Motherhood and Family Law

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Abstract

Motherhood is understood to be foundational to human relationships; the very ‘stuff’ of family law. However, rather than supported by the law, motherhood seems to exist in an uneasy tension with it. This thesis begins by exploring motherhood in the United Kingdom and New Zealand, from both legal and historical perspectives. The welfare principle, devised as a legal mechanism to protect the mother-child relationship in patriarchal 18th and 19th century England, is examined as a legal transplant into New Zealand’s younger, more egalitarian and gender-equal society. The impact of the legislative introduction of gender neutrality into New Zealand parenting laws in 1980 (in a social context that valued gender equality) is considered. Competing feminist theories, seeking gender equality by either denying or embracing gender difference, provide the theoretical framework for this thesis. Feminism’s problem with essentialism, and the difficulties that arise when the law seeks gender equality by disregarding gender difference, are also explored.

Particular attention is paid to how motherhood is understood and regarded within contemporary family law. With a focus on New Zealand family law, the impact of legal developments on motherhood are reviewed in relation to the specific issues of shared care parenting, relocation (at times regarded as an infringement upon shared care), gatekeeping, imprisonment and breastfeeding. It is clear that the voice and value of motherhood appears to have been diminished and compromised. The thesis concludes by considering whether a redemptive approach towards motherhood’s relationship with family law is possible. In particular, it examines whether the welfare and best interests principle enshrined in section 4(1) of COCA would be better served by a repeal of section 4(3), a legislative provision which requires that in the application of the welfare and best interests principle, no recognition is to be given to a parent’s gender. Such repeal may then arguably allow for an unrestrained consideration of the matrix of circumstances that determine the welfare and best interests of a child “in his or her particular circumstances” as required by section 4(2). This could thereby enable the law to legitimately accommodate the differences that both motherhood and fatherhood bring to parenting and, without compromising the value of fatherhood, enable a restoration to the law of the ability to consider, and dignify, the significance of the mother-child relationship as a discrete welfare and best interests factor.
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<td>ACART</td>
<td>Advisory Committee on Artificial Reproductive Technologies</td>
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<td>ART</td>
<td>Assisted Reproductive Technologies</td>
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<td>Status of Children Act 1969</td>
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<td>US</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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Chapter One

Introduction

This thesis explores the history, concept and understanding of motherhood and how it is currently regarded within contemporary family law, with a particular focus on New Zealand.

Motherhood is significant because it is understood to be foundational to human relationships; the very ‘stuff’ of family law. However, rather than having its significance confirmed and supported by the law, it appears rather to exist in an uneasy tension with it. Toni Morrison’s *Beloved* provides, for example, a challenging literary critique of the law’s representations of motherhood, confronting the United States of America (US) legal system’s apparent inability, or unwillingness, to incorporate the voice of the mother into the construction of the law. Whether this is also true of family law in New Zealand therefore lies at the heart of the enquiry in this thesis.

Firstly, however, what is ‘motherhood’ and what is its connection to the law?

1.1 What does ‘motherhood’ mean?

Motherhood is associated with women, a state of being and therefore a gendered concept. At the same time, in law it is associated with the function or role of caring for children and in this regard, gender may not be considered significant. For example, the development of ‘the psychological parent’ by Goldstein, Freud and Solnit in the 1970s, and the scientific advances of the late 20th century enabling in vitro birth technologies, created complexities that have challenged the significance to a child of a biological and/or gendered basis to the parenting relationship.

Motherhood has been variously defined as ‘a female parent’, ‘maternal tenderness or affection’, ‘the qualities of a mother’, ‘the qualities characteristic of a mother’, and ‘the

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1 Toni Morrison *Beloved* (New York, Plume 1987).
5 Above note 1
state of being a mother. It is understood to be a gendered state of being vital to the origins and source of life itself, rooted in theology and anthropology. It is also considered to be a role, a socio-cultural product subject to historical fluctuations, but normatively defined.

Motherhood became what philosophers described as an “essentially contested concept”. The feminist movement of the 1970s had difficulty in accommodating the reality of motherhood, identifying an unresolved issue as being the problem with maternal essentialism. Sanger describes how during this time motherhood, as a central but confusing icon within our social structures, became “at once dominating and dominated, much as mothers are both revered and regulated.” She further discusses how in legal scholarship the study of motherhood was avoided, perhaps being regarded as a suspicious subject choice. She also pointed to the difficulties of “theories of custody becoming conceptually estranged from the business of mothering”. Accordingly, motherhood as the subject of law has not

7 The Collins Concise Dictionary of the English Language 2nd Ed (Collins, London and Glasgow, 1988)
9 Central to the Christian story is Mary, chosen by God to bear His son: “But the angel said to her, ‘Do not be afraid, Mary, you have found favour with God. You will be with child and give birth to a son, and you are to give him the name Jesus. He will be great and will be called the Son of the Most High. The Lord God will give him the throne of his father David, and he will reign over the house of Jacob forever; his kingdom will never end’” (Luke 1: 30-33); Mary, mother of God, is honoured and deified worldwide by the Catholic Church’s 1.2 billion members; a biblical theology of motherhood describes its significance to the central story, beginning with a statement that the seed of the woman will crush the serpent’s head (Gen 3:15), and ending with a depiction of a dragon trying to devour a woman and her male child (Rev 12:1–17). Julia Stonehouse Father’s Seed Mother’s Sorrow, e-book http://www.amazon.com/Fathers-Seed-Mothers-Sorrow-ebook/dp/B008I8ZZJC (2012) reviews anthropological reproduction theory and its impact on gender relations.
10 In Andrea Doucet’s book Do Men Mother? Fathering, Care and Domestic Responsibility (Toronto: University of Toronto Press, 2006), her answer to the question “Do men mother?” was both yes and no. Yes, in the sense that men are capable of doing the work and assuming responsibility for the role and no in the sense that men live in some similar but also some different ways to women. In reviewing her work, Scott Neigh says that difference is not essential, but not trivial either and that it is not surprising there are gendered differences in parenting, as this is what gender is and how gendered relations presently work in the real world.
14 Sanger, above note 13, at 17.
15 Sanger, above note 13, at 24; Sanger also considered at 27 that legal scholarship with respect to motherhood in the end developed in part because of the influence of other disciplines; for example, economics where women and children were found to be less well off after family breakdown, as discussed by Lenore J Weitzman in “The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in
been clear-cut. In some jurisdictions, such as in France, it is a gestational state, though not always biological, as a result of advances in human assisted reproduction and surrogacy.\textsuperscript{16} This enables maternity to be more easily separated out from motherhood and able to be renounced beyond birth. In other jurisdictions, maternity is inextricably linked to the relationship between mother and child beyond birth.\textsuperscript{17} For example, in the United Kingdom (UK) and New Zealand, a woman who has given birth cannot refuse legal motherhood, oppose registration of her name on the birth certificate,\textsuperscript{18} nor abandon her baby without legal consequence.\textsuperscript{19}

The purpose of the thesis is therefore to explore the different ways in which motherhood has been portrayed in law and social policy, and to propose a way forward to enable motherhood to play its role in family law.

1.2 Research focus and its significance

Throughout the broad sweep of history and related disciplines, including the law, can be found instruction with respect to the issue of motherhood. In one sense, it transcends culture; in another, it is a cultural construct. That is, it is a cultural imperative that has constructed women as natural caregivers.\textsuperscript{20} Motherhood is understood to be of profound significance to children, and it instinctively seems important. The implications of such understandings for

\begin{itemize}
  \item Human Assisted Reproductive Technology Act 2004 (NZ); Human Fertilisation and Embryology Act 2008(UK).
  \item Michael Freeman and Alice Margaria in “Who and What is a Mother? Maternity, Responsibility and Liberty” Theoretical Enquiries in Law, The Cegla Centre for Interdisciplinary Research of the Law, Tel Aviv University, Vol 13 No 1 Jan 2012 discuss the approaches of different legal systems to this question; for example, in France the institution of accouchement sous X provides women with the choice to give birth anonymously and not become legal mothers yet in the UK and New Zealand, giving birth implies motherhood and automatically carries with it attaching legal responsibilities; see also Michael Freeman Understanding Family Law (2007) 164-66; see too Jonathan Herring with respect to the idea that welfare and best interests should be measured not atomistically but according to relationship with another, that is ‘relationship-based welfare’, and that ‘well-being’ can only sensibly be defined by reference to the nexus of relationships in which humans exist, as discussed in Chapter Six. These are ideas which Herring suggests form no part of most lawyers’ understanding and application of the welfare principle. J J W Herring and Charles Foster, “Welfare means relationality, virtue and altruism” (2012) Legal Studies 480.
  \item Births and Deaths Registration Act 1953 (UK); Sections 5 and 9 Births, Deaths, Marriages and Relationships Registration Act 1995 (NZ).
  \item Sections 152 and 154 Crimes Act 1961 (NZ) with respect to failing to provide the necessities of life and abandonment of a child under 6; see also Carol Sanger on the differences between abandonment and separation in “Mother from Child: Perspectives in Separation and Abandonment” in Mothers in Law: Feminist Theory and the Legal Regulations of Motherhood Martha Fineman and Isabel Karpen (eds) (New York: Columbia University Press, 1995).
  \item Alison Diduck and Felicity Kaganas Family Law, Gender and the State (Hart Publishing, 2012) at 127.
\end{itemize}
family law therefore warrant exploration. This includes the emergence of the welfare principle in late 19th century and early 20th century England, and its legal transplant from its jurisdiction of origin into that of New Zealand. The rise and fall of the ‘tender years doctrine’ in England and the ‘mother principle’ in New Zealand also warrant consideration in light of the current gender-neutral parenting provision contained in section 4(3) of the Care of Children Act 2004 (COCA).  

The culture of rights that has developed with respect to separated fathers is also relevant. That is, an understanding of equality that provides that a father has an equal right with the mother to provide day-to-day care to his child when the mother and father no longer live together. As well, the interpretation placed on the mother’s voice, speaking on behalf of her child, is explored, and consideration given to whether motherhood has been compromised by these developments in the law.

Clearly, a tension exists between motherhood and the law. This is linked to the recent emphasis in various jurisdictions (including New Zealand, Australia, and England and Wales) on the development of separated parenting shared care regimes. This is irrespective of the confirmation by New Zealand’s higher Courts of the ‘no a priori assumptions’ approach to determining a child’s welfare and best interests, and the effects of imposing a shared care regime where a conflicted post-separation co-parenting relationship exists.

The law in New Zealand requires a welfare and best interests assessment to be undertaken without any prior assumptions being made and without any relevant factors being given additional presumptive weight, when it seeks to determine a parenting outcome for a child. However, while the New Zealand Court of Appeal in D v S specifically rejected the UK approach in Payne v Payne that the mother’s health and happiness in seeking to relocate as the primary caregiver should be given a greater weight than any other relevant factor, the New Zealand Family Court at the same time began informally moving in a direction that was

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21 Section 4(3) Care of Children Act 2004 says: “For the purposes of this section, and regardless of a child’s age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person’s sex, best serve the welfare and best interests of the child”.
22 ‘Shared care’ carries a variety of meanings and has developed in different ways in a number of western jurisdictions. This is discussed further in Chapter Seven.
23 See Chapter Seven.
24 See Chapter Seven.
25 See Chapter Seven.
27 D v S [2002] NZFLR 116
effectively contrary to this appellate direction. It began developing a two-pronged approach which arguably saw a mirror image of the Payne situation emerging in New Zealand, notwithstanding the ruling of the Court of Appeal in *D v S*. This was because the Family Court began to prefer shared care parenting over the one home primary carer model. It appeared to equate the desirable norm of the then section 5(b) of COCA, that of providing to a child a relationship with both parents, with the provision of a shared care arrangement. This also seemed to satisfy the outcome sought by the fathers’ rights groups, that the need to preserve and strengthen a child’s relationship with his/her father, and therefore being in a child’s welfare and best interests, should be provided by an equal time shared care arrangement. As a result, relocation (often by mothers seeking to return to the wider maternal family after separation) became increasingly difficult to achieve. Further, the existence of inter-parental conflict was no longer regarded as a barrier to separated shared care parenting, but rather something to be managed in its introduction and maintenance. The provision of a relationship with both parents through shared care took an elevated and informally presumptive position in separated care considerations by the Family Court. As a corollary, the Family Court did not give a great deal of consideration to the voice of the mother expressing concerns, firstly, about the effect of the shared care arrangement on her child and, secondly, about her own ability to cope with a conflicted parenting arrangement that may have been exacerbated by the imposition of shared care. The mother was rather at risk of being regarded as alienating the child from the father, even in circumstances of

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29 This was detected by Priestley J in *Downing v Stamford* [2008] NZFLR 678 as the tension that had been developing between the High Court and the Family Court as to the correct emphasis required by the Care of Children Act 2004 of the factors relevant to a welfare and best interest enquiry with respect to relocation, continued to intensify. In addition, the Court of Appeal in *D v S (No 1)* [2002] NZFLR 116 expressly rejected the *Payne v Payne* approach, that is, that the emotional and psychological wellbeing of the primary carer should be accorded particular weight. Richardson J observed that “it is not a long step to the assumption that the happiness of the relocating parent will meet the best interests of the child’s welfare”. This view was reiterated post COCA by Winkelmann J in the appellate decision of *LH v PH* [2007] NZFLR 737. She noted that: “The Judge would have erred if he had addressed the application focusing on the issue of the mother’s emotional wellbeing as the primary or central issue for him”. The risk became, however, that the emotional health and happiness of the mother as a relevant factor in determining a child’s welfare and best interests, was given too little weight in a child’s welfare and best interest’s assessment. See also Chapter Eight.

30 *D v S* above note 27.

31 This section has since been revised, and is now incorporated in section 5(e) of the Care of Children Act 2004. See the Care of Children Amendment Act (No 2) 2013.


34 This change was understood to have commenced with the decision of Baragwanath J in *L v A (No 2)* [2004] NZFLR 298.
domestic violence. The mother could also be regarded as ‘gatekeeping’ the father’s relationship with the child, or otherwise being obstructive if she resisted embracing equal time shared care. Conflicted and / or equivocal social science views, particularly between those of Joan Kelly and others who prioritised the development of shared care, and Judith Wallerstein and others who prioritised the protection of a child’s primary attachment, compounded the difficulties. The 2003 decision of Baragwanath J in L v A promoted management of parental conflict to enable shared care to be imposed notwithstanding the existence of parental conflict, in preference to earlier judicial acknowledgements that such conflict mitigated against the practical viability and emotional safety of shared care for a child. This provided judicial appellate support for the Family Court moving in the direction of shared care despite misgivings being expressed, particularly by mothers, to the point where practitioners considered that it had become the informally preferred outcome in any contested separated parenting matter, including where parental conflict was evident; that is, an informal presumption in favour of shared care, by the elevation of the importance of the child’s relationship with the father pursuant to the then section 5(b) of COCA, had started to operate within the Family Court in New Zealand. Despite the Supreme Court’s decision in Kacem v

37 Joan Kelly’s work gained considerable acceptance and traction in New Zealand during the 2000s. Her shared care proposals became known in professional circles as the Joan Kelly 2:2:5:5 model or, more simply, the “Joan Kelly model” and was widely supported and adopted by the Family Court and Family Court professionals.
confirming again the no prior assumptions approach to a section 4 welfare and best interests enquiry, this decision is regarded as being in respect of relocation and therefore one step removed from a decision regarding separated care arrangements. However, confirmation by the Supreme Court of the paramountcy of the welfare and best interests test pursuant to section 4 of COCA, without any prior weighting of relevant principles pursuant to section 5 of COCA, is as equally applicable to decisions with respect to post-separation parenting arrangements as it is to relocation.

Accordingly, changes in New Zealand’s family law since the 1970s have meant that what may have been self-evident truths about motherhood expressed by the cases of the time, no longer had any place in modern family law. In addition, what was intended by the ‘no presumption’ rule with respect to parenting gender, originally devised in the UK to protect a mother and child from the power of possession and ownership by the father, has become a basis on which to build a separated parenting model based on equality irrespective of the reality that mothering and fathering is usually neither genderless nor gender neutral. The ‘tender years doctrine’ of the UK, and the ‘mother principle’ and ‘same-sex’ rule in New Zealand were only rules of thumb and did not have the force of legal rules. However, whether this meant that they should be completely supplanted by a preference for gender-neutral shared care parenting needs consideration. There also appears to be little account in law given to differences between motherhood and fatherhood. How a child may respond to and need to be mothered, as distinct from their response to and need to be fathered, does not seem to have been recognised.

A discussion of these developments in this thesis is framed by an examination of the theoretical frameworks of relevant aspects of feminism. Through three waves over the last

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41 For example, in Redding v Redding and Valentine D54/77, Supreme Court Dunedin, 18 August 1977, White J said “These children require the attention and care that a mother can give them”.
42 See Chapter Three.
43 Robert H. George “The Tender years Doctrine in Child Law” discusses its origins as having grown out of a desire to improve the position of mothers in relation to their children, which required a justification for interfering with the absolute rights of fathers at common law. It also confirmed that such a doctrine no longer has any place in modern child care law.
44 B D Inglis, Sim and Inglis Family Law Code (Butterworths, Wellington, 1983). In 1982, Judge Inglis QC described section 23 (1A) of the Guardianship Act 1968 (the predecessor to section 4(4) of the Care of Children Act 2004) as being oddly worded because he saw there never having been any presumption that a mother was the better custodian of young children or girls, or that a father was a better custodian of boys past infancy, nor that there had ever been a principle or rule of law to that effect. It may be that the origins of this gender-neutral provision, imported from the Court of Chancery in the eighteenth and nineteenth centuries to provide a mechanism to address patriarchy and absolute ownership and control of a child by its father and therefore to provide some relief to a mother and child in a separated parenting situation, had already become lost.
45 See Chapter Seven.
150 years, feminism has sought gender equality in the law of western jurisdictions. In pursuit of such outcomes, one feminist theoretical framework sought to deny gender difference and its effects, particularly with respect to child bearing. At the same time, it has faced an insoluble problem with the concept of maternal essentialism, which supports the notion of a unique genetic, biological, emotional and gendered connection between a mother and child.46 There are also other theoretical frameworks at play. One recognises gender difference is central to the pursuit of gender equality; another points to the gendered power structure which needs to be overcome if gender equality is to be achieved.47 These frameworks are all foundationally relevant to motherhood and how it has come to be regarded within contemporary family law, and are therefore deserving of further exploration.48

This work would be incomplete without some reference to the effect of deeper themes within the law, and how these might influence the issue of motherhood and its relationship with family law.49 The Hart-Fuller debate is a good starting place. An exchange between Lon Fuller and H.L.A. Hart, published in the Harvard Law Review in 1958, on morality and law50 marked the divide between legal positivism and natural law philosophy. Hart argued that morality and law were separate, while Fuller argued that morality was the source of the law’s binding power. Essentially, positivism provides a separation between the law as it is and the law as it should be, and legal rights and moral rights are not related. Hart believed the method of deciding cases through logic or deduction is not necessarily wrong, just as it is not necessarily right to decide cases according to social or moral aims. Legality was not determined by morality but by social practice, and interpretation of the words used in the legislation was key to judicial application of rules. On the other hand, Fuller’s view was that law was not neutral, but embodied its own inner morality; therefore the creation of law could only be based on natural laws or common morals, or it could not be said to be law at all. That is, the law is seen as based on its purpose, not just on the meaning of the words, and that imbued in the law itself is the existence and content of morality. However, philosophical

46 See Chapter Five.
47 See Chapter Five.
48 See Chapter Five.
49 These issues cannot be explored further in this study.
debates, particularly legal philosophical debates, are not usually about just the one issue, and as Shapiro says, this continuing debate:51

… concerns such disparate issues as the existence of judicial discretion, the role of policy in adjudication, the ontological foundations of rules, the possibility of descriptive jurisprudence, the function of the law, the objectivity of value, the vagueness of concepts, and the nature of legal interference.

Shapiro notes that the debate has continued because it is centred around one of the most profound questions with respect to the philosophy of the law, that is, the relationship between law and morality.52 Accordingly, for the purposes of this thesis I discuss whether family law, and in particular section 4 of COCA with respect to the paramountcy of a child’s welfare and best interests, should be seen as imbued with, or informed by, natural law and morality in relation to motherhood (and also fatherhood), or whether it should be based in and interpreted according to changing social practices, in which natural law and morality should play no part.53

There are other foundational values at play. Eekelaar argues that respect, while not easy to discern, is a pivotal value in the law governing personal or family relationships.54 He discusses Stephen Darwall’s two kinds of respect: ‘recognition respect’ giving appropriate recognition to people as people, and ‘appraisal respect’ as being not for everyone, but in circumstances of high regard or special excellence.55 Eekelaar also approves of the distinction drawn by Bird56 between respect for persons, and respecting difference between people. While this is in the context of cultural difference, I will discuss the need for family law to respect the differences between motherhood and fatherhood. Eekelaar points to Dworkin’s prescriptions of equality as not requiring concern and respect. Yet there is significance in Article 8 of the European Convention on Human Rights and Fundamental Freedoms’ stating not that “everyone has the right to his private and family life” but rather that “everyone has the right to respect for his private and family life”. Eekelaar describes the insertion of the word “respect” as giving the statement an important character of timeless quality, having

52 See also The Hart-Fuller Debate in the Twenty First Century (ed) Peter Crane (Hart Publisher Oxford, 2010)
53 The work of Jonathan Herring and others, with respect to recovery of the welfare principle as a concept based in the intimacy of relationship, is discussed in Chapter Six.
value in and of itself, and arguably this includes a respect for motherhood as a component part of everyone’s “private and family life”.

Honneth, in his theory of recognition, discusses the three aspects of love, rights and solidarity. While beyond the scope of this thesis, the importance of, and respect for, motherhood’s contribution to a child’s development with respect to the corresponding component parts of self-confidence, self-respect and self-esteem, should not be overlooked.

In a similar way, Waldron stresses the importance of dignity, understood as a status defining a person’s relation to law and his or her capability of presenting and arguing a point of view, and responding to the law's demands. He defines status as ‘a legal condition characterised by distinctive rights, duties, liabilities, powers, and disabilities’ which ‘attaches to a person when their occupying a certain position is a matter of public concern’ and traces the term ‘dignity’ from its Roman origins to its current use, marking a gradual equalisation of status between people. Accordingly, the responsibility accompanying the status of each of motherhood and fatherhood should therefore require each to protect the dignity of themselves and that of the other.

Trust is a further significant and relevant value to any consideration of motherhood. Henaghan discusses this in relation to health care professionals and describes an erosion of trust as having the potential to dehumanise the unique relationship that has traditionally existed between healthcare professionals and their patients. I argue that care to protect against the erosion of trust, and the dehumanising by the law of the unique mother-child relationship, is therefore also a relevant matter.

Accordingly, this thesis considers the need for the law to take care not to mechanise relationships that, at their very core, are founded in the intimacy of human relationships and based in the values of dignity, respect and trust. Herring’s theory of a relationship-based welfare principle is consistent with this aspiration and relevant to a consideration of motherhood and the mother-child relationship. He argues that “families, and society in

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57 Eekelaar, above note 54 at 77-81
58 Eekelaar, above note 54 at 77-81
60 Jeremy Waldron Dignity, Rank, and Rights (Oxford University Press, 2012); the 2009 Tanner Lectures at UC Berkeley, NY, New York University of Law.
61 Waldron, above note 60 at 51.
general, are based on mutual co-operation and support. He also says that such relationships should be fair and just, and that placing unacceptable or unrealistic demands on a parent do not further a child’s welfare.

Drawing on an examination of history, philosophy, legislation and case law as it relates to motherhood in both the UK and New Zealand, I will illustrate how motherhood is now viewed in contemporary child care and parenting law in New Zealand. This includes a brief discussion of the Māori perspective, including the concept of whāngai, and an examination of legal trends with respect to the contexts of shared care parenting and relocation, and the issues of gatekeeping, imprisonment and breastfeeding. I discuss the implications and examine whether the law should continue to adopt its current gender neutral approach in determining a child’s welfare and best interests in matters of parenting, or whether the law should consider recovering its ability to recognise again the unique contribution to parenting made by motherhood.

1.3 Personal background to this research

I am a New Zealand family lawyer based in Tauranga. I attended the University of Otago’s Law School in the 1970s when women students were a minority and the classes were small. We were taught well, we were regarded as our male counterparts’ equal and our gender seemed largely irrelevant. Then, in the 1980s, I became a mother and was challenged by the transformative power of the experience. However, I had difficulty in integrating my deepest feelings of motherhood with what liberal feminism had sought to teach me, and which by then was also influencing family law. As a result, I determined to make my own way as a young professional married woman, still in the world of work, but at the same time prioritising what I sensed was my more important task, that of mothering my children. I began to see an emerging paradox between the application of New Zealand’s separated parenting legislation and what was happening on the ground. My lecturers’ legacy led me to wrestle with the practical realities of legal practice in the family law field, and its disconnect from real-life mothers and fathers faced with needing to make arrangements for the care of their children following the breakdown of their relationship. The 1999 W v C decision, close to home as it involved a local family and local family law practitioners, was a watershed. The

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64 Herring, above note 63 at 438.
65 Herring, above note 63.
66 See Chapter Five.
judicial influence of Judge Inglis QC out of that decision profoundly affected the introduction, direction and thrust of COCA in 2004.\textsuperscript{68} While Parliament had, in 2000, rejected Muriel Newman’s Shared Parenting Bill\textsuperscript{69} seeking to introduce equal shared care between parents as the default position upon separation, the new legislation subsequently pushed towards the normalisation of separated shared care parenting arrangements. Much of this was driven by the activism of fathers’ groups, who rebadged the equality sought by liberal feminism as a welfare and best interests issue with respect to the father-child relationship. That is, a child’s relationship with the father was the same, equal to and equally as important to the child as that with the mother and this was best recognised by an equal time shared care arrangement. Cultural feminism, pursuing equality between men and women through recognition of difference,\textsuperscript{70} gained little traction. As a result, the movement towards equal time shared day-to-day care began to develop as the preferred mechanism to provide to a child an equality of parenting relationships as being in their welfare and best interests. These arrangements did not assess the different contributions that a mother and father could each make to the parenting of their child;\textsuperscript{71} rather they appeared to work from a position of equality in function by each of them, able to be shared by a care arrangement between two homes with time being split between the mother and father as nearly equally as possible. However, the fathering, particularly of young children, appeared to require the ongoing support and input of the mother such that the majority of the care actually continued to be shouldered by her. This did not sit easily with the premise that parenting function was the same, it was to be split equally between mothers and fathers and gender was irrelevant. This

\textsuperscript{68} B D Inglis \textit{New Zealand Family Law in the 21\textsuperscript{st} Century} (Thomson Brookers Wellington, 2007) at 298: “much of what was said in \textit{W v C} about the responsibilities and obligations of guardians … now appears in statutory form in the 2004 Act”.

\textsuperscript{69} The Shared Parenting Bill was a private member’s bill by Muriel Newman, ACT MP. It was first presented on 17\textsuperscript{th} February 2000 and defeated at its first reading on 10\textsuperscript{th} May 2000. It aimed to introduce a rebuttable presumption of 50-50 shared custody between separated parents.

\textsuperscript{70} See Chapter Five.

\textsuperscript{71} See Chapter Seven with respect to the work of Jennifer McIntosh et al, identifying the needs and stressors upon young children in relation to separated parenting arrangements, including the need for emotionally attuned nurturance and care with respect to nights away from the child’s primary attachment figure (usually the mother); see also McIntosh J, Smyth B. “Shared-time parenting and risk: An evidence based matrix” in K Kuehnle and L Drozd eds. \textit{Parenting plan evaluations: Applied research for the Family Court}. (New York: Oxford University Press; 2011). While beyond the scope of this thesis, see also discussions with respect to the neuroscience of a mother’s brain, for example: Pilyoung Kim, James F. Leckman, Linda C. Mayes, Ruth Feldman, Xin Wang, James E. Swain “The plasticity of human maternal brain: Longitudinal changes in brain anatomy during the early postpartum period” \textit{Behavioural Neuroscience}, Vol 124(5), Oct 2010, 695-700. The results of this study suggest that the first months of motherhood in humans are accompanied by structural changes in the mother’s brain regions that are implicated in maternal motivation and behaviours.
was not the reality in practice, nor was it consistent with the more traditional understanding that mothering and fathering contributed different functions to the upbringing of a child. By the early 2000s, the law in New Zealand had been saying for a long time that no assessment of the welfare and best interests of a child could be determined by reference to the gender of the parent. The reasons for this are explored later in the thesis. It is noteworthy, though, that within the law there appears such a clear expression of gender neutrality in a field where, in reality, there may be a clear gender difference.

In addition, as shared care parenting began to develop, the issue of relocation of children in New Zealand family law became highly contested, and diverged significantly from the position in England and Wales. This included circumstances where one parent, (usually the mother), was seeking to return with her children to the support and care of the wider maternal family, and even where she provided the majority of the day-to-day care. It also included both domestic and international relocations. This tension, between the law and its application by the Family Court, led me to complete a Masters in Law dissertation, exploring the trends that were developing in the area of child relocation. The subsequent Supreme Court was not the reality in practice, nor was it consistent with the more traditional understanding that mothering and fathering contributed different functions to the upbringing of a child. By the early 2000s, the law in New Zealand had been saying for a long time that no assessment of the welfare and best interests of a child could be determined by reference to the gender of the parent. The reasons for this are explored later in the thesis. It is noteworthy, though, that within the law there appears such a clear expression of gender neutrality in a field where, in reality, there may be a clear gender difference.

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Court decision of *Kacem v Bashir*\(^78\) assisted in correcting the slow creep into the Family Court that had been identified as an informal and incorrect presumptive weighting in favour of an ongoing relationship with the non-relocating parent (usually the father), contrary to the correct non-presumptive welfare and best interests test intended by sections 4 and 5 of COCA. Nonetheless, motherhood and its importance to a child was no longer spoken of as present or self-evident as it had been in the past.\(^79\) Motherhood was no longer really spoken of at all. It had become genderless. This is in contrast to a recognition of the importance of fathers and fatherhood through the movement during the 2000s that had gained considerable momentum, not only in New Zealand but also in other western jurisdictions including Australia, the US, Canada and the UK. Much of the emphasis on fathers and fathering was sound,\(^80\) but not on the basis of competition with, and at the expense of, mothers and mothering.\(^81\)

1.4 **Organisation of the thesis**

This thesis is concerned with motherhood and its relationship with family law, and is divided into the following chapters:

**Chapter Two**: The background and social context of motherhood is examined in this chapter. I traverse motherhood in the UK and New Zealand, from both historical and legal perspectives, and outline the historical development and significance of marriage as the context where motherhood was initially located. A mother’s place within and without this

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\(^78\) *Kacem v Bashir* above note 40.

\(^79\) See Chapter Three with respect to a discussion of early UK and New Zealand cases which discussed motherhood, in contrast to present Family Court decisions which no longer refer to mothering per se, and discuss ‘parenting’ instead.


institution, together with an understanding of the UK’s history of the absolute ownership and control of children by the father, is also explored.

**Chapter Three:** In this chapter, the historical enquiry into motherhood continues. The response of the law to the inequity of the absolute ownership by the husband of his wife and children is explored through the development of its equitable parens patriae jurisdiction, the welfare principle, the ‘tender years doctrine’ in England and the development of the ‘mother principle’ in New Zealand, a jurisdiction that had adopted the common law tradition of the UK, and assumed many of the UK’s statutes as its own. The circumstances surrounding the emergence of the welfare principle in England and its original purpose, to protect the mother-child relationship, are discussed. Motherhood is then explored through an historical tracing of the relevant statutory legal framework and associated case law between the UK and New Zealand. This includes recognition of the movement from mothering within marriage, to a more neutrally framed and individualised state of parenthood. Issues of morality, illegitimacy, gender and adoption as relevant to motherhood are also examined.

**Chapter Four:** This chapter explores the state of contemporary motherhood and its relationship and recognition by current family law, statute, policy and context. Surrogacy and human assisted artificial reproduction are also discussed within the context of socially and legally constructed motherhood. Reference is then made to the current separated parenting environment from a descriptive, statistical and policy point of view. The thesis context also requires that family demographic trends be discussed. This is done by reference to reports by the Ministry of Social Development[^52] and the Population Studies Centre at Waikato University[^53], as well as statistical information[^54].

**Chapter Five:** The theoretical frameworks underpinning this thesis, with a particular focus on competing feminist theories, are next considered as foundational to understanding the gender-neutral developments found in New Zealand’s contemporary family law, and the impact of such developments upon motherhood. This chapter also highlights feminism’s problem with essentialism, and the difficulties that arise when the law seeks gender equality by disregarding gender difference.

Chapter Six: This chapter considers the law’s response to the unique role of motherhood through a discussion of the welfare principle as a legal transplant from the UK into New Zealand, an egalitarian social context very different to that of England. While not initially discernible, a divergence between jurisdictions became evident from the 1970s onwards, notwithstanding the transplanted welfare principle being apparently both identical and foundational to family law in both jurisdictions. Discussion of the welfare principle as it has developed in each jurisdiction then follows. Originally understood as based on the intimate relationship between mother and child, it arguably developed into a gender-neutral, rights-based concept. This has led to tensions in the law as it seeks to engage in a gender-neutral way with issues that nonetheless remain gendered. Differences between masculine and feminine ways of moral reasoning, and Gilligan’s original notion of the ethic of care, as distinct from the ethic of justice, are explored. Herring’s ‘relationship-based’ view of the welfare principle is discussed and whether motherhood may have been compromised by the law by a loss of the Herring approach, is considered.

Chapter Seven: Building upon the previous chapters, this chapter explores family law’s response to motherhood within the legal context of gender-neutral separated parenting, through the phenomenon and development of the concept of shared care separated parenting across a number of jurisdictions, including England, Australia, Canada and New Zealand. The effect of the imposition of shared care arrangements upon motherhood, in light of underlying feminist theories seeking equality between mothers and fathers, includes tracing the tension that has arisen in the social science field as the same issue has been grappled with in that arena. There, it was initially concerned with the impact upon very young children of the introduction of overnight care or contact arrangements that took a child away from their primary attachment figure, who is usually the mother. More recently, this has been modified to recognise that the issue is not so much overnight stays away from a primary attachment figure. Rather, the issue is the importance, firstly, of the constancy of emotional nurturance and attunement being readily available to a young child, which is usually provided by the mother and, secondly, the need for a low conflict or conflict-free co-parenting relationship being developed between separated parents.

