orders were being complied with, it did not mean that their pattern of care was unproblematic. Several parents were dissatisfied with the arrangements and their ex-partner’s attitude, or remained concerned about their child(ren)’s safety.

Eleven parents (50%) had consulted their lawyers between their initial and follow-up interviews, while the other half of the parents had not made any further contact with their lawyer. In four instances the contact was to seek clarification about either the court orders (for example, holiday access, the timing of children’s changeovers between parents), or whether the court needed to be notified about a parent’s relocation. One mother had sought legal advice on a prenuptial agreement for her second marriage.

The other seven parents who had consulted their lawyers had embarked on further legal proceedings concerning their children’s care arrangements. Madelaine’s application to add a condition to the shared care order preventing contact between her child and William’s step-son had been dismissed. The Family Court had also been re-involved, on William’s application, in determining which primary school their child would attend. Anna had fought off Gary’s ex-partner’s application for his 60% share of the child and was now the full custodial parent. Further litigation had occurred over Gary’s access during the periods he was back in New Zealand, and very detailed court orders were now in place. Tom’s ex-wife had reapplied to the court to reduce his access. He had countered this with an application for custody and was awaiting a court date. Children’s legal representatives and specialist report writers were reappointed by the Family Court in these three cases, and also in Nick and Jane’s Family Court rehearing and appeals.

Five parents (23%) anticipated that court proceedings might occur in the future over such matters as child support, choice of secondary school, shared care or a reversal in custody.

Relationship formation and transition was also a significant feature by the time of the follow-up interviews. Four parents (18%) had remarried, as had
Tim’s ex-wife. A further five parents (23%), and Stella’s sister, had repartnered. One father had separated from his de facto partner. One parent had had a baby with her new partner, and several others had become step-parents to their new partner’s children.

X Discussion

The systemic factors raised by the participants in this study are highly consistent with those noted in the international research literature and in submissions to government and professional reviews of the family law system (ALRC & HREOC, 1997; Boshier et al., 1993; Family Law Pathways Advisory Group, 2001; HRSC, 2003; Law Commission, 1999, 2003, 2004; Ministry of Justice & Ministry of Social Development, 2001). In particular, consumers’ concerns about cost, delay and gender bias contribute significantly to their dissatisfaction with the Family Court and can detrimentally influence the nature of the agreements and orders they obtain. The cost of legal representation and other associated expenses (including private specialists and costs orders) was mentioned by 68% of the parents. They found this expenditure an enormous drain on their financial resources and 18% of the parents said they settled their case to avoid incurring further debt, while two others chose to ultimately represent themselves.

The length of time to resolve cases within the Family Court far exceeded the parents’ initial expectations and caused them considerable frustration. Fifty percent of the parents complained about the duration of their case, although some did acknowledge that they, their ex-partner, or a lawyer, were at times responsible for some delays. Nevertheless, the length of their cases was more usually the result of systemic pressures within an overloaded court striving to meet its workload demands. Several parents ‘gave up’ and settled with their ex-partner out of sheer exhaustion. Delay has been identified in several reports as the most dissatisfying and aggravating aspect of the family law system, so in this respect the New Zealand parents’ experiences were unfortunately consistent with those of other consumers (Boshier, 2004a; HRSC, 2003; Law Commission, 2003, 2004; Schepard & Bozzomo, 2003). However, this disappointing state of
affairs needs to be addressed as it seems evident that sophisticated case management systems are only having a limited impact in helping the Family Court cope with its expanded jurisdiction and ever-increasing caseload. Channelling cases through differentiated pathways, reserving the litigation track for complex family situations, may assist in both focusing the Family Court on its core role (Boshier, 2004b, 2004c) and in reducing the delays experienced by those utilising standard supported pathways (Family Law Pathways Advisory Group, 2001; Kuhn, 1998).

Perceptions of gender bias attributed to the Family Court in recent times reflect historical attitudes towards the division of parenting responsibilities upon separation or divorce. Fathers’ supreme authority over their wives and children was ultimately eroded as mothers’ secured greater equity in the parenting relationship and the welfare of the child principle was introduced and then elaborated upon by social scientists (Maidment, 1984; Piper, 2000). The courts could once be justifiably accused of being anti-women, but this perception has now reversed with fathers feeling as though they are the ones who have been marginalised to the fringes of their children’s post-separation lives (Hallett, 2002; Hawthorne, 2005; Parkinson & Smythe, 2005; Smart, 2003a). The underlying dissatisfaction of men with the Family Court was apparent in my study with five fathers expressing strong concerns about gender bias. All of them wanted to maintain significant ongoing and meaningful relationships with their children, but felt thwarted in this by a legal system that they experienced as favouring mothers. Their aspirations were highly congruent with the current expectation of parenting as a life-long commitment, and with the research evidence confirming the importance of fathers in children’s lives (Amato, 2004; Amato & Gilbreth, 1999; Smyth, 2005). Two mothers also sensed gender conflict within the Family Court, perceiving a trend towards the accommodation of fathers’ rights at their expense. Women more generally have also highlighted concerns about the court over power-imbalance issues and the enforcement of orders in the context of family violence (Chetwin et al., 1999; Law Commission, 1999; Morris, 1999; Neilson, 1995).
My findings revealed not just allegations of entrenched gender bias - with the court perceived by men as pro-mothers, or by women as pro-fathers - but also some other rather more modest, but nonetheless significant, gender-based concerns. Parents felt uncomfortable being outnumbered at counselling sessions or court hearings by people of the opposite sex, or by encountering professionals whose gender made it difficult for them to relate too. Several men also found they were the beneficiaries of gendered advice concerning the likely outcome of their applications. They resented being told that their applications were futile because fathers ‘did not stand a chance’ in the face of a pro-mother court. Workforce gender equity needs to be addressed within the Family Court, along with professional training to modify inappropriate attitudes towards fathers (Law Commission, 2003).

Nick’s ‘apron strings’ analogy was highly reminiscent of the ‘tender years’ presumption that previously operated in child custody disputes (Austin, 1994). Phil’s desire for mandatory shared care was a rather more modern representation of the current debate about whether or not presumptions should govern children’s post-separation living arrangements. Such a presumption has, however, been rejected outright in Australia (Australian Government, 2004; HRSC, 2003), Canada (Department of Justice, 2002) and New Zealand (COC Act 2004), and argued against in England (Kaganas & Piper, 2002; Smart 2003a), because of its generalised approach and lack of child-centredness.

Parental characteristics and behaviours, other than those attributable to violence, neglect, substance abuse and mental health concerns, hardly appear in the literature on family law proceedings. Yet this study unearthed some significant features among the adults that impacted upon the nature of the agreements they reached. Two mothers said that they were the ones who compromised in order to reach an outcome, and some professionals confirmed that they indeed exerted pressure on the most reasonable parent to achieve a compromise deal. One-third of the parents reported being exposed to the lies of their ex-partners throughout their court proceedings. Others were concerned that their ex-partner’s charm and plausibility would mask their true personality, while yet others disliked the way their ex-partner moved between professionals.
in an effort to locate people who agreed with their particular (often somewhat unreasonable) viewpoint. These interpersonal characteristics are worthy of greater attention in subsequent research as they are probably inflamed, or even sometimes initiated, by the distress of parental separation and may serve to exacerbate legal proceedings over the future care of children.

Family members’ knowledge of the law governing parental separation was very limited as both parents and their children had no prior experience of the Family Court and little understanding of its role. It was through their interactions with the family law system that they gained an appreciation of how it worked. Since this was occurring at a time of great personal anxiety and readjustment it could be difficult to properly comprehend (Day Sclater & Richards, 1995). Libby and Anna both found their lawyers had greater expectations of them than were truly warranted. The confusion, lack of understanding and imperfect grasp of legal knowledge has emerged in several studies (Davis, 2001a; Harland, 1991a; Maunsell, 1998) and points to the importance of better informing family members in the post-separation period. Pamphlets, websites (Boshier, 2004a), telephone helplines (Australian Government, 2003), court visits (Campbell, 2005), information meetings (Walker, 2000a, 2000b), intake interviews, early meetings with a court representative (such as the Family Court co-ordinator), community-based centres (Howard, 2005; Parkinson, 2005) and mentors have all been proposed as ways of achieving this.

The need for information to be tailored to fit the specific needs of the separating couple and their children appears to be essential, as a standardised approach fails to accommodate the varied agendas and requirements of people experiencing relationship breakdown (Walker, 2000b). Ways of successfully enabling children to access information also needs urgent attention as it is problematic to rely upon parents to pass written resources onto their children (Richards & Stark, 2000). More indepth information for both adults and children can be delivered through parent education programmes and support groups for children. The most successful overseas initiatives for parents, such as MDF in Australia (Dickinson et al., 2003) and various American programmes
(Amato, 2004; Kelly, 2000), operate over several weeks. The brief two-session
duration of the *Children in the Middle* programme, currently being implemented
through the Family Court (New Zealand Government, 2005), therefore appears
somewhat inadequate.

Despite the lack of prior knowledge about the family law system, many of
the parents in my study did exhibit a good awareness of key legal concepts -
particularly guardianship and the welfare of the child principle. However, some
misunderstood the status of any agreements they reached during counselling and
triggered court applications to remedy their inability to enforce the decisions
previously reached. It would therefore be desirable to better inform parents
about the legal effect of their agreements and orders, as well as their ability to
later amend these by agreement without further recourse to the court.

Three-quarters of the children were aware of their parents’ court proceedings
because either one or both parents had told them about these. However, their
understanding of the role of the Family Court could be quite obscure (Lowe &
Murch, 2001; Smith et al., 1997) because, as Ben (11) said, “if you’re not going
there you don’t notice it.” Instead “you just get asked questions” by various
professionals! Children’s indirect experience of the court did not preclude
several of them working out the court’s role, with Ben giving a most
sophisticated account of how legal representation and judicial adjudication
combine to identify “what would be best for the child.” Children’s knowledge
and understanding of the Family Court is another fruitful area for future
research, particularly in light of the more child-inclusive ethos now operating as
a result of the COC Act 2004 and the new opportunities emerging for children’s
more direct engagement in counselling and mediation services (Goldson, 2003;
McIntosh & Moloney, 2005).

Numerous studies have highlighted children’s desire to be more informed
about their parents’ separation and to play a greater role in the decisions over
their future living arrangements (Cashmore et al., 2005; Fitzgerald et al., 2003;
Pruett & Pruett, 1999; Smart, Neale & Wade, 2001; Smith et al., 1997). The
children in this study were no exception, and were supported in their aspirations
to contribute more directly by both their parents and the professionals. There
was strong acknowledgment of the fact that children are the ones who experience the daily reality of their parents’ separation, and who can generate creative options for their future care. The skill of adults in supporting and interviewing children was recognised as central to competently eliciting their views (Garbarino et al., 1992). While sociocultural concepts were not invoked by the adults to describe this process it was clear that opportunities for scaffolding children’s understanding and competence in the context of warm, reciprocal adult/child relationships was envisaged as the best means of ascertaining children’s views (Bruner, 1985; Rogoff et al., 1996; Rushforth, 1999; Smith, 1998; Tharp & Gallimore, 1988).

The terminology governing parenting disputes was considered problematic by several parents and professionals. Most wanted to remove the words ‘custody’ and ‘access’ as had already occurred several years previously in England and Australia. They felt an emphasis on co-parenting would help to promote agreement between ex-partners. The amendments to the terminology recently introduced in the COC Act 2004 are thus consistent with the views expressed in this study. However, one lawyer perceptively noted that their impact was likely to be minimal on parental and professional attitudes because a new normative culture for post-separation parenting had not emerged overseas when semantic changes had been made (Davis & Pearce, 1998; Dewar & Parker, 1999; Maccoby & Mnookin, 1992; Roades et al., 1999). Interestingly, some adults emphasised the name of the Family Court as a significant pointer to its proper focus. It was perceived as too narrowly focused on parents, when its orientation should instead be on families. This could be achieved through the adoption of child-inclusive practices within the court.

Professionals were especially critical of the unrealistic expectations parents held of the Family Court. They felt that some disputes centred around issues which were “just part of the territory of being parents” and that it was undesirable to expect the court to continue intervening in relatively trivial matters for which there was often no right answer. Ideally, agreements and orders should be flexible enough to accommodate changes in family arrangements and children’s needs over time. Furthermore, it was suggested that
the dispute resolution process should be working to strengthen and promote parents’ own competency to resolve ongoing issues either themselves or with the support of community-based agencies. An over-reliance on the court was not considered particularly helpful and only served to compromise its efficiency. However, in the New Zealand context, the lack of parenting plans, and the inadequate range of parent information, education and support programmes makes it difficult for parents to access these external resources to improve their ability to co-parent effectively as their children grow. In the absence of alternatives it is the Family Court to whom parents currently look for this assistance. Judges’ workload pressures make it very difficult for them to devote sufficient time to parents - hence new overseas models (such as the Columbus project) that draw more extensively on a collaborative interdisciplinary effort are becoming attractive (Murphy & Pike, 2003a, 2003b, 2004). The earlier identification of complex cases and intractable / vexatious litigants, with their subsequent processing through a specific court pathway would also assist (Smart & May, 2004), although some research questions the effectiveness of court procedures with such clients (Buchanan et al., 2001a; Trinder et al., 2003). New Zealand also currently lacks Special Masters programmes and other initiatives that could better assist with this time-consuming and needy sub-set of divorcing parents (Garon & Whitfill, 2003; Johnston, 2000; Kelly, 2001).

Two factors were found to primarily influence whether or not families were able to comply with their agreements and court orders over time. Five parents complained of their inability to enforce access orders either because of the gatekeeping tactics of the custodial parent or their ex-partner’s refusal to conform with their order and see their child. The court has long been considered too ineffective in dealing with such intransigence (Law Commission, 2002c, 2003), although more recent reforms to strengthen its enforcement powers (COC Act 2004) are consistent with international efforts to better manage breaches of court orders for parent/child contact (Bailey-Harris, 2001; Children Act Sub-Committee, 2001; Rhoades, 2003, 2004).

The other significant factor affecting compliance was changes in family circumstances. Sixty percent of the families had experienced either dramatic
(27%) or more modest (33%) changes by the time of their follow-up interviews. The former involved reversals in custody, while the latter mostly centred around reductions in the frequency or duration of contact visits. Only 40% of families had experienced no changes, although this did not mean their arrangements were necessarily satisfactory or unproblematic. Half of the parents had reconsulted lawyers, and seven of them had engaged in further litigation over their children’s care arrangements. Further court proceedings were anticipated in the years ahead by 23% of the parents. In addition, many families had also experienced relationship transitions, with 41% of the parents remarrying or repartnering between their initial and follow-up interviews and some becoming step-parents. These transitions are consistent with current demographic patterns in family reconstitution following parental separation/divorce in New Zealand (Dharmalingam et al., 2004; Pryor, 2005a). Furthermore, they match other research findings that reveal the impact of frequent formal and informal modifications to care arrangements on the durability of court orders (Buchanan et al., 1996; Depner, 2002; Maxwell & Robertson, 1993a; Smart et al., 2001; Smith et al., 1997; Smyth, 2004a). These trends highlight how unrealistic it is to remain preoccupied with the idea of final orders being issued by a court, since changes in family circumstances can quickly erode their ongoing applicability. The family law system needs to be flexible enough to build in periodic reviews and to better accommodate further changes and transitions across the family life course (Caruana & Ferro, 2004; HRSC, 2003; Parkinson & Smyth, 2003; Piper, 1997).

XI  Chapter Summary

Multiple factors have been identified by the parents and professionals in this study as impacting upon families’ ability to reach agreements or obtain court orders governing children’s post-separation care arrangements. Cost and delay were the most frequently mentioned concerns, which for some parents also contributed to their decision to compromise and accept, from their perspective, a less than ideal arrangement. Inadequate knowledge and understanding of the law, perceptions of gender bias, and irritation with the characteristics and
behaviours of their ex-partner were added considerations. Compliance was found to be significantly affected by parents’ ability to enforce their agreements and court orders, and by the frequency of changes in family circumstances over time.
Chapter Eleven

CONCLUSIONS

I  Introduction

The Family Court is arguably the most important court as far as New Zealand families are concerned, since it has the greatest potential to become involved in those transitions and experiences faced by adults and children from pre-birth to post-death. Significantly, the largest proportion of these cases involves those very parenting disputes explored within this thesis. Children’s post-separation care arrangements (and related guardianship matters) now account for 37.5% of the new applications to the Family Court each year, with 6% of these cases requiring a defended hearing (Boshier, 2005c). This chapter therefore assesses the role and performance of the Family Court, within an international context, in efficiently and therapeutically helping families to resolve disputes over the future care of their children. It also incorporates a new conceptual model for family dispute resolution. This sets those progressive elements of the current system alongside other necessary initiatives to fully integrate the principles and practices underpinning the Family Court with the research evidence, and clearly identified aspirations of the clients it serves. The thesis concludes with consideration of the policy and practice implications of my research.

II  Purpose of the Family Court

The Family Court has been instrumental in reducing the overlap and duplication of the previous multi-forum court system governing matrimonial and family matters. In this regard it has undoubtedly achieved the first of its two primary goals of more efficiently managing and determining domestic disputes, including those relating to the care of children. The delays currently beleaguering the court, and frustrating its clients, have little to do with the soundness of its fundamental role, but are rather more the legacy of its early success. Parliaments have been quick to expand the court’s jurisdiction and this, coupled with the demands of modern socio-demographic patterns and the wide-
ranging, often specialist inquiry, into many aspects of a child’s welfare and best interests, have negated the court’s ability - in the absence of sufficient resources - to readily respond to the issues arising from family relationship transitions. The Family Court’s overwhelming workload and three-fold increase in jurisdiction (to the current 19 statutes) has regrettably compromised the rationalisations initially achieved.

It remains doubtful that the Family Court can continue to focus its service delivery processes around the single-track pathway of counselling, judge-led mediation and defended hearings. Other countries have diversified their various family law pathways, boosted early intervention services for separating families via information, education, assessment and support programmes, and boldly experimented with initiatives designed to deflect parties away from lawyers and the court. New Zealand has yet to grapple with these process-related means of increasing the court’s efficiency and effectiveness, although some rudimentary steps are being taken to develop a court-based parent education programme and to pilot non-judge led mediation. Our tentativeness over reforms to Family Court processes, despite recommendations to this effect in two extensive reviews of the court (Boshier et al., 1993; Law Commission, 2003), can be attributed to concerns about their cost implications, and more critically, to the ongoing debate about the fundamental role of the court in the aftermath of parental separation.