Chapter Eight: This chapter continues the exploration of motherhood and contemporary family law in New Zealand, this time through the lens of relocation. Family law disputes associated with this issue are regarded as some of the most controversial and difficult issues to be found within current parenting law. The situation has commonly involved a mother
wishing to return home to the support of her family after the breakdown of the parenting relationship and, as the primary care-giver, seeking to take the children with her. At times, relocation was regarded as an infringement upon an existing shared care arrangement, or the implementation of such an arrangement, when tension between motherhood and the law increased. The different approaches to judicial relocation decision-making that emerged during the 2000s between the UK and New Zealand are examined, and linked to the fundamentally different bases upon which the welfare principle rests in each jurisdiction. The relevant case law in New Zealand is traced, through to the corrective provided by the Supreme Court in 2010 and subsequent legislative amendments in 2013 to the Care of Children Act 2004. The impact upon motherhood is reflected in the ebb and flow of relocation statistics during the 20 year period from the early 1990s to 2014.

**Chapter Nine:** The developments outlined in the preceding Chapters Seven and Eight may have resulted in a diminished or negative view of motherhood by the law. This chapter considers these concerns by examination of a further aspect of motherhood and family law, that of the concept of ‘gatekeeping’. The possibility of a constructive understanding of motherhood to emerge out of a previously negatively-viewed paradigm of gatekeeping is also explored.

**Chapter Ten:** In this chapter, three specific Family Court interventions are discussed, where the court seeks to a) impose and address the development of a child’s relationship with a father through directed contact with him in circumstances where the mother is the primary caregiver; b) the situation contains allegations of domestic violence and; c) the parenting relationship is conflicted. These examples highlight mothers’ responses through ‘gateclosing’, and the law’s apparent increased disregard for the voice and views of motherhood in such circumstances. It is a low point for motherhood within contemporary family law, with the imposition by the Family Court of terms of imprisonment upon some mothers for disobeying court-directed contact orders with fathers.

**Chapter Eleven:** This chapter explores motherhood’s relationship with family law through an exploration of breastfeeding, a matter uniquely associated with motherhood, and a matter relevant to human flourishing. It also has the capacity to create tension within the context of gender-neutral shared care separated parenting arrangements. A number of recent family law cases are examined, where differing judicial approaches to the issue can be discerned.
Chapter Twelve: This final chapter discusses the themes and issues that have emerged in the earlier chapters, considers their implications, and draws conclusions to help point the way forward in legal policy and practice. It analyses contemporary family law’s gender-neutral approach to separated parenting, the loss of recognition of motherhood by the law as being of unique value to a child, and the appropriateness or otherwise of section 4(3) of COCA continuing to form a part of New Zealand’s separated parenting legislative regime. It then draws conclusions, and discusses the possibility of the law adopting a redemptive approach towards motherhood. In particular, it examines whether the welfare and best interests principle enshrined in section 4(1) of COCA would be better served by a repeal of section 4(3), thereby allowing for an unrestrained consideration of the matrix of circumstances that determine the welfare and best interests of a child “in his or her particular circumstances.”\(^{85}\)

This could thus enable the law to legitimately consider the differences that both motherhood and fatherhood bring to parenting, and further enable a restoration to the law of the ability to consider the significance of the mother-child relationship as a discrete welfare and best interests factor.

I now turn to Chapter Two, which traces the history and relationship between motherhood and marriage, socially and as reflected in the early common law, in both the UK and New Zealand. It identifies periods of prominence and protection of motherhood, on the one hand, and periods of anonymity and lack of recognition on the other.

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\(^{85}\) Section 4(2) Care of Children Act 2004.
Chapter Two

The History of Motherhood I: Tracing the Development of Social and Public Policy

Introduction

This chapter traces the social history and development of public policy with respect to motherhood. The late Judge Inglis QC, one of New Zealand’s foremost family law jurists, said that the foundations of family law were based in marriage and parentage through marriage. It is accordingly difficult to historically trace the social and public policy framework with respect to motherhood without, at the same time, identifying the relevance and history of the institutions of marriage and divorce, and the issues of illegitimacy and adoption. It also follows that issues with respect to motherhood were addressed socially and by the law as being either within or outside of marriage, at least initially. This chapter therefore considers the context that marriage historically provided to the social, policy and legal development of the status of motherhood, culminating in an examination of the social history of the 17th to 19th centuries when the value of motherhood appeared to be at its zenith.

The development of the legal frameworks of both England and New Zealand with respect to marriage as a context for motherhood, the move towards ‘no fault’ divorce, and its impact upon motherhood are also explored. The chapter then examines, both socially and through the law, the effect of divorce upon motherhood, and motherhood outside the context of marriage, that is, illegitimacy and adoption. With respect to New Zealand, a brief discussion is included on whāngai and the Māori perspective. The chapter concludes by traversing the historical development of motherhood as a gendered role. Issues of gender inequality were quite apparent in England over this time, while in New Zealand, where social history was still in its infancy but appearing to be founded in a greater egalitarianism, equality appeared to be a key and central social driver. These issues foreshadow the tensions that were to arise with respect

86 B D Inglis, above note 68 at 3.
87 ‘Whāngai’ is a Māori concept and term meaning the raising of a child who has been born to another person (meaning literally, to feed or nourish). It is a customary practice similar to, but not the same as, adoption. The child is almost always related to the foster parents. In traditional Māori culture, a couple’s first child was often brought up by grandparents; the practice is still found today. See: http://www.maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&keywords=whangai&search searched 21 October 2015.
to gender equality, both socially and within the law, to which motherhood (and fatherhood) remain central (even) today.

2.1 Marriage as the social, legal and public policy context for motherhood

Sir William Blackstone said, as early as 1765, that ‘the establishment of marriage in all civilised states is based upon this natural obligation of the father to provide for his children’. It was the marriage relationship between man and woman that was the context into which children were to be born, and therefore where motherhood was naturally to be found. However, it is not easy to identify the origins of marriage. Pollock and Maitland discuss some evidence of marriage from early Teutonic times and also from Hindu law which suggested ‘marriage by capture’; the marriage was valid if the woman consented. The alternative was marriage by sale of the mund or protectorship of the woman. This would contractually provide to her, in return, honour as her husband’s consort. The ancient Greeks appeared to regard the issue of marriage as being ‘a matter of paternal wishes and economic considerations’, and that Athenian women, defined by their childbearing function and motherhood role, were in need of protection.

In Anglo Saxon times (recorded from the reign of Aethelbert AD 570-616), legal structures were based on kinship and family groups. Historian Lawrence Stone, in reviewing patterns of English family structure, pointed to kinship as having originally been the main organising principle of society. This declined with the rise of the modern state, when some of the family’s economic and social functions were taken over by government. At the same time, the ancient roots of patriarchal power were strengthening within the family, informed by its pre-existing condition but also encouraged as a device to develop state and political control.

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90 S Okin Moller Women in Political Western Thought (Princeton University Press, 1979) which includes a discussion of Demosthenes’ report of the lawsuit Against Naera Demosthenes, Private Orations III at 4-35.
92 There is now some evidence to suggest that the value of kinship with respect to the parenting of children may again be on the ascendency. Derived from anthropology and biology, kinship may be seen to inform issues with respect to separated parenting as well as the state care of children. See Marie Connolly “Kinship Care: A Selected Literature Review” submitted to the Department of Child, Youth and Family Services, May 2003; see also Chapter Four.
and nurtured by a widespread acceptance of Christian morality and teaching. Married women were regarded not as subservient, but as having independent status. Value was placed on their childbearing capacity and motherhood, and also on their economic contribution to the family unit and settlements were made to them on separation or upon becoming widowed. 

However feudalism, based on a hierarchical system of land ownership, influenced the development of men’s power, emerging from land ownership, as being superior to the women’s position as reproducers of heirs, necessary to provide legitimacy and continuity to the land ownership system. Women were accordingly again seen as needing protection and ‘coverture’ to enable them to fulfil this motherhood role. Blackstone described this in the following terms:

... by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a femme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.

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93 Lawrence Stone *The Family, Sex and Marriage in England, 1500-1800* (Weidenfeld and Nicholson, 1977). Stone was criticised for some of his methods and theses, but was acknowledged for his outstanding instinctual grasp of the bigger patterns of a society over time and the complexity of the interlinking issues.


95 See legal writers Gratian (1139-42) and Bracton (1300).

While motherhood was recognised and valued, the children who resulted from the marriage belonged to the husband and father, because the wife and mother had no separate legal identity.

Marriage, to create the context for motherhood, was historically a simple customary process. Two forms of promise were possible; a promise in the present tense (*sponsalia per verba praesenti*) was a valid and indissoluble marriage from the time of promise, while a promise in the future tense (*sponsalia per verba de futuro*) prohibited marriage with anyone else, but was not a marriage as such. However, if sexual intercourse took place after such latter promise, the marriage became valid and indissoluble.  

Amongst the aristocracy, marriage was often arranged and designed to increase property and wealth; amongst the poorer classes, informal marriages were endorsed by customs such as hand-fasting and broomstick ceremonies. Marriage was accordingly a private contract between a man and a woman with little, if any, link to the law or to the church.

It was not until the Middle Ages that marriage began to emerge as an institution of the Christian Church, with its prerequisites of consent and conjugality. In establishing its jurisdiction, the Church also developed the prohibited degrees of consanguinity, the practice of calling for banns of marriage, and required that marriage be solemnised in a church and conducted by a priest.

To settle debts, William the Conqueror separated canon and common law, thereby strengthening the position of the church in Rome with respect to marriage being the domain of the church. The theory of unity between man and woman from Genesis was incorporated into the canons and ecclesiastical laws in England. This concept of oneness was recognised by Bracton in the 13th century, Sir Edward Coke in the 17th century and Sir William Blackstone, as above, in the 18th century. Blackstone went on to say that “in the eyes of the law a husband and wife are one, and that one is the husband.”

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97 Sinclair, above note 94 at 58-59; see also T Poynter *A Concise View of the Doctrine and Practice of the Ecclesiastical Courts* (1824) as discussed in Pollock and Maitland above note 89; S Parker *Informal Marriage and the Law 1750-1989* (Basingstoke: Macmillan, 1990); A Diduck and F Kaganas *Family Law, Gender and the State* above note 20, at 59.


99 Alison Diduck and Felicity Kaganas *Family Law, Gender and the State*, above note 20 at 58.

100 Pollock and Maitland above note 89 at 364-371; Sinclair, above note 94 at 59.

101 Genesis Chapter 2 v 14 “Therefore a man shall leave his father and his mother and shall become united and cleave to his wife and they shall become one flesh” (Amplified Bible).

102 Blackstone, above note 96; see also Lyndon M Shanley *Feminism, Marriage and the Law in Victorian England*; S Atkins and B Hoggett, above note 94; Sinclair, above note 94 at 60.
ecclesiastical laws of marriage adopted and reinforced the ancient ideas of protection and ownership of husbands over their wives, and over the children born within this union. The Christian notion of marriage became foundational, central and pivotal to the ideas of equality and to gender roles, including motherhood. While these roles have become contested and politicised concepts in the centuries since, it is helpful to consider the development of the Christian foundation of marriage as a further important context for motherhood.

2.2 Effect of the Christian view of marriage

Christian teaching gave prominence to three purposes for the partnership of husband and wife in marriage: the procreation of children, the regulation of sexual activity and the mutuality in the giving and receiving of companionship, comfort and support. Wifely subjection and obedience was based in Paul’s Letter to the Ephesians, which reinforced the notions already held in scientific theory, that women were in many ways inferior to men. They were not as strong, less able to control their emotions and naturally unfitted for heavy work or public life. The husband also enjoyed legal supremacy over his wife, controlling her property. Husbands were, however, to honour their wives as the weaker vessels. Medieval theological scholars drew a distinction between the equality of the immortal soul irrespective

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103 Ralph A Houlbrooke *The English Family 1450-1700* (Longman; London and New York, 1984); see also Lawrence Stone “The Rise of the Nuclear Family in Early Modern England: The Patriarchal Stage” in The Family in History Charles E Rosenberg (ed) (University of Philadelphia Press, 1975) who describes Archbishop Cramner as being responsible in 1549 for the addition of the third purpose to the Anglican Prayer Book, being the “mutually society, help and comfort, that the one ought to have of the other, both in prosperity and adversity”, at 26. John Milton in his writings, removed all purposes for marriage except for this third purpose of mutual comfort, see Stone at 27.

104 Ephesians 5:22-33 (Amplified Bible).
22 Wives, be subject (be submissive and adapt yourselves) to your own husbands as [a service] to the Lord.
23 For the husband is head of the wife as Christ is the Head of the church, Himself the Saviour of [His] body.
24 As the church is subject to Christ, so let wives also be subject in everything to their husbands.
25 Husbands, love your wives, as Christ loved the church and gave Himself up for her,
26 So that He might sanctify her, having cleansed her by the washing of water with the Word,
27 That He might present the church to Himself in glorious splendour, without spot or wrinkle or any such things [that she might be holy and faultless].
28 Even so husbands should love their wives as [being in a sense] their own bodies. He who loves his own wife loves himself.
29 For no man ever hated his own flesh, but nourishes and carefully protects and cherishes it, as Christ does the church,
30 Because we are members (parts) of His body.
31 For this reason a man shall leave his father and his mother and shall be joined to his wife, and the two shall become one flesh.
32 This mystery is very great, but I speak concerning [the relation of] Christ and the church.
33 However, let each man of you [without exception] love his wife as [being in a sense] his very own self; and let the wife see that she respects and reverences her husband [f]that she notices him, regards him, honours him, prefers him, venerates, and esteems him; and [g]that she defers to him, praises him, and loves and admires him exceedingly.

105 In P H Barnum (ed) *Dives and Paupers*, Vol 1, *Early English Text Society* (1976), reverence and respect were the words used to describe honour; see Houlbrooke, above note 103 at 97.
of sex, and earthly inequality. However, other writers such as Erasmus and Castiglione\(^{106}\) suggested that women had equal intelligence and capacity for virtue, and women themselves began to write about their lack of educational opportunity.\(^{107}\) Mary Astell, an 18\(^{th}\) century conservative feminist, considered that the improvement of women was hampered by custom, poor education, and low and wrong aims including the attraction of men as an end in itself.\(^{108}\) Yet, despite the call for better education for women, there was, at that time, no real extension proposed to the woman’s role. As Houlbrooke said: “While she sought to free women from the tyranny of fashion and custom, Astell insisted that the family was their proper sphere; they had no business with ‘the Pulpit, the Bar or St Stephen’s Chapel.’”\(^{109}\) Women’s capacity for virtue might be equal to men’s, but it was exercised in different areas, and in particular it was exercised in the area of motherhood.

### 2.3 Gendered roles within marriage

Christian marriage and social convention demanded that the wife address her husband with humility and deference. Houlbrooke describes 15\(^{th}\) and 16\(^{th}\) century letters between husbands and wives as being marked on their face by compliance with such standards with respect to the salutations, but becoming increasing intimate and personal as female literacy grew. In conversation, particularly in lower social classes, a familiarity by wives towards their husbands was seen to develop, which raised the larger question of where the balance of power in families actually lay.\(^{110}\) Houlbrooke describes the identification by other writers of a woman commonly holding herself out as her husband’s equal notwithstanding the law and custom of the times, insisting on getting her own way and showing no more respect for her husband than she would for a servant.\(^{111}\) A woman’s will towards independence or mastery was also a common literary theme.\(^{112}\)

Despite this, married love was highly valued by the Christian church. St Thomas Aquinas in his *Summa Theologica* saw marriage as “a certain inseparable union of souls, by which

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\(^{106}\) C R Thompson (trans) *The Colloquies of Erasmus* (University of Chicago Press, 1965) and B Castiglione *The Book of the Courtier* (J M Dent and Sons, London, 1928); see Houlbrooke, above note 103.

\(^{107}\) For example, Hannah Woolley *The Gentlewoman’s Companion* (1675) and Mary Astell *A Serious Proposal to the Ladies* (1697); see Houlbrooke, above note 103 at 99.

\(^{108}\) Mary Astell *Reflections Upon Marriage* (Dublin 5\(^{th}\) Ed, 1730) cited by Houlbrooke, above note 103.

\(^{109}\) Houlbrooke, above note 103 at 101.

\(^{110}\) Houlbrooke, above note 103 at 99.

\(^{111}\) Houlbrooke, above note 103 at 101.

\(^{112}\) For example, the knight in Chaucer’s *Wife of Bath’s Tale* discovered what women most desired: the same mastery over their husbands as their lovers. See Houlbrooke, above note 103.
husband and wife are pledged by a bond of mutual affection that cannot be sundered.” 113 The wedding ring symbolised love without end, and, while the duty of love was a mutual one, most Reformation writers regarded the greater responsibility for love resting on the husband. 114 Husbands and wives were seen as different. God had given to the man “great wit, bigger strength, and more courage to compel the woman to obey by reason or force” and he had given to the woman “bewtie, faire countenaunce and sweete words to make the man obey her againe for loue.” 115 The Church drew an uneasy distinction between sinful lust and conjugal love. This distinction was also found in secular romantic literature. 116 Mutual married love existed in practice, as demonstrated by the intimate and shared nature of letters between husbands and wives that have survived from that era, 117 marked by a shared enjoyment of sexual intimacy, high expectations of the relationship, close affection, loneliness without the other and a sense of humour. Married love became a highly valued ideal, demonstrated by the funeral inscriptions that began to develop upon the death of a spouse. The idea that marriage occupied a more central place in a woman’s life than that of the man, with her investing more into it, also became an accepted notion. 118 Motherhood was seen not only as a natural consequence of this gendered marriage relationship, but also as central to its purpose.

2.4 Marriage for the purpose of procreation

It was the Christian church’s teaching that one of the major purposes of marriage was for the procreation of children. Socially, childlessness was regarded as a worse plight than having too many children, as the availability of child labour was important to the economies of many families. Parental affection was, in part, understood through possession, but however strong the paternal affection may have been, by the 16th century maternal love was held to be

114 Houlbrooke, above note 103. See also Thomas Gataker (1620) that love went downward while duty went upward; Daniel Rogers described St Paul’s comparison between husbandly love and that of Christ for the Church as meaning a different intensity of love by each. The wife’s love was like the light of the moon and borrowed, love otherwise descending from the husband “as the oile of Aaron’s head descended downe to his beard and cloathing” at Houlbrooke, above note 103 at 102.
115 I MacLean The Renaissance Notion of a Woman: A Study in the Fortunes of Scholasticism and Medical Science in European Intellectual Life (Cambridge UP, 1980) at 24-5, in Houlbrooke above note 103 at 103
116 W Harrington’s In This Boke are Conteyned the Comendacions of Matrymony, dated between 1512 and 1515 and H A Kelly Love and Marriage in the Age of Chaucer (Cornell UP) at 269-273 discussed in Houlbrooke, above note 103 at 103; see also the writings of John Milton discussed in Stone, above note 93 at 27.
117 Houlbrooke, above note 103 at 104-5.
118 Houlbrooke, above note 103.
naturally stronger. A mother’s love for her child was described as “hardly contained within the bounds of reason” and what man “were able to endure that clamor, annoyance, and clutter which she goes through without complaint among poore nurslines, clothing, feeding, dressing and undressing, picking and clensing them; what is it save the instinct of love which enableth her hereto?” Mothers also played the greater part in a child’s early religious instruction and, by the end of the Reformation, this came to be regarded as her most important responsibility. The legacy of the Middle Ages with respect to the parent-child relationship was described by Houlbrooke in these terms.

Children were welcome gifts from God. Parental love was the most deeply rooted of all instincts, and showed itself especially in the mother’s tender loving care of the helpless baby. … There is much direct evidence of the reality of loving care in some families and of parental grief in face of the loss of children. Women of the upper classes did not generally suckle their own children … but this did not preclude care and solicitude in the choice and supervision of wet-nurses. … The quality of parenthood was not … determined by material circumstances alone. … The unquantifiable and still only partially understood elements of individual character were crucial in this period as they still are today.

2.5 Civil and common law challenges to canon law with respect to marriage

There were civil and common law challenges to canon law. During Henry VIII’s reign, the English Parliament passed the Marriage Act 1653 to address the uncertainty of a future promise to marry, on the basis that a promise to marry that was broken should not be a barrier to a later marriage, unless it had been followed by sexual intercourse. This was subsequently repealed by Edward VI, which resulted in promises to marry continuing as valid marriages, in addition to 17th century attempts to record magistrate-sanctioned civil marriages. Therefore by the mid-18th century, it had become difficult to identify a valid marriage. There were “three overlapping, occasionally hostile but generally exclusive jurisdictions – the Church, the State and customs enforced by the local community.” The increasing number of ‘Fleet

119 Houlbrooke, above note 103 at 135.
120 Houlbrooke, above note 103 at 135.
121 Daniel Rogers in Houlbrooke, above note 103 at 135.
122 Houlbrooke, above note 103 at 148.
123 Houlbrooke, above note 103 at 155-6.
Street marriages and concerns by the church and the aristocracy about the lack of social control of the lower and working classes resulted in the passage of Lord Hardwicke’s Marriage Act in 1753, which then gave the established Church of England a virtual monopoly on marriage. There were detractors. The poet Percy Bysshe Shelley argued that religion’s emphasis on monogamy, with sexual relationships conducted only within marriage, was unnatural. Wheeler and Thompson considered marriage subordinated women, and believed gender equality was only possible through social groupings in which marriage had no place. There were subsequent reforms introduced by the Marriage Act 1823 to further regulate marriage and link it to the Births, Deaths and Marriage registration processes and consolidation of the Poor Laws. It was the Marriage Act 1836 which introduced civil ceremonies for marriage in addition to the church and emerged, as Cretney suggests, out of an analysis of the respective interests in marriage of each of the Church and State. The 1836 Act remains the basis for modern laws of marriage and is reflected in New Zealand through the Marriage Act 1955, where every marriage ceremony held in a church or elsewhere, and conducted by a priest, celebrant or registrar, is a civil ceremony. This has now also been amended by the Marriage (Definition of Marriage) Amendment Act 2013 to introduce same-sex marriage. Thus, while marriage continues to exist, it can no longer be said that it is gendered, or the preferred social and legal context for motherhood.

125 From Smollett The History of England (London, 1830): the clergy were “a band of profligate miscreants, the refuse of the clergy [and] performed the ceremony of marriage without licence or question, in cellars, garrets, or alehouses, to the scandal of religion, and the disgrace of that order which they professed.” Cited in C Lasch “The Suppression of Clandestine Marriage in England: The Marriage Act of 1753” (1974) Vol 26 Salmagundi 9, and as discussed in Sinclair, above note 94 at 59.
126 S Parker “The Marriage Act 1753: ‘A Case Study in Family Law-Making’ Vol 1 International Journal of Law and the family 1987 at 147; there were arguments that the Bill would deny basic liberty and freedom of choice.
127 Percy Bysshe Shelley 4 August 1792-8 July 1822 was one of the major English Romantic poets and is critically regarded as among the finest lyric poets in the English language. Shelley professed atheism which led to his expulsion from Oxford, branded a radical and ostracised from the intellectual and political circles of his time. Recognition of his significance grew after his death.
128 A Wheeler and W Thompson “An Appeal of One Half of the Human race, Women against the pretensions of the other half, men” (1825) cited in Sinclair, above note 94 at 64.
129 The Poor Law Amendment Act 1834 reformed England’s system of poverty relief, replacing legislation based on the Poor Law of 1601, including its consolidations of 1822-25. The importance of the Poor Law declined with the rise of the welfare state in the 20th century.
131 The New Zealand Act was understood to refer to marriage as being between a man and a woman, which was confirmed by Quilter v Attorney-General [1988] NZLR 523 (CA). However, on 26 July 2012, Labour Party MP Louisa Wall’s private member's bill, the Marriage (Definition of Marriage) Amendment Bill, was drawn, seeking to modify the definition of “marriage” in Section 2 of the Marriage Act 1955 to be inclusive of same sex marriage, and to replace Schedule 2, the list of prohibited degrees of marriage, with a new schedule using gender-neutral language. This resulted in the Marriage (Definition of Marriage) Amendment Act 2013; section 2 was amended to provide that “marriage means the union of 2 people, regardless of their sex, sexual orientation, or gender identity.” In addition, the Civil Union Act 2004 makes available a civil union to same sex couples.
2.6 The rise of the nuclear family

Stone describes how, between 1500 and 1750, the importance of the nuclear family and the centrality of motherhood within this structure increased as the political influence of surrounding kinship decreased. At the same time, the affective bonds of the family were seen to be strengthening, as its centrality as an economic unit declined. He sees these trends as reflective of three related issues of the time: the decline of kinship as the basis of societal organisation, the modern state rising and taking over some of the social and economic functions of family or kin, and the subordination of kin loyalty to the higher obligations of patriotism and allegiance to the sovereign. He also regarded the rise of Christian morality as influencing the role of the family towards that of a substitute parish. The power of the state was strengthened by the destruction of the political power of aristocratic kinship, while at the same time the state fostered the rise of patriarchy. This strengthened the power of the husband and the father within the family unit, seen by Reich as a situation where “in the figure of the father, the authoritarian state has its representative in every family, so that the family becomes the most important instrument of power”. The contemporaneous rise of the church’s sanctification of marriage and married love meant that the authority of a husband over his wife was strengthened with an increased readiness on the part of the wife to submit herself to such authority, including in her motherhood role, and this contributed to the rise of patriarchy.

At first, as the kinship of the Middle Ages gave way to the nuclear family of the 17th century, it became more patriarchal and authoritarian than ever before, with power flowing increasingly to the husband over his wife, and to the father over his children. Subsequently, influenced by a number of factors including the growth of affective bonds between husband,
wife and children and the influence of the Christian church, there continued a complex evolutionary process of the structure of marriage and family from this patriarchal authoritarianism towards what Stone describes as the more “companionate and egalitarian” nuclear family of the 18th century. However, he then saw patriarchy returning after 1800. This had implications for the understanding of family gender roles, with the development of separate spheres of activity for men and women. Stone’s “companionate” marriage has been described by other writers not as a move away from patriarchy, but a ‘gentle tyranny’ in which male dominance was maintained, if somewhat more subtly.

Shoemaker, for example, considers that recent research on family shies away from grand theories of change, emphasising instead a basic continuity influenced by regional, class and individual differences.

2.7 The development of divorce

Marriages did not always last and the context for motherhood was therefore not always secure. Stone records that at common law:

… a married woman was the nearest approximation in a free society to a slave. Her person, her property, both real and personal, her earnings, and her children all passed on marriage to the absolute control of her husband. The latter could use her sexually as he wished, and beat her (within reason) or confine her for disobedience to any orders. The children were entirely at the disposal of the father.

Yet whether the marriage broke down through cruelty, domestic violence, adultery or simply through incompatibility, the parties faced a difficult situation as divorce, except by statute, was illegal in England until 1857. A formal divorce could be obtained by an Act of Parliament but it was rare and expensive, and only available on certain grounds. A husband could obtain a divorce against a wife on the basis of her adultery, but a wife could not achieve the same against her husband unless accompanied by bigamy, rape, incest or sodomy. It was also possible through the ecclesiastical courts to pursue a legal separation, mostly brought by husbands on the basis of the wife’s adultery. Private agreements were possible and often resulted in more favourable outcomes for the wife, as they could include

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136 Stone, above note 134 at 57.
137 Robert B Shoemaker Gender in English Society 1650-1850 The Emergence of Separate Spheres? (Addison Wesley Longman Ltd, 1998) at 90.
138 Shoemaker, above note 137 at 90.
140 Bridget Hill, above note 124 at 210-11.
maintenance and the prospect of economic freedom. They were often utilised in circumstances where a husband wished to go and live with a new lover.\textsuperscript{141} However, where there were not the financial resources to make these kinds of arrangements, desertion became the increasingly common option of achieving divorce. This was often the result of economic stress but, whatever the reason, it was usually the man who left both the woman and their children. Motherhood therefore continued after marriage breakdown, but in challenging circumstances. However, a woman who deserted her husband was regarded as still legally married and, in these circumstances, had no right to any property nor to the custody of her children who belonged to the father. Common law divorces and remarriage became relatively common, marked by such rituals as returning the wedding ring or jumping backwards over a broom. However, with the passage of Hardwicke’s Marriage Act in 1753, these practices became more difficult as the detection of bigamy became easier.\textsuperscript{142} From about 1750 a more formalised, but still customary, practice developed called the wife-sale; a husband placed a halter around his wife’s neck and led her to the market where she was sold to the highest bidder. Women were treated as the property of their husband and the process lacked respect for the wife. However, these rituals did not occur without her consent, with a sale often having been pre-arranged with the wife’s lover and arrangements being made for her to continue in her motherhood role, suggesting that this form of divorce could sometimes work to her advantage.\textsuperscript{143} The Matrimonial Causes Act 1857 reformed the law on divorce in England. The jurisdiction of the ecclesiastical courts moved to the civil courts, with divorce becoming more widely available to those who could not afford to bring proceedings for annulment or to promote a private Bill. Subsequently, the Matrimonial Causes Act 1937 promoted a more equitable treatment of divorce law, making it easier for women to seek divorce. It also widened the grounds for divorce from adultery alone, to include desertion and incurable and mental illness. This was consolidated by the Matrimonial Causes Act 1973.\textsuperscript{144} Throughout all these processes, marriage, and remarriage upon divorce, continued to be the preferred context for motherhood.

\textsuperscript{141} Lawrence Stone, above note 139.
\textsuperscript{143} Shoemaker, above note 142 at 110.
\textsuperscript{144} Divorce in England and Wales is presently granted on the basis of the irretrievable breakdown of marriage, as evidenced by one of five grounds, being: adultery, unreasonable behaviour, desertion, two years’ separation with consent and five years’ separation without consent.
The development of New Zealand’s legislative regime with respect to marriage

The New Zealand legislative regime initially followed that of England, although Inglis saw the divergence after 1840 eventually becoming so pronounced that any resemblance between the two became largely superficial.\footnote{Inglis, above note 68 at 15.} New Zealand was regarded as a pioneer in many family law areas, such as enfranchising women and with respect to the introduction of the Married Woman’s Property Act 1884, allowing women for the first time to hold property in their own right. With respect to divorce, the Divorce and Matrimonial Causes Act 1867 was almost identical to the English Matrimonial Causes Act 1857. It allowed divorce for the husband only on the grounds of the wife’s adultery; a wife’s ability to obtain a divorce from her husband through his adultery, as in England, had to be linked to other serious misconduct on his part such as cruelty, desertion, bigamy, rape or bestiality. Motherhood had some protection in these circumstances as the mother was not regarded as being at fault, contrary to her motherhood role being placed in jeopardy if she was regarded as guilty of moral failure. The development of New Zealand’s divorce laws continued to be based on fault. The Divorce Act 1898 allowed a wife to divorce solely on the basis of her husband’s adultery, together with a number of new grounds including desertion, habitual drunkenness, failure to maintain, non-compliance with a decree for restitution of conjugal rights or attempted murder of the wife (providing a minimum sentence of seven years imprisonment was imposed). The Divorce and Matrimonial Causes Act 1907 added two further grounds, being a conviction for the murder or attempted murder of a child and confinement as a lunatic for ten of the previous twelve years,\footnote{Inglis, above note 131 at 15.} (subsequently reduced to five out of the last seven years).\footnote{Divorce and Matrimonial Causes Act 1912; see Inglis, above note 68.} Further amending legislation added more grounds, being three years separation by agreement and a sentence of seven years imprisonment or more for grievous bodily harm to wife or child.\footnote{Divorce and Matrimonial Causes Act 1920; see Inglis, above note 68.} The Divorce and Matrimonial Causes Act 1953 added seven years separation with no likelihood of reconciliation, and the murder of any person. The Matrimonial Proceedings Act 1963 consolidated all of the earlier legislation and remained the foundational legislation until the major reforms of the Family Proceedings Act 1980, when the Family Court was instituted and the ‘no fault’ policy and sole ground of divorce on the basis that the marriage had broken down irreconcilably\footnote{S 39 Matrimonial Proceedings Act 1980.} were introduced. These reforms should have protected motherhood from the challenges of the previous fault-based regime, but the changes occurred at the time

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of moves towards gender neutrality in New Zealand’s parenting laws, which arguably then became problematic for motherhood because of its gendered nature.\textsuperscript{150}

The Destitute Persons Act 1910 provided statutory relief for mothers with respect to issues of paternity, maintenance and a separation order where domestic violence was involved. In 1939, these remedies became available to husbands through the Domestic Proceedings Act 1939. This was again reformed and consolidated in the Domestic Proceedings Act 1968, which also introduced the non-molestation order.\textsuperscript{151} This was consolidated into the present Family Proceedings Act 1980. The Guardianship Act 1968 addressed issues of custody, access and guardianship, carrying forward the principle of the paramountcy of the welfare of the child from the Guardianship of Infants Act 1926, introduced into New Zealand from England. The welfare principle itself, foundational to this legislation, had first emerged in English law in 1885 and was elevated there to the paramount principle in 1925. New Zealand followed suit by the introduction of the welfare principle in 1886, with its paramountcy being legislated in 1926. Gender neutrality in parenting entered New Zealand law as an amendment to the Guardianship Act 1968, introduced in 1980. The Care of Children Act 2004 replaced the Guardianship Act 1968 and, following amendment in 2013, remains in force today.

\section*{2.9 The History of motherhood outside the institution of marriage ie illegitimacy}

Until the passage in the UK of the 1753 Marriage Act, which ended legal protection for a betrothed, sex had been playing an important part in negotiations leading to marriage. A promise to marry was understood to convert to a common law marriage if sexual intercourse took place. Pregnancy was still expected to lead to marriage even after this Act came into force, and by the early 19\textsuperscript{th} century it was estimated that about a third of brides were pregnant at the time of their marriage.\textsuperscript{152} Gillis says of the time that there had by then been no increase “in chargeable bastards [to the poor law], but a great increase of marriages to prevent it.”\textsuperscript{153} However, Shoemaker reports that while illegitimacy declined in the early 17\textsuperscript{th} century and would decline again in the late 19\textsuperscript{th} century, from about 1650 to 1850 it increased from 1.5 per cent to 5 per cent of all births. If the focus is only on first births, the illegitimacy rate was

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\textsuperscript{150} See Chapter Three with respect to the Guardianship Act 1968, its subsequent amendment in 1980 and the introduction of the Care of Children Act 2004, with its gender-neutral language with respect to parents and parenting, replacing any previous gendered references to mothers and fathers.
\textsuperscript{151} This was subsequently replaced by the Domestic Violence Act 1995.
\textsuperscript{152} Gillis \textit{For Better For Worse}, referring to “Report of His Majesty’s Commission to Inquire into the Poor Laws”, cited in Shoemaker, above note 142 at 98.
\end{flushleft}
even higher at about 16 per cent.\(^{154}\) This was not the type of motherhood intended by the Christian view of marriage. It resulted in shame and rejection for the mothers, and created difficulty for them in providing for their children.\(^{155}\) The first admission to the London Foundling Hospital was in 1741, and in the period 1756-60 when the admissions policy was at its most liberal, about half of all first births in London were delivered there.\(^{156}\) For most women, motherhood through an illegitimate birth was catastrophic, both socially and economically.

New Zealand again led the common law world with respect to its legal response to illegitimate children, recognised in their ‘bastardy’ as being the children of no-one (nullius filius).\(^{157}\) In 1860, New Zealand took steps to create some recognition with the Half Caste Disability Removal Act which provided legitimacy if the child’s parents later married. The legitimacy of such children was not recognised in England until 1926. In New Zealand, there was further legitimising legislation in 1894, followed by the Legitimation Act 1939. Then, in 1969, New Zealand’s Status of Children Act removed illegitimacy altogether from the law.\(^{158}\) At the same time, marriage as a context for motherhood was becoming less important. Illegitimacy, with its associated social shame, was no longer recognised in the law and barriers to motherhood outside of marriage were being broken down. The Domestic Purposes Benefit was introduced to provide state financial support to unmarried mothers.\(^{159}\) Motherhood was no longer limited, either socially or legally, to the context of marriage.


\(^{155}\) That maternity might not automatically lead to responsibility for motherhood was not considered in England and other common law systems such as New Zealand. However, in France from the time of the French Revolution, a system of accouchement sous X developed and was subsequently adopted into the Civil Code in 1941, which provided a clear distinction between maternity and the choice by a mother whether or not to accept responsibility for the child after birth. See Michael Freeman and Alice Margaria, above note 17 153; see also discussion in Chapter Five with respect to theories of motherhood.


\(^{157}\) The term ‘bastard’ apparently derives from the French ‘bast’, meaning a ‘pack-saddle’ often used as a pillow by muleteers. A bastard was a pack-saddle child, born of a casual relationship on the road. See Anthony Dickey Family Law (Thomson Reuters, Australia, 6th ed, 2013). Nullius filius is defined as “an illegitimate child: a bastard having no heritable rights in common law”; see Merriam-Webster dictionary www.merriam-webster.com/dictionary/nullius%20filius, searched 5 August 2015.

\(^{158}\) Inglis, above note 68 at 21.

\(^{159}\) The passage of the Social Security Amendment Act, on 14 November 1973, introduced the Domestic Purposes Benefit to New Zealand's social welfare system. Paid out from 1 May 1974, the DPB was to be maintained at a level that would enable sole parents, usually mothers, to care for their children without needing to find paid employment.
2.10 Adoption, whāngai and the Māori perspective in New Zealand

Adoption as a response to the problem of illegitimacy, that is, birth and motherhood outside of marriage, was recognised early in New Zealand’s family law. The Adoption Act 1881 again led the way in the Commonwealth, in enabling adoption of illegitimate children. This early legislation was followed by the Adoption Act 1955 which still remains in force today, although the subject of review and calls for reform. Adoption was also an early legal mechanism introducing and providing legal authority for the social mother in the place of the biological mother.

Whāngai, a longstanding practice of Māori customary adoption or gifting of a child, continued alongside these legal initiatives and is also now formally recognised within New Zealand’s family law. It has always maintained the central importance of kinship in placement arrangements for a child within whānau (based on a Māori and tribal world-view of the physical, emotional and spiritual dimensions of the extended family). It has also always recognised within this, the role of a female caregiver, be it an aunt or grandmother, in place of the natural mother rather than a gender neutral caregiver for the child.

Makereti, in The Old Time Māori, considered that Māori did not regard illegitimacy in the same way that Europeans did. It was not common but, if a birth occurred outside of marriage, the mother was not deserted by the father. The child would be brought up by the mother or by the father’s people, would be well looked after and would own shares in land and property along with the other children of the whānau. It is Judge Somerville’s view that the Adoption Law Commission Report Adoption and its Alternatives (NZLC, 65) (Wellington, New Zealand, 2000); Care of Children Law Reform Bill Member's Bill 62—1, 2012 (not drawn out of the ballot). Adoption numbers in New Zealand increased from 1455 adoptions in 1955 to 3967 adoptions in 1971; thereafter the numbers began to decrease, with 1864 adoptions in 1981 continuing to steadily reduce with 259 adoptions in 2008. http://www.cyf.govt.nz/documents/about-us/adoption-data-1955-2011.pdf searched 24 November 2015. These statistics do not identify children in state care, away from their natural mothers, but whose care arrangements do not proceed through formal adoption. However, they do correlate with the introduction of the Status of Children Act 1969 and the Domestic Purposes Benefit in 1974, providing to a single mother a social and financial ability to keep her child.

See Chapter Three with respect to the ‘psychological parent’, a term developed by the work of Joseph Goldstein, Anna Freud and Albert Solnit in Beyond the Best Interests of the Child (1973), Before the Best Interests of the Child (1979), and In the Best Interests of the Child (1986).


Makereti The Old Time Māori (Gollancz,1938) at 117.
Act 1955 fails to accommodate this practice of whāngai.\footnote{Judge Annis E Somerville “Whānaungatanga in the Family Court” (2006) 5 NZFLJ 140; A E Somerville “He Tamariki, He Taonga” in (2003) 7 (2), x-y, Childrenz Issues – Journal of Children’s Issues Centre.} Section 7 of the Adoption Act requires that the consent of the natural parent must be given prior to adoption; this does not include the wider whānau who are seen by Māori as requiring input into the decision making. The child belongs not to the individual parent, but to the wider descent group where kinship is central and important. Judge Somerville quotes from the affidavit of an unidentified Māori mother to further explain the concept:\footnote{Somerville, above note 164 at 145.}

My pregnancy was unplanned and unexpected. X and I discussed my pregnancy and she asked for my son. X wanted to have a child so I gifted my son to her. It was very difficult but I have not given him away. He is part of my immediate family and is never far from me. He now has two mothers and is bonded to X, myself, my Koro and Aunty… My son is in my sister’s primary care and he is bonded to her. My son has lots of people who love him and X is an awesome mother. My son is very lucky to have so many people who love him.

To Māori, motherhood was a respected state whether inside or outside of marriage. It was also uniquely a female role, based in a recognition of gender difference between motherhood and fatherhood.

Whether motherhood is more broadly accepted by the law as a uniquely female role or not, is relevant to issues of gender neutrality and gender equality, which can be traced through the law as it applies to motherhood.\footnote{See Chapter Three with respect to a discussion of gender-neutrality emerging in the law, firstly in England in the late 19\textsuperscript{th} century, as a mechanism to protect motherhood in the face of the gendered dominance of patriarchy, and secondly in New Zealand in the late 20\textsuperscript{th} century to remove the effect in law of any application of the ‘mother principle’, thereby arguably seeking the opposite by failing to recognise and protect motherhood as a gendered role.} Recognition of motherhood as a gendered role within a broader social context, at the same time linked to the development of gender equality including within the context of motherhood, is now explored.

\subsection*{2.11 Motherhood as a gendered role, yet an issue of gender equality}

Historical tensions have played out socially and legally with respect to the issue of gender equality between motherhood and fatherhood, and these tensions continue to exist today. Seeking gender equality between motherhood and fatherhood also contributed to the unresolved tension between motherhood and fatherhood being regarded either, firstly, as
equal in value but different in function, or secondly, as equal in value and the same in function. John Locke, a 17th century English philosopher, argued that motherhood was not an obstacle but the key to women’s equality.\textsuperscript{167} Locke, regarded as the father of classic liberalism and one of the most influential of the Enlightenment thinkers, was, as Waldron says, “at his most radical”\textsuperscript{168} in his aggressive arguments on behalf of mothers and motherhood. According to Waldron, Locke rejected the notion that motherhood was a debilitating state precluding women sharing equally in the rights granted to men. In contrast, says Waldron, Locke regarded motherhood not as an obstacle but as the key to equality.\textsuperscript{169} According to Locke, it is the mother, not the father, to whom the foetus owes its soul. He credits the mother with “an equal share, if not the greater” for the child’s “Materials and Principles of its Constitution,”\textsuperscript{170} which Waldron describes as “emphatic egalitarianism or actual favouring of mothers.”\textsuperscript{171} Waldron also regarded Locke as expressing no concern about a child being left to the sole care and protection of its mother, nor any suggestion that an abandoned mother needed to go and find a male guardian for her children.\textsuperscript{172}

Shoemaker also confirmed that the division of role and function between motherhood and fatherhood was becoming more gendered and specific to task during the 17th to 19th centuries, perhaps as a result of the growing ideology of separate spheres.\textsuperscript{173} Maternal care of children was seen as natural. Richard Allestree had written in 1673 that “a mother is a title of so much tenderness … that nature seems to have secured the love of mothers to their children.”\textsuperscript{174}

\textsuperscript{167} John Locke First Treatise of Government , “Of Government: Book I” In Economic Writings and Two Treatises of Government(1691) Volume 4 of The Works of John Locke in Nine Volumes (London, Rivington,1824); see chapter 55 “But grant that the parents made their children, gave them life and being, and that hence there followed an absolute power. This would give the father but a joint dominion with the mother over them: for nobody can deny but that the woman hath an equal share, if not the greater, as nourishing the child a long time in her own body out of her own substance: there it is fashioned, and from her it receives the materials and principles of its constitution: and [56] it is so hard to imagine the rational soul should presently inhabit the yet unformed embryo, as soon as the father has done his part in the act of generation, that if it must be supposed to derive any thing from the parents, it must certainly owe most to the mother. But be that as it will, the mother cannot be denied an equal share in begetting of the child, and so the absolute authority of the father will not arise from hence.” See also chapter 61 “nay, the scripture makes the authority of father and mother, in respect of those they have begot, so equal, that in some places it neglects even the priority of order, which is thought due to the father, and the mother is put first, as Lev. xix. 3. from which so constantly joining father and mother together, as is found quite through the scripture, we may conclude that the honour they have a title to from their children, is one common right belonging so equally to them both, that neither can claim it wholly, neither can be excluded.”


\textsuperscript{169} Waldron, above note 168 at 1.

\textsuperscript{170} Locke, above note 167.

\textsuperscript{171} Waldron, above note 168 at 22, 23.

\textsuperscript{172} Waldron, above note 168.

\textsuperscript{173} Shoemaker, above note 142 at 122.

\textsuperscript{174} Richard Allestree The Ladies Calling (1673) at 211, cited in Shoemaker above note 142 at 123.
While the responsibility for parenting was shared, a mother’s responsibility was at its greatest with babies and young children. It then began to decrease after the child reached about seven years of age, especially for a boy child. Childbirth was a woman’s domain, the lying-in period became extended and this was often followed by a “churching” ceremony. This was to purify new mothers from the taint of sex and childbirth and became popular notwithstanding its potential for embarrassment, because it “legitimated the wider ceremony of childbirth”\footnote{Adrian Wilson “The Ceremony of Childbirth” in Women as Mothers in Pre-Industrial England ed V Fildes (1990) at 88-93, cited in Shoemaker, above note 137 at 123.} which mothers controlled. Pollock records that mothers, in having assumed the primary care of babies and young children, wrote diaries during the 18\textsuperscript{th} century period noting that they “devoted every waking moment to the care of their offspring”.\footnote{Linda Pollock Forgotten Children: Parent-Child Relations from 1500 to 1900 (Cambridge, 1983) at 120.} Fathers were seen to have a different role in taking an increasing interest as the child got older, playing with them, reading, going on walks and undertaking other recreational activities. They also took responsibility for the major decisions, enforced discipline and helped their children (especially their sons) to get established in a career. However, men saw their primary role as providing economic support for the family.\footnote{Shoemaker, above note 137 at 124; Stone, above note 134 at 461-473.} There was some overlapping responsibility in the area of moral and religious instruction, and general schooling. Mothers provided most of the instruction for young children, and as children got older, fathers began playing a greater role. Stone records that the mother became the dominant figure in children’s lives in the period 1640 to 1800,\footnote{Stone, above note 134 at 456, cited in Shoemaker, above note 137 at 126.} and refers to Lady Sarah Lennox, writing in 1820, that as her children “rose out of infancy, [she] left them to their father’s management, and studied to become their friend, not the tutoress of [her] sons.”\footnote{Stone, above note 134 at 125-6.} There was a steady increase in a mother’s responsibilities towards her children such that Davidoff and Hall noted that during the 18\textsuperscript{th} and 19\textsuperscript{th} centuries there was a “progression to a model of full-time motherhood”\footnote{Davidoff and Hall Family Fortunes cited in Stone, above note 134 at 456.} as recognition of this primary and gendered role and responsibility. Tosh\footnote{John Tosh “Authority and Nurture in Middle-Class Fatherhood; the case of early and mid-Victorian England” in Gender and History 8 (1996) at 53-59.} viewed early and mid-Victorian motherhood as having a greater moral importance than it had at any other time, as “all questions relating to the upbringing of children were increasingly resolved by the mother.”\footnote{Tosh, above note 181.} Shoemaker records that childrearing manuals of the 17\textsuperscript{th} through to the 19\textsuperscript{th} centuries were aimed initially at both mothers and fathers, by the 18\textsuperscript{th} century at mothers only
“with some anxiety expressed about this” and by the 19th century at mothers only, without such anxiety.\textsuperscript{183} Perry argues that women became defined by their maternal function, rather than their sexuality.\textsuperscript{184} Motherhood had become a serious duty and responsibility for women, with maternal qualities such as pity, tenderness and benevolence being highly valued and wet nursing declining as maternal breast-feeding increased.\textsuperscript{185} Tosh saw the mother’s responsibilities towards her children extending to their moral upbringing, which went so far as to include “the manliness of her son”.\textsuperscript{186} At the same time, men were seen to be withdrawing from child-raising. Leavy suggests that motherhood acquired increased importance at the expense of fatherhood.\textsuperscript{187} Tosh considered that the most common approach to fatherhood that developed through this period was the emotionally distant father who cared deeply about his children, but withheld his feelings for them, not because of the rise in the centrality of motherhood but because of a number of inter-related factors. These included the use of nurseries in middleclass homes, work away from home, the greater difficulty in securing employment for their sons, the need to demonstrate a hard-heartedness to equip them for the outside world, and the increased importance placed on the mothers’ accepted moral qualifications with respect to child-rearing.\textsuperscript{188} While it could be argued that this undermined the role of fathers, Shoemaker suggests that the evidence points to the contrary. He saw fathers continuing to participate in domestic decision-making and family intimacy, and that the best conclusion to be drawn from this time was that, while a gendered division of responsibilities for childcare may have been accentuated, it was the continuities of shared but different parental roles over a long period, rather than changes, that were the most striking.\textsuperscript{189}

The impact on children of the increasing value that was placed on motherhood during this period is difficult to measure. Boys and girls were treated differently and expectations as they each approached adulthood were also different, yet both spent significantly more time with

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\textsuperscript{183} Abigail J Stewart, David G Winter and A David Jones “Coding Categories for the Study of child-rearing from Historical Sources” Journal of Interdisciplinary History 5 (1975) at 701, as discussed in Shoemaker, above note 137 at 126.
\textsuperscript{185} Perry, above note 184.
\textsuperscript{186} John Tosh A Man’s Place: Masculinity and the Middle Class Home in Victorian England (Yale University Press, 2007). Once the rights of wives were extended by law and society, Tosh saw marriage as less attractive to men of the Victorian era. While he saw that the Victorians declared that to be fully human and fully masculine, men must be active participants in domestic life, he at the same time exposed the contradictions in this ideal which laid the foundation for gender politics over the century to come.
\textsuperscript{188} Tosh, above note 186 and Chapter Five; see also Shoemaker above note 137 at 127.
\textsuperscript{189} Shoemaker, above note 137 at 128.
\end{footnotesize}
their mothers than their fathers during their formative years. Locke may not have been concerned about this; other writers were more so.\footnote{Stone refers to commentators writing of fathers beating and terrorising their sons but never touching their daughters, and girls developing close but complicated relationships with their mothers; see Lawrence Stone \textit{The Family, Sex and Marriage in England, 1500-1800} (Weidenfeld and Nicholson, 1977) at 469, referred to in Shoemaker, above note 142 at 133-4.}

\textbf{Summary}

By the 19\textsuperscript{th} century, the accepted social and policy context for motherhood was within the context of Christian marriage. However, marriages did not always last; motherhood was therefore not always secure, and outside the context of marriage, it was generally regarded as catastrophic for a woman. Men were regarded as superior, particularly in the UK’s patriarchal society, and husbands and fathers had supreme authority and ownership over their wives and mothers to their children. Kinship remained important, which was also the case in New Zealand, particularly with respect to whāngai, a Māori cultural practice which pre-dated, and continued after, European settlement. Gendered roles within family were recognised, motherhood having become a revered, full-time and serious duty and responsibility.

The next chapter continues this historical survey of motherhood, this time tracing the emerging family law jurisdictions of both the UK and New Zealand, and case law developments from the late 18\textsuperscript{th} century to the present time as they relate to motherhood and the role of the mother.
Chapter Three

The History of Motherhood II: Tracing Law and Society

Introduction

The origins and development of family law in the UK initially reflected respect for the role of motherhood, and protection of mothers and the mother-child relationship from the inequity of the absolute ownership by the husband of his wife and children. This approach was the basis of the emergence of the law’s equitable parens patriae jurisdiction, the welfare principle, the ‘tender years doctrine’ in England and the development of the ‘mother principle’ in New Zealand, a jurisdiction that had adopted the common law tradition of the UK and which also assumed many of the UK’s statutes as its own. The law’s understanding of motherhood as a unique and gendered role also emerges from an historical tracing of the relevant statutory legal framework and associated case law between the UK and New Zealand from the late 1700s, through the 19th and 20th centuries, to the 1970s. The subsequent movement from mothering within marriage, to a more neutrally framed and individualised state of parenthood, based in equality and gender neutrality, is then identified. As a consequence, regard for motherhood by the law appears to diminish. This occurs at a time that the law’s regard for the importance of fatherhood appears to increase. A discussion of these historical developments follows.

3.1 Roman law

Roman law provides the origins of both English and New Zealand family law. Pater familias was the highest ranking family status in Roman law, meaning “father of the family”. The Roman pater was the chief of his house, a concept distinct from that of the biological father who was called the genitor. The pater familias had patria potestas, the power of life and death, over his children, his wife and his slaves who were said to be sub manu, “under his hand”. His word was absolute and final. If a child was unwanted, the pater familias had the power to order the child be put to death by exposure. He had the power to sell his children into slavery, and to approve or reject marriages of his sons and daughters. The children could be other than biological offspring, such as brothers, nephews or adoptive sons and daughters. In Ancient Rome, the family household was an economical and juridical unit subordinated to
a single person, who held significant authority over all its members. The family was considered the original social unit, foundational to the clan, caste, or tribe.

The *pater familias* was the only person endowed with legal capacity, or *sui iuris*. Women (in most, but not all, cases) had a *capitis deminutio*, meaning diminished capacity, that is, they could not enter valid contracts, could not possess personal property and did not have authority over their children. All assets, including contracts and children, belonged to the *pater*. He owed duties towards the women, children and slaves within his household. Only a Roman citizen could enjoy the status of *pater familias* and there could only be one holder of the office within a household. Male adult sons remained under the authority of their *pater* while he still lived, and could not acquire the rights of a *pater familias* while he was still alive. Those who lived in their own households at the time of the *pater*’s death succeeded to the status of *pater familias* over their respective households (*pater familias sui iuris*), even if they were still barely more than children themselves.

Women were always under the control of a *pater familias*, either their original *pater*, or the *pater* of their husband’s family once married. Over time, the absolute authority of the *pater familias* weakened, and rights that theoretically existed were no longer enforced or insisted upon. The power over life and death was abolished, the right of punishment was moderated, and the sale of children was limited. Nonetheless, Roman law had a significant influence upon the development of English common law which, in turn, was foundational to the development of New Zealand family law.

### 3.2 The development of English family law

The English *parens patriae* doctrine, having its roots in Roman law, developed in England through common law and equity. In feudal times, various obligations and powers, collectively referred to as the ‘royal prerogative’, were reserved to the king who exercised these functions in his role as father of the country. Blackstone noted that the English sovereign was “general guardian of all infants, lunatics, and idiots”.\(^{191}\) This was initially invoked by the King’s Bench in the 16\(^{th}\) century in cases of *non compos mentis* adults. The doctrine dates from at least 1608, as recorded in Coke’s Report of Calvin's Case “that moral

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law, honora patrem ... doubtless doth extend to him that is pater patriæ.' The parens patriae doctrine was gradually applied to children throughout the 17th and 18th centuries, and has since evolved from one granting absolute rights to the sovereign to one associated with rights and obligations of the state and courts towards children and adults suffering from an incapacity. In the 17th through 19th centuries in England, feudal law began to break down and the legal relationship of parents and children was no longer intertwined with land tenure. However, the father retained ownership and control of the children. He had custody of them, defeated only if the mother could establish that the father’s conduct would place their life, health or moral development in serious jeopardy. In the 1781 decision of Ex Parte Lytton, the reach of the Court of Chancery was becoming evident. There, the father retained custody but Lord Mansfield required him, within a voluntary deed of separation, to provide access by the mother to her child. However, the 1804 decision of R v De Mandeville illustrates how pervasive and superior a father’s ownership rights were considered at that time to be, notwithstanding the significance of the mother. There, a breast-fed eight-month-old baby girl, whose mother had left the home with her because of her husband’s violence, was ordered to be returned by the mother to the father. Lord Ellenborough indicated that the Court would protect the child if injured “through want of nurture” or in any other respect. The limitation to the father’s rights was justified by the Court of Chancery as being in the interests of the child, that is, motherhood was understood as being of great importance to the child, and not because of any evident lack of equality between the parents. In the 1806 decision of Whitfield v Hale, the mother gained custody because of the father’s ill-treatment; however, in R v Greenhill, three young girls were ordered back to a father who had committed adultery and was paying no support to the mother. There, Lord Denman directed that the father would retain custody unless there was some evidence on his part of “the apprehension of cruelty, or contamination by some exhibition of gross profligacy”. The few exceptions to the father’s right to ownership and custody of the child, were based on the father’s conduct, not because of any legal recognition of the importance of the mother to the child. Examples can be found in the 1818 decision of R v Dobbyn, where a father lost custody because of his cruelty, and

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192 Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608). In the view of Sir Edward Coke, who was one of the deciding judges, the court’s determination was required by the divine law of nature. It was an important constitutional decision with respect to birthright and naturalisation.

193 Ex Parte Lytton (1781) 5 East 222.

194 R v Mandeville (1804) 5 East, 221 at 1054; Lord Ellenborough at [233].

195 Whitfield v Hale (1806) 12 Ves 492.

196 R v Greenhill (1836) 4 AD & E 922.

197 Above note 196, per Lord Denman at 928, [641].

198 R v Dobbyn (1818) 4 Ad & El 644.
in 1838, in *Ex Parte Bailey*,\(^{199}\) where the father’s conviction with respect to a felony caused the loss of custody to the mother. Thus, the absolute nature of the father’s rights under the common law could be ameliorated by equity.

From the 17th century, social changes and the consequential changing nature of the family affected how the mother-child relationship was viewed. This brought about a greater orientation towards the concept of childhood and the welfare principle. However, that the interests of the child required the mother-child relationship to be protected was far from established in law. The patriarchy of the common law in the 18th century meant that women and children were denied legal status or competence. It was not until women’s struggle during the 19th century for recognition of equal parental rights with respect to their children that two results emerged. One was the 1925 elevation of welfare principle to the central and paramount consideration in any custody dispute. The other was the creation of a neutral gender principle as between mothers and fathers in determining such disputes. That is, fathers should not be advantaged by their gender in determining issues of child custody ownership, as had previously been the absolute position in common law. The gender neutral principle did not have its origins in arguments that mothers should be advantaged by their gender in determining issues of custody. This was a position that was to emerge much later, in the late 20th century, argued largely by fathers, that mothers should not be advantaged by their gender, as they sought to neutralise the effects of the ‘tender years doctrine’ in England and ‘the mother principle’ in New Zealand.\(^{200}\) In the beginning, the neutrality principle only operated if a custody matter was brought before the Court. Until then, the all-encompassing rights of the father at common law, regarded as sacred, remained as they were.

Cretney traces the development, through the English common law, of the enduring legal principle that the welfare of the child is the paramount consideration.\(^{201}\) He identifies the pressures and processes which led to change, examining the influence of officials in government and the Parliamentary draftsmen. He gives particular attention to the pressure for compromise. Maidment suggests that the legislative introduction of the welfare principle in England through the Guardianship of Infants Act 1925,\(^{202}\) against a background of complete authority, ownership and power by the common law belonging to the father (though

\(^{199}\) *Ex Parte Bailey* (1838) 6 Dowl 311.

\(^{200}\) See Chapter Three, para 12.

\(^{201}\) Stephen Cretney *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003); see also Susan Maidment *Child Custody and Divorce* (Croom Helm, 1984).

\(^{202}\) The welfare principle emerged earlier in 1885, being elevated to the paramount consideration through the 1925 legislation.
somewhat ameliorated by the Court of Chancery), was a political device which enabled patriarchy to continue. She saw that mothers, by such a provision, would then be enabled to obtain the care of their young children upon separation, as was understood to be a right and natural consequence of motherhood, without any further concessions having to be made by husbands and fathers or Parliament, with respect to equal rights for women within the home or generally.\(^{203}\) Power would not then need to be shared or equalised, and patriarchy could continue. This is consistent with the development of dominance feminist theory, that the important issue between men and women was the difference in power and its distribution, with the consequential powerlessness of motherhood within a patriarchal culture.\(^{204}\)

The statutory principle that a child’s welfare in custody disputes was the first and paramount consideration, which developed out of the principle in equity and the Court of Chancery, required the neutrality principle to be subordinated to it. Moreover, the legal position concerning parental rights, and therefore the legally superior father’s claim, influenced the judicial interpretation of the welfare principle. Paradoxically, the welfare principle was, in its earliest form, used to justify eroding the sacred rights of fathers over their children. Maidment also refers to the fact that the welfare principle did not emerge out of concern for children, but rather to assist mothers to be more equally recognised with fathers in custody disputes when the absolute and superior ownership right of the father had previously prevailed.\(^{205}\)

### 3.3 The development of New Zealand’s legislative framework

The late Judge Inglis QC outlined the nature and history of family law in New Zealand as having been derived from English ecclesiastical law and the principles developed by the English common law and the Court of Chancery, in his authoritative work *New Zealand Family Law in the 21st Century*.\(^{206}\) New Zealand’s Custody of Infants Act 1839 legislated the position that already existed in England, that is, children belonged to their fathers and women and children had no rights in law.\(^{207}\)

Then New Zealand adopted and codified the provisions of England’s Guardianship of Infants Act 1886, through the provisions of the Infants Act 1908. This related to situations where the

\(^{203}\) Maidment, above note 201 at 7.
\(^{204}\) SeeChapter Five.
\(^{205}\) Maidment, above note 201.
\(^{206}\) B. D. Inglis above note 68.
\(^{207}\) Inglis, above note 68.
father had died, and the mother was seeking guardianship which she did not otherwise have, in his place, either alone, or in conjunction with any testamentary guardian appointed by the father. The New Zealand Courts were greatly influenced by the value of precedent established by the English common law and equity cases of the time. However, they were also influenced in the exercise of their discretion by instinct and by natural law. 208

It was England’s Guardianship of Infants Act 1925 which introduced the two important ongoing strands referred to above, and which also further affected the development of New Zealand’s law. The first was the elevation of the welfare principle to a position of legislative centrality, taking it out of equity and its place of origin in the Courts of Chancery, to become a central statutory and legal principle. The second was to create neutrality between fathers and mothers in relation to custody arrangements between them for their children, seeking to acknowledge and address the history of women’s struggle for equal parental rights with respect to their children. While the neutrality principle was to be subordinate to the welfare principle, Maidment noted that the principle of neutrality only operated as an equitable principle when the matter was brought to court; otherwise, the rights of the father at common law remained intact. That is, he had absolute rights over his children. The 1925 legislation advanced matters for a mother by enabling her to have the right to apply for custody and/or access of her own child, which in turn was subordinated to the emerging welfare principle as the paramount consideration. 209

New Zealand’s Guardianship of Infants Act 1926 adopted exactly the same legislative standard incorporated by England, after many years of struggle, into its Guardianship of Infants Act 1925. That is, pursuant to section 2:

Where in any proceedings before the Supreme Court … the custody of an infant is in question the Court in deciding that question shall regard the welfare of that infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father in respect of such custody … is superior to that of the mother, or the claim of the mother is superior to that of the father.

New Zealand, then, along with many other countries as a result of the Second World War, faced significant social upheaval and change. This was later to be reflected in the law. At the

208 For example, see the decision of Palmer v Palmer [1961] NZLR 702.
209 Maidment, above note 201.
Conference comments about the role and value of motherhood were expressed in these protective terms:

Our birth rate has steadily fallen and if it continues, it does not matter if we win this war or not, and a crusade which must be launched today is to get the mother back into her rightful position as the most honoured person in the community.

Similar sentiments were expressed in 1944 by the Rev Dr Gascoigne, the Director of Catholic Education:

If there be one mother in this country today who has to work in a factory to make ends meet financially or through any misguided estimate that a mother in overalls is doing more for the prosecution of the war effort than if she were at home it is high time that the state stopped placing a financial burden on motherhood and that the true significance of motherhood in the wellbeing of the nation is recognised.

Walter Nash’s post-war reconstruction efforts reinforced a woman’s maternal and wifely role and motherhood was regarded as a fulltime occupation. The New Zealand post-war baby boom is regarded as one of the most significant in the western world, beginning at the end of the Second World War and continuing until the early 1960s. In 1948, 58.6 per cent of women were married by age 25; in 1958 this had increased to 70 per cent and the average age of a woman at her first birth dropped from nearly 26 years in 1948 to 24 years in 1958. Gender relations contributed to this post-war context. Men and women as equals, yet different from each other, meant that marriage and motherhood were promoted as roles for women and held equal status to the roles of men. The concept of motherhood shifted, from

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210 The impetus in New Zealand for a society that would ‘help the mothers and save the babies’ came from Dr Frederic Truby King, and, on 14 May 1907, The Society for the Promotion of the Health of Women and Children was founded at a meeting in the Dunedin Town Hall. This became known as the ‘Plunket Society’ after its first patron, Victoria, Lady Plunket, the wife of the governor. It is an organisation that has continued through to the present time, supporting mothers and their babies with mothering advice, encouragement, support and monitoring of children’s health in the initial period after a child’s birth up to 5 years. See [http://www.plunket.org.nz/](http://www.plunket.org.nz/) searched 3 November 2015.


212 Montgomerie, above note 211 at 9.


216 See Chapter Five with respect to a discussion of cultural feminist theory, consistent with this position.
providing social identity in the early 20th century, to one of service, influenced by the attachment theory work of John Bowlby.\textsuperscript{217} This value appears to have contributed to present day outcomes for mothers, that is, in their having assumed a greater share of child care and unpaid work within the home, in addition to increasing their commitment to paid employment outside the home.\textsuperscript{218}

### 3.4 Motherhood reflected by the law

I now trace case law and legislative developments in both the United Kingdom and in New Zealand over, approximately, the last 200 years, as they relate to motherhood and the role of the mother within the social context and emerging family law jurisprudence of both jurisdictions. Originally, the overwhelming power of patriarchy and the father dominated. In the late 19th century, the courts began to address this and the centrality of the role of motherhood and the mother’s importance to her child began to be recognised in the law. This continued throughout the 20th century until such noteworthy significance appears to fade into an unmentioned insignificance in contemporary family law decisions. This is in stark contrast to the earlier decisions, which openly speak of mothers and motherhood. It is also inconsistent with the statistical reality of a continuing division of role and function between genders with respect to work within the home, including child care, which continues to be carried out predominantly by mothers. This dissonance appears to have developed in New Zealand case law from about the 1980s onwards.

### 3.5 Early English legislative and case law developments

The principle of the welfare of the child assuming a predominant position in Victorian society was related to a number of wider considerations than the imbalance of power between separating mothers and fathers.\textsuperscript{219} Maidment refers to the 19th century as having become the child’s century, the concept of childhood having developed in the 17th and 18th centuries. Maternity safety, physical care, hygiene and health issues, working conditions, poverty, education, moral and religious issues were all concerns that were considered. As a result, between 1780 and 1914 some ninety Acts relating to children’s issues were passed by the English legislature and described by Maidment as a “largely ad hoc and extremely complex

\textsuperscript{217} MacKinlay, above note 213 at 137-140.
\textsuperscript{218} See Chapter Four, para 4.7.
\textsuperscript{219} See also discussion of its origins from Roman times, discussed in Chapter Three.
structure of legal protection which aimed to safeguard the interests of the young”.220 Concern
for the emotional welfare of the child also began to develop. Rousseau’s innocence of the child221 was glorified by the poetry of Blake and Wordsworth,222 and Charles Dickens’ “Oliver Twist” provided a vehicle for consideration of the psychological childhood experience and its impact.223 Darwin’s theory of evolution pointed to the development of the child through nature, and the work of Freud initiated an interest in and study of the development of personality and sexuality through childhood experiences. Dr Ian Suttie followed up, emphasising the importance of the mother-child love relationship, writing that:224

The child’s basic need is for mother-love, his basic fear is loss of such love, and all his later social and cultural attitudes depend on the nature of this relationship.