Therapeutic justice - the much lauded second goal of the Family Court internationally - has experienced a vexed trajectory over the past quarter century in New Zealand (and elsewhere) and is at the heart of the current paradox bedevilling our Family Court. Given the extensiveness of our evidence-based knowledge about the impact of separation and divorce on parents and children, and the small number of studies now emerging which question the positive influence of legal and court proceedings on family members’ lives, the tension between the court’s ability to deliver a ‘therapeutic’ response and ‘justice’ is never more evident. Barry and Henaghan (1986) rightly claimed that the New Zealand Family Court “was born with a built-in identity crisis” (p. 84) because its primary function was conciliatory rather than adjudicative.
It is somewhat ironic that the very institution established to deliver therapeutic justice, namely the Family Court, is now itself regarded as failing in this respect. Rather than approaching this as a deficiency of the Family Court concept, it should perhaps instead be considered as a sign of its evolution. The pioneers of the unified approach looked to the Family Court as the means of humanising the law’s response to relationship breakdown. This was clearly achieved when account is taken of the historical background to divorce and child custody law, and the traditionally formal and adversarial approach of previous courts. However, 25 years following the establishment of the Family Court it is inevitable that new social pressures, professional tensions and resource issues will take their toll on its applicability to modern family disputes.

The majority of separated parents are able to reach agreement about post-separation financial, property and childcare issues either by themselves or with the professional assistance of lawyers and conciliation services. Yet a minority of difficult, conflicted, violent or intractable cases require judicial intervention. Efforts are now focused on how best to reconcile this highly diverse separating/divorcing population with the range of court and community-based services on offer, and to ideally use these services to prevent growth in that minority sub-group requiring time-consuming and costly court interventions.

Two alternative reform mechanisms appear to be emerging in response to the efficiency and therapeutic justice concerns about the Family Court. Firstly, the most radical paradigm, aims to remove lawyers and the law from the relationship breakdown industry and to instead elevate community-based alternative dispute resolution techniques like parent education, counselling and (child-inclusive) mediation as the means by which families resolve post-separation parenting disputes (Howard, 2005; Kelly, 2005; King & Piper, 1990; Parkinson, 2005). These reformers concede a limited role for the Family Court in the adjudication of complex or difficult cases, the protection of parties in cases involving conflict, abuse, violence and mental health issues, and in the enforcement and review of court orders. However, they are much more concerned with establishing processes whereby the majority of essentially cooperative parents with straightforward issues to resolve can be assisted by
professionals (primarily counsellors, mediators and psychologists) to achieve both an emotional divorce from their ex-partner and some clarity about a positive life path for them and their children. By divesting this process of the harmful effects of an adversarial approach, it is considered that these families will be much better placed to resolve issues co-operatively now and in the future, to maintain meaningful contact with their children (if not also with each other) and to avoid conflict. The difficulty is that there is, as yet, little research evidence - outside of mainly American studies on the effectiveness of parent information, education and mediation services - in support of this non-legalised approach, although the Australian child-inclusive mediation initiative appears promising (McIntosh & Moloney, 2005).

Other evidence reveals that the authority of the court is actually influential on separating couples and that they value the role of their lawyer along with the advocacy and protection afforded by the current legal system. Most of the complaints stem from the delays, the high cost of legal representation, perceptions of gender bias, parents’ inadequate knowledge about the impact of separation on themselves personally and on their children, a lack of awareness of the options available to them, the restricted range of therapeutic resources available to deal with emotional and mental health needs, and people feeling as though they are not able to tell their story or to be understood and responded to in a way which is meaningful to them.

An alternative, more modest, approach to reform involves a reassertion of faith in the central role of the law in resolving family relationship disputes (Boshier, 2004c, 2005a, 2005b; Dewar, 1997; Eekelaar, 1995; Henaghan, 1998, 2002b). In the realm of meanings, it is said the law can play a particularly important role:

... it provides a site where meanings can be defined, contested and challenged. Law is also a source of meanings either through the confirmation of established norms, or the legitimation of new ones. (Smart, 2003b, p. 22)

There has long been a prominent assumption that divorcing couples “bargain in the shadow of the law” (Mnookin & Kornhauser, 1979, p. 950). This implies
that they bargain and negotiate against the background of what a judge in court would order if called upon to do so. Others argue that there are multiple sites of legal interpretation and that the law, in fact, casts multiple shadows rather than a single shadow (Dewar, 2000; Ingleby, 1992), or, alternatively, no shadow at all (Jacob, 1992). The parents in this study certainly seemed cognisant of the authority of the law and enthusiastic about its ability to help them settle their differences. Family law reflects its historical development and remains a prominent part of the ecology of societal institutions and family life. Lawyers are well-established as the gatekeepers of separation/divorce advice and advocacy and act as an important conduit to conciliation and court services. They have ingeniously adapted their practice (for example, through counsel-led mediation and collaborative law) to retain their central role in this field, and the confidence of their clients and the legal aid funding authorities, in the face of some Commonwealth policy initiatives to eliminate or minimise their role.

Nevertheless, evidence has emerged of the tendency for legal processes to exacerbate rather than resolve parental disputes about the care of children. The parents in my own study found affidavits, court applications and lawyer/client communications problematic in this respect. Trinder et al. (2002) noted similar concerns in their study of contact disputes. Yet an out-of-hand dismissal of the legal process masks the unique contribution the law and courts have played, and can continue to play, in post-separation dispute resolution. Eekelaar (1995) argues that research falls “far short of establishing a case for marginalising legal involvement, let alone abandoning it” (p. 198). Family lawyers have been remarkably successful in achieving out-of-court settlements and the ‘bad press’ about the legal system may be driven by caricatures of it as wholly adversarial when, in fact, this aspect of it is primarily reserved for those complex cases deservedly on a litigation pathway:

Eckelaar (1995) and Henaghan (1998) both believe that the continued application of a legal framework in post-separation parenting matters offers the following distinct advantages:

- the introduction of normative standards to provide guidance about the appropriateness of coercive interventions;
- the provision of fair and just procedures; and
- the transparency of rules put forward for critical public justification within the courts.

Such rules operate silently when used or imposed by community-based practitioners, are more vulnerable to individual biases and values, and are insulated from independent scrutiny. “It is precisely because there is disagreement, socially, politically and psychologically as to what is best for children, that the law provides the crucial role of drawing a line” (Henaghan, 1998, p. 7). The success of projects like Majellan, Columbus, the CCP and the Auckland Docket, in revealing the encouraging role that registrars and judges can play in the early management of children’s cases, illustrates the helpful exercise of the Family Court’s authority.

Those reasserting the significance of the law in family transitions are mindful of the need for a more therapeutic response to counter the dissatisfaction experienced by legal and court consumers. However, their answer is not to abandon justice in favour of a purely therapeutic response as they consider there is no evidence that social scientists would do any better than lawyers and judges. Instead, they prefer to see the existing multidisciplinary approach built upon to offer multiple pathways depending on client need, and to see the litigation pathway reinforced by clear and strong substantive law. They accept that while family disputes should continue to be resolved within a legal framework, there is no necessary presumption that the Family Court should ordinarily be involved. This, in fact, represents the current reality for the majority of separating couples, but their disillusionment with the court is confounded by a misunderstanding of its conciliatory and adjudicative functions. The Family Court may therefore be being unfairly maligned by these
clients because their access to conciliation processes is currently exclusively governed by it.

Setting the Family Court up to deliver therapeutic justice has created an impossible tension between the role of the court as a court of law or as a social agency (Boshier, 2004c; Jefferson & Parsons, 1998). Essentially the two alternative reform paradigms recognise the dilemma involved in having the Family Court straddle both the therapeutic and the judicial elements in the face of an onerous workload, an inadequate range of conciliation services, and public and consumer aspirations to more efficiently and humanely meet the diverse needs of separating parents and their children. Boshier (2004b) is of the view that the court has created a rod for its own back by becoming too accessible and user-friendly:

Have we permitted too many cases to return to Court time and time again on the most trivial of matters because the Court is seen as having a supermarket capability? Answers are sought from judges on everything from choice of school to choice of surnames. (Boshier, 2004b, p. 14)

The Family Court professionals who participated in the focus group interviews shared a similar perception that the Family Court was too exposed to the unreasonable and trivial demands of its clients. Being clearer about which cases require court intervention will improve the family law system’s ability to respond in a more respectful and timely manner. This will also help to clarify which parts of the system undertake which functions. A narrowing of role is clearly envisaged, although yet to be endorsed by the New Zealand Government:

The Court should be concerned with dispute resolution and making decisions. It should not be concerned with addressing the therapeutic needs of the litigants. Unless we get this right, there is a misunderstanding on what the real role of the Family Court is and whether it is a Court in which the laws of the country are applied and enforced or whether it is all things to all people, including a social agency. (Boshier, 2004c, p. 11)

Judge Boshier argues strongly for the removal of information, education, counselling and conciliation processes from Family Court oversight, leaving the court with improved early intervention and dispute resolution pathways. New
Zealand is unlikely to adopt the separate conciliation service previously recommended (Boshier et al., 1993), nor the Australian Family Relationship Centre model, because of their financial and resource implications. However, it is realistic, and in line with research evidence and consumers’ and practitioners’ views, to more clearly demarcate the self-help, supported and therapeutic pathways from the litigation and judicial ones. Nevertheless, this should not be at the expense of ignoring the court’s essential welfare function (Richards, 1996), nor overly restrict judges to an exclusively adjudicative and enforcement/review role. Judges can clearly play an important role in the early management of children’s cases and transfer their valued authoritative role from judge-led mediation to new settlement conferences and the like.

Twenty-five years following the Family Court’s inception it is timely to clarify the dilemma inherent in the phrase therapeutic justice. While this may resonate nicely in theory, it has become a source of exasperation - for clients and professionals alike - in practice. The court can no longer adequately heed both elements and should clarify its core role to avoid unrealistic expectations continuing to be placed upon it.