Further work with respect to maternal deprivation and the significance of the child’s primary attachment figure, (usually that of the mother), was undertaken by John Bowlby in the 1940s.225

The relationship between the welfare principle and the development of equal parental rights in the law is complex. The strength of the authority of the father, the power of the Courts and the injustices perpetuated on mothers (and their children) were real, and the Court of Chancery recognised from quite early times the deprivation suffered by mothers (and by implication, children) in the light of such inequities.226 In 1827 in Ball v Ball,227 the mother was unsuccessful through the Ecclesiastical Courts in gaining custody or access to her 14-year-old daughter. The separation had arisen through her husband’s adultery, and her daughter had initially been living with her with occasional visits to her father. On one occasion her father did not return her and instead sent her away to school, with no reference or advice to the mother. The mother sought the assistance of the equitable jurisdiction. The question for the Court, advocated for the mother, was “whether a child of fourteen years is to

220 Susan Maidment above note 201 102.
221 J J Rousseau “Emile” (1762).
222 William Blake, poet (1767-1827) eg “The Cradle Song”; William Wordsworth, poet (1770-1850) eg “the Prelude”; Samuel Coleridge (1772-1834) was also a romantic poet of this era who wrote “A Child’s Evening Prayer.”
223 Maidment discusses the work of P Aries Centuries of Childhood (Penguin, 1973), above note 201 at 91.
224 I Suttie The Origins of Love and Hate (Harmondsworth, Penguin, 1935); J A C Brown Freud and the Post-Freudians (Harmondsworth, Penguin, 1961); see also Maidment, above note 201 at 104.
225 See Chapter Seven and note 435.
227 Ball v Ball (1827) 2 Sim 35.
be deprived, by the brutal conduct of the father, of the company, advice and protection of a mother, against whom no imputation can be raised. Vice Chancellor Hart confirmed the absolute authority of the father with which the Court could not interfere unless there was some conduct on his part to authorise it, which there was not. However, he also confirmed the prevailing view that separation of a mother and child was unconscionable. He said:

This Court has nothing to do with the fact of the father’s adultery unless the father brings the child into contact with the woman. … I do not know of any case similar to this, which would authorise any making of the order sought, in either alternative. If one could be found, I would almost gladly adopt it; for, in a moral point of view, I know of no act more harsh and cruel, than depriving the mother of proper intercourse with her child.

In Wellesley v Duke of Beaufort, the father did lose custody because of his immoral and adulterous conduct, although it was still considered in the “interest and happiness” of the children to have their “filial affection and duty towards their father operate to the utmost.”

Nonetheless, the notion of the welfare of the child was used in the 19th century to deny a mother a right to custody, and often access, because judges at the time continued to deem that the child’s welfare was best served by upholding the sacred rights of the father. It was therefore a concept initially used against mothers. Maidment suggests that the Guardianship of Infants Act 1925 was, in the end, a political device to deny equality of parental rights to women and that had it not been for the struggle by women for equality rights generally, the welfare principle may not have reached the statute books when it did. Thus the welfare principle, in itself an indeterminate test, was informed and shaped by the dominant political and social values of the time. The women’s movement, to force their recognition in relation to their children both within marriage and upon separation, was a key driver, at least as significant as any of the humanitarian and social recognitions of the day, of the need for child protection and associated reforms.

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228 Ball v Ball, above note 227 at [36].
229 Ball v Ball, above note 227 at [36].
230 Wellesley v Duke of Beaufort (1827) 2 Russ 22.
231 Wellesley v Duke of Beaufort above note 230 at 44 per Lord Eldon, Lord High Chancellor.
233 Maidment, above note 201.
3.6 The Court of the King’s Bench and the equitable Court of Chancery

Before 1875, there were two court procedures available in England with respect to disputes over the custody of a child. One, through the Court of the King’s Bench, was utilised by the father by the seeking of a writ of habeas corpus for the return of the body of the child to the person who has the legal right, that is, the father, even if this was against the mother. The other was through the Court of Chancery which anyone could invoke on behalf of a child’s interest, including the mother, and was based on the Court’s ancient *parens patriae* jurisdiction.

The Court of the King’s Bench would usually enforce the father’s right to custody irrespective of his behaviour or the child’s age. Over time and through the influence of societal and political influences, there was some softening of this absolute approach by allowing some access to the mother. It was only through the Court of Chancery that the father’s absolute right was ameliorated by an increasing recognition of the welfare of the child through its protective jurisdiction but, even then, it was difficult to point to conduct serious enough by the father to warrant intervention by the Court. Certainly, retention by the father of the child to the exclusion of the mother was not enough.

Examples of judicial attitudes through the early English cases during this period can be seen in the following decisions. In *Vikkareal v Mellish* 234 the mother, Mrs Mellish, daughter of a Jewish father, had married Mr Vikkareal, also a Jew. They had two children aged nine and eight when their father died. The mother agreed to transfer her guardianship of the children to her father, then remarried without her father’s consent and became a Christian. The grandfather, as a consequence, refused contact by the mother with the children. The Court drew on natural law to confirm the right of the mother towards her child (although in this situation, it was not in competition with the father as he was deceased). The Court said: 235

> It is with reluctance [I] am obliged to determine questions of this sort, in family disputes, and more disagreeable where they relate to religious matters; but when it becomes necessary [I] will do it. Here are two petitions, first by the mother and then by the children. As to the mother’s ... her claim is clear and a right in her. It has been truly said that the right of guardianship of the mother differs from that of the father; she cannot devise, as the father may ... The mother’s right abstracted from socage

234 *Vikkareal v Mellish* 2 Swans 533, In Chancery 17th March 1737.
235 *Vikkareal v Mellish* above note 234 at 536, per the Lord Chancellor.
(which is not here the case, there being no lands) arises from nature. She has a right to the custody of the persons, and care of the education; and this in all countries where the laws do not break in. The grandfather has no right to interpose, otherwise than as the mother being his daughter, owed a duty to him.

Irrespective of this natural right, the mother’s position was not secure in law. Equity initially only provided relief to the mother where the father had died and had not appointed a testamentary guardian or there were issues with respect to land or property to be determined. Where there was a testamentary guardian, the common law provided no rights to the mother and equity did not intervene, as confirmed in *Eyre v Shaftesbury*.\(^{236}\)

As between the mother and the father, there was a clearly superior claim by the father. In *R v de Manneville*,\(^{237}\) an English mother left her French husband alleging mistreatment, taking her eight-month-old baby with her. The father was described by the court as having taken steps:\(^{238}\)

\[\ldots\] by force and stratagem, to get into the house where she was, and had forcibly taken the child then at the breast, and carried it away almost naked in an open carriage in inclement weather; with a view, as the mother apprehended, of taking it out of the kingdom.

Once the issue of non removal was addressed, Lord Ellenborough C J said that the burden of proof then lay on the mother to show why the father was not entitled to custody, he being the person entitled by law to the custody of his child. However, he also said that if the father should abuse his right to the detriment of the child, the Court would protect the child. Although custody remained with the father, Lord Chancellor Eldon had previously espoused the following three principles. The first concerned the welfare of the child: “It has been truly observed, that the court will do what is for the benefit of the infant, without regard to the prayer”; second, with respect to access, “I shall take care that the intercourse of both father and mother with the child, as far as it is consistent with its happiness, shall be unrestrained” and, third, he confirmed the applicable criteria for removing a child from the father’s custody: where he was abusive, not providing proper maintenance or by his character, insolvency,

\(^{236}\) *Eyre v Shaftesbury* (1722) 2 P Wms 103.

\(^{237}\) *R v De Manneville* above note 194; the King’s Bench decision discussed the prior application for the invoking of the Court of Chancery’s *parens patriae* jurisdiction by the mother and child, found at *De Manneville v De Manneville* (1804) 10 Ves 52 .

\(^{238}\) *R v De Manneville*, above note 194 at [221] per Lord Ellenborough C.J.
imprisonment or religious concerns, or was considered unsuitable to retain custody despite his common law rights in this regard.\textsuperscript{239}

However, the bar for any intervention by the court against a father’s rights remained high, and motherhood continued to suffer accordingly.

In \textit{Blake v Lord Wallscourt},\textsuperscript{240} the Court acknowledged evidence of abuse by the father and the probability of cruelty and mistreatment having been made out, but because it had stretched back over a number of years and no steps had been immediately taken by the mother, this mitigated against the Court’s interference. The Court said:\textsuperscript{241}

\begin{quote}
Grievances were alleged to have existed many years ago; and one circumstance in particular, was said to have taken place with respect to indecent conduct so far back as 1839 … a transaction that transpired when they were seven years younger, and, when in fact, they might have been sleeping at the time. … It was true there was one act, which, even as explained by Lord Wallscourt, could hardly be said to be defensible, namely that which related to his interfering with his daughter’s ablutions … neither did the evidence go far enough to shew there had been any improper exposure … which related to His Lordship’s dress. … No one could be more delighted … with the society of Irishmen; but it was impossible not to see that, from their breeding rather than their birth, there were modes of viewing things, and there were actions tolerated amongst them which were quite abhorrent to the minds, and … the more geometrical view Englishmen took of such things.
\end{quote}

The judgment went on to describe the father’s conduct as assuming the character of barbarity, on the one hand, but with respect to educating his daughters to have been very properly attended to, as they were proficient in drawing and music, speaking French, German and Italian, and had been taught to read the Bible and, in particular, the New Testament in Greek. This, the Court regarded, was:\textsuperscript{242}

\begin{quote}
… one of the wisest and kindest things a father could do for his daughters, for it enabled them to read the sacred oracles of truth and judge for themselves.
\end{quote}

\textsuperscript{239} \textit{De Manneville v De Manneville}, above note 237, at 58 per The Lord Chancellor (Eldon); see also discussion in Maidment, above note 201 at 112.

\textsuperscript{240} \textit{Blake v Lord Wallscourt} (1846) 7 LawTimes 545.

\textsuperscript{241} \textit{Blake v Lord Wallscourt} above note 240, at 545 per the Vice-Chancellor.

\textsuperscript{242} \textit{Blake v Lord Wallscourt} above note 240, at 546 per the Vice Chancellor.
The daughters’ application to be removed from their father’s care and their mother’s application to the Court of Chancery for custody of them once they had been so removed were declined on the basis that the Court of Chancery would not interfere on behalf of Irish parents normally resident in Ireland. The consideration of the Court was also that:  

… unless the cruelty was proved to be excessive, [it] ought not to interfere; for it was clear that any such general interference would be the means of entirely breaking up the privacy of families. … the common law of our country was only ancilliary to the law of God and nature in declaring that, during the state of infancy, the father should have the custody and guidance of [the children].

The principle was that the father’s rights could reluctantly be forfeited, but only if the welfare of the child required it, rather than provide recognition to any rights of the mother.

In *R v Greenhill*, the rules with respect to a writ of habeas corpus were discussed. The mother, Henrietta Greenhill, had left the marital home as a result of her husband’s continuing affair and returned home to her mother. Her brother said he subsequently went and spoke with the husband, who indicated he did not intend giving up his new relationship and was living with the woman in question. The brother uplifted the three young children of the marriage and took them to their mother. The father applied for a writ of habeas corpus and the mother was required to produce the children in answer to the writ. She then sought the assistance of the Court to have custody granted to her because of the father’s conduct and the risk this represented to the children. The Court considered that while she had not done anything wrong to render her an unfit or unworthy mother, and that the father would be able to have access if the children were in her care, there was nothing to suggest that the usual rule should be departed from, that is, that the father’s right over the children was paramount. The mother offered to relinquish custody and control if she was assured of permission to provide care to the children during their tender years. It was further argued on her behalf that the proceedings were not about whether the father’s rights over his children were paramount; that was accepted. Rather, the question was whether the rights of the mother were to be wholly disregarded such that she did not even have access to the children during what was known as their age of nurture, and, in addition, whether the children were to be deprived of maternal

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243 *Blake v Lord Wallscourt* above note 240, at 546.
244 *Blake v Wallscourt*, above note 240.
245 *R v Greenhill*, above note 196.
care and protection in circumstances where the husband had made his house unfit for his wife’s residence.

The Court discussed the common law habeas corpus rule: where, after a child has been produced in answer to the writ, they are too young to exercise the discretion to decide where they want to live, such discretion vests with the father. However, where the father exercises that discretion, not to enforce his own rights, but to take away those of the mother the Court considered that some restraint might need to be placed on the father in a manner consistent with the interests of the children themselves. The issue at this time, then, was whether the Court could exercise its own discretion or whether the rights of the father were so far paramount to those of the mother that she had no right to stand before the Court to make any claim. Reference was made to the anomaly that “a bastard child” within the age of nurture (that is, originally up to age seven, then extended to eleven and then further to age fourteen) was not to be separated from the mother, but that such ruling pursuant to the *R v Mandeville* decision did not extend to legitimate children where custody belonged to the father and not even access could be guaranteed by the Court to the mother. The mother having lost custody in these circumstances, then took the children out of the country so that the order that they be returned to the father could not be enforced. A number of actions against her followed, including attachment against her for contempt. The Court of Chancery was then asked by the wife to enforce a previously made support order against the husband in her favour. The Court was urged by the husband to withhold enforcement on the basis of the mother’s disobedience with respect to the King’s Bench orders, and the fact that she had gone abroad with the children to avoid enforcement. There was no precedent; the Court of Chancery determined that the custody matter belonged in another jurisdiction and should not affect its enforcement of the support issue that had arisen through the husband’s conduct, saying:

… in this case I am at a loss to know why I should, by starving an innocent wife, compel obedience to the order of other tribunals to render up to the guilty husband the offspring of that union, the obligations of which he has grossly violated.

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246 *R v Greenhill*, above note 196 at 635; see also the decision of *Greenhill v Greenhill* (1836) 1 Curt 461 where Mrs Greenhill had already obtained a divorce and alimony from the Ecclesiastical Court, then lost her children through an application for habeas corpus made by the father to the Court of the King’s Bench; she then sought the assistance of the Court of Chancery who were unable to help her because of the father’s superior rights, notwithstanding his adultery.

247 *R v Mandeville* above note 194 at 221.

248 *Greenhill v Greenhill*, above note 246.

249 *Greenhill v Greenhill*, above note 246, at 467.
Difficulties continued for motherhood. Despite the new divorce court under the *Matrimonial Causes Act* 1857 being enabled to make custody orders on divorce “as it thinks fit”, it was still influenced by the Courts of the Kings Bench and Chancery, which were still basing decision-making on the absolute rights of the father. Motherhood remained compromised by the operation of a gendered law. In *Clout v Clout and Hollebone*, the father had petitioned for divorce based on the mother’s adultery, which was granted. The mother subsequently asked the Court to grant her access to the two children of the marriage, they remaining in the custody of the father. This was considered to be “an application of novel character which required some consideration”. However, the Court considered it was required to follow established precedent that where a mother had committed adultery, no custody or access order could be made in her favour, and her application was refused. Then in *Codrington v Codrington*, the Court discussed the nature of its discretion in refusing a mother’s application for access to her 11- and 12-year-old daughters pending the hearing of the father’s application for divorce against her based on her adultery, which she had denied. The father had arranged the removal of the children from their governess while out on a walk, with no communication to the mother of his intentions. The mother made arrangements through an intermediary to be able to correspond with them. Then the father subsequently removed them out of the country to Gibraltar. Because the mother had initially agreed after the children’s removal, to address contact through letters, the Court considered that what the mother was really now trying to do was have it order the father and children back from Gibraltar, which it was not prepared to do. The Court made clear when the mother appealed this decision, that she was incorrect in seeking to argue from a position of some vested right on her part, “the obvious intention of the Legislature [being] to gratify the natural affection of both parties for the children” through the exercise of a discretion on the part of the Court, and that “the right of the wife to access to her children has been argued to exist in a much stronger degree than it really does.” Notwithstanding, there was considerable sympathy for Mrs Greenhill’s position and embarrassment with respect to the state of the law, that it should be rendered so impotent in the face of such injustice against a mother.

250 *Clout v Clout and Hollebone* (1861) 2 Sw & Tr 391.
251 *Clout v Clout and Hollebone*, above note 250.
252 *Codrington v Codrington* (1864) 3 Sw & Tr 496.
253 *Codrington v Codrington* above note 252 at 503.
254 See N.J. Taylor, above note 226 at 76.
3.7 The reforms of Caroline Sheridan Norton

During these years, the campaigning of the Honourable Caroline Norton, arising out of her own personal, unjust circumstances as a mother, had been influential in forcing legislative changes throughout the 19th century, but most particularly with respect to the Custody of Infants Act 1839, the Matrimonial Causes Act 1857 and the Married Women’s Property Act 1870. She argued that natural justice required a separate recognition in law of the natural love of the mother:

… that whereas hitherto the Courts have refused to consider the suffering and wrong done on very many instances to the mother, [and] some recognition and acknowledgement may now be made of the mother’s separate existence, and right to protection.

Caroline Elizabeth Sarah Norton (1808-1877) was the granddaughter of playwright Richard Brinsley Sheridan and wife of Tory George Norton. She was a social reformer, poet and author of the early and mid 19th century. In 1836, she left her husband and her very unhappy, violent marriage. However, given the domination of fathers’ rights, she lost custody and also all access to her three sons who were removed by their father to live in Scotland, outside the jurisdiction of both the Court of the King’s Bench and the Court of Chancery. There was also notoriety because her husband sued her close friend Lord Melbourne, the Whig Prime Minister, for criminal conversation. The claim was unsuccessful but her reputation was ruined; she was also unable to divorce her husband as there was no evidence of adultery on the part of either of them. The extreme injustices she suffered, particularly as a mother towards her children, caused her to campaign for social and legal change with respect to custody and property laws as they related to married women. She was primarily responsible for the passage of the Custody of Infants Act 1839, which allowed a mother to seek the custody of her children up to the age of seven years and access for her older children. A new legal era was dawning with respect to the recognition of the significance of the mother to the child and the legislation was the forerunner of the tender years doctrine in the United Kingdom, to be discussed further. Caroline Norton wrote Observations on the Natural Claim of a Mother to the Custody of her Children as affected by the Common Law Right of the Father, The Separation of Mother and Child by the Law of ‘Custody and Infant’ Considered 1838 and under the pseudonym Pearson Stevenson, A Plain Letter to the Lord Chancellor on the Infant Custody Bill in 1839. She also wrote the poem “The Mother’s Heart”:

My eldest-born, first hope, and dearest treasure,
My heart received thee with a joy beyond
All that it yet had felt of earthly pleasure;
Nor thought that any love again might be
So deep and strong as that I felt for thee.

Caroline Norton was not a feminist; indeed, feminists of the time such as Harriet Martineau viewed her with suspicion. See also the work of Anna Wheeler and William Thompson, Barbara Leigh-Smith and Mrs Elmy (formerly Elizabeth Wolstenholme) with respect to the issue of women’s rights generally during this period.

The Bill was introduced by Serjeant Talfourd in 1837 and was conservative in expectation. Serjeant Talfourd would have liked “to effect the transfer of the right of custody of children in their earliest infancy, especially female children, from the father to the mother” but did not, given “the length of time during which the father’s paramount right has been recognised by our law, the various fibres by which that power is entwined with our social system.” Others would have gone further, motherhood spoken of in reverent terms during the House of Commons speeches. For example “One of the finest principles of human nature was the attachment of the mother to her child” (Mr V Smith) and “In nine cases out of ten, especially when the children were of tender years, the mother was the better guardian, and this no-one would deny” (Mr Praed); see Maidment, above note 201 at 114.

See Elizabeth Sinclair, above note 94 at 81.
She also said that:258

… doubtless the claim of the father is sacred and disputable, but when the mother’s claim clashes with it, surely something should be accorded to her. There are other laws beside those made by men – what says the holier law, the law of nature?

Caroline Norton further argued that a mother:259

… is under God responsible for the souls of the new generation confided to her care; and the woman who is mother to the children of a profligate and tyrannical husband is bound by her duty, even if she were not moved by the instinct of her own heart, to struggle against the seizure of her infants.

However, change was slow to come politically in England, where the environment was complex and conflicted. In support of the Bill in the House of Commons debates, Mr T J Leader described the law as:260

… sternly refus[ing] to listen to the pleadings of natural sympathies and affections, giv[ing] to the husband the charge and possession of the children, and den[y[ing] even the sight of them to the beloved and loving mother. … There are hundreds of women now suffering in silence, pining for the children whom a stern law has torn from them.

The arguments against it were based on a prediction of an increase in conflict between husbands and wives, and an increase in separations. One argument suggested that access to a separated mother would be a bad thing for children as it would provide opportunity for their minds to be poisoned, one parent against the other.261

When the Custody of Infants Bill finally passed in 1839, it granted a married mother upon separation or divorce, the right to apply to the Court of Chancery for custody of her children

258 Caroline Norton, above note 255.
260 Mr T J Leader, House of Commons debates, 23 December 1837 c 1090; see Elizabeth Sinclair, above note 94 at 84; see also Maidment above note 201 at 114.
261 Sir E Sugden; see Maidment, above note 201 at 114.
up to the age of seven years (putting her on the same footing as a mother of an illegitimate child), and for access up to any age, unless she was guilty of adultery.

Change was less slow through the Courts, particularly the Court of Chancery, where there was increasing sympathy and recognition of a mother’s position and role.

In *Barnes v Barnes and Beaumont*,\(^{262}\) the father had petitioned for divorce based on the mother’s adultery. There were two children of the marriage aged three years and 18 months respectively. The father had removed the children to the care of a third party stranger. The wife denied the adultery and sought a custody order in her favour in respect of the children, pending determination of the divorce petition. She was described as depressed at being separated from her children. It was argued that an earlier decision of *Cartlidge v Cartlidge*,\(^{263}\) where the child was living in the father’s house, the mother’s health was not described as suffering and custody remained with the father, should be distinguished. The Court agreed, saying:

> I think this application should be granted. … The children in this case are both of tender age; they are not living with their father, and it is clear that the mother’s health has suffered from being deprived of their society.

Court of Chancery decisions reflected a recognition of motherhood’s plight, where the absolute right of the father at common law was understood but the Court, where appropriate, sought to ensure that such rights were limited when the father’s conduct warranted it and when the mother’s character had not been impugned. For example, in *Hyde v Hyde*,\(^{264}\) it determined that:

> … guardianship for nurture continues until the age of fourteen, and that a child has no right before that age to exercise his own choice as to quitting or remaining in the custody of his father.

In that situation, the father had left his wife, having formed an adulterous relationship with another woman with whom he was still living. He also had the custody of the parties’ 13-
year-old son. The mother petitioned the Court of Chancery for a judicial separation and also for custody. Sir C Cresswell said further:\textsuperscript{265}

No imputation was cast on the wife, and it would be unjust if a husband, having deserted an unoffending woman, were allowed to deprive her of the custody of her child. Nor would it be proper to oblige her, if she wished to see the child, to resort to the husband’s home, where his mistress is residing, nor to place the boy where he would be liable to be contaminated by his father’s evil example. I shall therefore order, that the child be delivered up by the respondent [the father] to the petitioner [the mother], and that he remain with her until he shall attain the age when the law gives him a right to elect for himself with which of his parents he will remain; the mother to keep the father informed of where he resides, and the father to have access to him once a week for two hours, between the hours of ten and four.

Likewise, in 1850 in \textit{Thomas v Roberts},\textsuperscript{266} the care of a three-year-old boy was confirmed with his mother through the protective jurisdiction of the Court of Chancery. The petition was presented on behalf of the child, seeking guardianship and custody to be placed with his mother, and that the father be restrained from applying for a writ of habeas corpus. The detailed decision describes the father as having, in 1842, commenced ordination in the Church of England. He then, having seceded from the church, joined a religious sect which professed a high spirituality, had abandoned the idea of prayer, had “set a high value on exercise of a cheerful and amusing kind”,\textsuperscript{267} and did not appear to be committed to any works of usefulness or charitable purpose. There, the father met and married the mother, a young woman who had been left a considerable inheritance by her late father. When she did not give this up to her husband and the community, as she was pressured to do, she was cast out despite being pregnant. The father remained with the community. The Court saw that the father had abandoned his wife and child and that there were sufficient equitable grounds in existence to prevent him from obtaining custody. He was described by the Court in scathing terms:\textsuperscript{268}

\begin{footnotes}
\item[265] \textit{Hyde v Hyde}, above note 264, at 150 per Sir C Cresswell.
\item[266] \textit{Thomas v Roberts} 3 De G & Sm (1850) 758.
\item[267] \textit{Thomas v Roberts}, above note 266 at 765 per the Vice Chancellor, Sir J.L. Knight.
\item[268] \textit{Thomas v Roberts} above note 266 at 766 per the Vice Chancellor, Sir J.L. Knight.
\end{footnotes}
… this confiding and unoffending woman was, without the slightest justification, apology or excuse, deserted and abandoned – wilfully, completely and finally deserted and abandoned – by her husband, in the state which has been mentioned.

The Court also viewed critically the community in which the father was residing, the Judge saying:269

But God forbid that I should be accessory to condemning any child to such a state of probable debasement; as lief would I have on my conscience the consigning of this boy to a camp of gypsies.

The Judge went on to say:270

It appears to me that, consistently with the law of England as declared and enforced by the Court of Chancery. … I cannot decline interfering to avert from the country the infliction of such a citizen, and from the child such ruin temporally and such spiritual peril as his father’s threatened care must, I think, without a miracle, produce.

As Maidment comments, however, it was only behaviour that was unacceptable to Victorian society that would lose a father custody of his children.271

The English Judicature Act 1873 then gave concurrent jurisdiction to the Common Law Courts and the Courts of Equity with respect to the care and custody of children, and further, that in the case of any conflict the rules of equity were to prevail. However, the legal standard remained a difficult one for many mothers, notwithstanding the elevated recognition motherhood at the same time was receiving within the private spheres of Victorian life. This incongruent legal standard was discussed in Re Goldsworthy,272 where a father had sought through an application for a writ of habeas corpus to remove his child from the care of the maternal grandfather. The Court decided that this was a case of “a man habitually indulging in inebriety and in the use of violence and language of a character the most abominable that can be conceived” such that equitable principles ought to be invoked and his application declined. The Court commented upon the interference with a father’s natural rights to custody of his children as being a difficult and delicate one, and that mere habits of intemperance would not justify the interference of the Court. Rather, the father’s conduct must be such as to

269 Thomas v Roberts, above note 264.
270 Thomas v Roberts above note 264 at 773 per the Vice Chancellor Sir J.L. Knight.
271 Maidment, above note 201 at 124.
272 Re Goldsworthy [1876] 2 QB 75.
render it not just merely better for the children, but essential for their safety or welfare, that the father’s acknowledged rights be interfered with.

The Goldsworthy decision was sought to be relied on by the father in Condum v Vollum,273 in an attempt by him to control issues of his eight-year-old daughter’s religious education, he being a Roman Catholic and the mother being a Protestant. The mother and father had agreed to separate when their daughter was two years of age. The mother would have custody without interference by the father, though he would have access. The mother would not bring up the child in a manner at variance with the Roman Catholic faith and when the child was seven, they would review her care arrangements. The mother was now asking the Court for the right to provide education and religious instruction to the child. The father, who had not seen the child for three and a half years, and was living in another relationship, opposed the mother’s application on the basis that as the father he had the right to require the child to be brought up in the Roman Catholic faith. The Judge said:274

The objection on the part of the father is not, in my opinion, a bona fide objection, but is merely made for the purpose of vexing and worrying Mrs Condon. … Looking at the facts of the case, and taking into account the circumstances that the mother is to have custody of the infant, and is willing to educate and maintain the infant, I do not think that it would be for the benefit of the infant to be brought up by its mother and yet to be, in its religious education, to be dissociated from its mother. Further, speaking as a man of the world, I am aware of the futility of attempting to make such an order, and also that if it were attempted to be carried out such an attempt would be injurious to the infant’s welfare in the proper and, indeed, in the highest sense of the term.

Access to the father was also directed. This was to be a week in each school holidays and other opportunities when the child was home from school with her mother. Here, a natural and rightful influence of the mother upon the child was recognised. That was, however, the exception. For example, in Re Besant,275 the Court removed an eight-year-old daughter from her mother and placed her in the care of her father, notwithstanding earlier agreements that the parents had made between them that the son would be cared for by the father and the daughter by the mother. The Court’s reasons related to the mother’s atheism, her refusal to

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273 Condum v Vollum (1887) 57 LawTimes 154.
274 Condum v Vollum, above note 273 at 155, per Chitty J.
275 In Re Besant [1879] 11 Ch D 508.
allow her daughter to receive religious instruction and her proactivity in publishing material
designed to educate with respect to the issue of contraception, considered to be immoral and
obscene. The evidence, apart from this, was that the mother cared well for her daughter. The
Court said: 276

We have not in this case to consider any question as to the exercise of the power of
the Court to deprive a father of the paternal power over his children which the law
recognises as the essence of that family constitution which lies at the foundation of
our social organisation. We have not to inquire … whether the things that are alleged
as the grounds for removing the infant ward from the custody … of her mother, would
or would not if alleged against the father, have afforded sufficient ground … for
depriving him of his legal power and natural authority. Now there is nothing more
clearly established as the settled rule of the Court than this: that it is the duty of the
Court to take care that a fatherless ward is brought up in the religion of the father… It
would be impossible for the Court to allow its ward, a Christian child, the child of a
Christian father, baptized in the Christian Church, to remain under the guardianship
and control of a person who professes and teaches and promulgates the religious, or
anti-religious, opinions which the Appellant avows that she professes and intends to
persevere in teaching and promulgating. … In the absence of the father (the father
being assumed to be practically absent) the Court is the real guardian of the infant and
must perform its duty to the ward accordingly, and, if necessary, wholly irrespective
of the convictions or wishes of the mother and by separating the child from her.

3.8 The strength of fatherhood’s sacred power

The influence of the Christian church upon the procreation of children and their being
brought up by the father, remained strong. What the Court would do if confronted by
attitudes of atheism or obscenity in a father had already been considered in Shelley v
Westbrooke. 277 The father was the poet Percy Bysshe Shelley. Shelley deserted his wife and
went to live with another woman. His wife, the mother of their two children, went to live with
her father. The mother then died and the children remained in the care of their maternal

276 In Re Besant, above note 275, at 518 per James LJ. The Court also said the mother’s conduct was “so
abhorrent to the feelings of the great majority of decent Englishmen and Englishwomen, and would be regarded
by them with such disgust, not as matters of opinion, but as violations of morality, decency, and womanly
propriety, that the future of a girl brought up in association with such propaganda would be incalculably
prejudiced.” at 521.

277 Shelley v Westbrooke (1817) Jac 266.
grandfather. The Court of Chancery had been petitioned by the children to restrain the natural authority of their father over them, and to resist being handed over into his care. The Court said:

… the father avowed himself an atheist, and that since his marriage he had written and published a work, in which he blasphemously derided the truth of the Christian revelation, and denied the existence of a God as creator of the universe; and that since the death of his wife he had demanded that the children should be delivered up to him … and educated as he thought proper. ... This is a case in which the father’s principles … cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been established in proof … conduct nevertheless, which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation. … I cannot therefore think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr S wishes it to be intrusted.

The Court therefore made an order restraining the father from taking possession of the children at that time, but left open the possibility of a further order. This situation was regarded as having been quite exceptional in its interference with the rights of the father.

The case of *Swift v Swift* was discussed by Lord Romilly M R in *Hamilton v Hector*, in the context of a father and mother having reached their own agreements as to the separated care of their children, but where the mother considered subsequent circumstances required the protection of the children from the cruelty of their father. The Judge said:

... if a husband, by deed or by an agreement … agreed to abandon all his parental duties, and transferred them to the wife to be performed by her, this Court would not specifically enforce a Contract of that description. Then on the other hand, a case afterwards came before me which was unquestionably a case likely to try the principle very strongly – the case of *Swift v Swift*, where the father had been guilty of moral turpitude towards his own child, a little girl of seven years old; and thereupon he consented to a deed by which the children were taken away from him and consigned

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278 *Shelley v Westbrooke*, above note 277, at 267.
279 *Swift v Swift* (1865) 4 De GJ & Sm 710.
280 *Hamilton v Hector* (1872) LR 13 Eq 511, at 519-520 per Lord Romilly MR.
281 *Hamilton v Hector*, above note 280 at 521 per Lord Romilly MR.
to the mother. He repented of that afterwards ... and insisted that he should have possession of the children; upon which the mother instituted a suit for the purpose of restraining him from so doing. Thereupon I endeavoured to point out ... that the foundation of the jurisdiction lay in determining what was for the good of society in general; that it was against public policy to allow a father, under ordinary circumstances, to abandon his duties as a parent. ... But on the other hand, a different and a controlling equity arose where the father had shewn himself utterly incompetent to perform those duties, and where he had so ill-behaved himself that the interposition of this Court was necessary for the protection of his children. ... It is a compliance with the rules of public policy that prevents this Court from taking away the rights of the father. It is also a compliance with the rules of public policy which in another case induces this Court to prevent a father from injuring his own children.

The law therefore continued to uphold the rights of the father as against the mother, notwithstanding the age and needs of the child. It said that it regarded its task as ensuring that the father carried out his legal responsibilities, notwithstanding the compromise to motherhood that this entailed. This can be seen as an example of the application of the dominance feminist theory, that is, the powerlessness of motherhood within a legal system that continued to require the subordination of motherhood to the dominant power of fatherhood.\textsuperscript{282} 

A further example of the effect of such patriarchal power reflected through the law is found in \textit{Agar-Ellis v Lascelles},\textsuperscript{283} where the four children of the marriage had already been made wards of the Court at the father’s request. The mother had, contrary to the express views of the father that the children were to be Protestant, raised the younger three children as Roman Catholics. When they, at ages nine, eleven and twelve respectively, refused to go with their father to a Protestant church, he took action resulting in the mother being restrained from taking the children to confession or to a Roman Catholic Church and leaving the father to do what he thought best for the temporal and spiritual welfare of the children. As a result, he took the children away from the mother and placed them in the care of a clergyman and others, allowing the mother to visit them once a month. He also required all correspondence between them to be supervised.

\textsuperscript{282} See Chapter Five. 
\textsuperscript{283} \textit{Agar-Ellis v Lascelles} [1883] 24 Ch D 317.
When the second daughter, Harriet, reached sixteen, she wrote to her father’s solicitors asking that she be able to spend the long holidays with her mother because her carer was going abroad and could not take her with her, and because her father, who had not in the last four years spent the holidays with her, would probably be placing her in the care of still more strangers. A petition was filed by Harriet and her mother asking that Harriet be able to spend the holidays with her mother, and that in the future her mother might have free access to her and they also be able to freely correspond with each other. The father strongly opposed such unrestricted communication between them on the basis that “for so long a period as two months would tend to create a great prejudice in the child’s mind against him, and might result in entirely alienating her affection from him.”

The petition failed on the ground that in the absence of any suggested fault on the part of the father, the Court had no jurisdiction to interfere with the legal, and more powerful, right of the father to control the custody and education of his children and as to where they should reside. However, Harriet and her mother did not give up, and appealed this decision on the basis that a court should allow a child at 16 to be freed from restraint (being the usual outcome of a habeas corpus application) and that the child should then be able to exercise her own discretion as to custody and movement, rather than having her father’s discretion substituted for her, as is the law for a younger child. The father argued that if this course was adopted by the Court, it would “produce a revolution in the relations of father and child.”

He further argued that the Court only had three situations in which it could interfere with a father’s custody: first, where the father was guilty of gross moral turpitude towards his children; second, where the father has abdicated his parental responsibility and the Court will not allow him to interfere and resume it; and third where the Court holding wardship will not allow a father to remove the child from outside of its jurisdiction. He saw that none of these situations applied to enable the Court to interfere, but, if it did, he wanted to let the Court know that he would consider himself discharged from all moral and legal obligations to maintain his daughters.

The mother’s counsel asked the Court to meet Harriet, a most forward thinking strategy, but the Judges declined. The mother’s counsel also indicated a willingness and ability on the part of the mother, in light of the father’s attitude, to maintain Harriet herself. The Court recorded its disappointment that the father had not been willing to accede to its suggestion, made

284 _Agar-Ellis v Lascelles_, above note 283 at 319 per Brett MR.
285 _Agar-Ellis v Lascelles_, above note 283 at 319 per Brett MR.
during the course of argument, that Harriet be allowed by him to visit with her mother for the holidays and thereafter, not unlimited access, but once a fortnight, and also that the correspondence between them not be the subject of supervision. However, because the father refused, and because it was not a habeas corpus application brought by him (being the thrust of the authorities cited by the wife’s counsel and which therefore had no application), the Court found itself required to act on the general rule that the father has the control over “the person, education and conduct”\(^{286}\) of the child until they are twenty one years of age and the Court could not intervene.

Brett M R, cited with approval in *Re Plomley*,\(^{287}\) said that:\(^{288}\)

> Appeals have been made to the principles of the law which have been settled for centuries. Those principles have never been called into question. One of those principles (and it is the prominent one) is that this Court, whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children.

He went on to say that “the rights of the father are sacred rights because his duties are sacred duties” before confirming that whatever view the Court took of this particular father’s responses, the Court could not interfere with the general trust “which the law reposes in the natural affection of a father”.\(^{289}\) The petition of Harriet and her mother therefore had to be dismissed. Cotton L J agreed, but expressed regret, saying:\(^{290}\)

> I can hardly conceive circumstances where a daughter should not have the opportunity of visiting, under any restrictions which may be necessary, and of corresponding with, her mother. I should think that would, almost as an unexceptional rule, be of the greatest possible advantage to the infant. But the father takes a different view and the question is whether the Court ought to interfere with the discretion of the father and to say what it would think best for the infant. Here we are not in any way dealing with the jurisdiction of the Court under habeas corpus, we are considering the jurisdiction which the Court of Chancery has always exercised, delegated probably from the Crown as *parens patriae*. … The jurisdiction is not exercised unless the infant is

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\(^{286}\) *Agar-Ellis v Lascelles*, above note 284 at 319.

\(^{287}\) *Re Plomley* (1888) 4 TLR 256.

\(^{288}\) *Agar-Ellis v Lascelles*, above note 284 at 323 per Brett MR.

\(^{289}\) *Agar-Ellis v Lascelles*, above note 284 at 329 per Brett MR.

\(^{290}\) *Agar-Ellis v Lascelles*, above note 284 at 331-332, 334 per Cotton L J.
made what is called a ward of the Court. … Here in my opinion, the circumstances are not such as, having regard to the principles on which the Court has acted in exercising that jurisdiction, to justify the Court in interfering with the discretion of the father. I do not say the Court has no jurisdiction. The Court has jurisdiction to consider whether the father has acted in such a way as will justify the Court in interfering with his parental authority. … The father has not in my opinion forfeited his right to exercise his duties as a father, and we ought not to interfere.

Bowen L J said essentially the same:

If we were not in a Court of Law, but in a court of critics … we might be tempted to comment … upon the way in which … the father has exercised his parental right. But … the Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father. … As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant … that [the father] has perverted the ties nature for the purpose of injustice and cruelty. When that case arrives, the Court will not stay its hand; but … it is not mere disagreement with the view taken by the father of his rights … that can justify the Court in interfering. If that were not so we might be interfering all day and with every family.

The prevailing power of the father, reflected through the law, is based in dominance feminist theory. Maidment suggests that it was the injustice of this decision that prompted women’s groups to seek legislative change to provide joint guardianship.

3.9 A gendered power imbalance

The issue of the power imbalance that creates a powerlessness for motherhood was discussed by John Stuart Mill. In his *In Subjection of Women*, he likened marriage to a partnership, saying:

It is quite true that things which have to be decided every day, and cannot adjust themselves gradually, or wait for a compromise, ought to depend on one will; one person must have their sole control. But it does not follow that this should always be

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291 Agar-Ellis v Lascelles, above note 277, at 334-338 per Bowen L J.
292 See Chapter Five.
293 Maidment, above note 201 at 126.
the same person. The natural arrangement is the division of powers between the two; each being absolute in the executive branch of their own department, and any change of system or principle requiring the consent of both. … The division of rights would naturally follow the division of duties and functions; and that is already made by consent, or at all events not by law, but by general custom; modified and modifiable at the pleasure of the persons concerned.

The promoter of the 1886 Guardianship of Infants Bill, adopting this reasoning, said:

Some might hold it a graver objection to the Bill that where two people lived together, one must rule; that the father ought to be at the head and have control of his family, the wife yielding to him; and the usual illustration was given that if two people rode together one must ride behind. But this answer was that the old system of giving the husband supreme power over the child had not worked well in the past; and he believed that nothing could be more conducive to harmony than the husband and wife be placed in apposition of perfect equality before the law, the former recognising and respecting the rights of the latte. When women had had power over their children, they generally used that power well – as well, on the whole, as fathers did. So far from his proposal being likely to breed discord in families, he was sure it would improve the relations between husband and wife, by removing from him an engine of tyranny, and from her a motive for attaining her ends by indirect methods. … It must be remembered that the provisions of this measure would only be needed where the parties did not agree. Where they lived together and loved one another, all would go smoothly; where affection had ceased, the Bill would apply the principles of justice.

There were objections:

The great objection that he had to the Bill under consideration was that it would establish duality of control in the household – a thing to be avoided. … Duality of control and of leadership was often to be regretted in other matters, but it would be especially bad within the domestic circle.

The final passage of the Guardianship of Infants Act 1886 backed away from joint guardianship, but embodied the “best interests” test as the “paramount” consideration. This

295 House of Commons, Vol 286, 1884, c 817-8, Mr Bryce; see also Maidment, above note 201 at 127-8.
296 House of Commons, Vol 286, 1884, c 824; see also Maidment, above note 201 at 128.
allowed a custody order to be made in favour of a mother on her application “having regard to the welfare of the infant” during the father’s lifetime, that is, it gave separated mothers the ability to apply for custody without altering the father’s absolute rights in the home while the marriage subsisted. It also gave mothers’ rights of guardianship on the death of the child’s father, either alone or jointly with a testamentary guardian the father might appoint. Finally, it provided a statutory mandate that ostensibly gave the Court a wide discretion of its own. Mothers and fathers were now both being recognised as having distinct, different and necessary functions, and the devaluation of the role of the mother was recognised. This comment was made within the House of Commons at the time:\textsuperscript{297}

Our country is to be congratulated on this achievement and on the liberality of our law, which discerned … that a child generally has two parents, and that one of them, though comparatively unimportant – even verging on the superfluous – might feel hurt if her existence and wishes were altogether ignored. … Yet even now their position is subordinate. The woman who bears, suffers, risks her life, rears, trains, watches – of whom indeed, public opinion demands these things … Father and mother are to share pleasantly between them the rights and duties of parenthood – the father having the rights, the mother the duties.

While there was some difficulty in moving on from the common law position of the supremacy of the father’s rights, the divorce courts sought to adopt this new standard with its recognition of motherhood within the law. In \textit{Symington v Symington},\textsuperscript{298} a father who had committed adultery was allowed the custody of his three sons, away at school, while the mother regarded as the innocent party, was allowed custody of her daughters, being “the natural person to have their custody.” With respect to the father, Lord O’Hagan said:\textsuperscript{299}

The father’s right to the guardianship of his child is high and sacred. Our law holds it in much reverence, and it should not be taken from him without gross misconduct on his part and danger of injury to the health or morals of the children. Bad as the offence of adultery may be, there may be considerations of convenience and advantage to the children which, if injury to them be not likely to arise, should forbid their withdrawal from their father’s care.

\textsuperscript{298} \textit{Symington v Symington} (1875) LR 2 Sc and Div 415.
\textsuperscript{299} \textit{Symington v Symington}, above note 298 at 422; see also Maidment, above note 201 at 121.
However, in the decision of *Handley v Handley*, a mother who had committed adultery was denied custody or access on the basis that the child’s welfare required deference to be given to the father’s wishes about the matter. The father had for the first three and a half years after separation allowed access to the mother, but then stopped it when he remarried. The Court saw that “it is a great hardship for the mother suddenly to be deprived of all access to her children” but also that:

… here, the wife was divorced for adultery, and forthwith married again. The husband, while unmarried, allowed her access to the children, but on his marrying again, refused it. His marrying again made a great difference. He might well say, “This lady has broken up my first home, and if I do not take care she may break up my second home.” I think that his refusing access was reasonable, and that the order appealed from ought not to be disturbed.

By 1893, the father’s wishes had been ameliorated even in the Common Law Courts, to the extent that they would stand only if there was no case for welfare interests becoming instead the dominant consideration. In addition, the concept of a child’s ‘ties of affection’ was introduced. In *Re McGrath*, another decision about religious education, the dispute was between and around the appointment by a widowed Protestant mother of a testamentary guardian, and the trustees of the late Roman Catholic father’s estate. The Court said:

The dominant matter for consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

Notwithstanding these inroads, judicial responses and the exercise of judicial discretion pursuant to the new legislation with respect to mothers’ claims and what was intended by the welfare of the child, continued to be guided by the two principles of the supremacy of the father’s rights and the mother’s matrimonial guilt. In *Re G*, a mother lost custody of her two children to her husband’s trustees on the basis that the trust fund required that it be

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300 *Handley v Handley* [1891] P 124.
301 *Handley v Handley*, above note 300 at 126 per Lindley LJ.
302 *Handley v Handley*, above note 300 at 128 per Lindley LJ.
303 *Re McGrath* [1893] 1 Ch 143.
304 *Re McGrath*, above note 303 at 148 per Lindley LJ.
305 *In Re G* [1899] 1 Ch 719.
applied to the bringing up of the children. Because she was living in an adulterous relationship, this was regarded as an immoral home for the children, and accordingly a breach of trust. Kekewich J said:

I am not sitting as a court of morals … but I distinctly hold that a woman thus living in adultery cannot be treated as properly bringing up her children, however much she may do in the way of making them a comfortable home and giving them a proper education.

3.10 First wave feminism seeking equality for mothers with fathers

The social and political context in England around the turn of the 20th century was dominated by the Pankhursts, and the establishment in 1903 of the Women’s Social and Political Union was aimed at achieving women’s suffrage, and other similarly focused women’s rights movements. The continuing inequality between men and women with respect to the existing divorce laws was highlighted in *Dodd v Dodd*. The wife had left her husband because of his adultery, but because she could not also establish his desertion (he wanting her to continue to live with him), she was unable to obtain a divorce unlike the position of the husband had circumstances been reversed. Sir Gorell Barnes heard the matter and went on to deliver the Gorell Report in 1909 in response to the 1909 Royal Commission set up to examine Divorce and Matrimonial Causes. As a result, he recommended that the sole ground of divorce become adultery, equally for either the husband or the wife, contrary to previous policy based on an understanding that a wife’s adultery was more serious than a husband’s because, as a mother, she could “palm spurious offspring upon the husband” which the husband’s adultery could not do.

At the same time, there was some movement towards recognising that a mother should not for all time be disqualified from access to her children by her adultery. A father had never been so disqualified, provided he was circumspect in not allowing the children to come into contact with the woman and thereby suffer a moral taint. In *Mozley Stark v Mozley Stark and Hitchins*, the Court recognised the social forces at work in the drive towards the emancipation of women and equality of parenting rights for mothers before the Guardianship of Infants Act 1925 was finally passed. In that case, the Court recognised the reality of a

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306 In *Re G*, above note 305 at 723 per Kekewich J.
307 *Dodd v Dodd* (1906) Times 28 April.
308 Maidment, above note 201 at 132-3.
sixteen-year-old daughter who strongly wanted to live with her adulterous mother and new husband, and not her father. The Court therefore considered the easier course was to discharge the custody order in favour of the father, and leave the parties to fall back on their common law rights. If the daughter left her father’s house, she being over the age of discretion, the father would not be able to force her return through an application for habeas corpus. The Court went further, by saying: 310

We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to custody of her daughter, assuming her to be under sixteen. The Court ought not to lay down a hard and fast rule on this subject. … And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse.

The problem of the immoral mother, her continued importance to the child and the significance of the status quo with respect to care arrangements were all discussed in the 1924 decision of B v B, 311 which cited with approval the Stark decision. On appeal, the decision of the lower Court judge, exercising his discretion and refusing all access to a mother in respect of her eleven year old daughter, was reversed and access was allowed. The appellate Court said the following: 312

… we are dealing with a delicate child of eleven years of age, an only girl, who obviously is very closely attached to the mother, and who, owing to the circumstances of the matrimonial home, has necessarily been throughout the whole of her childhood under the substantial and sole charge and nurture of the mother. Under those circumstances, it would be a very strange and unusual combination of circumstances that would make it to the interest of the child to be deprived at that age of all association with the mother. It means a cutting away from the child all the most tender associations that she has ever had in her life… to my mind the love and affection of a mother outweigh many foolish or indiscreet acts on the part of the parent in question. … The result of this seems to me to be that it is our duty in the interests of the child to allow her from time to time, as I would prefer to put it, to have access to the mother, rather than to deal with it in the other way.

310 Mozley Stark v Mozley Stark and Hitchens, above note 309 at 193-4 per Cozens-Hardy MR.
312 B v B, above note 311 at 182 per Atkin LJ.
In tracing the early English decisions it is of note that it was not until 1948, notwithstanding the introduction of the Guardianship of Infants Act 1925, that an adulterous mother was not considered unfit to have the custody of her child “on the ground that a bad wife did not necessarily make a bad mother.”313 In *Allen v Allen*,314 after a divorce was granted to the husband based on the wife’s adultery, the father sought and was granted custody of their eight-year-old daughter who had always been in the care of her mother. The basis of the decision was that the child’s moral welfare was the paramount consideration, notwithstanding the evidence that the child’s health may suffer if separated from her mother. It was considered that the mother had committed adultery once, and she may do so again. The mother appealed. The Court of Appeal found that the lower Court had not applied the correct test, that both the moral and physical welfare of the child was of paramount importance, and the appeal was allowed. The Court said:315

> The welfare of the child, both moral and physical, was the paramount consideration. It was impossible to say, because a woman had once committed adultery she was not a fit person, vis-à-vis one who had not, to look after a child. There was no suggestion that the mother was promiscuous, or a bad mother, or a bad housekeeper, or anything which made it undesirable for her to look after the child. All the evidence in the case is strongly in favour of leaving the child with her, and the appeal must be allowed.

The value of motherhood accordingly continued to be recognised, notwithstanding issues of morality and gender inequality.

3.11 The compromise: the welfare principle

There was continuing Parliamentary opposition in England to the introduction of the 1925 Guardianship of Infants Act. It remained unwilling to cede, within the home, the superior rights of the husband and father to a position of equality between husband and wife. A compromise position emerged: full equality for women was not necessary to protect the child because the welfare of the child generally required the care of the mother. Thus, there was a subtle change in emphasis from women’s equality rights to the welfare of the child as the

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313 Maidment, above note 201 at 131.
314 *Allen v Allen* [1948] 2 All ER 413.
paramount principle, which was far more politically acceptable. As the Solicitor General, Sir Ernest Pollock, said:316

In all cases the Courts have always leant in favour of giving the mother the custody and the care of children of tender age. I cannot recall, for my part, a single case in which violence has been done to those sentiments, which accord both with our feelings and our wishes.

The Lord Chancellor, Viscount Haldane, said:317

The status of women has very much changed in the last twenty five years. Recently it has been so changed that the woman almost has the same status as the man. She has not altogether the same status, because it is necessary to preserve the position of the family as a unit, and if you have a unit, there must be a head to that unit.

When the family unit broke down, however, Viscount Haldane went on to say:318

When you come to the interest of the child it is recognised as most important that the mother should be able to intervene and take care of the child with a power of doing good and preventing evil equal to that possessed by the father.

Thus, section 1 of the Guardianship of Infants Act 1925 was expressed in the following terms:

Where in any proceeding before any court … the custody or upbringing of an infant … is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

This legal principle was then transplanted into New Zealand’s family law jurisprudence.

317 The Lord Chancellor, Viscount Haldane, House of Lords, Vol 57, 1924, c 792.
318 Above note 317.
3.12 The welfare principle in New Zealand

New Zealand by now had moved ahead, from its greater egalitarian position, to address issues of women’s equality with an equanimity not seen in England. It accordingly led the way in many areas of reform relating to women, families and motherhood. The paramountcy of the welfare principle was adopted into New Zealand law in the same form as that just passed in England, through the Guardianship of Infants Act 1926. It was hailed as a landmark in both England and New Zealand and remains foundational to child custody laws in both countries, even today. However, the disingenuity behind its legislative introduction in England, based in unresolved cultural and rights tensions as they related to women, may be relevant to the ongoing struggle to determine what the principle actually means as between mothers and fathers. The introduction of gender neutrality through the welfare principle, informed by social practice, was a device designed to protect the mother-child relationship without the legislature needing to further address the general lack of gender equality in the law. The issue of gender neutrality was subsequently, approximately a century later, then used in relation to the gender neutral meaning of the welfare principle to dismantle the protection of the mother-child relationship, the very purpose for which the welfare principle had in the first place been introduced. The law therefore, arguably again, avoided the need to address gender equality.

319 New Zealand’s Guardianship of Infants Act 1926 provided that the welfare of the child was “the first and paramount consideration” when considering custody between mothers and fathers. Previous to that, Section 21 of New Zealand’s Divorce Act 1898 provided that “In all undefended cases, where application is made to the Court to make the decree absolute, the Court may in its discretion give the wife custody of one or more of the children; and may also do so in defended cases, upon proof that the respondent has had notice of the intention of the petitioner on hearing of the motion to make the decree absolute, to apply for the custody of one or more of the children.” It was regarded in more egalitarian terms than England (although the issue of a mother having committed adultery remained a disqualifying factor when custody arrangements were made upon divorce). Otherwise, most custody orders made pursuant to a wife petitioning for divorce under the Divorce Act were made in her favour; see Hayley Marina Brown, “Loosening the Marriage Bond: Divorce in New Zealand, c.1890s – c. 1950s” Thesis, Doctor of Philosophy in History, University of Victoria, Wellington, 2011; see also Bruce Cameron “Reforming the Law” in Encyclopaedia of New Zealand ed A H Mclintock (Te Ara, 1966) that “a persistent theme is a preoccupation with the welfare of the family, particularly wives and children. In this sphere, New Zealand has never been simply content to follow others”; see also J L Robson, New Zealand: The Development of its Laws and Constitutions (2nd ed, London, 1967) at 442 that “the New Zealand legislature has shown itself in the sphere of family law ready to borrow freely from a diversity of sources, to innovate boldly and in the interests of humanity and practical justice, to discard traditional rules, policies and approaches.” New Zealand removed the sexual double standard in divorce legislation, introduced desertion as a ground for divorce and allowed wives to seek custody orders in respect of their children in 1898. These issues were not addressed until 1923 and 1937 respectively in England and Wales. New Zealand also granted women suffrage in 1893; this was not granted fully in England until 1928. New Zealand’s settler population was predominantly Scottish in origin and as James Belich in Making People: A History of New Zealanders from Polynesian Settlement to the end of the Nineteenth Century (Auckland, 1996) at 315 suggests “the Scots were to New Zealand what the Irish were to Australia – the chief lieutenants of settlement.” Therefore the more liberal attitudes of the Scots to marriage, divorce and custody law may have influenced New Zealand’s more liberal attitudes in the development of its family law legislation, while at the same time New Zealand was adopting its legal machinery and laws from England. This included adoption of the principle of the paramountcy of the welfare of the child.
with respect to motherhood, based in its previously recognised difference from fatherhood. The failure of the law in this regard also then, arguably, enabled current developments with respect to shared care in separated parenting law to occur in the manner that they did.320

3.13 20th Century English case law

The facts of the 1931 decision of Re Carroll321 suggest that a pattern of disingenuity may have continued. The Divisional Court had refused an appeal against a chambers decision to refuse an application for habeas corpus by a mother to have her child delivered up to her. The mother further appealed to the Court of Appeal. The appellant, Miss Carroll, was a domestic servant. She already had one illegitimate child Patrick, when she had another baby, a girl named Joan. Both children were baptised as Roman Catholics. The mother and her children were in a working house run by a Roman Catholic order. The mother was unable to leave with the children because she had no means to care for them, and she was unable to leave herself unless she could make suitable arrangements for the care of the children. When Joan was nine months old, she sought the assistance of an organisation which arranged adoptions. She completed the forms, including a question as to whether Joan had been baptised. She answered this in the affirmative. A Protestant couple was found and Joan was placed with them. The mother was advised that Joan would be brought up according to the Protestant faith. She did not demur, and signed the consents. Several weeks later, the Father of the Roman Catholic workhouse where the mother was still living, wrote to the adoption organisation advising that Joan had been baptised as a Roman Catholic and therefore needed to be brought up according to her faith. He said that the mother had acted without his knowledge and that in her anxiety had forgotten this important point, which she now wanted to rectify. The mother then wrote to the adoption organisation, which appeared in the view of Greer L J, the dissenting appellate Judge, “not to have been composed by herself, in which she said that she now wanted her child back so that she could arrange for it to be brought up in its own religion.”322 The Father also wrote, in terms based not so much on the wishes of the mother, but on what he considered were the rights of the child. The organisation advised that the couple who had the care of Joan did not wish to give her up, as they were now

320 See Maidment, above note 201 at 139-140; see also Chapter Seven with respect to the development of shared care parenting.
321 In Re Carroll (an Infant) [1931] 1KB 317.
322 In Re Carroll (an Infant), above note 321 at 341 per Greer LJ.
attached to her and she to them. Then, there was a subsequent letter from the mother to the adoption organisation, in which she said:323

… [I] have been thinking it would be best to keep Joan where she is and would be very grateful to you if you could fix my boy Patrick, who is five years old, into one of your homes, or if inconvenient to do that, could you get him adopted. Should be out of here months ago but owing to my boy Pat I am unable to go.

The organisation advised that they were pleased that she considered Joan’s care settled, but felt unable to assist with Patrick owing to the position of the Father of the Roman Catholic workhouse. The mother replied that the Father was not going to help with Patrick unless she got Joan back, and added:324

… so we have come up with the conclusion that it would be best to give up writing to Father Craven altogether. They have turned very disgusted towards me.

Subsequently, Father Craven wrote to the organisation advising that he had been to see the mother, had ascertained “her real sentiments” in the matter and that what had happened was that she had offered the child in a fit of pique because they would not immediately relieve her of her responsibilities. The mother subsequently swore an affidavit in support of her application which said:325

I find that I cannot be entirely separated from my daughter, as would be the case if the arrangements made with the defendant society were to continue. I have therefore applied to the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children to take care of the child for me, and if they take the child I shall be given every opportunity of seeing her from time to time. Further, if the child is left in the custody of the persons with whom she now is, I find that she will be brought up in a faith other than that which I myself profess. The child was baptized as a Roman Catholic, and it is my earnest desire that she should be brought up as a Roman Catholic.

Greer L J saw that “this case was not really the application of the mother at all, but the application of the Incorporated Society of the Crusade of Rescue and Homes for Destitute

323 *In Re Carroll (an Infant)*, above note 321 at 341 per Greer L J.
324 *Re Carroll*, above note 321 at 341-2 per Greer L J.
325 *In Re Carroll (an Infant)*, above note 321 at 342 per Greer L J.
Catholic Children” and wished to confirm the lower court’s refusal of her application for habeas corpus that the child be delivered up to the mother. However the majority of the appellate judges took a different view. Scutton L J, in determining that a habeas corpus should issue, considered that the mother:

… when left to herself and pressed by the inability to get work due to the encumbrance of her two children she is chiefly anxious to hand over their custody to anyone who will maintain them regardless of religion, but that when the spiritual advisors of her religion point out to her that her duty is to bring up her children in the religion she professes, she recognises that duty and is prepared to act on it, and does so … that the mother has a legal right to require that the child be brought up in her religion … and the Court will … be undertaking a dangerous and impossible task if I substitutes its own wishes and responsibility for the wishes and responsibility of the parent in the matter of religion.

Slesser L J, in agreeing with him, held the view that:

Certainly, [the mother] appears to be illiterate and many of the letters undoubtedly are phrased in language which suggests another hand and another mind; but taking into account all these elements … I think it would be unfair to Father Craven … to assume that [he has] put forward her desires when they are not really her own. I prefer to believe her sworn testimony rather than to draw inferences on very inadequate data to her detriment and the detriment of those who are supporting her by affidavit.

Slesser L J went on to consider the Guardianship of Infants Act 1925 and the legislative introduction of the paramountcy of a child’s welfare, which had influenced the lower Court’s decision. However, he saw that:

… between the mother and father [to decide] which religious education should be given. … [t]his statute … has confined itself to questions as between the rights of mothers and fathers … problems which cannot arise in the case of an illegitimate child.

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326 Re Carroll, above note 321 at 345-6 per Greer LJ.
327 Re Carroll, above note 321 at 331 per Scrutton LJ.
328 Re Carroll, above note 321 at 352 per Slesser LJ.
329 Re Carroll, above note 321 at 355 per Slesser LJ.
He further went on to say that a mother of such a child has a right to its possession, and while not a legal guardian as an illegitimate child is *filius nullius*, the child of no one, her claim upon the child has always been recognised in equity. She has, by law, obligations imposed on her in respect of the child, a contract between her and another person for the transfer to that person of her rights and obligations is invalid and so far as religious education is concerned, the Court is required to give “the gravest considerations to the wishes of the parents – in the case of an illegitimate child, of the mother”, \(^{330}\) that the child was under two years of age so its wishes could not be obtained, and that the appeal should therefore allowed.

In *re Collins*,\(^ {331}\) a baby boy, Patrick, born in 1943, had been baptised as a Roman Catholic. His father was Roman Catholic and his mother was Protestant, and at the time they married in 1942, his mother signed a declaration that any children of the marriage would be brought up as Roman Catholics. Patrick’s father was killed in action in 1943 and his mother died in 1947. Before she died, she expressed the wish that Patrick be raised as a Protestant. For two and half years before the application brought by the paternal grandparents that custody be granted to them, to enable them to raise him as a Roman Catholic in accordance with the wishes of his father, Patrick had been living with his maternal grandparents. The argument was that the father’s common law rights to dictate the religious education of the child should continue to prevail, even in death. This right had previously been absolutely enforced by the Court of Chancery, even though it was described in an earlier Chancery decision in *Hawksworth v Hawksworth*\(^ {332}\) as:

… creat[ing] a barrier between the widowed mother and her only child; to annul the mother’s influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would recognise any right in the widowed mother to bring up her child in a religion different from the father’s can be allowed to weigh with me at all.

The Court saw that this rule had persisted until 1925, when the paramountcy of a child’s welfare was introduced. It was then argued the legislation only applied as between a mother’s

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\(^{330}\) *Re Carroll*, above note 321 at 356 per Slesser LJ.

\(^{331}\) *In Re Collins* (1950) 1 All ER 1057.

\(^{332}\) *Hawksworth v Hawksworth* L R 6 Ch 539 (1871) at 540.
and father’s rights, and as they were both dead, the common law position should prevail. The Court disagreed and extended the application of the welfare rule to situations where the parents were alive or dead. The child was left with the maternal grandparents where he was already settled, even though this would mean that he would be brought up as a Protestant.

In Re A,\textsuperscript{333} the Court of Appeal considered competing claims between a putative father and an adoption application by the child’s adoptive parents with whom the unmarried mother had placed the child. It held that the paramount (but not exclusive) consideration was the welfare of the child, and that the mother’s wishes regarding the person who should bring up the child were not entitled in law to prevail merely because they were her wishes. The Court found that it was the duty of the judge to exercise his discretion by considering the alternatives presented to him by the mother and the father, and to come to a conclusion as to which was the better place in the interests of the child.

The idea of divided custody began to arise through the English decisions from about the 1930s, that is, legal custody to the father and care and control to the mother. It was seen as recognising the reality, and difference, of the mother’s child rearing role and enabled the paramountcy of the child’s welfare to be addressed. At the same time, it ensured that the father retained his right of control over decision making with respect to the upbringing of the child.\textsuperscript{334} This can be seen as an example in the law of not only the dominance feminist theory where patriarchal power is maintained, but also perhaps as an early application of cultural feminist theory, that is, there is an equality in value but difference in role and function between mothers and fathers.\textsuperscript{335} For example, in Re W,\textsuperscript{336} the lower Court judge decided as follows:\textsuperscript{337}

So far as I am aware … it is most unusual to deprive the mother of a very young child of, at least, the care and control of the child. Only in cases of extreme necessity, having regard to the paramount consideration, that is to say, the child’s welfare, would a child so young … be taken away from his mother. … On the other hand, it is … in the interests of [the infant] that his father should have a practical and effective interest in, and so far as possible, be able to plan ahead and provide for his child’s further education. … For this purpose, [the father] requires at least some promises of

\textsuperscript{333} In Re A [1955] 2 All ER 202.
\textsuperscript{334} Maidment, above note 201 at 29-30 and 155-156.
\textsuperscript{335} See Chapter Five.
\textsuperscript{336} In Re W [1963] 2 All ER 556.
\textsuperscript{337} In Re W, above note 336 at 558.
certainty that he can prepare for such education in a reasonable hope of his desires being effective, and … to have the chance… of proving… that his proposals are in the best interest of his son.

I therefore order that the custody of [the infant] be granted to the father, but that [the infant] shall not be removed from the care and control of … his mother, save as is provided for in his access … that [the father] shall be entitled to the possession of his son from eleven in the morning until six in the evening on one day in each week, and for the period of a fortnight during the school holidays in the summer of each year.\footnote{338} The mother appealed the decision and was successful in obtaining custody. The appellate Court saw the father as having had exclusive custody at common law and that this meant ‘safe-keeping’, as well as an inseparable element with respect to the right to determine matters of education, religion and other matters, and that the notion of divided custody was unknown to the common law. However, it saw a child’s wardship through the Court of Chancery being a division of custody, and with respect to directions under the divorce legislation, Denning L J had already in \textit{Wakeham v Wakeham}\footnote{339} given ‘legal custody’ to one parent and ‘care and control’ to the other. This was to get around the adulterous wife who had not previously been allowed access at common law, and the paramount consideration of the welfare of the child. This was recognised as only one consideration, the father’s rights as an innocent party also being entitled to consideration. Accordingly, custody was given to the father, “although for practical reasons, and solely for practical reasons, the mother may have the care and control.”\footnote{340} The appellate Judge said there was no jurisdiction upon which such split orders could be made, preferring instead that the matter be addressed as to:\footnote{341}

\begin{enumerate}
\item The fact that the mother had the custody would not prevent the father from making plans for the infant’s education.
\item Any order relating to an infant is in its nature being subject to review, and where the custody of an infant is given to one parent it is always open to the other parent to make a further application to the Court.
\end{enumerate}

\footnote{338}{In New Zealand, the term custody under the Guardianship Act 1968 (now day-to-day care under the Care of Children Act 2004) denotes the day to day care of the child; guardianship is the term used under both Acts to describe the authority of a parent to control the major decisions with respect to a child’s upbringing, including education.}
\footnote{339}{\textit{Wakeham v Wakeham} [1954] I WLR 366 at 369.}
\footnote{340}{\textit{Wakeham v Wakeham}, above note 339 at 369 per Denning L J.}
\footnote{341}{\textit{Re W} above note 336 at 364.}
(iii) The ability for either parent to apply to the Court of Chancery by way of wardship proceedings, and that probably being the right course in a case of any complexity.

(iv) A recognition that if one parent has legal custody and the other care and control, and they are unable to agree, a further application by one or other to the Court is probably inevitable in any case.

The law’s approach to divided custody may have been a precursor to the shared day-to-day care parenting arrangements that have now developed. Divided custody was founded on a continuing reality and recognition of a father’s superior rights and, therefore, upon dominance feminist theory.\textsuperscript{342} Shared care parenting regimes appear to be the result of political pressure applied by fathers’ groups.\textsuperscript{343} A new default legal position and a proposed amendment to New Zealand’s legislative regime to provide for equal time shared day-to-day care was rejected in 2000.\textsuperscript{344} The paramountcy of the welfare of the child was confirmed as the continuing and applicable legal standard for a child’s care arrangements. Notwithstanding, there was pressure to legislatively introduce shared day-to-day care into the UK.\textsuperscript{345}

3.14 Motherhood and adoption

The intensity of a mother’s feelings towards her child can be seen in adoption cases where the mother has not been able to finally commit to the fiction which requires that she give her child up, absolutely and completely, and she then seeks to withdraw her consent. In \textit{Re C},\textsuperscript{346} a 1964 English adoption case, the mothers’ feelings towards her child were written into the judgment directly from her affidavit:\textsuperscript{347}

\begin{quote}
My failure to make up my mind was because I could not bring myself to put pen to paper because of my strong desires for her and my decision as to what was best for her. I was aware of the risk of attachment between the child and the adopters and they and her. I have read [the doctor’s] report … He says - to summarise – there is a very real danger in a move now, taking into account the time she has been with the
\end{quote}

\textsuperscript{342} See Chapter Five.
\textsuperscript{343} See Chapter Seven.
\textsuperscript{344} Dr Muriel Newman’s Shared Parenting Bill in 2001.
\textsuperscript{346} In \textit{Re C} [1964] 3 All ER 449.
\textsuperscript{347} In \textit{Re C}, above note 346 at 453.
adopters. This came as a slight shock to me. I knew that she would be terribly upset, but I was slightly surprised that so much was written on the psychological effect upon her. I was surprised that the report seemed to harp so much on the psychological effect on the child. This is what I had realised I would have to cope with if she returned to me. I think that I will succeed in coping with her troubles. I acknowledge the possibility that she will be very turbulent and the effect this will have on her – tantrums, tempers, perhaps bed-wetting. I think that, if she feels strong love from me, she will grow out of the terrible depressions she will suffer at first. I think maybe in her subconscious mind she will feel love and security in me.

The issues of the child’s attachment to the adoptive parents, and the doctor’s report of the dire consequences if the child was removed from this care to be returned to the natural mother, were determinative. The Court considered the natural mother was unreasonable in withholding her consent to the adoption proceeding. Her consent was therefore dispensed with. She appealed, again seeking the restoration of the care of her child back to herself. Her appeal also failed, the Court deciding that in their view, “[the mother] show[ed] a self-indulgent indifference to the welfare of the child, in the sense of the whole future wellbeing of the child”.