III A New Conceptual Model

The parents participating in this study did recount satisfying experiences with the professionals and services they encountered within the Family Court. However, as the quotes below signify, the analogies they drew to describe their legal journey overwhelmingly focused upon negative images:

Once somebody has applied for custody, you have to have a result. It’s either a fight for him to have it, or me to have it, or we both have it. (Tina)

I was always on the back foot, because he’d take some unilateral action and then I’d end up having to fight it. (Anna)

Being caught up in the legal system is like being in a tornado. … I felt everything was happening - it was just taken out of my hands. I just let it run its own course. (Harry)

It was just like you get into this steam roller and it sounds like that’s what you do next. (Libby)
I couldn’t see the wood for the trees at times and I wasn’t told about what may happen. It was just day by day, just boxing on a day at a time. (Robbie)

With the Family Court you are basically thrown in the deep end. It really was like entering a dark room. (Kathy)

It went straight to warfare. (Phil)

We were in the bloody trenches with our hard hats on. (Nick)

The court thing is all set up to suit the court and the people that work in it. It’s not about the individuals. It’s about some smart mouth trying to be smarter than the other smart mouth, and the bloody judges let them. (Gary)

To help redress this I have developed a new conceptual model for family law dispute resolution processes governing the post-separation care of children (see Figure Two).

This model emphasises parenting and family life as processes across time, rather than being dictated by those legal agreements or orders determined in a court at a sole point of relationship crisis. The international research evidence, supported by the experiences of the families in my study, reveal the ongoing challenges and further transitions that parents and children face beyond the separation which triggered their initial involvement with the Family Court. Flexible guidelines, rather than final adjudications, need to be promoted by the court so that families can adapt their children’s care arrangements to accommodate changed family circumstances without subsequent recourse to the court.
The significance of kinship and friendship networks in supporting separated parents and their children, offering informal advice and information, and influencing their engagement with professionals, should not be underestimated. They can act as a buffer to ameliorate the adverse effects of parental separation on parents and children alike. Similarly, support services (counsellors,
mediators, health, welfare and education personnel) and professional services (lawyers, lawyers for children, specialist report writers, judges and the Police) represent the human face of investigation, assessment, therapeutic, conciliation and litigation networks within the community and within the Family Court. They, too, can act as buffers to help restore family well-being and manage any identified risk factors (including family violence, child abuse, substance abuse and mental health issues). In ecological theory (Bronfenbrenner, 1979), these kinship, friendship, support and professional services microsystems act as mesosystems connecting the family microsystem to these informal and professional support services and interventions. The stronger and more complementary these links, the more positive their impact will be on the family.

Differentiated pathways, tailored to provide parents and children with options depending on their need for self-help, supported or litigation tracks, offer the most responsive approach to families in transition. They also increase the likelihood that the Family Court can focus on its core role and overcome the current confusion in clients’ minds about the conciliation and adjudication functions.

The Family Court has a clear role in the management, determination and enforcement of cases involving identified risk factors in complex and difficult cases, and where intractable and vexatious litigation appears likely. Once agreements and orders are made, the Family Court must take some responsibility for explaining the status and implications of these to its clients, and in providing post-order support to assist with their implementation. Lengthening the appointment of lawyers for children and report writers, as well as facilitating referrals to therapeutic services, will enable a smoother transition from the court to the reality of post-order daily family life and increase the likelihood of compliance with court outcomes.

The conceptual model also recognises the broad ideological and institutional elements of family law operating within the macrosystem. These include domestic laws and statutes, the Treaty of Waitangi, and international law, especially the UNCRC. The significance of court and professional policies, case
management practices and important legal principles, like natural justice and financial equity between separating parents, are noted. So too, are the ideal range of family law interventions, commencing with information, advice, education, support, assessment and referral and then moving onto more formalised procedures such as legal negotiation, counselling, mediation, hearings and appeals. Client satisfaction with these service delivery components needs to be regularly monitored and evaluated.

Family members’ desire to feel heard, understood and respected has been a significant theme in the research literature and in the voices of the participants in my study. It is vital that the current attention on children’s views and participation does not eclipse adult clients’ aspirations in this regard. Creating the space for parents to have their say will do much to humanise the legal response to family transitions and to increase their satisfaction with the court.

One of the important transformations that is currently occurring in thinking about childhood is in relation to children’s citizenship. Its genesis is in the rights-based discourse of the UNCRC (and human rights more generally), as well as the contemporary conception of children as agents or social actors. Smart (2003a) initially applied the concept to children within the context of their family, arguing that this gave them a quite different place in the family to that experienced by children in previous centuries as they now had a “meaningful ‘speaking part’ in their everyday lives” (p. 35). More recently, the notion of children’s citizenship has been embraced in civic settings where law, policy and practice is created and put into effect. One of its compelling features is its reinforcement of an unconditional status for children as they “do not become any more deserving of recognition, respect and participation simply by virtue of growing older” (Neale, 2004, p. 13). Section 6 of the COC Act 2004, concerning the expression of children’s views within Family Court proceedings, already reflects this new ethos, and the court could give greater consideration to the merits of this concept for other aspects of its work in children’s cases. The citizenship notion could, for example, help “to alter the culture of adult practices and attitudes in order to include children in meaningful ways and to listen and
respond to them effectively” (Neale, 2004, p. 9). This is as applicable to parents as it is to Family Court professionals.

The welfare and best interests of the child has been widely regarded as an indeterminable standard, but the very fact that it is open to differing interpretations may actually be its greatest strength:

Not only can the principle be the vehicle by which the law takes account of the particular circumstances of each case, but also interpretation of the principle can be the means by which social change is either adapted to, or else ‘engineered’ in, a desirable direction. The indeterminacy of the provision also helps to avoid the need to draft unambiguous – but politically contentious – statutory provisions. (Day Sclater & Piper, 2001, p. 412)

Woodhouse (1999), too, argues that the future of the law governing children’s post-separation care arrangements lies in perfecting the principle, “not abandoning it for simpler alternatives that lack a child-centered justification” (p. 815). The welfare and best interests of the child principle remains at the heart of the COC Act 2004 and has already accommodated a more explicit imprint of children’s views and rights as a result of the passage of this Act.

The Family Court generally operates in a theoretical vacuum, probably because its concerns are at the more pragmatic level of coping with the deluge of emotionally charged cases requiring its attention. However, the conceptual model acknowledges the influence of existing jurisprudential and psychological theories on the nature of the law and the assessment and understanding of child development and family dynamics. What the model adds are the sociocultural, ecological and sociological theories outlined in chapter five as offering a promising theoretical framework for the Family Court and professionals’ styles of practice with family members. These discourses are consistent with the court’s recently enhanced focus on children’s agency and participation, and on its desire for an early collaborative and interdisciplinary response to family transitions. They can also help to underpin those new child-inclusive models of practice to which the New Zealand Family Court must shortly turn its attention, and for which the sociocultural concept of scaffolding will be highly relevant.
The tensions discussed throughout this thesis are an important component of the new conceptual model for they depict those cutting-edge issues facing the Family Court as it strives to resolve its ideal future role. I have identified five tensions: whether or not conciliation services should remain within or external to the Family Court; whether the Family Court is a social agency or a court of law; how a balance is achieved between the application of presumptions (rules) and a discretionary approach to individual family circumstances and the welfare and best interests of each child; how children’s agency and right to express a view and to participate in family and court decision-making processes also recognises their dependency on adults (especially parents) and need for safety, security and protection; and, finally, how the Family Court can straddle the efficient delivery of its services without compromising their effectiveness. Addressing these tensions is critical if the New Zealand Family Court is to remain a world leader.

IV Policy and Practice Implications

Three key policy and practice implications arise from my research.

Firstly, there is a need for a clearer demarcation between the Family Court’s conciliation and adjudication processes. The recent reform emphasis within New Zealand has been on the substantive law governing children’s post-separation care. Now that the COC Act 2004 has taken effect it is timely to turn attention to the dispute resolution processes and pathways which separated parents travel in their quest for certainty about their children’s future living arrangements. This is where the effort has been directed in other countries, including England, Canada and, most notably, Australia. New Zealand has lagged behind these international developments in the reform of the family law system and Family Court processes, although we have had the benefit of previous recommendations to this effect (Boshier et al., 1993; Law Commission, 2003).

Secondly, professionals’ styles of practice need to take better account of clients’ preferences and to reflect the theoretical and research evidence now available on those modes of interaction which enhance well-being and
satisfaction, and contribute timely and relevant information to the court. Participatory processes and the role of professionals in scaffolding clients’ understanding through collaborative partnerships, characterised by reciprocity and warmth, offer new opportunities to improve family functioning and the quality of decisions made, as well as to enhance professionals’ own role satisfaction.

Finally, the Family Court needs to adopt a more expansive research agenda and invest in a range of studies evaluating aspects of its service delivery from the perspectives of its consumers and its staff. The Law Commission (2002a) has previously noted its reservations about the lack of basic information on the court’s functioning, and it is lamentable that much of the research on the New Zealand Family Court is now over a decade old. Demographic and cultural challenges, as well as those posed by the conceptual tensions facing the court, will only exacerbate the need to evaluate the ongoing effectiveness of this institution. There is also considerable merit in further research exploring ex-partners’ and children’s perspectives on Family Court dispute resolution processes, particularly where these can be linked with court file analyses. Such studies will help to elucidate the opportunities for shared meanings within family contexts and how the Family Court fosters or inhibits these.

V Conclusion

The New Zealand Family Court is blessed with considerable advantages: in international terms it serves a relatively small (but increasingly diverse) population; it interprets and administers nationally applicable statutes, which, with the exception of the Adoption Act 1955, are modern and appropriate; it lacks the complexity of state and federal government; and it has a 25 year legacy of experience as well as a nationwide pool of specialist professionals. It is hard to avoid the conclusion that our Family Court is at the leading edge of international developments in family law, particularly in the spheres of cultural responsiveness, family violence, children’s legal representation, and the ascertainment of children’s views. To capitalise on these strengths, and to counter the culture of dissatisfaction and disillusionment which has arisen
amongst many of its clients, the court’s next phase of development must centre on clarifying and diversifying its dispute resolution processes and reorienting its professionals’ styles of practice to reflect the theoretical principles and empirical research findings highlighted throughout this thesis. This would make it so much more likely that the problematic dimensions of the current system, with their adverse implications for post-separation family well-being, could be overcome.

The essence of my thesis has been eloquently captured by a mother who participated in the study. Linger over her words and contemplate how the Family Court could be so much closer to achieving therapeutic justice if we would only heed her message:

I found the Family Court incredibly intimidating. You know that feeling when you just want to wet your pants. My lawyer showed me the list of questions she was going to ask [my ex-husband] in the Family Court and I felt sick because I thought if she is writing questions like this for him, which all it’s going to do is show him in a very poor light, then no doubt his lawyer has done exactly the same. And I didn’t want to see him saying those things about himself, and I didn’t want to be saying those things about myself because I think that’s all incredibly negative. Somehow I think there must be a way where you are asked to say the good things about your ex-partner and there’s almost a reward for being able to think of the good things. Because when you can change your mind about your former partner then it also becomes part of how you feel. If you’re always saying negative things, and I think that’s the problem with taking things to court, because if you start thinking about the positive you are shooting yourself in the foot. I was saying these nice things about [my ex-husband], and my lawyer would say ‘well, that’s not actually really that helpful, because you really only want to focus on the reasons you think the children shouldn’t be with him. You’re not really here to help his case.’ And I think that it is really important to get yourself thinking good things about the other person. I want to have a life long relationship with my children’s father that is constructive and positive and I think it was incredibly damaging having those several years of only being hassled and made to think bad things. I really needed someone tapping me on the shoulder saying ‘hey, remember when he did that, remember when he did that.’ (Libby)
References


Attorney-General’s Department. (2001). *A child-focused professional development program for family law practitioners and other providers of dispute resolution assistance to separating families* (Background briefing paper). Canberra: Attorney-General’s Department.


Boshier, P.F. (2004a, July 15). *The Family Court and the future* (Speech by the Principal Family Court Judge). Law Faculty, University of Otago, Dunedin.


and the Rights of Children and Youth held in association with the 1997 Annual Conference of the Association of Family and Conciliation Courts, San Francisco.


Campbell, A. (2005, February). ‘Like stubbing your toe and then suing the ground’: Children, their rights and their ability to participate in decisions that directly affect them. Paper presented at the 9th Australian Institute of Family Studies Conference, Melbourne.


Family Law Section of the New Zealand Law Society. (2001a, June 7). *Response to article ‘Court of injustice’.* Letter to the editor of North & South.


Institute of Public Policy at AUT, Children’s Agenda, & UNICEF. (2002). *Making it happen: Implementing New Zealand’s agenda for children*. Wellington: Institute of Public Policy at AUT, Children’s Agenda, & UNICEF.


Lee, A. (1990). *A survey of parents who have obtained a dissolution* (Family Court custody and access research report two). Wellington: Department of Justice.


Murphy, P., & Pike, L. (2002). Columbus pilot project evaluation: First interim report (Report prepared for the Family Court of Western Australia). Perth: School of Social and Cultural Studies at the University of Western Australia, and School of Psychology at Edith Cowan University.

Murphy, P., & Pike, L. (2003a). Columbus pilot evaluation: Report of stage II cost/outcome analysis and stakeholder feedback (Report prepared for the Family Court of Western Australia). Perth: School of Social and Cultural Studies at the University of Western Australia, and School of Psychology at Edith Cowan University.


Parkinson, P., & Smyth, B. (2003, February). *When the difference is night and day: Some empirical insights into patterns of parent-child contact after*


**Statutes**

**Australia**
Family Law Act 1975
Family Law Reform Act 1995

**Canada**
Ontario Juvenile and Family Courts Act 1934
Provincial Courts Act 1968
**England and Wales**
Children Act 1989
Courts Act 2003
Custody of Infants Act 1839 (Talford’s Act)
Custody of Infants Act 1873
Family Law Act 1996
Guardianship of Infants Act 1886
Guardianship of Infants Act 1925
Matrimonial Causes Act 1857

**New Zealand**
Adoption Act 1955
Adult Adoption Information Act 1985
Births and Deaths Registration Act 1951
Births, Deaths and Marriages Registration Act 1995
Care of Children Act 2004
Child Support Act 1991
Children’s Commissioner Act 2003
Children, Young Persons and Their Families Act 1989
Civil Union Act 2004
Destitute Persons Ordinance 1846
Destitute Persons Act 1910
Divorce Act 1898
Divorce and Matrimonial Act 1881
Divorce and Matrimonial Causes Act 1867
Divorce and Matrimonial Causes Amendment Acts 1907, 1920, 1922, 1953
Domestic Proceedings Act 1939
Domestic Proceedings Act 1968
Domestic Protection Act 1982
Domestic Violence Act 1995
Family Courts Act 1980
Family Courts Amendment Act 1991
Family Proceedings Act 1980
Family Protection Act 1955
Family Protection Amendment Act 1991
Guardianship Act 1968
Guardianship of Infants Act 1926
Infants’ Guardianship and Contracts Act 1887
Infants Act 1908
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003
Law Amendment Act 1882
Law Reform (Testamentary Promises) Act 1949
Law Reform (Testamentary Promises) Act 1991
Marriage Act 1955
Married Women’s Property Act 1870
Matrimonial Proceedings Act 1963
Matrimonial Proceedings Amendment Act 1968
Matrimonial Property Act 1976
Mental Health (Compulsory Assessment and Treatment) Act 1992
Property (Relationships) Act 1976
Protection of Personal and Property Rights Act 1988
Status of Children Act 1969
Status of Children Amendment Act 1987
Status of Children Amendment Act 2004

Scotland
Children (Scotland) Act 1995

United States of America
Standard Family Law Act 1959

Conventions

Treaties
Treaty of Waitangi 1840

Cases

* Austin v Austin* (1865) 55 ER 634
* Barnado v McHugh* [1981] AC 388 (House of Lords)
* Bolton v Bolton* [1928] NZLR 473
* Cubitt v Cubitt* [1930] NZLR 227
* Epperson v Dampney* (1976) 10 ALR 227 per Street CJ
* G v B* (19 August 1998, FC Hastings, FP 020/420/95)
* Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112
* In re Agar-Ellis* [1883] 24 Ch D 317
* In re Mills (An Infant)* [1928] NZLR 158
* In re Taylor* [1876] 4 Ch D 157 per Jessell MR
* In re Thain (An Infant)* [1926] 1 Ch 676
* K v K* [2005] NZFLR 28 per Heath and Venning JJ
* Otter v Otter* [1951] NZLR 739
* Palmer v Palmer* [1961] NZLR 129
* Parsons v Parsons* [1928] NZLR 477
* R v Nash* (1993) 10 QBD 454 (CA)
* Re Hylton* [1928] NZLR 145
* Re JH and LJ Thomson (Infants)* (1911) 30 NZLR 168
* Re T (Custody and Guardianship)* [2000] NZFLR 594
* Salaman v Salaman* [1923] NZLR 454 (CA)
* Tavita v Minister of Immigration and A-G* [1994] 2 NZLR 257
* Van Der Veen v Van Der Veen* [1923] NZLR 794
* Warde v Warde* (1876) 41 ER 1147
Practice Notes

Family Court Caseflow Management Practice Note – issued September 1998; currently under review.


Family Court Counsellors – issued 10 August 2001; took effect 1 September 2001.
Appendix A

Letter to Parents (Family Court A)

May 2001

Dear Parent

Re: Family Court Research Project

Recently [name], the Family Court co-ordinator at [Family Court A], phoned you to talk about some research the Children’s Issues Centre is doing. We are talking with families who have recently finished a custody and/or access case in the court, and would like to invite you and your child to help us with our research.

We are interested in how you felt about the way your case was decided and how you have followed your court order or agreement. A pamphlet is enclosed to tell you more about the study.

[The co-ordinator] has phoned you and sent you this letter on our behalf, to see if you are interested in the research. We have not had access to your court records or to your name, address and phone number.

Please contact me on our toll free number 0800 433 999 if you would like to take part in the study or learn more about it. Otherwise, you could fill in the tear-off section of the pamphlet and send it to me. Then I will contact you.

I look forward to hearing from you.

Yours sincerely

Nicola Taylor
Senior Researcher

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix B

Letter to Parents (Family Court B)

June 2001

Dear Parent

Re: Family Court Research Project

The Children’s Issues Centre is doing a research study talking with families who have recently finished a custody and/or access case in [Family Court B]. We would like to invite you and your child(ren) to help us with our research.

We are interested in how you felt about the way your case was decided and how you have followed your court order or agreement. A pamphlet is enclosed to tell you more about the study.

The Family Court co-ordinator has sent you this letter on our behalf, to see if you are interested in the research. We have not had access to your court records or to your name, address and phone number.

If you are interested in participating in the study or learning more about it then please contact me on our toll free number 0800 433 999 sometime during June/July. Otherwise, you could fill in the tear-off section of the pamphlet and send it to me. Then I will contact you.

I look forward to hearing from you.