In another English adoption decision from 1966, the quality and character of not just the natural mother, but also the proposed substitute mother (being the wife of the natural father who sought to care for his baby son himself, rather than have him retained by the adoptive parents) were central to the decision of the Court. In changing his mind during the course of the concurrent adoption and custody proceedings, and granting custody to the 49-year-old Protestant father despite the baby having been with the proposed adoptive Roman Catholic parents with the consent of the 24-year-old mother since he was seven weeks old, the judge indicated how favourably impressed he was by the father’s wife. Her quality as a mother, combined with the “instinctual bond” that should develop with the child’s father, changed the judge’s mind. He said:

I will just refer to one or two short passages of my notes of the wife’s evidence in the hope that something of her quality will come through in the written word. .. She said that she always wanted a boy and that the father wanted a boy too, and that after it had

348 In Re C, above note 347 at 455.
349 Re C (MA) [1966] 1 WLR 646 at 652; see also In re Adoption Application 41/61 (No 2) [1963] 2 All ER 1082.
been found that she could not have any more children, she and the father … talked about adopting a child. …She said that her husband told her of the affair and that he wished to marry the mother. She said “I loved him; I thought there was no sense in three people being miserable about it”… [on] the day of the decree nisi, she met him because he always took her two daughters to the pictures on that day of the week. She said she was very upset. They had a number of discussions about it and about making a fresh start. … The baby was discussed before the decree nisi was rescinded. It was one of the basic things that she should look after the baby. She was asked in cross examination why she was willing to look after the child and she said: “really, because, first, he” (that is, her husband) “does love me and we are very happy together, and, secondly, he did such a lot for me and my two daughters … and this is one of the ways I can repay him. She was asked: “Is it your position this: that you are in love with your husband and you are grateful to your husband,” and her answer was, “Yes, I am.” Question: “And that is why you are willing to look after this child that was part of his betrayal to you?” and she said yes, she was. This woman is of a kind which fortunately is not very rare in this country. She is not given to ideas or ideology; she is not irreligious though not a church-goer; she is thoroughly practical, with her feet firmly on the ground. She is a woman of principle, truthful, honest, forthright, sincere, kind, loyal and decent through and through. She impressed me most favourably … I am confident she would make a good and completely devoted mother to the child, and that to bring him up would be to her a work of love.

3.15  Motherhood, morality and the law

By 1969, an understanding of a child’s need for its mother was regularly referred to, notwithstanding the adultery of the mother. In Re F, the father obtained an interim custody order through wardship. The mother had left their home, although unable to take their young daughter with her, to live with an Air Force colleague of her husband and became pregnant to him. The husband wanted to reconcile, but this was refused by the wife. The father then sent the child to his parents. The mother subsequently uplifted her and took her to her mother’s, where she also remained. The wardship order was made and the child had to be returned to the father. Meanwhile, the father had entered a new relationship and was living with the young woman, close by to his parents. A further child was also expected of this union.

\[350\] In Re F [1969] 2 All ER 766.
Accordingly, both the mother and the father had re-partnered and were creating new families. The Court decided that while there was little between the parties in terms of moral guilt, it was still the mother, not the father, who had broken up the home. It saw both parents continuing to have significant input, and also discussed the mother-substitute and father-substitute roles of the new partners together with the considerations required to give effect to the principle that the welfare of the child was the paramount. It also confirmed that the welfare principle was not exclusive, and, while giving it special weight, the Court should also weigh all relevant circumstances. It said:\footnote{In Re F, above note 350 at 243.}

First, as regards the home, the mother has a small advantage. Second, as to the parent substitute, again the mother has a small advantage. Third, as to the upheaval to the ward, the father has a small advantage. Fourth, as to a young child’s need for its parents, the mother has a substantial advantage. Fifth, as to justice between the parents in the responsibility for the breakup of the marriage, the father has a substantial advantage. … Of these five … all except the fifth relate to the welfare of the child.

He came to the conclusion that the mother’s failings as a wife had not made her so bad a mother as to displace the greater need young children had for the mother, rather than the father, and custody by “a small margin” \footnote{In Re F, above note 350 at 244.} was granted to the mother. Thus, by the late 1960s, the issue for the judges was still reconciling two competing principles: that of punishing a guilty party, with the understanding that as a general rule it was better for little girls to be cared for by their mothers.

However, by 1970 this had been displaced by decisions that there was no principle that a boy over seven should be with his father, just as there was no principle that a young girl should be with her mother. \textit{The Court of Appeal in Re C (A) (An Infant)},\footnote{In Re C (A) (An Infant) [1970] 1 All ER 288.} in a dispute over an eight-year-old boy between the father, and the paternal grandmother and aunt (the boy being left with his father), said:\footnote{In Re C (An Infant), above note 353 at 291.}

I do not agree at all with expressions of opinion which have fallen … from judges that a boy should, as a matter of “principle” be with his father – just as much as I disagree with the other “principle”, which has altogether been abandoned, that a girl under
three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge, where the scales are nicely balanced.

1970 was an important year in tracing the English case-law. The House of Lords decision in *J v C*\(^{355}\) established that the welfare principle is one that is deliberately indeterminate, as beliefs about what is best for a child change with time, cultural norms and social and parenting practices. Further, what was understood as a child’s welfare, whether intuitive or informed by sociology or psychology\(^{356}\) was to be incorporated into the concept itself.\(^{357}\) Thus, much of current parenting law is based in the following statement from that decision by Lord McDermott:\(^{358}\)

... the words’... shall regard the welfare of the infant as the first and paramount consideration’ ... in their ordinary significance ... must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they promote a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.

This view means that a child’s welfare is the sole, not first, consideration. All other considerations must be subordinated to it. This has resulted in elevation of the welfare principle as the only consideration. It has also led to the principle having had removed from it all previous social understandings, and has therefore made it vulnerable to being politically

\(^{355}\) *J v C* \([1970]\) AC 668.

\(^{356}\) The rise of the discipline of psychology and its influence on the law with respect to motherhood and parenting, is significant. See the foundational work of Bowlby and others with respect to attachment; also Goldstein, Freud and Solnit with respect to the development of the psychological parent, above note 161 and Chapter Seven with respect to these influences on the development of separated parenting.

\(^{357}\) Maidment, above note 201.

\(^{358}\) *J v C*, above note 355 at 686 per Lord McDermott. The New Zealand Family Court continues to cite *J v C* with approval and in particular, the “checklist” of factors that should be considered in determining a child’s welfare and best interest.
In addition, judicial discretion and how it is informed and exercised, has become a significant part of the decision making process.

While the status quo approach emerged from the *J v C* decision, and, as a result most mothers continued to obtain custody because they were doing most of the caring at the time of the breakdown of the parenting relationship, it also created a vulnerability for motherhood that was already becoming evident in New Zealand from the drive for equal parenting rights through gender neutrality. The status quo principle, while generally protective of motherhood, was further undermined by the cases where a child was ‘taken’ by one parent and a new status quo established by the time the matter came to hearing. This meant that some judges were reluctant to give effect to the status quo principle and “the old fallacy that possession was nine tenths of the law”. The case law suggests they preferred instead, in these situations, to follow their instincts.

### 3.16 The development of the gender neutral psychological parent

The 1970s was also the period when the psychological parent was in its ascendancy, through the work of Goldstein, Freud and Solnit, and there was a great deal of weighing and balancing between status quo, a natural mother’s claims, and a child’s existing attachment to a mother substitute.

The obligations of one parent towards the other parent also began to emerge during the 1970s. Respect for the other parent was referred to as a need for the child to have recognised the significance of a relationship with the other parent. In *B v B*, Edmund Davies L J said:

> … one parent who takes that attitude [one parent believing it is in the interests of the child that there is no contact with the other parent] is undertaking a tremendous responsibility and discharging it thoroughly badly. Again speaking generally, it is the

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359 Pauline Tapp and Nicola Taylor “Relocation: a Problem or a Dilemma” (2008) 6 NZFLJ 94 indicated that the Family Court was vulnerable to the influence of the fathers’ movement and the making of “sub silencio decisions by ‘re-badging’ adult interests as an interest related to child welfare.”


361 *G v G* [1976] 6 Fam Law 43 per Stamp LJ.


363 *B v B* [1971] 3 All ER 682.

duty of parents, whatever their personal differences may be, to seek to inculcate in the child a proper attitude of respect for the other parent.

In Re D,365 the reality of “a temporary drifting apart and a withdrawal by the husband father, when the marriage is breaking up, and especially when he has another woman to keep” was discussed as not being abrogation, by the father, of his duties. A father caring about his child and missing him but not wanting to upset him or the mother by pushing the access was another situation discussed in Re B;366 and the cutting off of a natural father’s relationship through step-parent adoption was disapproved of:367

It is quite wrong to use the adoption law to extinguish the relationship between the protesting father and the child, unless there is some really serious factor which justifies the use of the statutory guillotine. The Courts should not encourage the idea that after divorce the children of the family can be reshuffled and dealt out like a pack of cards on a second rubber of bridge.

It was still expected that mothers would have the care of the children after separation. Therefore, any challenge to this was usually based on the unfitness of the mother. The risk was that there was not a corresponding assessment of the father’s parenting fitness, as the alternative. Even so, it was still recognised, with respect to young girls, that the father may not be as suitable as the mother. In M v M,368 Stamp L J said:369

However good a sort of man he may be, he cannot perform the functions which a mother performs by nature in relation to a little girl [of four and a half years].

Accordingly, a foundation in cultural feminist theory was evident.370 However, by the late 1970s, this situation was described as one of a negative bias in favour of mothers by the appellate Court. Families Need Fathers were, in 1974 in the UK, beginning to frame their issue on the basis of bias in the Court in favour of mothers (and therefore against fathers), saying that nine out of ten custody cases were decided in favour of mothers. Maidment points to this statistic being correct, but that within this 90 per cent, over 90 per cent were in uncontested or consent matters, usually confirming the status quo which was also often with

\[365\] In Re D [1973] 3 All ER 1001 at 1008.

\[366\] In Re B [1975] 2 All ER 449.

\[367\] In Re B, above note 366 at 465.

\[368\] M v M (1980) 1 Family Law Reports 77.

\[369\] M v M, above note 368 at 80.

\[370\] See Chapter Five.
Accordingly, it was not a maternal preference, but the dominance of the status quo principle which was actually at play. Eekelaar said, in 1977, that:

Our study confirms that the major factor taken into account by the courts in deciding where a child is to live is the avoidance of disruption of the child’s present residence. We could find no significant relationship between the outcome of the residence issue and factors such as the age of the children, the sex of the custodian or the separation of the siblings … occasional instances of ‘favouritism’ for the wife may still be found, but they are quite uncharacteristic of the general practice.

That the two considerations probably coincided did not need to have attention drawn to it, and therefore the significance of the mother to the child did not need to be separately identified. Given the increasing demands by fathers, it was politically expedient that this should be the case. Bias against the mother was seen in some instances. A child’s wishes began to be independently obtained through social workers’ reports, although the nature of their independence came under scrutiny. Mothers came to be regarded with greater suspicion. In Cadman v Cadman, a constellation of these issues was discussed. The lower Court judge had formed an adverse view of the mother arising out of her early action in having the father “ousted” from the home. In addition, the father was unhappy with the social workers’ reports proposing custody of their seven-year-old daughter should continue to be with the mother. He therefore obtained the approval of the Court, without any reference to the mother, to obtain through his counsel another ‘independent’ and court-sanctioned report which provided a more suitable conclusion to him, contrary to the ones already provided. This was on the basis that these earlier reports were biased against him. The appellate Court said it would have been difficult to find any reports which contained less bias. After extensive interviews over a long period of time, the mother had been reported as coping well with the child despite the extreme difficulties she had been in with respect to accommodation, now resolved by the provision of a council house. The appellate Court considered that the mother might have been forgiven in thinking that the turn of events in the lower Court provided a slanted set of instructions against her, that the order for another report was made in a form to which she had little option but to submit, and that her position was “wholly prejudiced”. The appellate Court

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371 Maidment, above note 201 at 180.
described the lower Court’s judgment as not only appearing wrong in process and substance, but also one where an opinion about the mother was expressed in the judgment in such unusually explicit language that one could not help but wonder “whether [the judge’s] mind to some extent has been affected.”

3.17 Motherhood and poverty

The issue of poverty of the mother also began to arise during this period. Occupation of the home was often contested. In the 1974 decision of Allen v Allen, where the father had for some years been living in the home with two of the three children, and the mother supporting herself and the third child in a rental flat, the lower Court judge said:

I really think this family should be back together as far as possible, and I think the mother should have the care and control of these children until they are grown up, or at least until they are aged 16 … She ought to go back and live in the house with them and make a matrimonial home for them.

The father appealed. However, the decision was confirmed.

In Dennett v Dennett, the husband put pressure on the wife to agree to his payments of four pounds per week for maintenance of their child to continue at that figure without it ever being able to be increased, and in return the husband would not defend the wife’s divorce suit against him. The Court considered this agreement to be so against public policy that it also refused granting the decree nisi to the wife (reversed on appeal as to the granting of the decree nisi). However, it spoke of a certain reality faced by mothers in respect of their financial, housing and property settlement situations after marriage break down, which difficulties that persist today.

374 The ‘feminisation of poverty’ was identified by Diana Pearce (1978), who, on the basis of statistical analysis relating to the United States for the period 1950-1970, pointed to a trend towards increased concentration of poverty among women, and especially among female-headed households; see Sylvia Chant “Feminisation of Poverty” Wiley-Blackwell Encyclopaedia of Globalisation, February 2012; see also Burbridge Poverty in Australia: new data on the incomes of Australian families and individuals (1984).
376 Allen v Allen, above note 375.
Split custody orders continued to develop, despite the appellate Courts signalling the undesirability of allowing one parent to dominate a custody situation. The appellate decision in *Dipper v Dipper*\(^{379}\) was described by Maidment as confused.\(^{380}\) However, the Court did say, in allowing an appeal by the mother against a lower Court decision providing the father with sole custody (all the major decision making rights) and the mother with care and control, that:\(^{381}\)

… these split custody are not really desirable. … care has to be taken not to affront the parent carrying the burden day to day of looking after the child by giving custody to the absent parent.

The answer in that case was to provide the mother and father with joint custody, and therefore joint control over the major decisions, seeking the assistance of the Court if they could not agree. The mother was granted day to day care and control.

It is hard to resist the conclusion that a form of patriarchy was still evident in the English cases in the latter part of the 20\(^{th}\) century, and at the time that the fathers’ movement (and their claims to the contrary) began to gain ascendency and political influence. Notwithstanding, the position and role of motherhood was still recognised in the UK, founded in either dominance feminist theory or cultural feminist theory.\(^{382}\) This was in contrast to the position in New Zealand where, by this time, the role of motherhood was no longer formally and distinctively recognised in the law, and liberal feminist theory was in the ascendency.\(^{383}\)

Motherhood’s increasing, then decreasing, legal recognition is now traced through New Zealand’s case law.

### 3.18 20\(^{th}\) Century New Zealand case law

The New Zealand Courts were greatly influenced by the value of precedent established by the English common law and equity cases of the time. However, they were also influenced in the

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Financial Disputes; see also Theresa Glennon “Still Partners? Examining the Consequences of Post-Dissolution Parenting” (2007) Family Law Quarterly 41 at 105-144.

379 *Dipper v Dipper* [1980] 2 All ER 722.

380 Maidment, above note 201 at 27.

381 *Dipper v Dipper*, above note 379 at 736 per Ormrod LJ.

382 See Chapter Five.

383 See Chapter Five.
exercise of their discretion by instinct, by natural law and by the egalitarian social context that had been foundational to the development of New Zealand society.

In 1910, the Supreme Court in Dunedin in *Re Thomson* 384 confirmed that: 385

After 1882 the legislation in England and New Zealand on the subject of the custody of infants was the same. … Our legislation, therefore, has followed close on the English legislation, and is now the same in every respect as the English legislation.

Williams J further confirmed that under The Infants Act 1908, where a father asks for a habeas corpus to take a child out of the custody of the mother, the Court can give effect to the provisions of the legislation even though the mother may not have petitioned. The Court was required under this legislation to have regard first, to the welfare of the infant, secondly to the conduct of the parents and, thirdly, “to the wishes as well of the mother as of the father.” This was contrary to the old English common law position, as modified by equity and the legislature that the Court was first to have regard to the paternal right, secondly to the marital duty and, thirdly, to the interests of the children. Thus, the approach of the early judges in the New Zealand Courts appeared to recognise the greater historical vulnerability of the mother. It also appeared more cognisant of the differences between mothering and fathering to a child, despite the wholesale adoption of English law which had been constructed around patriarchy. In *Re Thomson*, 386 Williams J discussed the need for English common law as described in *R v de Manneville*, 387 to have been ameliorated through equity with respect to the domination of the rights of the father against the mother. He saw this as having commenced in 1839 with Talfourds Act, replaced by the Custody of Infants Act 1873, which extended the age up to which control of a child could be given to a mother from seven to sixteen years. He confirmed the New Zealand legislation as having adopted the English position, describing the English Acts of 1839, 1873 and 1886 as a series of modifications, in favour of the mother, of the absolute common law rights of the father with respect to the guardianship and custody of his children. Williams J quoted from the English judge Lindley L J in the decision of *In Re A and B*, 388 that: 389

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384 *Re Thomson* 13 GLR 420; 30 NZLR 168.
385 *Re Thomson*, above note 384 at 421.
386 *Re Thomson* above note 384.
387 *R v de Manneville* above note 194.
388 *In Re A and B* (1897) 1 Ch 786.
389 *In Re A and B*, above note 388, quoted in *Re Thomasen*, above note 384 at 422 per Williams J.
Nobody can read the various sections in the [Guardianship of Infants Act 1886] without seeing that it is essentially a mother’s Act. It has very greatly extended the rights of mothers. I do not say that it has as much, if at all, diminished the rights of fathers except as regards mothers.

Williams J was clear that the rights of the father were not to override the wishes of the mother, and that the rights of the father were no longer paramount. In that case, the husband left the wife; the wife had asked if he was going to give her anything to keep the children. Because he said ‘no’, she then said that he had better take the children with him, which he did. The wife was also pregnant. She had the baby and there was no response from the husband to this advice, to her requests for information about the children or in providing support for the new child. The father had placed the children with the paternal grandmother in Milton and when the mother attempted to see them she was refused access to the house. The husband’s behaviour was described as “callous and hard-hearted”; the wife’s, on the other hand, as “genuinely anxious about her children.” She then “took the extreme step of taking them away surreptitiously from their grandmother’s custody” and while the judge considered what she really should have done was to apply to the Court under the Infants Act 1908, he saw that “it is difficult to blame a mother from doing anything right or wrong to recover her children.”

The mother subsequently took up a housekeeping position in Napier, taking the children with her, they being two boys aged six and four years together with the baby. Williams J approved of the remarks made by Sir J Romilly M R in the English decision of Re Austin, where he said:

No thing and no person and no combination of them can, in my opinion, with regard to a child of tender years supply the place of the mother, and the welfare of the child is so intimately connected with its being under the care of the mother that no extent of kindness on the part of any other person can supply that place.

He commented that the paternal grandmother at 65 years old, however well meaning, could not take the place of a mother to the children. There was nothing to suggest that the wife would not treat the children as a mother should, and therefore, looking at the welfare of the children and the conduct of the parents, Williams J considered he should then prefer the wishes of the mother to those of the father with respect to custody. With respect to the issue

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390 Re Thomson above note 384 at 423.
391 Re Austin (1865) 34 Beav 263.
392 Re Austin, above note 391, quoted in Re Thomsen, above note 384 at 424 per Williams J.
of religious education, however, he saw that it remained beyond question that the law provided to the father the right to have his children brought up in the religion that he professes, “however languid and lukewarm that profession may be”\textsuperscript{393} and even when the father is dead. He referred to the English decision of in Re Besant\textsuperscript{394} as his authority. He saw this as a secondary issue to that of custody, and noted the difference between a father wanting to take the children off his wife and seeking custody to have that want satisfied using his right to control their religious education to do so, and a father who wanted his children in his care to enable them to be raised according to his religion. The mother was granted custody, the children were to be raised as Presbyterians (according to the father’s wishes), and the father was granted access once a month.

An emergence of the ‘same-sex’ rule began, that is, that young children should be with their mothers but, as they grow older, girls do best with their mothers while boys should be cared for by their fathers. For example, in Morton v Morton,\textsuperscript{395} a Dunedin Supreme Court decision from 1911, the wife sought the custody of the three children of the marriage, a boy aged ten and two girls aged seven and six years. The marriage had been dissolved on the wife’s petition as a result of the husband’s adultery. The children had remained in the care of the father at separation by the agreement of them both, and he was described as fond of them and they of him. He was also seen as having done his best to bring them up properly and the wife, while innocent and with “no suggestion of immoral tendencies or that she is given to drink”, was suggested to be “given to gadding about and to neglecting her household duties.” Williams J said that in deciding the question of the custody of the children:\textsuperscript{396}

\begin{quote}
\ldots where the mother is innocent of any matrimonial offence, it is obvious that she is the natural person to take charge of her female children, unless it is shown conclusively that she is for other reasons unfit to take charge of them. That has not been shown here.
\end{quote}

However, he saw the situation for the boy as different, for much the same reasons; that is, just as growing girls want a woman to look after them, growing boys are better in the charge of a man.

\textsuperscript{393} Re Thomsen above note 384 at 425.
\textsuperscript{394} In Re Besant, above note 275.
\textsuperscript{395} Morton v Morton (1911) 31 NZLR 77.
\textsuperscript{396} Morton v Morton, above note 395.
The judge went on to suggest that the father’s immorality did not appear to be continuing, nor that his previous fault would affect the morals of his son. He then cited the 1875 English decision of *Symington v Symington*\(^{397}\) in support and as providing him with authority for the decision he was about to make. However, *Symington v Symington* was also regarded as the high point in the recognition of the “high and sacred”, (and exclusive), guardianship rights of the English father. While it was similarly a decision that provided for the ongoing care of a son by an adulterous father, with care of the daughters by the innocent mother, the basis of the decision may have had more to do with the competing superior and natural right of the father than with the more intuitively, natural law-based theory of Williams J. Thus, while the children were separated between their parents according to the gender of both parent and child, provision was at the same time made for there to be “the fullest provision for access”\(^{398}\) for both parents.

The same principle, that is “as growing girls want a woman to look after them so growing boys are better in the charge of a man”, was also applied by Stringer J in the 1921 decision of *Meurant v Meurant*.\(^{399}\) Accordingly, there was a continuing recognition into the 20\(^{th}\) century of the value of gendered parenting roles for mother and fathers.

### 3.19 New Zealand Courts’ interpretation of the paramountcy of the welfare principle

The legislative introduction into New Zealand in 1926 of the paramountcy of a child’s welfare, did not alter the Court’s previously held views as to what that might mean. For the New Zealand courts, this appeared to be rooted more strongly in natural law and therefore less influenced by the strongly held superior (and absolute) right of the father over the child that existed in England. In the 1928 Wellington Supreme Court decision of *Parsons v Parsons*,\(^{400}\) the wife had separated from her husband and had sought orders appointing her guardian and granting her custody of their three-year-old son. The husband also wanted custody. There was no proof of immorality by the wife but there were suggestions which had culminated, after the proceedings had been commenced, with the wife discovering that she suffered from a venereal disease. The Court pointed to the legislation that it was required to apply, that is, section 2 of the Guardianship of Infants Act 1926. It regarded this as meaning that it was directed, in determining the welfare of the child as the first and paramount

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\(^{397}\) *Symington v Symington*, above note 298.

\(^{398}\) *Symington v Symington*, above note 298.

\(^{399}\) *Meurant v Meurant* (1921) GLR 660; [1922] NZLR 262.

\(^{400}\) *Parsons v Parsons* [1928] NZLR 477, per Smith J.
consideration, not to take into consideration a husband’s superior right to custody at common law or any right of the mother against the father, other than from the point of view of the welfare of the infant. The decision required to be made was what to find the best solution with respect to the question of custody, in the interests of the welfare of the child.

The decision was that that it would be better that the husband have custody of the child.401

In the 1930 Supreme Court Nelson decision of In Re Winter,402 a father, living with his mother, was refused an application for a writ of habeas corpus against the mother, living with her mother, in respect of their 18-month-old daughter who was in the mother’s care. Kennedy J referred to section 2 of the Guardianship of Infants Act 1926 as the relevant statutory authority. He referred with approval to Parsons v Parsons,403 decided under this legislation, and, also with reference to In Re Thomsen,404 decided under the earlier legislation but still addressing itself to a consideration as to what was in the best interests of the child. He concurred with Williams J with respect to Sir J Romilly’s observations in Re Austin405 and extended the quote by adding, also with approval, “It is the notorious observation of mankind that the loss of a mother is irreparable to her children and particularly so in the young.” He went on to confirm that:406

A child of such tender age as the child claimed, essentially requires a mother’s care and so far as upon the existing evidence one can see into the future it will be better for her to be surrounded in her upbringing, when she has left her very tender years, with her mother’s love and care. … the grandmother’s care … is not better for the child than the care of its own mother which will be available, so far as may be seen, for as long as the child may need it.

In 1940, the Supreme Court in Wellington in Re H,407 also confirmed the general view that it was preferable in all ordinary circumstances that a male child should be brought up by, and have the care and guidance of, the father. However, Smith J, in the circumstances of this particular case, saw that it was better that the mother have custody of both children, boys aged 13 and 3 years. An additional reason for this was that the elder boy, regarded as capable

401 Parsons v Parsons, above note 400 at 479.
402 In Re Winter (an Infant) [1930] GLR 637.
403 Parsons v Parsons, above note 400 at 480.
404 Re Thomsen, above note 384.
405 Austin v Austin, above note 391, quoted with approval in Re Thomsen, above note 384 at 424 per Williams J.
406 In Re Winter (an Infant), above note 402 at 638.
407 In Re H [1940] GLR 165.
of making a choice, indicated a clear preference for living with his mother when interviewed by the judge. The father had obtained a writ of habeas corpus and as a result, the question of custody needed to be determined.

The mother had left the father in Kaikohe and gone to her parents in Wellington with the children, ostensibly for the school holidays. In reality, she was leaving him. They had been married for 14 years and there had been previous significant financial difficulty resulting in periods of separation while the husband worked in the South Island. He had also been imprisoned for criminal activity. The wife stood beside him and her parents had supported him with funding to establish a piggery in Northland. There were further difficulties and the wife spent periods back with her parents with the children “heartbroken, depressed and discouraged.”

In reality, she was leaving him. She became ill, she was not sympathetically treated by her husband and the doctor ordered her to go to her parents as part of her recovery. She took the younger of their two boys with her. During her absence, the husband made considerable efforts to put the place to rights, erecting fencing so that the pigs could no longer wander freely between the farm and the home. When the wife came home, things were considerably better but the financial pressures continued. The wife’s father suggested the family relocate to Wellington to be closer to them and to enable better schooling for their eldest son. The wife’s mother had guaranteed the business overdraft, it was not being addressed and matters continued to decline. The husband became depressed, uncommunicative and was subject in the home to “moods of ill-will”.

He was also inattentive to the difficulties the business was in and bills were mounting and remaining unpaid. The wife could take no more and returned to the support of her parents taking the children with her.

Smith J concluded that, notwithstanding the desirability of male children being under the care and guidance of their fathers, there was no rule which superseded the rule that the Court will regard the welfare of the child as paramount. He referred to the process of habeas corpus and that the liberty accorded to the 13-year-old by the writ being granted then meant that if he was capable of exercising his own discretion, full effect should be given to that. The judge talked to the boy, who thought he was getting on better at his school in Wellington, that he wanted to be an engineer, and if his parents were going to live apart he would prefer to live with his mother. The judge considered him to be articulate and intelligent and accordingly

408 In Re H, above note 407 at 166 per Smith J.
409 In Re H, above note 407 at 165.
followed the English decision of *R v Greenhill*[^410] that if a youth of this age expressed a preference, the Court should have clear reasons for disregarding his wishes. The judge considered that the mother, on the facts, was entitled to the custody of the three-year-old boy (although it is not clear how he reconciled that conclusion with his position in *Parsons v Parsons*[^411]) and that it would also be preferable for both children to be brought up together.

By the mid-20th century, there was still an acceptance of the different roles of motherhood and fatherhood in New Zealand, with motherhood continuing to be recognised and valued in the law. For example, in *Norton v Norton*[^412] in the Supreme Court at Hamilton, Adams J referred to the need for children of tender years to be with their mother and said that:[^413]

… There is scarcely need to quote authority for the proposition that, other things being equal, children of tender years should be in their mother’s care; … or for the proposition that a mother’s care is to be preferred to that of a father, in the case of girls, even after they have ceased to be of tender years. … These considerations would, on this view of the law, be clearly decisive. But, even if one assumes that the Court may have regard in the wider sense to the rival claims of parents I think the same conclusion must be reached. … the only proper course is to grant the custody to the mother. … The matter can of course be reviewed if her position becomes such that she cannot properly fulfil the duties of a mother. I am not proceeding on the assumption that she will not undertake work outside the home.

This decision also demonstrated considerable sensitivity to the wife as to the reasons for the breakdown of the marriage. On the face of it, she had left her husband. He had obtained against her a decree for restitution of conjugal rights and she had failed to comply. This put her in the wrong, and the husband was able to obtain a divorce. Adams J said:[^414]

The law does not permit a wife to leave her husband except on weighty grounds. She is to bear much before she may justify departure. In this case, the wife failed to attain the required standard of patience and forbearance, and left the husband for reasons which might not have influenced a less sensitive person. But it was, in my view, the husband who subjected her to the strain which was too great for her susceptibilities,

[^410]: *R v Greenhill*, above note 196.
[^411]: *Parsons v Parsons*, above note 400.
[^413]: *Norton v Norton*, above note 412.
and was at least guilty of a lack of sympathy and consideration which ought to have been extended to the wife. …

Conduct was also discussed in *Miller v Low*, a 1951 decision considered by the Full Bench of the Court of Appeal. It allowed an appeal by the mother against the lower court decision of Gresson J who had granted the father custody of his 10-year-old twin daughters in circumstances where it was clear that the conduct of the wife, in marrying her former companion in adultery, had influenced the outcome. This was contrary to section 6 of the Guardianship of Infants Act 1926 where conduct was only relevant if it affected the welfare of the children, and was at odds with the uninterrupted care the mother had provided to the children throughout their lives.

Criticism was levelled at the mother’s original adultery, her continuing association, and then at the mother’s new husband as a ship deserter and aged 24 years, when the mother was 32. However, the Court of Appeal was clear. The decision of Gresson J was wrong and the appeal was allowed. The Court drew a distinction between what a mother is understood to provide to her children, and what this particular mother was or could provide weighed against this father’s proposed care arrangements. It made strong comments in this regard:

> There is one matter not referred to … in the [lower court] judgment, but which we regard … as crucial – that is to say, the importance to these girls of their mother’s affection and care compared with the affection and care which may be expected to be given by … any … stranger, however kindly, bearing in mind in particular that the mother’s relation to these children is founded on the natural tie between mother and children, has subsisted throughout the children’s lives, and may fairly be regarded as a permanent bond between them and her. … In our opinion … it overrides every other consideration.

Further:

> It seems to us that it is a matter of great importance in [the interests of the children] that they should continue to have their mother’s care and attention, and, from the point of view of their interests, the mere fact that the mother has married her former companion in adultery does not outweigh this consideration. Unless and until the

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415 *Miller v Low* [1952] NZLR 575.
416 *Miller v Low*, above note 415.
417 *Miller v Low*, above note 415.
contrary appears, it is right to assume that her new ménage will be, not loose and immoral, but conducted with normal propriety; and, although it has originated in wrong, it should not be inferred that its wrongful origin will so cloud the home as to affect these children unduly. Without minimizing the mother’s guilt, it may be said with justice that nothing else of substantial importance has been said against her as a mother … The father may be equally good as a father, but, with liberal access, such as he certainly ought to have, he can still play a father’s part towards these girls, and is not likely to be supplanted in their affections.

And finally, there was a strong general comment and recognition given to the value of mothering generally:

We are much influenced by the view that the care and affection of a mother are of great importance in the case of adolescent girls. There is, or ought to be, an intimacy between a mother and her daughters of that age which is profoundly important for the daughters, and which operates in spheres to which a father’s influence cannot easily penetrate. The relationship springs normally from the intimate relations of early childhood, and rests largely on the daily ministrations of the years that have passed. In this case, the mother and daughters have stood in that relationship to each other for a decade – the formative first decade of the children’s lives – and it would, in our opinion, require strong grounds to justify the Court in saying that the bond must be broken and the children henceforth committed to the care, perhaps only temporary, of some woman who is not their mother.

However, while the 1961 decision of Palmer v Palmer418 continued to confirm the importance of the ‘mother principle’,419 it was also careful to confirm that the general desirability of a young child being in its mother’s care was not to be regarded as having an inflexible application, much less application as a rule of law.420 The ultimate decision in that case rested on the fact that the child, not quite two, had already been out of his mother’s care since he was three months old and, as a boy, would probably require his father’s care when he was older in any event. Therefore, given the significance of the status quo principle, custody was confirmed in favour of the father to avoid any further shifts in care. However,
the dissenting judgment of Gresson P, supporting the lower court judge that the child should be returned to his mother, contrary to the Magistrate who thought he should remain with his father, was very strongly in favour of a continuing recognition of the “overwhelming importance” to a young child of care by his mother. Gresson P said:

… the advantage to a child under three years of age of the care and attention of his own mother is so considerable as to outweigh such other disadvantages as may be incidental to the transfer of the child from his father’s (or grandfather’s) custody to that of his mother. One does not need the testimony of psychiatrists to know that a young child is happier and better with its own natural mother of 24 or thereabouts than with its grandmother of 54. … But for the fact that the father has had the custody for upwards of two years … the granting of custody of so young a child to its mother, would in the absence of any disqualifying circumstance, be a matter of course. … Even if a transference of custody to the father might hereafter – in some five or six years time – become desirable, I do not think that possibility … would warrant denying the child for the next five years the care and companionship of its own mother.

Gresson P also discussed the need for such frequent access with his mother if he was to stay in the custody of his father:421

So that an intimate relationship between mother and child could develop – as it should … would mean that the boy spent approximately half his time with his mother, for anything less would surely be unfair to both the child and his mother. … [then] … the child will become perplexed as to why…he must leave his mother and go and stay with his grandmother.