Yours sincerely

Nicola Taylor
Senior Researcher

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix C

Brochure: Custody and Access Matters: Families, Dispute Resolution and the Family Court

_The Children’s Issues Centre is carrying out a study on how custody and access matters are resolved through the Family Court. We are particularly interested in how parents, children, lawyers, report writers and judges feel about the ways in which decisions are made about where children will live and how they will have contact with each parent after separation or divorce._

**Why is the Study Important?**

Family Court orders affect some parents and their child(ren) every day. Yet, families have not previously been asked about the sorts of things that affected whether they felt heard, understood and respected in the Family Court, and how these impacted on whether or not they followed their agreements or the order(s) made by the court. It is important that we find out about this as sometimes lawyers and judges, who are familiar with the Family Court, see it differently from how it appears to people who are new to legal processes. Understanding how families and professionals feel about court services will enable the Family Court to better assist families when it is making custody and access arrangements for their children.

**What will the Study Involve?**

Our study involves talking with parents and children who have recently finished a custody or access case in [Family Courts A, B and C]. The case could have concluded as the result of agreement being reached between the parents, the withdrawal of an application, or the issuing of a court order.

We would like to speak with 24 families who have a school-aged child. Twelve families will be sought from each area. With parents’ permission we would also like to speak with their child(ren) who are aged five years and over to find out their feelings about the legal process. Children will also be asked if they are willing to participate.

Parents who agree to take part will be interviewed during 2001, at a convenient time and place, and again twelve months later. The first interview will take about one hour and will be tape-recorded. We will talk about how each parent saw the issue they wanted to decide, what they hoped lawyers and the court would do for them, which services they used from the court, the outcome, and how they felt about the agreement or the order reached. In the second interview we will ask how they have followed their agreement/order and whether it has met their needs and those of their child(ren). If any changes were made we will be interested to learn how these came about.

Children will be interviewed for about half-an-hour to an hour. This interview, like those for their parents’, will be carried out privately in a one-to-one
situation, either at home or in another venue suitable to the child. An experienced and qualified interviewer will interview the children. Children will be asked what they knew about the legal process, whether they were given an opportunity to be involved in any way, and how they felt about the process and the outcome. We would also like to tape-record these interviews if each child is agreeable.

After the first round of interviews with parents and children have finished the major themes they have raised will be identified. Judges, lawyers and specialist report writers from [Cities 1 and 2] will then be invited to attend a small group discussion in their area to comment on the general information provided by family members. These professionals will not know which families took part in the study, and no confidential details will be revealed. They will be asked to comment on the issues raised by family members because we think it is important to get both family and court professionals’ views on the way custody and access arrangements are resolved.

How will Participants’ Privacy be Protected?

The researchers will follow strict guidelines for confidentiality and will not have access to any court records. Material taken from the interview transcripts and group discussions will never be used in any way which would enable individuals to be identified. Only the person who undertakes an actual interview will know the real names of participants. The transcripts will have a numerical code rather than a name on them.

Participation in the research is voluntary and participants have the right to withdraw at any stage. The results of the research will be made available to the Family Court and will be published in journals. Family members and professionals participating in the study will be given a summary of the results when the research is completed, and can have a copy of the complete report if they wish. The information collected will be securely stored at the Children’s Issues Centre for five years and then destroyed.

None of the information provided for this study will be able to be used in any Family Court proceedings. The research project has been approved by the Ethics Committee of the University of Otago, the Principal Family Court Judge and the Department for Courts.

What do I do if I want to take part in the study?

If you would like further information about the study or if you wish to participate please:

* Contact Nicola Taylor at the Auckland Office of the Children’s Issues Centre:

- telephone: 09 373 9717
- fax: 09 373 9701
• email: nicola.taylor@stonebow.otago.ac.nz

OR

* Freephone the Children’s Issues Centre at 0800 433 999.

Alternatively, fill out the form below and send it to Nicola. She will then contact you.

☐ I am interested in learning more about the custody and access study.
☐ I would like my family to participate in the custody and access study.

Name:
Address:
Phone:
Email:
Ages of children:

Please return to: Nicola Taylor, CIC, University of Otago Auckland Centre, P.O. Box 5543, Auckland.

What are the Centre’s Aims?

The Children’s Issues Centre aims to provide a national interdisciplinary forum for research into and discussion of children and young people’s issues, as well as resources and information for those involved with children, young people and their families. The Centre has an educational research and policy role and its main mission is to “monitor, co-ordinate, produce and disseminate information about children and young people’s well-being and healthy development”. The Centre was opened on 20 July 1995 through the joint support of the University of Otago and the Children’s Issues Centre Trust.

Mail: Children’s Issues Centre, University of Otago, P.O. Box 56, Dunedin
Tel: 03 479 5038
Fax: 03 479 5039
Email: cic@otago.ac.nz
WWW: http://www.otago.ac.nz/CIC/CIC.html
Appendix D

Potential Participant Information Sheet

Name: ____________________________________________________________

Address: _______________________________________________________  

________________________________________________________________  

Phone: ______________ Fax: _________________________________

Email: _____________________________

________________________________________________________________  

Child Details (names, ages, custody/access arrangements, location)

________________________________________________________________  

________________________________________________________________  

Name of custodial parent:

________________________________________________________________

Name of non-custodial parent:

________________________________________________________________

Other parent knowledgeable about study? Yes No

Contact Address / Phone for other parent:

________________________________________________________________

________________________________________________________________

________________________________________________________________

When did separation / divorce occur? ____________________________

When did Family Court proceedings conclude and how? ____________

Family Court Involvement: counselling mediation defended hearing
Counsel for the Child Appointed:  Yes  No
Report Writer (Psychologist) Involved:  Yes  No
Court orders made or agreements reached:

Comments:

Arrangements Made:

Date phoned: ______________________  Spoke to: ____________________
Appendix E

Consent Form for Parents

I have read the letter and brochure concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage. I know that:

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

3. The research team will be discussing the general preliminary findings from the family member interviews with groups of judges, lawyers and specialist report writers, but neither I, nor my child(ren), will be able to be identified.

4. The audio-tape of my interview will be destroyed at the conclusion of the project, but any raw data on which the results of the project depend will be retained in secure storage for five years, after which it will be destroyed;

5. This project involves an open-questioning technique where the precise nature of the questions which will be asked have not been determined in advance, but will depend on the way in which the interview develops. In the event that the line of questioning develops in such a way that I feel hesitant or uncomfortable I may decline to answer any particular question(s) and/or may withdraw from the project without disadvantage of any kind.

5. The results of the project can be discussed by the research team and may be published, but my anonymity will be preserved.

I agree to take part in this project.

.......................................................... .............................................
(Signature of Participant) (Date)

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix F

Consent Form for Parents re Their Child(ren)’s Participation

I am the parent of the following child/children aged 5 years or over:

Names of children: ........................................................................................................
.................................................................................................................................

Please tick appropriate box:

\( \square \) I give my consent for my child (or children) to participate in the *Custody and Access Matters: Families, Dispute Resolution and the Family Court* study. I understand that his/her anonymity will be maintained throughout the project and within any resulting publications, and that even if I give my consent now s/he can withdraw from the project at any stage.

OR

\( \square \) I do not consent to my child(ren) participating in this study.

.................................................................................................................................
.................................................................................................................................
(Signature of Participant) (Date)

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix G

Consent Form For Parents re Their Child(ren)’s Participation [incorporating passive consent clause]

I am the parent of the following child/children aged 5 years or over:

Names of children: ........................................................................................................................................
...............................................................................................................................................................
...............................................................................................................................................................

Please tick appropriate box:

ρ I give my consent for my child (or children) to participate in the Custody and Access Matters: Families, Dispute Resolution and the Family Court study. I understand that his/her anonymity will be maintained throughout the project and within any resulting publications, and that even if I give my consent now s/he can withdraw from the project at any stage.

OR

ρ I do not consent to my child(ren) participating in this study.

.................................................................................................................................  ...........................................
(Signature of Participant) (Date)

If we do not receive this form back by [3 week deadline] we will assume that you have no objection to your child(ren) participating in the study.

This project has been reviewed and approved by the Ethics Committee of the University of Otago

[Logo: UNIVERSITY OF OTAGO]
Appendix H

Consent Form for Children and Young People

I agree to talk to [name of researcher] about the legal proceedings my family has been involved with.

If I don’t want to keep talking to her I can stop, or turn the tape recorder off, at any time.

What we talk about will be private.

I am happy for the things I tell [researcher] to be discussed by the research team and written in any reports on this study, provided no-one can tell who I am.

Child’s Name: _________________________________________

Signature or Note of Oral Consent: _________________________

Date: _______________________

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix I

Letter to Family Lawyers (Family Court C)

10 August 2001

Dear

Re: Research Project – Families and the Family Court in Custody and Access Matters

The Children’s Issues Centre is currently undertaking a research study to examine family members’ experience of Family Court procedures in custody and access matters, and to ascertain the relevance for them of court proceedings and agreements/orders over time. We would like to examine the factors which influence family members’ expectations about, and approaches to, dispute resolution. We are particularly interested in the sorts of things that affected whether parents and child(ren) felt heard, understood and respected in the court, and how these impacted on the way their agreement or court order was followed. We have completed several studies on custody and access over the past five years, but this is the first time families have been asked about their participation in and satisfaction with legal proceedings and court services.

The research is being undertaken in three Family Court districts. We would like to recruit 24 families with children who have recently finished their custody and/or access case. The enclosed brochure provides more information about the study, which has been funded by the Foundation for Research, Science and Technology, and approved by the Ethics Committee of the University of Otago, and by the Principal Family Court Judge and the Department for Courts.