Finally, he said:422

In the result, the child has been deprived for two years of the care of its mother. I regard it as a grave injustice to continue that deprivation because possibly … in about five years time it may be desirable to give custody to the father. That does not seem to me to provide an adequate ground for denying the child for the next five years benefits which it is said are incalculable.

421 Palmer v Palmer, above note 418.

422 Palmer v Palmer, above note 418.
North P, in allowing the father’s appeal to retain custody, said:

While … I do not wish for one moment to be thought to pass over too lightly what has been described as “the mother principle” I attach a great deal more importance … to the desirability of maintaining continuity in custody.

Cleary J, also allowing the appeal because the child was already in the father’s custody, however said:

I am prepared to accept the principle, as a general but by no means invariable rule, that young children, including young male children, are better in the care of their mother, and I accept also that good and sound reason affecting the welfare of the infant should be shown before the principle is departed from. …

These New Zealand decisions also took the position in Australia into account. The 1950 decision of the High Court of Australia in Lovell v Lovell423 was frequently cited. There, a wife had left her husband taking their three-year-old daughter with her. The husband took the child off her and the wife sought the assistance of the Supreme Court of Victoria. It decided that the child was at least as well off with the arrangements that the father could make for the child’s care, as could the mother (who was also working). She successfully appealed to the Full Supreme Court. The husband then took the matter to the High Court of Australia where the majority confirmed the judgment of the primary judge in initially refusing the wife’s application. The Court discussed ‘the mother principle’,424 and while it confirmed its significance to the welfare of the child, it also said it was not a rule of law. It confirmed that parents were to be on an equal footing and that the welfare of an infant could not be allowed to “elbow out” all other considerations. Latham C J said: 425

… the welfare of the infant cannot properly be allowed to “elbow out” all other considerations … The Full Court has based its judgment not only on the proposition that the consideration of the welfare of the child should elbow out other considerations, but also on the proposition that a mother has a superior right to the custody of an infant of tender years … and that right can only be displaced by the very strongest evidence. … The provision means that the parents are to be on an equal

423 Lovell v Lovell 81 CLR 513.
424 See later in this chapter: para 3.20 The rise and fall of the ‘tender years doctrine’ (UK) and the’ mother principle’ (NZ).
425 Lovell v Lovell above note 423 at 521-523.
footing as to rights and claims. Neither is to be regarded as superior to the other. …

These propositions involve no challenge to the common sense of the proposition that
as a general rule small children will be better looked after by their mother than by
their father, particularly in the case of female children. But there is no rule of law to
that effect.

Webb J delivered a dissenting judgment, saying:\textsuperscript{426}

… ordinarily the paramount interests of a girl of three require it to be with its mother.
To give the child’s custody to the appellant simply to console him or to avoid adding
to the hardships he has already suffered would be to subordinate the child’s interests
to his.

By 1971, the Guardianship Act 1968 had been in force in New Zealand for three years. It
provided for equal and shared guardianship between mothers and fathers when married, and
for the mother as sole guardian when unmarried and not living together at the time of the
birth of the child.\textsuperscript{427} It also provided pursuant to section 23 that:

(1) In any proceedings where any matter relating to the custody or guardianship of
or access to a child, or the administration of any property belonging to or held
in trust for a child, or the application of the income thereof, is in question, the
Court shall regard the welfare of the child as the first and paramount
consideration. The Court shall have regard to the conduct of any parent to the
extent only that such conduct is relevant to the welfare of the child.

(2) In any proceedings under subsection (1) of this section the Court shall
ascertain the wishes of the child, if the child is able to express them, and shall,
subject to subsection (9) of section 19 of this Act, take account of them to such
extent as the Court thinks fit, having regard to the age and maturity of the
child.

Even then, the Court of Appeal was still saying, in \textit{D v R} \textsuperscript{428} per North P that:\textsuperscript{429}

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\textsuperscript{426} \textit{Lovell v Lovell} above note 423 at 531.
\textsuperscript{427} Section 6 Guardianship Act 1968.
\textsuperscript{428} \textit{D v R} [1971] NZLR 952.
\textsuperscript{429} \textit{D v R}, above note 428.
There is no doubt at all that the mother principle is a very vital one. … but … it is not a right in law – the law has never recognised the “mother principle” as having the status of a rule of law. It is a factor of importance which varies from case to case.

However, Turner J added:

I think … it is impossible to contend that, when other things are equal, the welfare of the children is better served by placing them with a mother who has broken up the family home to live in adultery for her own selfish purposes.

Hence, the idea of the “bad” mother began to emerge, despite the clear legislative directive contained in section 23(1) of the Guardianship Act 1968, and despite a continuation of the long held view that, generally and all other things being equal, young children did best if in the care of their mothers.

The 1977 decision of White J in *R v R and V*[^430^] also expressed the tension the Court saw between the “mother principle” as being a “very vital one” as described by North P in *D v R*,[^431^] and the issue of a “bad” mother usually associated with her repudiating the marriage relationship for an alternative which the Court regarded as relevant conduct pursuant to section 23 (1) of the Guardianship Act. In that case, the solution was found by White J in recognising that:

… these children require the attention and care that a mother can give them. In my view, therefore, … the proper course is to grant custody to the [mother] but at the same time making it clear that I consider this order may be an interim one.

From the late 1970s, a change of judicial approach can be detected. This was against a background of the ‘tender years doctrine’ having developed in England, which protected motherhood. At the same time the ‘mother principle’ in New Zealand had been similarly protective of motherhood. This had been despite the legal transplant of the welfare principle from the English jurisdiction and social context, to the jurisdiction and social context in New Zealand, the divergent effects of which were yet to be seen.

The following section explores the ‘tender years doctrine’ and the ‘mother principle’ and considers the effects of the legal transplant, that is, a borrowing of law from another legal system. Several cases are discussed that were influential in developing a jurisprudence in

[^430^]: *R v R and V* 18 August 1977 D. 54/77 Supreme Court (Dunedin Registry, unreported).
[^431^]: *D v R*, above note 428.
New Zealand that was based on equality through the gender neutrality of parenting as the dominant value. This is contrasted with the value of fairness to mothers in England, which had shaped the jurisprudence there. As a corollary, motherhood in New Zealand was arguably being diminished, no longer assuming a position in law as uniquely valuable to a child, and as distinct from fatherhood.

3.20 The rise and fall of the ‘tender years doctrine’ (UK) and the ‘mother principle’ (NZ)

The advantages of young children being with their mothers were first reported in the American Courts in 1840. This was particularly noteworthy in *Mercein v People, ex rel. Barry*:

The wisdom of the rule, again, was suggested by the law of nature. Ordinarily, the infant is under the complete control of the mother. Usually, she discharges her duty of nurture and education far more effectively than does the father. ‘All things being equal,’ then, ‘the mother is the most proper person to be entrusted with the custody of a child of … tender age.’ It was said that nature implanted in the woman a domesticity, an affection and a love for helpless infancy which no man could likely possess ‘in an equal degree’.

In England, this became known as ‘the tender years doctrine’ where it was used, in the 19th century, to introduce greater equality for mothers within the patriarchal social system. The doctrine recognised an accepted reality: that mothers were understood as being the parent by nature better equipped to care for their young child, and this also extended to young male children. However, Parliament was not prepared to grant equality to women because of it. Talfourd’s Act of 1839 had finally allowed an innocent mother (that is, not adulterous or immoral) to be granted custody of her child up to the age of seven years contrary to a father’s right in law to absolute possession and control of the child. The age of seven was extended to eleven years by the Guardianship of Infants Act 1873. The inherent capacity of a mother was being recognised even if not articulated. The works of attachment theorists such as John

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434 See Chapters Two and Three.
Bowlby and Mary Ainsworth (with respect to maternal sensitivity to infant signals)³³⁵ in the first half of the 20ᵗʰ century further strengthened the position of the ‘tender years doctrine’ in England and the ‘mother principle’ as it was referred to in New Zealand. However, the law in both jurisdictions was careful to ensure that the notion did not displace the paramountcy of the welfare principle first legislatively found in England in section 1 of The Guardianship of Infants Act 1925, later consolidated in section 1 of the Guardianship of Minors Act 1971. The welfare paramountcy principle applied to any proceedings in relation to the care of children, the Court being expressly instructed to disregard, whether from any other point of view, that the claim of the father was superior to that of the mother, or vice versa. It was carried through to section 1(1) of the Children Act 1989 and the reference to the claims of either the father or the mother being superior was then dropped. Baroness Hale in Re J (a child) (FC)³³⁶ considered this was because “the proposition was too obvious to require repetition.”

In New Zealand, the welfare paramountcy principle was adopted from England in identical form by section 2 of The Guardianship of Infants Act 1926.³³⁷ Section 3 was added, confirming that a mother had the same rights as those possessed by a father to make any application to the Court. This was followed by the Guardianship Act 1968 which enshrined the paramountcy of the welfare principle in section 23(1) as follows:³³⁸

(1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

Then, by the Guardianship Amendment Act 1980, section 23(1A) was added:

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³³⁶ In Re J (a child) (FC) [2005] UKHL 40 at para 18.
³³⁷ Sections 2 and 3 of the Guardianship of Infants Act 1926:
In Australia, an identical provision to the section (1) of the Guardianship of Infants Act 1925 (UK), and section 2 of the Guardianship of Infants Act 1926 (NZ) was introduced pursuant to section 136 of the Marriage Act 1928-29.
³³⁸ Section 23 Guardianship Act 1968.
(1A) For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.

This was carried forward into the then section 4(4) of the Care of Children Act 2004:

4(4) For the purposes of this section, and regardless of a child’s age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person’s sex, best serve the welfare and best interests of the child

This subsequently became s4(3) of the Care of Children Act 2004, by amendments introduced on 1 April 2014. The provision now reads:

4(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person’s gender.

These movements were a subtle but significant departure from the origins of the English legislation, which had been addressing gender neutrally solely to ensure that the rights of separated mothers, and therefore the welfare of the child, were not lost within the existing patriarchy. Rather than seeking to have legislatively recognised that a child’s welfare would not be served by placing a child according to the sex of the parent, as New Zealand has now done, the English law had been at pains to ensure that the sex of the parent as a child welfare issue, was, in fact, recognised.

Nonetheless, the notion that a young child is inherently better off in the care of its mother, accepted as a given, began to create tensions in the law. In England, the application of the tender years doctrine had grown throughout the 20th century. By the 1950s, it was firmly entrenched. Roxburgh J said in Re S (an Infant): 439

The prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where the court gives the custody of the child of this tender age to the father it is incumbent upon it to make sure that there really are sufficient reasons to exclude the prima facie rule.

439 In Re S (an Infant) [1958] 1 WLR 550.
Then, in 1960, while the English Court Appeal confirmed “that there was no rule that children of a tender age should remain with their mother,”440 each of the hearing Judges went on to qualify their remarks. Lord Evershed M R added: “it is, of course, true to say that as a matter of human sense a young child is better off with its mother and needs a mother’s care.”441 Harman L J added: “so long as a child is young enough to need the day to day care of its mother, it is better to leave the child with her unless she is an entirely unsuitable person. But that does not mean that one starts with the mother being ‘one up’; the court must look at the facts of each case.”442 Donovan L J stated: “Prima facie a child of this age ought to remain with its mother and strong grounds are required to justify taking it away. I agree that there is no rule of law to that effect but certainly it is the natural law and one that should, if possible, prevail.”443

Throughout the 1970s the tension continued, that is, a clear statement by the Courts that there was no rule of law or presumption to the effect that a child of tender years should be cared for by his or her mother, followed by such clarifying comments as, nonetheless being, “very remarkable indeed … that there is no reference to the desirability, other things being equal, of small children being with their mother.”444 Further judicial comments, recognising the unique and special nature of motherhood and its value to a young child, continued to be made. Ormrod L J said, in Re K (Minors) (Children: Care and Control): 445

Taking all the facts of this case as they stand, with the exception of [the fact that the father is an Anglican minister], I cannot imagine any court deciding to give children of this age, namely 5 ½ and 2 ½, to the father, when the mother, a perfectly competent mother, is able to offer them, physically speaking, a perfectly satisfactory home. I cannot believe that the fact that the father is a minister of religion can have so dramatic an effect on the decision of the court as to reverse what would have been the inevitable answer in any other case.

In 1983, Cumming-Bruce L J said that if the position were “nicely balanced, then probably it is right for a child of tender years to be brought up by his or her natural mother.”446 George describes the place of the ‘tender years doctrine’ by this time as having been reduced to that

440 Re B (an Infant) [1962] 1 WLR 550.
441 Re B (an Infant), above note 440 at 551.
442 Re B (an Infant), above note 440 at 553.
443 Re B (an Infant), above note 440 at 554.
444 Re O (infants) [1971] Ch 748 at 752-3 per Davies L J.
445 Re K (Minors) (Children: Care and Control) (1977) Fam 179.
of a “tie-breaker”.\textsuperscript{447} In 1990, it was considered by Butler Sloss L J in \textit{Re S (A Minor)} in the following terms: \textsuperscript{448}

It used to be thought many years ago that young children should be with mother, that girls approaching puberty should be with mother and that boys over a certain age should be with father. Such presumptions, if they ever were such, do not, in my view, exist today.

Her Ladyship appreciated that, in reality, it is mothers still doing most of the caring of young children and this created a consideration, not a presumption. What was more relevant was not the inherent importance to a child of being cared for by its mother, but the factor of the continuity of the care arrangements (which therefore often preferred the mother).\textsuperscript{449} She therefore also said: \textsuperscript{450}

In cases where the child has remained throughout with the mother and is young, particularly when a baby or toddler, the unbroken relationship of the mother and child is one which it would be very difficult to displace, unless the mother was unsuitable to care for the child. But where the mother and child have been separated, and the mother seeks the return of the child, other considerations apply, and there is no starting point that the mother should be preferred to the father and only displaced by a preponderance of evidence to the contrary.

In \textit{Re S (A Minor)},\textsuperscript{451} Lord Donaldson M R described this change of legal approach as being a reflection of “a change in the social order, in the organisation of society, whereby it is much more common for fathers to look after young children than it used to be in bygone days.” Yet at the same time in \textit{Re W (A Minor) (Residence Order)}, the Court said “there is a rebuttable presumption of fact that the best interests of a baby are served by being with its mother, and I stress the word ‘baby’.”\textsuperscript{452} Thus England appeared to move away from the tender years doctrine; the Courts did not accept that the welfare principle should have imbued within it a recognition of the separate roles of the mother and the father towards the child, which by their nature stand apart from each other. It prefers instead to equate the preponderance of

\textsuperscript{447} Robert H George, above note 433 at 4; he also refers to whether the tender years doctrine could really be considered a tie-breaker, posed by the proposition that all other factors being equal could include the child’s father being as capable and well equipped to care for the child as the mother.
\textsuperscript{448} In \textit{Re S (A Minor)} [1991] 2 FLR 388 at 390.
\textsuperscript{449} \textit{Re A (A Minor) (Custody)}[1991] 2 FLR 394 at 400.
\textsuperscript{450} \textit{Re A (A Minor) (Custody)}, above note 449.
\textsuperscript{451} \textit{Re S (A Minor)(Custody)}, above note 448 at 390.
\textsuperscript{452} \textit{Re W (A Minor) (Residence Order)} [1992] 2 FLR 332 at 336.
early child care still being carried out by mothers as creating a continuity of care principle which may therefore have the Courts confirming that a child should remain in the care of its mother. That is, it is no longer the role of motherhood that is being given recognition as it once was, particularly for a young child. It is the desirability of continuity of care that is important. That the carer may be the mother is no longer relevant. In the 2006 House of Lords decision in *Re G (Residence: Same Sex Parents)*, Baroness Hale of Richmond did point out that only a woman can combine genetic, gestational and social parenting, but the thrust of the decision was to confirm that unless there are strong reasons to make a change, a child’s existing care arrangements should normally be maintained. Thus, the significance of the existing carer being the mother was not relevant in making a welfare assessment for the child; rather it was that she had cared for the child for the previous four years, with continuity of care being the important factor. Smith subsequently expressed concern that the tender years doctrine not re-emerge, and describes this decision “as an attempt to cling to the old safety net of biology” in preferring the biological mother in a custody dispute between two mothers, one biological and the other her separated partner.

In New Zealand, prior to the 1970s, there had been some equally compelling judicial commentary about motherhood’s importance to children, even if not a ‘legal’ principle. In the 1961 decision of *Palmer v Palmer*, Gresson P in his dissenting judgment referred to the ‘mother principle’ as being of “overwhelming importance” and also noted the evidence of one medical professional as saying “that the cardinal principle is that a baby belongs to its own mother, that biologically the mother’s role was tremendous, there being some bond between the natural mother and the natural child which was hard to define.” Another medical professional in the case was also recorded as advising that “the mother in the first three years was a more important figure than the father and that many authorities gave it as much older than that and up to at least seven years.” Gresson P also referred to a third medical professional, giving evidence on behalf of the father, as saying “that for a much longer period than three years a mother was still imparting to her baby benefits which were

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*Re G (Children) (Residence: Same Sex parents)* [2006] 2 FLR 629 at 631 (HL); [2006] UKHL 43.


Smith, above note 454. George also considers that the case placed emphasis on the continuity of care principle than the gender of the parents.

*Palmer v Palmer*, above note 418 at 709.

*Palmer v Palmer*, above note 418 at 709.

*Palmer v Palmer*, above note 418 at 709.
incalculable.” Finally, Gresson P stated that the suggestion that the paternal grandmother could be regarded as a mother-substitute was “mere sophistry.” However, by 1971 the courts had rejected the ‘mother principle’ as a presumption or a rule of law, but confirmed that it nonetheless remained vitally important. Inglis J, however, was subsequently emphatic in his 2007 New Zealand family law textbook that it was not a principle at all, and never had been.

Summary

This chapter has traversed the history of motherhood and the law between the UK and New Zealand. Though women in England made inroads with respect to the issue of gender inequality throughout the 1800s, particularly with respect to improved working conditions and through the suffragette movement, the relationship between mothers and their children was not recognised by the law, which continued to reflect the ownership and power of the father. The development by the state of its parens patriae equitable, or fairness, jurisdiction, and recognition of an increasing need to protect the mother-child relationship upon separation of the parents, was reflected in a focus in the 19th and early 20th centuries upon the development of the welfare principle as a mechanism to protect the mother-child relationship, without politically needing to recognise gender equality. The continuing demand for gender equality in the UK resulted in elevation of the welfare principle to its paramount status by the Guardianship of Infants Act 1925, adopted into the more egalitarian New Zealand society by the Guardianship of Infants Act 1926 (NZ). The development of New Zealand’s Guardianship Act 1968 and the ‘death’ of the ‘mother principle’ in 1980, pursuant to section 23(1A) of the Guardianship Amendment Act, occurred at a time when there was also a contemporaneous decline of the ‘tender years’ doctrine in the United Kingdom. Recognition and protection of the unique role of motherhood within the parenting laws of both England and New Zealand was also waning against a background drive for gender equality through the feminism of the 1960s, 1970s and 1980s, essentially based in removing gender differences from the law.

459 Palmer v Palmer, above note 418 at 709.
460 Palmer v Palmer, above note 418 at 709.
461 D v R above note 428 per North J.
462 B D Inglis above note 68; Judge Inglis QC also said in W v C [2000] NZFLR 1057; (2000) FRNZ 457 at 463 that “The presumption of gender equity in s 23(1A) was introduced in 1980 to correct a developing assumption that girls were best in the custody of their mother while boys beyond infancy were best in the custody of their father, but of course it has a wider effect than that.”
463 See Chapter Five for a discussion of the relevant theories of feminism.
At the same time, a divergence between England and New Zealand began in about 1970 with respect to the understanding and application of the welfare principle. The principle had developed in England based in a context of patriarchal fairness. In New Zealand, the welfare principle was adopted into the law of an egalitarian society where equality (meaning same, there being no legally recognised gender difference) was the prevailing value. Goldstein, Freud and Solnit’s ‘psychological parent’ became main-stream during this period, and the value of the natural mother and the significance of Bowlby’s work in recognizing the importance of the natural mother-child attachment, was further diminished.

Against this background, the next chapter turns to consider motherhood within modern history, that is, within contemporary and current family law, legislative and social contexts.
Chapter Four

The History of Motherhood III: Contemporary Law, Policy and Social Context

Introduction

Having laid an historical foundation for motherhood with respect to evolving social developments and the emergence of the law’s treatment of motherhood, this chapter considers contemporary motherhood’s relationship with current law, and discusses New Zealand’s present legislative family law framework as it pertains to motherhood. This is based in the paramountcy of the welfare principle, transplanted from England, but is gender neutral in its language such that motherhood is no longer recognised as a role distinct from fatherhood, and unique to a child. It also identifies, statistically, the reality of our social context with respect to the continuing division of role and function between mothers and fathers. Mothers continue to undertake a greater share of homemaking and parenting work, which is arguably incongruent with New Zealand’s current gender neutral parenting laws.

4.1 The Care of Children Act 2004 (COCA)

COCA replaced the Guardianship Act 1968 from 1 July 2005 and is now the central piece of legislation providing the legal framework for the guardianship and parenting of children in New Zealand. It does not refer to either mothers or fathers by gender; rather it is gender neutral in language and refers only to parents. Pursuant to section 4(1) it requires that the welfare and best interests of the child be the first and paramount consideration, requiring consideration for a particular child in that child’s particular circumstances. Section 4(3) requires that, regardless of a child’s age, it must not be presumed that by placing a child in the day-to-day care of a particular person, will because of that person’s sex, best serve the welfare and best interests of the child. Decisions must be made by the court and implemented within a time frame appropriate to a child’s sense of time, informed by the principles set out in section 5, and, pursuant to sections 6 and 7, the court must also ensure a child is given

464 The UK’s family law legislative framework with respect to care arrangements for children between mothers and fathers is found in the Children Act 1989, as amended by the Children Act 2004, and the more recent Children and Their Families Act 2014 introduced at the time of the establishment of a single Family Court. For the purposes of this section, the focus is on New Zealand’s current legislative regime. No further comparison with the UK legislation is therefore intended.
reasonable opportunities to express his or her views and to take any views expressed into account.

The Act does not refer to marriage or to any other relationship context within which parenting prior to separation might have been conducted; no prior relationship is required to have existed. However, the biological parentage of the mother and father does provide the starting point for the legal authority bestowed with respect to both guardianship and parenting orders pursuant to sections 17 and 48 respectively.

Section 15(a) defines the role of guardian as involving “all duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child.” Section 16(1) refers to the exercise of guardianship as including “determining for or with the child, or helping the child determine, questions about important matters affecting the child.” Important matters are defined in section 16(2) as including “changes to the child’s residence (including, without limitation, changes of that kind arising by travel by the child) that may affect the child’s relationship with his or her parents and guardians.” A child’s father and mother are usually joint guardians, and joint guardians must consult and secure joint agreement with respect to guardianship decisions wherever practicable. Where there is a dispute between guardians, this is resolved by an application to the Family Court pursuant to section 46R for guardianship directions. A parenting order pursuant to section 48 does not provide the right to shift a child as an incident of day-to-day care. This was removed from the Care of Children Bill before it was enacted. However, a parenting order can have conditions attaching to it as to where a child is to live when the order is made. It is also possible to apply for the variation of a parenting order with respect to where the child will live, if a parent’s location is to change.

Relevant to an assessment of a child’s welfare and best interests and not previously included in the Guardianship Act 1968, are the section 5 principles, amended by the Care of Children Amendment (No 2) Act 2013 (which came into force on 1 April 2014). These principles

Section 5 Principles relation to child’s welfare and best interests
The principles relating to a child's welfare and best interests are that—
(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and cooperation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
are not exhaustive and the court may take other relevant factors into account. They refer to
the parents having primary responsibility for their child’s care, that there should be continuity
in the care arrangements, the child should continue to have a relationship with both parents,
and the child’s relationship with “family group, whānau, hapū, or iwi” (understood to mean
and include the extended family, the descent group, and the tribe) should be preserved and
strengthened. A child’s identity is important. Consultation and cooperation is encouraged
but, above all, a child must be kept safe (including from psychological harm). The language
of the legislation is neutrally written. There is no distinction between mother and father. The
role of the mother and father as distinct from each other, is deliberately omitted from the
legislation. This is consistent with liberal feminist theory. That is, mothers and fathers should
be treated equally and any significant natural difference through gender is not generally be
regarded as relevant. This is not consistent with cultural feminist theory, which pursues
gender equality through recognition of such difference.466 That is because there is no
presumption in law providing for a recognition of the differences between motherhood and
fatherhood in the weighing and balancing of the matrix of circumstances which make up a
welfare and best interests assessment pursuant to section 4 of the Act. By virtue of the
specific direction contained in section 4(3), there can be no presumption that a child’s welfare
and best interests require that the child be placed in the day-to-day care of a particular person
because of that person’s gender.467

(d) a child should have continuity in his or her care, development, and upbringing:
(e) a child should continue to have a relationship with both of his or her parents, and that a child’s
relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
(f) a child’s identity (including, without limitation, his or her culture, language, and religious denomination and
practice) should be preserved and strengthened.

466 See Chapter Five
467 Section 4 Child’s welfare and best interests to be paramount
(1) The welfare and best interests of a child in his or her particular circumstances must be the first and
paramount consideration—
(a) in the administration and application of this Act, for example, in proceedings under this Act; and
(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or
contact with, a child.
(2) Any person considering the welfare and best interests of a child in his or her particular
circumstances—
(a) must take into account—
(i) the principle that decisions affecting the child should be made and implemented within a time
frame that is appropriate to the child’s sense of time; and
(ii) the principles in section 5; and
(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the
child to the extent that that conduct is relevant to the child’s welfare and best interests.
(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to
be placed in the day-to-day care of a particular person because of that person’s gender.
(4) This section does not—
(a) limit section 6 or 83, or subpart 4 of Part 2; or
A discussion of other New Zealand legislation relevant to the regard the law has for motherhood follows. The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), originally developed to address the issue of abduction of children, usually by fathers out of the care of mothers, is first considered, and then legislation focusing on the responsibility of the state to address care and protection concerns for a child where motherhood may have become compromised.

4.2 The Hague Convention on the Civil Aspects of International Child Abduction 1980

The Hague Convention forms part of New Zealand’s statutory framework relevant to motherhood, shared care, and international relocation.\(^468\) Difficulties have arisen in recent years over the changed emphasis of the Convention. It was originally devised as a mechanism to ensure the return of children to their home jurisdiction when they had been abducted overseas by a non-primary care-giving parent (and more commonly the father against the mother). In recent years, it has become the instrument of choice to prevent a pre-emptive relocation by a primary care-giving parent, (more commonly the mother against the father). The tensions created by this, and by a mechanism not designed to address welfare issues but to apply the law as to the prevailing jurisdiction with few exceptions, has had a significant impact upon motherhood within a separated parenting environment. This is particularly in situations where a mother may be seeking to return, after relationship breakdown, to the support of her own family.\(^469\) It is also related to the difficulties some mothers have experienced when seeking the permission of the Court to relocate with their children, after separation, back home to family support.\(^470\)

4.3 Children, Young Persons and Their Families Act 1989

The Children, Young Persons and Their Families Act 1989 (CYPFA) provides a statutory framework for the state protection of children and also touches on mothering. Under CYPFA, the Chief Executive of the Ministry of Social Development may apply, pursuant to section

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(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

\(^468\) Incorporated into our domestic jurisdiction through sections 92-124 of the Care of Children Act 2004


\(^470\) See Dr Nicola Taylor, Megan Gollop and Professor Mark Henaghan “Relocation Following Separation: The Welfare and Best Interests of the Child” Research Report, June 2010, Centre for Research on Children and Families and Faculty of Law, University of Otago, Dunedin.
78, for an interim custody order in respect of a child pending determination of care and protection proceedings. As a result of a successful application pursuant to section 14 that a child is in need of care and protection through any of the stipulated grounds, a custody order in favour of the Chief Executive, pursuant to section 101, will usually result. This may be accompanied by an additional guardianship order pursuant to section 110. Any rights that the mother (or father) may have had in law are suspended as a result of such state intervention. Strong efforts are made through the use of the Family Group Conference to have family and whānau take responsibility for, and make decisions about, their own children. The value of whānau, or kinship, is a central and respected part of the decision making process. However, there is a different emphasis on the value of a child maintaining a relationship with both parents under this legislation as compared to COCA. If a child is not to be returned to the day-to-day care of one or both parents but is to achieve permanency in another placement through state intervention, the same effort is not made by the Chief Executive to maintain a relationship with a non-care-giving natural parent as is considered desirable by the Family Court with respect to orders under COCA. A permanent care-giver under the CYPFA may subsequently be encouraged to obtain COCA orders for additional guardianship and parenting pursuant to sections 44 and 48. The Chief Executive then withdraws the CYPFA orders. The care-giver is then confronted by a different philosophical legislative approach. Under COCA, they are statutorily required to consult with the other guardians pursuant to section 16(5) and can no longer simply relocate with the child as a function of their day-to-day life, or make any other parenting decisions which go beyond the normal incidence of day-to-day care.

In 2005, former Principal Family Court Judge Peter Boshier discussed the interface between these two pieces of legislation, saying: 471

> Children are primarily dependent on their families, so to truly uphold the principle that the welfare of the child is paramount, one must also look to the welfare of the child’s family, as the two are inextricably linked. To eliminate these considerations from the welfare assessment under one Act while they remain as a fundamental concept under another would seem to cause irreconcilable ambiguity as to what the Court – and society – consider as having a crucial impact on the welfare of children

471 Peter Boshier, Principal Family Court Judge of New Zealand “Relocation cases: an international view from the Bench” (2005) 5 NZFLJ 77 at 81.
These competing legislative positions remain outstanding, as do their differing impacts upon motherhood in its relationship with the law.

4.4 The Māori perspective

COCA provides, in a manner not available under its predecessor, the Guardianship Act 1968, for the desirability of taking into account wherever possible a child’s cultural identity and for the strengthening of its relationship with whānau. Yet COCA is ideologically inconsistent with CYPFA, despite both professing to have the best interests of the child as their guiding and paramount principle. Atkin has described the interface between COCA and CYPFA as a lack of harmony in family law in New Zealand. He points to the ideological inconsistency between COCA, which he describes as “monocultural and Euro-centric in focus”, and CYPFA, which focuses, not on the primacy of the parent–child relationship but on the child’s relationship with whānau or kin. COCA does not elevate the biological parent above the social parent, nor the mother above the father, when determining care arrangements. This is apart from the gateway by which an application might be brought (leave being required pursuant to section 47(1)(d) and (e)). CYPFA, on the other hand, is founded on the principle that there must be, firstly, an exploration of whether the child can be returned to its own whānau, hapū or iwi before alternative placements are explored. Atkin cites Hall and

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472 Care of Children Act 2004, sections 4 and 5, particularly 5(b) and 5 (f).
474 Section 13 of the Children, Young Persons and Their Families Act 1989 provides:
Principles
Subject to sections 5 and 6, any court which, or person who, exercises any powers conferred by or under this Part or Part 3 or Part 3A or sections 341 to 350 shall be guided by the following principles:
(a) the principle that children and young persons must be protected from harm, their rights upheld, and their welfare promoted;
(b) the principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whānau, hapū, iwi, and family group, and that accordingly—
(i) a child's or young person's family, whānau, hapū, iwi, and family group should be supported, assisted, and protected as much as possible; and
(ii) intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection:
(c) the principle that it is desirable that a child or young person live in association with his or her family, whānau, hapū, iwi, and family group, and that his or her education, training, or employment be allowed to continue without interruption or disturbance:
(d) where a child or young person is considered to be in need of care or protection, the principle that, wherever practicable, the necessary assistance and support should be provided to enable the child or young person to be cared for and protected within his or her own family, whānau, hapū, iwi, and family group:
(e) the principle that a child or young person should be removed from his or her family, whānau, hapū, iwi, and family group only if there is a serious risk of harm to the child or young person:
(f) where a child or young person is removed from his or her family, whānau, hapū, iwi, and family group, the principles that,—
(i) wherever practicable, the child or young person should be returned to, and protected from harm within, that family, whānau, hapū, iwi, and family group; and
Metge, who describe the approach contained in the CYPFA as reflecting the Māori aspiration of the family ideal.\footnote{475} However, neither piece of legislation enables the role of each of motherhood and fatherhood to be independently valued, arguably leading to an erosion of the unique value of motherhood in the drive for gender equality through the gender neutrality of the law in both statutes.

Section 5(e) of COCA now provides that “a child should continue to have a relationship with both of his or her parents and that the child’s relationship with his or her family, family group, whānau, hapū or iwi should be preserved and strengthened.” Prior to the 2013 amendment, section 5(b) provided not only that “the child’s relationship with his or her family … should be stable and ongoing” but also that “in particular, the child should have continuing relationships with both of his or her parents.” This had enabled the Family Court to focus on and elevate the child’s relationship with the non-care-giving or non-relocating parent (usually the father) to a degree of exclusivity not found nor intended by CYPFA. While the Māori perspective favoured maintaining links with both parents and whānau, this did not mean sharing day-to-day care and a tension in the law was therefore created. The elevated emphasis on the relationship with both parents through COCA, without the same emphasis being given to the importance of wider whānau, was inconsistent with the whānau-

\footnote{475} Atkin, above note at 452. Note also the meaning of “whānau, hapū or iwi” as commencing with iwi (tribes) that form the structure of Māori society. Within each iwi are many hapū (clans or descent groups), each of which is made up of one or more whānau (extended families). See \url{http://www.teara.govt.nz/en/tribal-organisation} searched 14 December 2015.
based Māori perspective. Relocation of a mother back to her whānau, but away from the father, or placement of the child with an aunt or grandmother as is quite usual under Māori customary whāngai practices, created further tension from a Māori perspective if contested parenting arrangements were subsequently addressed under COCA. The 2013 amendments to section 5 of COCA have ameliorated this to some extent, but the whāngai or kinship approach, with its continued recognition of gendered parenting roles, remains in uncomfortable tension with COCA’s current emphasis on gender neutrality and its favouring of shared day-to-day care of children between two parenting homes.  

4.5 Separating maternity from motherhood, human assisted reproduction and surrogacy

The concept of motherhood presents other modern challenges for the law. No longer is a child’s gestation an automatic and intimate consequence of its mother’s biology. Today, assisted human reproduction and surrogacy are well established processes available through assisted reproductive technology. Human assisted reproduction means an egg may be donated by one woman, and be fertilised and implanted in the uterus of another woman who will then gestate, carry the child to term and give birth. Both women could be called the biological mothers of the child but only one, the one who gave birth, will be legally recognised in Western jurisdictions.  