Our reason for writing to you is to see if you could assist us in finding families who may be interested in participating in the research. Obviously you cannot disclose to us which of your clients have recently completed a custody and/or access case, but we wondered if you would be prepared to send the enclosed letter and brochure onto relevant clients on our behalf. It would then be up to the parent to contact the Children’s Issues Centre if they wanted more information or to express their interest in participating in the study. If you are able to help us we would provide you with some pre-paid envelopes containing the letter to parents and the brochure. All you would need to do is address these and mail them to any of your clients who have recently finalised a custody/access case through either counselling, legal negotiations, mediation or a defended hearing.

We would greatly appreciate your help with finding families for this study. If you are able to assist or would like more information please phone me on 09 373 9717.

Many thanks.
Kind regards

Nicola Taylor
Senior Researcher

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix J

Letter to Parents (Family Court C)

September 2001

Dear Parent

Re: Family Court Research Project

The Children’s Issues Centre is doing a research study talking with families who have recently finished a custody and/or access case in [Family Court C]. We would like to invite you and your child(ren) to help us with our research.

We are interested in how you felt about the way your case was decided and how you have followed your court order or agreement. A pamphlet is enclosed to tell you more about the study.

Your lawyer has sent you this letter on our behalf, to see if you are interested in the research. We have not had access to your court or legal records, or to your name, address and phone number.

If you are interested in participating in the study or learning more about it then please contact me on our toll free number 0800 433 999 sometime during September/October. Otherwise, you could fill in the tear-off section of the pamphlet and send it to me. Then I will contact you.

I look forward to hearing from you.

Yours sincerely

Nicola Taylor
Senior Researcher

This project has been reviewed and approved by the Ethics Committee of the University of Otago
Appendix K
Parent Interview Schedule

Introduction

• Explain the purpose of the study.
• Confirm understanding of the use of a tape, right of withdrawal, publication, checking of quotes, consents.

Pre-separation

• Experience of participation in formal and semi-formal situations.
• Family decision-making pre-separation - did they discuss important issues as a family or did one person make most decisions?
• Were the children involved in family decision-making?

At the time of the separation

Their initial feelings about arrangements for the care of the child(ren):

• When the decision to separate was made what was their initial view about where the child(ren) should live and contact with the other parent? Why?
• What was the initial view of the other parent? What influenced this?
• At this stage did they discuss custody and access with the other parent? With anyone else?
• What did they tell their child(ren) and when? What did they know about their child(ren)’s feelings/views? What role did they expect their child(ren) to play in the decision making process?
• Did they consult any professional people – lawyer, counsellor, Family Court? What assistance did they expect professionals to provide?
• What did they know about the Family Court and the law at this stage?

Contact with Lawyers and the Family Court (utilise those categories which fit the parent’s situation)

Initial Visit to their Lawyer:

• What were their feelings about lawyers at this stage?
• When and why did they decide to see a lawyer?
• What did they hope a lawyer could do for them?
• What happened at their first meeting with their lawyer?
• What did the lawyer tell them about the law and what might happen in their situation?
• What did the lawyer suggest they should do? [negotiation, mediation, court etc]
• Did they feel comfortable talking with the lawyer? Were they able to say everything they wanted? Did the lawyer understand what was important to them? Did they understand what the lawyer said to them and why?
• How did they feel after the first meeting with the lawyer? How clear were they about what was going to happen next?
• What did they tell their child(ren) about the meeting with the lawyer?

Subsequent contact with their lawyer:
• Choice of best way to proceed – reasons why?
• Any change of expectation about what they hoped to achieve in the process?
• Any change in plans?
• What happened after they had met with the lawyer?

Contact with the Family Court:
• What did they know about the role of the Family Court did at this stage? How did they know this?
• What did they hope the Court could do for them?
• Did they know what their child(ren) thought about the involvement of the Court? What did the child(ren) want to happen about custody/access?
• Any referral to counselling? – expectation of what this would achieve, number of sessions attended and how these went, outcome, level of satisfaction.
• Subsequent involvement in dispute resolution processes:
  - Negotiations between parties and/or their lawyers - expectations, opportunities to participate, feel heard and understood. What was the outcome of negotiations between lawyers or with former partner? Level of satisfaction; explanation to children.
  - Mediation - expectations, opportunities to participate, feel heard and understood; outcome; level of satisfaction; explanation to children.
  - Was counsel for the child or a specialist report writer appointed? What contact did they or the child(ren) have with them? How satisfactory was this?

Judicial Mediation /Court Hearing:
• How did they feel about the matter going to the Court?
• Did they swear an affidavit? Who decided what should be in it? Were they happy with what was in the affidavit?
• What did they hope the Court could do for them?
• Did they know what their child(ren) thought about the matter going to Court? What did the child(ren) want to happen about custody/access?
• What was the most important thing for them about going to Court?
• Did the court room look how they expected it to?
• How did they feel about being there?
• Who was in the Court? What was their role?
• What happened in Court? Who spoke to whom? What did they say and why? Did they understand what was said? Did they get to speak? How did they feel about that? Were they able to say everything they wanted to? Who did they think were the most important people in the court? Who was in control? Did anyone talk about their child(ren)’s feelings or wishes? How did they feel about this?
- Did the judge give everyone who wanted to speak a chance to do so? Did the judge really listen to everyone? What did they think was most important to the judge? What did the judge decide? What do they think influenced the judge to decide this way?
- Who told them about the order of the Court? Did they understand what it meant for their family? How did they feel about the order? Was the hearing fair? Was the outcome what they had expected?

General

- Did somebody explain the agreement/order to their child(ren)? Who? How did they think their child(ren) felt about the agreement/order?
- How did they implement the agreement/order immediately following the conclusion of their case.
- What were the things they were happy about with the legal process? What things were they unhappy with? How could the process be improved?
- Any other perceptions of the usefulness of the process for them, their understanding of it and satisfaction with it.
- Is there anything else they wish to discuss about their custody and access proceedings?

Thank parent for their co-operation and discuss 12 month follow-up.
Appendix L

Child Interview Schedule

Hi, I’m [name of researcher]. I work at the Children’s Issues Centre at the University of Otago, in Dunedin. We’re talking with families who have asked the Family Court to help them work out where children should live and when they should see each parent after their parents have separated. The Court calls that custody and access.

Your parents have said that it is okay for me to ask you if you would like to help us with our study. I would like to talk with you about what you think about the Family Court and how decisions were made about who you live with and when you see your [access parent]. We’ll also be talking to your Mum and Dad, but we think it is really important that children and young people get to have their say about it all too. So that’s why we want to talk to you – so we can find out what you think about it all. That way we hope to be able to tell people who work at the court and lawyers what young people think to help them help other children better.

Everything you say to me will be private, just between you and me, and I won’t tell Mum, Dad, [siblings], or anyone else like your lawyer or the judge what you tell me. I will be talking to the people I work with about what we talk about but they won’t know your real name, because we give you a fake name. What we want to know is what you think so there are no right or wrong answers, and if there are any questions that you don’t want to answer just tell me. Sometimes children/young people have a lot to say about some things and nothing to say about other things so you can say as much or as little as you want to and it’s okay if you don’t know the answers – just say you don’t know. You don’t have to talk to me if you don’t want to and you can tell me if you want to stop at any time and we will.

What you and everyone else tells us will be written in a report which others can read. This will not have anyone’s names, and nobody will know it was you who said anything in the report because we’ll use your fake name. It is okay if you change your mind after you talk with me. If that happens before the report is written I will not use anything you have said.

Ask child if it is okay with them to talk to you. Show child the consent form and ask them to sign it.

Explain tape recorder and give child the option of turning it off if they want to.

Warm-up:
Start with some general warm-up questions about who is in the child’s family and where everyone lives – favourite tv programmes, pets etc.
Pre-separation:
Before your parents separated did you use to have a say in the decisions that were made in your family? What sort of things were they about? Did you get listened to/did what you think make a difference?

At the time of parents’ separation:
I’m just going to ask you a couple of questions about when Mum and Dad split up – is that okay?

How did you find out that Mum and Dad were separating?

What did Mum and Dad tell you when they split up?

Where did you live? When did you see [access parent]? Did you have a say about these arrangements?

How did you feel about the way these arrangements worked out?

Legal proceedings:
Did you know your parents were asking the Family Court to help them work out things like who you live with and when you see [access parent]? Who told you? When? What did they say? How did you feel about this?

What did you think about the decisions that were made about who you would live with and when you would see your [access parent]? What ideas did you have about what you would like?

Was there anyone you wanted to tell about what you thought/wanted?

Did you tell anyone about what you thought/wanted? Who? When? How did you feel about this? What happened? What did they say? How did they react?

Was there anything you wanted to say, but couldn’t? What stopped you?

When all this happened what did you already know about the Family Court and the legal things that happen?

Did anyone tell you anything about the Family Court and the legal things that happen? Who told you? What did they tell you?

Counsel for the Child:
Sometimes children and young people get a lawyer of their own to represent them in the Family Court.

Did you have a lawyer who represented you? / I heard you had a lawyer to help you [use lawyer’s name].

What do you think you had a lawyer for? Did you understand why you had a lawyer? Have you met your lawyer? How many times did you meet with the lawyer? What did the lawyer tell you about what was happening? Did you tell
your lawyer what you thought/wanted? Did the lawyer understand what was important to you? Do you know if the lawyer told the Judge [or anyone else] about what you thought/wanted/talked about? Was that okay with you for them to do that?

**Specialist Report Writer:**
Sometimes the Court will ask someone called a report writer to come and talk to the family and write a report for the Court.

Did you talk to a report writer? / I heard you met with a report writer [called “report writer’s name”].

What do you think you had to talk to [report writer] for? Did you understand why you had to talk to [report writer]? How many times did you meet with [report writer]? What did [report writer] tell you about what was happening? Did you tell [report writer] what you thought/wanted? Did he/she understand what was important to you? Do you know if [report writer] told the Judge [or anyone else] about what you thought/wanted/talked about? Was that okay with you for them to do that?

**Family Court Involvement:**
When everybody gets all the information and goes to the Family Court and tells the Judge about it all and the Judge decides what is going to happen that is called mediation or a court hearing.

What did you think was going to happen at the court? Did anyone tell you about what might happen?

After court was over did anyone tell you anything about what did happen there? Who? What did they tell you?

Did you go to the courtroom yourself? Did you ever talk with the Judge?

What did your parents and/or the Judge decide? Who told you about this? How did you feel about the decision? How has it worked out for you since? How happy are you about how it has worked out for you and your family? What do you think your Mum/Dad/siblings think about what was decided?

**General:**
What things did you like / dislike about the way the decisions were made about your custody and access arrangements? Can you think of a better way to make such decisions?

What advice / tips would you give to other kids whose families go to the Family Court?

What advice / tips would you give the adults who are involved? What do you think they should know about what children/young people think?

Is there anything that I haven’t asked you that you’d like to tell me about?
Do you want to ask me any questions?

Thank child / young person for their co-operation.
Appendix M

Letter to Parents Offering a Copy of their Interview Transcript

20 June 2002

Dear

Re: Research Interview Transcripts

I have now finished interviewing the adults and children participating in our study on custody and access proceedings in the Family Court. I remain most grateful for the time you spent with me last year when we completed your interview. The tape we made of that interview has now been transcribed and I would like to offer you the opportunity to receive a written copy. This can be just for your interest to read through, or if you wish to change any of the information included then this is possible too. It is these transcripts which I will use to write up the findings of the study.

I have already identified a number of key themes coming through from the interview material. The major concerns which were raised include:

- the lack of a holistic approach e.g. property and financial matters being dealt with in isolation from custody and access arrangements
- a fairly rapid escalation into family law proceedings with little opportunity to resolve matters outside the court system
- dissatisfaction with lawyers who were not family law specialists, who adopted an adversarial approach, or who focused on the adult issues without sufficient regard for the best interests of the children
- confusion about the various phases in Family Court processes – legal negotiation, counselling, mediation, defended hearings – and their purpose
- communication between parents not being well facilitated by Family Court professionals
- a perception that wider family members (e.g. grandparents) were excluded from the proceedings
- counselling not being helpful because of a parent’s attitude or the approach of the counsellor
- mediation conferences being conducted in a courtroom, rather than a more informal setting
- little account being taken of the room layout to accommodate a parent’s hearing disability
- constraints on the time counsel for the child and specialist report writers can spend with children and parents
- appointment of counsel for the child occurring too far down the track
- reports and expert evidence of specialist report writers being unintelligible to parents
o not feeling heard, understood or respected by lawyers, counsellors, report writers and judges
o little opportunity to put your side of the story; feeling that everything had to fit into legal boxes
o frequent adjournments and delays
o perceptions of gender bias – both male and female
o lack of continuity with different judges being involved in the mediation conference and then the defended hearing
o giving up because of sheer exhaustion with the personal and systemic stresses
o high cost of legal proceedings
o inadequate enforcement of agreements and orders

So, as you can see, a huge range of issues have come out of the interviews. The picture is not all negative – many people did comment positively on the assistance they received from various professionals associated with the Family Court. This primarily occurred when they felt they had a good relationship with a competent professional (whether this was a lawyer, psychologist, counsellor or judge), and had an opportunity to discuss the matters of concern to them. Being heard, understood and respected, and feeling the professional was taking a genuine interest in helping you to resolve the custody and access arrangements, was vitally important.

As I discussed last year, I would like to meet with you again around September this year to interview you about how the custody/access arrangements are going. This will be a much shorter interview, but it will provide some important information about just how well your involvement with the Family Court has worked out for you over time – i.e. have the agreements and orders been successful from your perspective? Have you had to return to your lawyer or to the Family Court about any further issues? I’ll be in touch with you during August 2002 to arrange this interview.

Meanwhile, I’d be grateful if you could let me know whether or not you want to receive a written copy of your interview transcript. Please don’t feel you have to have a copy, but we like to make this offer in case you are interested in reading or amending the transcript. Once we have written up all the information later in the year I will send you an executive summary detailing the key findings. Plus you will be welcome to have a copy of the full report if you would also like to receive this.

To contact me you can email me - nicola.taylor@stonebow.otago.ac.nz - or phone me on 09 373 9717, or write to me at the University of Otago, P.O. Box 5543, Auckland. I look forward to hearing from you about your interview transcript.

Kind regards

Nicola Taylor
Senior Researcher
Appendix N

Parent Follow-up Interview Schedule (One Year Later)

Explain how the study has progressed. Reconfirm consents, that the parent is happy for a tape to be used and understands about confidentiality and publication.

- Explain to the parent what I took from their first interview – e.g. key points and recommendations they made. Does this sound right?
- What messages do they remember being given by their lawyer, counsellor, judge, counsel for child or report writer – Is there anything they particularly remember being told by a Family Court professional - something which sticks in their memory?
- What did they expect from the Family Court?
- What has happened in relation to custody/access since our last interview? How closely does this resemble the agreement/order they obtained? How easy or difficult was it was to implement the agreement/order?
- If the agreement/order has not been implemented explore why? What arrangements are now in place, and how satisfied are they, the children and the other parent with these?
- If the agreement/order has been implemented - how satisfied are they, their child(ren) and the other parent with it? Has it been easy or hard to implement the agreement/order? Is there anything they would like to change about the agreement/order?
- Have they had any further contact with their lawyer, or the Family Court (counsellor, judge, counsel for child, report writer)? If so, why? What has the involvement been, and what was its outcome?
- Is there any prospect of further contact with their lawyer or Family Court involvement in the future?
- Ask parent to reflect on their involvement with the legal process [lawyer, counsellor, judge, counsel for child, report writer]. What aspects do they now consider to be positive and negative with the legal system (barriers and strengths), and how might it be improved? Would they return to the Family Court to resolve custody and access issues?
- Do they feel that the Family Court process enabled them to tell their side of the story adequately – giving them opportunities to be heard and to have all their concerns taken into account? Did they feel they were treated with respect?
- In hindsight is there anything they would have done differently?
- What advice would they have for other families facing custody and access issues?

Thank parent for their co-operation
Appendix O

Letter to Family Court Professionals re Focus Group Participation

6 September 2002

Dear

Re: Research Project – Custody and Access Matters: Families, Dispute Resolution and the Family Court

You may be aware that the Children’s Issues Centre has been interviewing family members as part of a research project about their experience of the Family Court in custody and access matters. We have completed several studies on custody and access over the past five years, but this is the first time families have been asked about their participation in and satisfaction with legal proceedings and court services. With the permission of the Principal Family Court Judge and the Department for Courts, the research is being undertaken in three Family Court districts. We have now talked with all the parents about their experience of the legal process and its outcome, and written up the general themes from their interview material.

An important feature of the study is ascertaining the views of the professional people involved in custody and access cases. We would like to invite you to participate in a Focus Group discussion facilitated by Nicola Taylor and Pauline Tapp. The group will comprise judges, lawyers, specialist report writers, counsellors and Family Court co-ordinators from [City 1]. (A similar group will also be convened in City 2).

The focus groups will be an opportunity for the researchers to raise the major themes which have emerged from the initial interviews with the parents and children (with no confidential details revealed) and to ask you to reflect on and comment on these findings. This will enable the clients’ perspectives to be checked out against your general experience, to help inform our analysis and to build the professionals’ perspectives into our follow-up interviews with parents later this year. The purpose of this second round of family interviews is to see how the custody and access arrangements have worked out over time and to check how closely they have followed the original agreement or court order.

We anticipate that the Focus Group discussion will take around two hours of your time. It will be held [at venue] sometime in mid-October. At this stage we are just wanting an indication from you as to whether or not you would be interested in participating. We will then liaise with you and the others to finalise a convenient date and time (probably the most challenging aspect of all!) A brief document summarising the key themes from the family interviews would then be sent to you prior to the focus group.
We do hope you will be able to participate in this group discussion and look forward to hearing from you - email: nicola.taylor@stonebow.otago.ac.nz; office phone: (09) 373 9717.

Kind regards

Nicola Taylor
Senior Researcher

This project has been reviewed and approved by the Ethics Committee of the University of Otago and by the Principal Family Court Judge and the Department for Courts.
Appendix P

Consent form for Family Court Professionals

I _____________________________________________________ have read the information concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:

- My participation in the project is entirely voluntary;

- I am free to withdraw from the project at any time without any disadvantage;

- The audio-tape of the focus group discussion will be destroyed at the conclusion of the project, but any raw data on which the results of the project depend will be retained in secure storage for five years, after which it will be destroyed;

- This project involves an open-questioning technique where the precise nature of the questions which will be asked have not been determined in advance, but will depend on a) the preliminary findings from the interviews with family members and b) the way in which the focus group develops. In the event that the line of questioning develops in such a way that I feel hesitant or uncomfortable I may decline to answer any particular question(s) and/or may withdraw from the project without disadvantage of any kind.

- The results of the project may be published, but my anonymity will be preserved.

I agree to take part in this project.

..............................................  .................................. ...............................
(Signature of Participant)  (Date)

This project has been reviewed and approved by the Ethics Committee of the University of Otago

[University of Otago logo]