Advances are also being made with respect to three-parent babies, that is, children who will have three genetic parents. The legal relationship between mother and child in most

476 However, see PED v MHB & DWT FAM 2009-079-000089 Oral judgment of Judge S J Coyle dated 19 April 2011; see also T v T [2007] NZFLR 307 per Judge T H Druce at para [23] “In considering TW’s welfare, I note the principle that the child’s parents and guardians should be encouraged to agree to their own arrangements for the child’s care, development and upbringing: see s 5(a), and ss 39 and 40 of the Act. The whāngai agreement should be respected by this court (subject to the paramountcy of TW’s welfare and best interests). Further, it is appropriate to have regard for the customary practice of whāngai, given the obligation on the Court to consider all factors relevant to a child’s welfare.”

477 Note that in other countries, for example in India, it is the commissioning parents who assume legal responsibility for the child, not the surrogate. Assisted reproductive technologies such as donor insemination have been practised in New Zealand since the 1950s, and invitro fertilisation began in the mid-1980s. There are presently seven infertility clinics located in the main centres and funded both publicly and privately. New Zealand’s artificial reproductive technologies (ART) are highly regulated with respect to practical application, unlike some other countries such as the US and India. This is through legislation and through the establishment of committees such as the Ethics Committee on Artificial Reproductive Technologies (ECART), and the Advisory Committee on Artificial Reproductive Technologies (ACART). The child born to a woman as a result of these technologies is regarded as her biological child, irrespective of it being a different woman who may have provided the genetic material. This issue does not arise with respect to fatherhood. The man who provided the genetic material is regarded as the biological father.

478 This process involves taking the nucleus of one egg and inserting it into the cytoplasm of another egg which has had its nucleus removed, but still contains mitochondrial DNA. The hybrid egg is then fertilised with sperm. The purpose is to remove a nucleus from a cell with defective mitochondria and place it in a donor cell with
western cultures tends to reflect the traditional link between the child and the woman who has carried and borne that child. This gives rise to the associated responsibilities of motherhood, as Herring says, and a cultural assumption that it is ‘natural’ for mothers to care for children, which is not necessarily expected of fathers. However, this can now include circumstances where an egg may be donated by one woman and implanted in the womb of another woman not genetically related to the child, who then gestates and gives birth to that child. Both women can be regarded as the biological mother, with the law needing to consider whether the rights and responsibilities of motherhood should lie with the genetically related mother, or the carrying mother. While, at present, it is the carrying mother who is recognised in Western law as the mother, the issue of who the law should recognise needs further consideration in light of ongoing technological advances. At present, there is a general lack of congruence around these issues. For example, the genetic relationship between a father and child is usually the basis for the creation of a legal relationship. In the case of the mother-child relationship, it is the fact giving birth that makes a woman legally a mother. That is even where the child is immediately placed for adoption, or is born to a surrogate to whom the child is not genetically related. Diduck and Kaganas suggest the law may wish to consider whether there should be formal recognition in the care arrangements of both the genetic mother and the gestational mother. This would create some symmetry between the present priority accorded to the gestational mother supported by the emotional bonding which anthropologists and psychologists suggest takes place in the womb, and the priority usually accorded to the genetic father.

In New Zealand, surrogacy arrangements as a consequence of human assisted reproduction are addressed by the Status of Children Act 1969 (SCA). An agreement that the child, once

healthy mitochondria, which, after fertilisation will contain a nucleus with genetic material from only the two parents.

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480 Diduck and Kaganas, above note 20.

481 Michael Freeman and Alice Margaria above note 17 at 169; see also Alison Diduck “If Only We Can Find the Appropriate Terms to Use the Issue will be Solved: Law, Identity and Parenthood” 19 *Child & Family Law Quarterly* 458 (2007).

482 Note however that pursuant to Sections 18 and 21 of New Zealand’s Status of Children Act 1969, the man donating genetic material through AHR (assisted human reproduction) procedures is deemed not to be the father if he is not the mother’s partner; it is the mother’s partner, providing the partner consents, who becomes the child’s legal father even though there is no genetic connection.

483 Diduck and Kaganas, above note 20 at 128.

484 Anthropologist Robin Fox recorded in 1992 that “The emotional bonding of the mother and child starts before birth. This bonding will eventually become essential to the healthy emotional development of the child as the mother’s milk (in pre-formula days) is essential to its physical development. The evolutionary function of the preparturition bonding is presumably to prevent the mother from rejecting the infant at birth ....” Diduck and Kaganas, above note 20 at 127.
born, will become the child of the commissioning couple by adoption, or guardianship and parenting orders, is enforceable (although such enforceability is always subject to the overriding principle of the welfare of the child).\(^{485}\) Otherwise in New Zealand, as in the UK, commercial surrogacy arrangements are not legally enforceable.\(^{486}\) A surrogate mother maintains legal rights to the child, even if they are genetically unrelated, and the surrogate mother remains the legal mother of the child unless an adoption order is made. The partner of a surrogate mother will also be a legal parent. In addition, it is illegal to pay more than to cover expenses with respect to a surrogacy arrangement.\(^{487}\) These issues are addressed in New Zealand pursuant to the Human Assisted Reproductive Technology Act 2004 (HART). In England and Wales, these issues are addressed by the Surrogacy Arrangements Act 1985, and the Human Fertilisation and Embryology Act 1990. In both jurisdictions, respect continues to be accorded to the unbroken link between maternity and the responsibility of motherhood arising out of the child being born to the gestational woman.\(^{488}\) This approach has been consistently found throughout common law based jurisdictions. Because reproductive technologies arguably denigrate motherhood by minimising the value of gestation, prioritising in law the parental rights of the gestational mother goes some way to countering this trend.\(^{489}\) However, this is not necessarily the case in legal systems based on

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\(^{485}\) Section 4(1) of the Care of Children Act 2004.

\(^{486}\) By way of contrast, in the Ukraine and Georgia for example, a donor or a surrogate mother has no parenting rights over the child born; the child born is legally the child of the prospective parents. In addition, in some US states such as California, commercial surrogacy is legal, with such contracts being enforceable. In New Jersey however in the 1986 case of Baby M, the surrogate mother refused to give custody to the couple with whom she had made a surrogacy agreement. The Courts of New Jersey found that she was the child's legal mother and declared contracts for surrogate motherhood illegal and invalid. The court then found it in the best interests of the child to grant custody to her biological father and his wife, rather than to the surrogate mother, who was granted access.

\(^{487}\) This is consistent with section 21 of the Adoption Act 1955, which prohibits payment for an adoption other than reimbursement of hospital and medical expenses of the mother. Note however that the courts have been lenient with respect to breaches of the payment issue. See Re P (Adoption) [1990] NZFLR 385

\(^{488}\) Women being treated as mothers throughout pregnancy was implied in in Re G (Residence: Same Sex Parents), where Butler-Sloss L J pointed out that only a woman can combine genetic, gestational and social parenting. Note, however, the pressure being placed on the law in this regard by the UK decision of Z (A Child: Human Fertilisation and Embryology Act: parental order) [2015] EWFC 73 (7 September 2015) where section 54(1) of the Human Fertilisation and Embryology Act 2008 provides that a parental order can be made in certain circumstances upon the application of two persons. Z, the biological son of a British single father, was conceived through a US surrogacy arrangement. An order had already been made in the US that the British father was legally the child’s only parent, in line with what everyone intended. The father brought his son home to the UK, and has cared for him in the UK ever since. However, because UK law treats the US surrogate (who has no biological connection with the child and never intended to be his parent) as the boy’s legal mother, she, rather than the father, has sole decision-making rights. The father therefore sought a parental order from the UK High Court to confirm his sole parentage and to give his son a UK birth certificate. Despite the agreement of all parties, the court said that the law was clear – two applicants were required in a surrogate situation, which only Parliament could change.

civil law, where a sharp contrast between maternity and motherhood is evident and supported by the law. Abortion on demand also provides a woman with a right to fully renounce maternity as well as motherhood. A gestational mother at the time of birth can already renounce her motherhood in such jurisdictions as France, Italy and Luxembourg and, if she makes that choice, she has no further motherhood responsibilities. Freeman and Margaria examine the body of opinion, led by Katharine O’Donovan, that considers that the way forward lies in a gestational mother being legally allowed to deny post-birth motherhood in those jurisdictions where this is presently seen as abandoning a child and therefore illegal.

O’Donovan contrasts the response of both England and New Zealand to the issue of baby abandonment as one of denial with that of France as creating a legal right of anonymous maternity, and Germany as accepting of it as a pragmatic necessity. However, Freeman and Margaria see England’s position as one where the fact of giving birth simply implies motherhood and, as in New Zealand, there is no such thing as anonymous birth. That means motherhood continues to be recognised. Lord Simon of Glaisdale said that: “[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition.” New Zealand’s legal framework is the same as that in England. The law does not allow a woman to give up the responsibilities of motherhood upon the birth of her child, except by legal processes such as adoption. If a mother seeks to otherwise abandon her baby, while it is on the one hand a criminal offence, on the other hand she is generally regarded as needing special assistance to be helped to come to terms with her motherhood and to afford protection to the child. O’Donovan considers this view reflects the popular belief that blood ties and biological mother love are natural and best for a child. However, in France since the time of the French Revolution, women have had a choice whether to accept legal motherhood upon the birth of their child, with a legal distinction being drawn between maternity and motherhood. If they choose anonymity upon birth, this is regarded as a right

490 Further discussion of this issue is beyond the scope of this thesis.
491 Michael Freeman and Alice Margaria above note 17.
493 Katherine O’Donovan, above note 492 at 348; in Germany the law recognises “Babyklappen” (baby flaps) enabling babies to be anonymously deposited; in the US safe-haven laws have been enacted in all states providing a mother with the legal right to give up her baby within 72 hours of birth; in other jurisdictions, baby hatches have had a long history but have tended to operate without legal recognition.
495 Katherine O’Donovan, above note 492 at 360.
protected by the French Civil Code, known as “accouchement sous X”, the birth giver being recorded as X on the birth certificate.\textsuperscript{496}

O’Donovan discusses the English approach as resonating with mothers “being persons who give life to their children,”\textsuperscript{497} in contrast to the autonomy and freedom underlying the French system. She points to the English understanding of a mother as emphasising biology and kinship, while other cultures give greater emphasis to parenthood as a social, biological and legal construct.\textsuperscript{498} She also observes that Bonnet, in describing the majority of French X women as not wanting to reveal their identities nor seeing themselves as mothers, as also acting as autonomous agents with rights while at the same time surrendering their children as “gesture[s] of love.”\textsuperscript{499} Yet the 1999 study of the X women by Lefaucheur suggested that hardship and a lack of resources constrained their capacity to freely make a choice, and they sought anonymity because of their lack of autonomy.\textsuperscript{500} However, the inconsistencies highlighted by the various approaches of civil legal systems, as outlined by O’Donovan, do not appear to adequately address the issues of biology, kinship and the relational aspects of the mother-child relationship which is understood to commence in utero. A simple separation of maternity and motherhood is also a complex issue as a result of modern technologies, and is therefore increasingly legally fraught.\textsuperscript{501} In addition, the approach of the civil legal systems leads to contradictions and tensions between a mother’s right to abandon her child, and a child’s right to know his or her identity as required by Article 8 of the United Nations Convention on the Rights of the Child (UNCROC).

Movement of common law systems towards recognition of the legal rights of two mothers, one contributing genetics and the other gestation as proposed by Diduck and Kaganas with respect to post-birth care arrangements,\textsuperscript{502} would be an appropriate next step by recognising and dignifying the biological contributions of each towards the life of the child.\textsuperscript{503} At present, 

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\textsuperscript{496} In 2002, a compromise was introduced in France to address the identity articles in the UN Convention on the Rights of the Child. The woman was invited to identify herself under secret seal. Thus, maternity was being seen no longer as solely a private event, with the right of a society to ask women for their personal details for the sake of the children being recognised.

\textsuperscript{497} Katherine O’Donovan, above note 492 at 368.

\textsuperscript{498} See also Carol Sanger “Separating From Children” Colombia Law Review 1996 Vol 96 at 375.

\textsuperscript{499} Katherine O’Donovan, above note 492 at 370

\textsuperscript{500} Katherine O’Donovan, above note 492 at 371

\textsuperscript{501} See In the matter of Z (A Child) [2015] EWF (7September 2015) per Munby J.

\textsuperscript{502} Diduck and Kaganas, above note 20.

\textsuperscript{503} From the point of view of symmetry, this raises the issue of whether sections 18 and 21of the Status of Children Act 1969 should be reviewed to provide the legal recognition of two fathers, one presently excluded if his genetic material is provided through AHR. However, there is a biological difference arising through the issue of gestation which is the sole domain of motherhood.
\end{flushleft}
while the common law position demands more of gestational mothers, greater protection should continue to be provided in respect of their interests. A lack of congruence can, however, be identified between common law and civil jurisdictions with respect to the separation of maternity and motherhood, and the consequential definition and legal responsibilities of motherhood.

Attempts to address the ethical problems arising from the process of human assisted reproduction, where motherhood in the context of donor sperm, donor eggs, conception occurring outside a human body, frozen embryos and implantation of fully developed embryos into the bodies of non-donor women are all new issues that the law needs to grapple with and regulate.504 These issues have been given further complexity by technology where the genetic material from two mothers can be combined to create one egg and ultimately one child,505 and, more recently, by innovative technology that appears to have the potential to develop a human egg from the skin cells of two men (with the implication that a mother may no longer be required in the creation of a child).506 There is also a lack of harmony, in common law systems at least, between genetic and gestational mothers such that further careful consideration by the law is required with respect to these new and emerging issues for motherhood.

4.6 Current social and statistical trends

In 2011, “The Changing Face of Motherhood” report507 was commissioned in the UK to assess how the motherhood role had changed since the 1950s. It found that 34 per cent of mothers today believe they have less time for themselves than their mothers did, with the majority of them attributing this to going out to work. The key findings included that,


506 See http://www.dailymail.co.uk/news/article-2964586/Scientists-make-human-egg-skin-two-men.html searched 19 April 2015. Any further exploration of the development of such science, and the implications for motherhood is beyond the scope of this paper.

notwithstanding the demands of working outside the home, 20 per cent of mothers spend more than four hours a day of active time with their children, that 47 per cent rely for their greatest support upon their own mothers, with 20 per cent considering that the single most important thing that would improve their quality of life as a mother is living closer to their own mother (that is, the maternal grandmother) and that mothers are twice as involved with child care as fathers.\textsuperscript{508}

The Australian Institute of Family Studies has undertaken research to measure the value of unpaid household, caring and voluntary work. It found that the value of unpaid work is at its greatest among women aged 25 - 44 (where mothering and child care boosts the value of unpaid work to $45,617 per annum), and that the value of these contributions decreases slowly after age 45 years. Older men (over 45 years) contribute more through their unpaid work than do younger men but, in all categories, women contribute more in unpaid work than men.\textsuperscript{509}

Intact families also provide useful information as to how mothers and fathers each spend different time with their children. Craig\textsuperscript{510} uses data from the Australian Bureau of Statistics Time Use Survey to give a more complete picture of gender differences in the quantity and nature of child care in Australia, including when women are also in full-time work. She finds that despite widespread approval of the concept of shared care parenting, it is not occurring in real terms. She reports that the experience of parenting as a mother is not the same as parenting as a father, even where mothers and fathers both work full-time and they live together. Mothering involves “more double activity, more physical labour, a more rigid timetable, and more overall responsibility than fathering,” an outcome not explained by any time limitations for fathers, and she concludes that “social and employment policy makers cannot assume that masculinisation of women’s work patterns is concomitant with a masculinisation of their care responsibilities.”\textsuperscript{511}

In New Zealand, the National Council of Women’s November 2015 White Paper records that “women spend twice as much time as men in unpaid work – raising children, running the

\textsuperscript{510} Lyn Craig “Does Father Care Mean Fathers Share? A Comparison of How Mothers and Fathers in Intact Families Spend Time With Children” \textit{Gender and Society} Vol 20 No 2 (April 2006) 259-281.
\textsuperscript{511} Craig, above note 510 at 276 and 280.
The Government’s Time Use Survey of 2009/10 also confirms this. It points to men and women spending similar amounts of time on productive activities (about 6.75 hours a day). However, men were paid for most of their time (63 per cent) while women were unpaid for most of their time (65 per cent), recording that these statistics had changed very little since 1998/99. Productive activities include labour force activities, household work, child and family care, purchasing goods and services, and community services. Further key findings were:

- There were significant differences in the kinds of work men and women did, with women spending significantly more time than men on unpaid work;
- On average women spent 4.3 hours per day on unpaid work and 2.9 hours on paid work (compared with 4.8 hours and 2.2 hours, respectively, in 1998/99);
- Men spent 2.5 hours on unpaid work and 4.7 hours on paid work (compared with 2.8 hours and 4.2 hours respectively in 1998/99);
- Women who were employed part-time, were unemployed, or not in the labour force, spent more time working than men in these groups;
- Men spent considerably less time than women on unpaid work if they were employed either full-time or part-time. Women who were employed full-time spent on average one hour more on unpaid work than men each day;
- Women employed part-time spent almost the same amount of time on unpaid work as women who were not in the labour force at just over 5 hours per day. The amount of time women spent on unpaid work reduced only when women were employed full-time.

These findings and realities are inconsistent with the development by the law of shared care parenting. The implied premise upon which the introduction of shared care is based (and particularly equal time shared care) is the equality of rights and responsibilities of parenthood by both mothers and fathers. Shared care parenting and its impact upon motherhood is discussed further in Chapter Seven, but its development suggests that the law may have failed to recognise and respect the reality of motherhood and mother work undertaken in society.

New Zealand’s Ministry of Justice statistics for the period 2006 to 2010 with respect to access to the Family Court, indicate that during this period, after COCA came into force,
there were 27,500 applications for parenting orders made. Of these, 53 per cent of the applicants were mothers, 29 per cent were fathers and 18 per cent were by other parties.\textsuperscript{515} Thus, many more mothers applied for parenting orders than fathers. Of the mother applicants, day-to-day care was granted to 82 per cent of them, 60 per cent of these by consent, 31 per cent after a formal proof hearing (indicating that the father did not participate) and 9 per cent following a defended hearing. Of the remaining 18 per cent, day-to-day care was granted to the father in 5 per cent of the cases, and to the mother and father in some sort of shared care arrangement in 10 per cent of the cases. Day-to-day care was awarded to other family members or caregivers in the remaining 3 per cent of cases.\textsuperscript{516}

Former Principal Family Court Judge Boshier recorded in 2011 that of the 29 per cent of parenting applications brought by fathers in the preceding 4 year period, 30 per cent granted day-to-day care to the father, the mother sole care in 45 per cent of the cases, and shared care in 21 per cent of cases finalised.\textsuperscript{517} These statistics have been further refined with reference to those applications which proceeded to a defended hearing. Where the mother was the applicant and the matter proceeded to a defended hearing, a day-to-day care order in her favour as the primary care giver was made in 77 per cent of the applications heard. Where the father was the applicant and the matter went to a defended hearing, he was awarded day-to-day care as the primary caregiver in 34 per cent of the applications heard. There are no statistics available on the care arrangements in place prior to a defended hearing and what percentage reflects a continuation of the status quo.\textsuperscript{518} Judge Boshier also considered the challenge by fathers to the question of gender bias in the Family Court and while in 2008 he is recorded as encouraging the move to shared care parenting orders if that was what the non-caregiving parent (usually the father) was seeking, by 2012 he also records that “the scathing criticisms from men’s groups that the Family Court is gender biased have largely dried up.”

\textsuperscript{515} See Wyatt (with Ong) “Family Court Statistics in New Zealand in 2006 and 2007”, Ministry of Justice, April 2009; Peter Boshier and Julia Shelman “What’s gender got to do with it in New Zealand Family Law?” NZFLJ September 2011 61-69.
\textsuperscript{516} Boshier above note 515.
\textsuperscript{517} Boshier above note 515. It is not clear how the remaining 4 per cent were finalised; they are not referred to.\textsuperscript{518} Boshier, above note 515 at 66.
\textsuperscript{519} Peter Boshier and Julia Shelman, above note 515; Wendy Davis “Gender Bias, Fathers’ Rights, Domestic Violence and the Family Court (2004) BFLJ 299; Principal Family Court Judge Peter Boshier’s responses to an empirical survey in F A Mackenzie, above note 77; Peter Boshier “Family Justice: Aligning Fairness, Efficiency and Dignity” Four Jurisdictions Family Law Conference, Liverpool, 4 February 2012, 1-27 at 24.
Comparing 2013 and 2014, including the period since the 2014 reforms of the New Zealand family law system, the Ministry of Justice identified, in December 2014, that there had been a 15 per cent decrease in the COCA type case.\textsuperscript{520}

It therefore appears that within recent Family Court statistics at least, mothers appear over the 10 year period 2000 to 2010 to have provided more of the post-separation care than fathers. These statistics, however, do not necessarily reflect a difference in division of role and function between parents in intact families, nor what separated parenting arrangements are being implemented without reference to the Family Court. This is also all against a background of increasing numbers of women participating in the labour force. Statistics New Zealand confirm that in the ten year period from 1986 to 1996, the labour force participation rate of women continued to increase; in 1986, mothers of 53.7 per cent of children in two parent families were in paid work and in 1996 this had increased to 61.3 per cent.\textsuperscript{521} In Statistics New Zealand’s 2015 report “Mothers in the New Zealand Work Force”, over the last 20 years the labour force participation rate of women is recorded as having increased from 54.5 percent (June 1994 year) to 63.3 percent (June 2014 year). Over the same period, men’s participation rate was largely unchanged, but remained higher than women’s. While much of this growth in women’s participation was in the older age groups, significant increases were also recorded for those aged 25–49 years, recognised as the prime child-bearing and rearing ages.\textsuperscript{522} The number of children a woman may have is at the same time declining, as is the total number of children being born (in actual numbers and as a proportion of the population). In 1880, the average number of children born to a woman was six; this dropped in 1930 to three.\textsuperscript{523} The fertility rate in June 2007 was just at replacement level, being 2.1. It increased slightly to 2.2 in December 2007, but by 2016 is projected to drop to 1.85.\textsuperscript{524}

\begin{footnotes}
\textsuperscript{520} See https://www.courtsofnz.govt.nz/statistics, providing Ministry of Justice statistics as at December 2014.
\textsuperscript{523} Shelley Elizabeth Griffiths “Feminism and the Ideology of Motherhood in New Zealand 1896-1930” PhD University of Otago, Department of History, 1984.
\end{footnotes}
Summary

This chapter identifies New Zealand’s diverging position as continuing, through the developments leading up to COCA and the ongoing inclusion of section 4(3), to require gender neutrality to apply in parenting decisions. The foundation had been laid in part by the Hansard debates from the 1970s and 1980s to eradicate the ‘mother principle’, the fathers’ rights movement from the 1980s through to the 2000s demanding equal (meaning same) parenting recognition as mothers had previously been accorded, and Judge Inglis’ watershed decision in W v C.525 The divergent positions between England and New Zealand became evident from the 1970s, and, as will be further discussed, reached a high point with respect to child relocation, as identified by George.526

Changing demographics over the last 150 years, including women entering the work force and a rise of cohabitation as opposed to marriage, suggest a trending towards greater gender equality. However, women have also been identified as, notwithstanding, continuing to undertake the majority of work in the home, including caring for children. There accordingly appears to be an unaddressed incongruence between the reality of the statistics of the disproportionate gendered care taking place in the home, and the gender neutral basis required by COCA, upon which child care decisions are made after separation of the parents.

Contemporary family law must also now grapple with new issues relevant to motherhood, including an increasing recognition of a separation of maternity and motherhood through human assisted reproduction and surrogacy. These emerging issues are challenges for the law, and motherhood’s future relationship with it.


525 W v C, above note 67 at para 2 per Inglis J: “The father’s aggressively vocal political stance on such issues has not been allowed to detract attention from the real merits of the case as disclosed by the evidence or from the true essence of the father’s case, which is that the courts have approached guardianship and custody issues with an incorrect perspective. That is a question of substance which squarely arises in these proceedings. As a legal, as distinct from a political issue, it is this Court’s duty to give it serious consideration. If indeed the Courts have taken a wrong turning there is nothing in the existing statute law to prevent the Courts from changing course.” See a discussion of this case in Chapter Seven.

526 George, above note 75; see also Chapter Eight with respect to relocation, including as an infringement upon shared care, and New Zealand relocation statistics.
In addition, the reality of motherhood identified in this chapter foreshadows some of the difficulties that arise within the context of the development of separated shared care parenting, where parenting care time is sought to be divided on the basis of gender-neutrality but does not recognise gender difference nor the inequality of parenting work actually occurring.\textsuperscript{527}

The next chapter examines relevant theoretical foundations, as they relate to motherhood and the development of family law in New Zealand. In particular, the impact of the quest for gender equality through the second wave feminism between the 1960s and the 1980s is explored. This movement helped to foundationally secure the direction for contemporary family law, and its consequences for motherhood.

\textsuperscript{527} See Chapter Seven.
Chapter Five

Theoretical Frameworks

Introduction

A theory is a set of interrelated concepts that describe, explain and predict how society and its parts are related to each other. There are a number of theories, particularly in the social science field, that have relevance and application to the issue of motherhood and family law. The most significant for the purpose of this thesis is the development of the feminist theories of the 1960s, 1970s and 1980s. They are important because they seek the ultimate goal of gender equality, yet they hold to paradoxically different approaches to achieve this. These different positions have directly impacted upon the approach family law has taken since that time to the issue of parenting gender and to motherhood. On the one hand, to

528 The word “theory” was used in Greek philosophy. For example, as used by Plato, it was a statement of how and why particular facts are related.
529 For example, family systems theory, defined as “bounded set of interrelated elements exhibiting coherent behaviour as a trait” or “an assemblage of objects related to each other by some regular interaction or interdependence” (see Whitechurch and Constantine, 1993 “Systems theory” in Sourcebook of Family Theories and Methods: a Contextual Approach (ed. P. Boss, W. Doherty, R. Larossa, W. Schumm, and S. Steinmetz) (New York: Plenum Press, 1993). This refers to a self-regulating and self-correcting closed system and serves as a bridge between disciplines, for example ontology (the philosophical study of being), science and engineering, political and social sciences and economics. Its emphasis is on the organisation of the parts in relation to one another, rather than on the parts themselves. Family Systems Theory postulates that the family is understood best by seeing it as a complex, dynamic, and changing collection of subsystems and family members, and that individuals cannot be understood in isolation from one another but rather as a part of their family. Boundaries are an important part of family systems theory as this provides that each family part or member is able and should hold to their own distinct emotional, psychological, or physical separateness. Boundaries are therefore critical to healthy family functioning. This means that the mother and the role of motherhood has been understood as a separate discrete part of the whole, not to be confused with the father and the role of fatherhood, also understood as a separate and discrete part of a healthy family system. The idea of family systems theory recognises that the patterns that exist in families are also present in work and social relationships and have the quality of “systems”. It is a theory that focusses on functioning. Therefore, a change in the functioning of one family member is expected to be followed by a compensatory change in another family member. Same-sex parent families also provide for the application of family systems theory, as these patterns of parenting continue to develop. If a parent, either a father or a mother, is absent from a family system, it can give rise to the application of family law and the need for resolution of disputes with respect to a child’s care. The family begins to develop and change the ordering of its various parts and their relationship to each other to compensate for the absence of one parent on the one hand, and perhaps to accommodate the development of two new separated family systems. See A.P. Turnbull and H. R. Turnbull; Murray Bowen The Use of Family Theory in Clinical Practice (1966) and Salvador Minuchin Families and Family Therapy (1974). Also generally: Karl Ludwig von Bertalanffy General System Theory: Foundations, Development, Applications (New York: George Braziller, 1968); Talcott Parsons The Structure of Social Action (1937), The Social System (new York: Free Press, 1951), Sociological Theory and Modern Society (New York: Free Press, 1967) and others; Niklas Luhmann, many German publications from 1963 including Das Recht der Gesellschaft (Frankfurt, Suhrkamp, 1993)(English translation: Law as a Social system, Oxford: Oxford university Press, 2004). Note that a closer examination of family systems theory is beyond the scope of this thesis.
achieve gender equality feminist theory required any natural difference between men and women to be denied while, on the other hand, it demanded recognition of the reality of gender differences as the only way such equality could be achieved. These competing and apparently conflicting theoretical frameworks and their impact upon motherhood and family law will be discussed further within this chapter. Gender theory will be explored, and whether a theory of motherhood has developed will also be considered. The chapter will conclude with a discussion of the theoretical framework of essentialism, and the possibility that second wave feminism’s problem with essentialism might be overcome through recovery of the unique experience of motherhood as understood by third wave feminism.

5.1 Feminism and feminist theory as they relate to motherhood and family law

Feminism and feminist theory (including feminist legal theory) focuses on the significance of gender and inequality, and can be found across many disciplines. Also known as the women's liberation movement, it refers loosely to campaigns for reforms on issues such as reproductive rights, domestic violence, maternity leave, equal pay, women’s suffrage, sexual harassment, and sexual violence based in challenging gender inequality. It emerged in the western world in the late 19th century and has gone through three waves. First-wave feminism of the 19th and early 20th centuries focused on women’s suffrage and political equality, and upon women’s special rights to custody of their children. The development of the welfare principle emerged from this agitation. The second-wave feminism of the 1960s, 1970s and 1980s sought to address social and cultural inequalities, and women’s autonomy. In particular, it critiqued the influence of state systems, especially the law, on motherhood as a practice and a status. It identified that the prevailing view of motherhood inhibited women’s financial self-sufficiency, career progression and independence from men. The third-wave feminism of the last twenty years, in intergenerational tension with second wave feminism, has become more personalised with storytelling focusing on a woman’s journey towards

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530 The history and development of feminism, feminist theory and feminist legal theory is beyond the scope of this thesis. However, the theoretical frameworks developed by feminism are important because of the contested ideas around gender equality, difference and power, and engagement in the study of what it means to be male and female living in a gendered society including as a mother. For background to the origins of feminist thought, see such examples as the life of such first wave feminists as Mary Wollstonecraft (18th Century). See also such seminal texts such as Betty Friedan’s The Feminine Mystique (Penguin, 1963), credited with starting the second wave feminism and discusses “the problem that has no name” and Simone de Beauvoir’s The Second Sex (1949) in which she says that “one is not born a woman” and describes men having stereotyped women and organised society into a patriarchy around this stereotype.

531 See Chapter Six.

motherhood as a new rite of passage, while also seeking to address the economic inequalities arising from this. Crawford suggests that third wave feminists appear to keep critical theory at a distance.\textsuperscript{533} She sees this combined with the content of third wave narratives about fertility and motherhood, as contributing to a mythology about motherhood which the second wave feminists had sought to dismantle. She further criticises third wave feminism for failing to grapple with gender equality or “law writ large.”\textsuperscript{534} She accordingly advocates for a joining of third wave feminism with the law to develop an equality jurisprudence that, on the one hand, can acknowledge the uniqueness of a woman’s reproductive capacity while, on the other, can neutralise the role this capacity has contributed to a woman’s legal oppression. The feminist perspective is about the personal as well as the political and, as Diduck and O’Donovan point out, feminist theory is therefore also about “the possibility of the transformation or reconstruction of both.”\textsuperscript{535} This may be relevant to motherhood, as a statement aspirational of its future relationship to family law.

Thus, from the 18\textsuperscript{th} century, feminists have contested the idea that gender differences are innate and that these differences could be seen in different intellectual, emotional and moral capacities.\textsuperscript{536} There have been a number of streams of thought which have created apparent inconsistencies. What is clear, however, is that gender relations involve ideas of both inequality and difference which have been held in uneasy tension in different ways at different times.

Feminist scholars across all periods have identified the institution of motherhood as a social construction, yet also an ideology as a natural consequence of the biological differences between men and women. Adrienne Rich,\textsuperscript{537} in 1976, deconstructed the notion of the maternal instinct and this was followed in 1995 by Fineman, who described motherhood as a “colonised concept, something physically occupied and experienced by women, but defined

\begin{footnotes}
\item Alison Diduck and Katherine O’Donovan Feminist Perspectives on Family Law (Routledge: Cavendish, 2006) at 1; see also Chapter Twelve with respect to a discussion of a redemptive movement towards the restoration of motherhood within family law.
\item Adrienne Rich Of Woman Born: Motherhood as Experience and Institution (W W Norton and Company, 1976).
\end{footnotes}
controlled, and given legal content by patriarchal ideology.” O’Donovan and Marshall described social construction as the most common second wave feminist approach to motherhood.

Ideological frameworks have shifted over time and have become complicated as equality became the central and driving norm, with fathers expected to participate to a greater extent in their children’s lives and mothers expected to take up a greater share of employment outside the home. Boyd points to “the rise in gender symmetry in relation to legal parenthood” as being in contrast to the disproportionate responsibility for child care and “mother work” that continued and has been rendered invisible because of the legal trends promoting fathering. Boyd further describes the significance of ideology in discussing mothers being constructed as the “favoured darlings of the law” where motherhood is measured according to the ideology of a middle-class stay-at-home, heterosexual mother. The law then reinforces this by measuring the child’s best interests against the mother’s degree of conformity to such an ideological norm. Yet, as Boyd points out, there has been a dilemma in feminist theory. In seeking to emphasise a child’s best interests, instead of the value of maternal care, there have been negative consequences for mothers through family law embracing gender neutrality and the principle of ‘no fault’ in relationship break down. The language of maternal care was discredited, mothers lost their voices in the debate over separated parenting care arrangements, and the rise of fathers’ rights advocacy became embedded in the formal equality approach to parenting. Fineman describes this as “the neutered mother” and argues this shift reinforced patriarchal norms as fathers’ rights groups in the 1970s absorbed and redeployed for themselves the feminists’ arguments against gender-specific parenting law. In her view, gender neutrality should have made feminists wary of pursuing formal equality. Feminist legal theory is not gender neutral and therefore cannot seek equality in a formal, legal and gender neutral sense if it is to address the needs of mothers. She sees instead that feminist legal theory should be founded on the gendered

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540 Boyd, above note 538.

541 Boyd, above note 538.

542 Boyd, above note 538.

543 Martha Albertson Fineman The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies (Psychology Press, 1995).
experiences of women’s lives to show that the concept of difference is necessary to remedy the harm to women (and mothers). A contested definition of ‘mother’ in law would, in that way, challenge equality as one of patriarchy’s core concepts.⁵⁴⁴ Uviller, too, recognised as early as 1978 that the move towards sharing equal custody rights with fathers based on gender neutrality could result in unintended consequences against mothers. “[U]nder the guise of sex-neutrality, women who want their children may be at a distinct disadvantage in custody disputes due to their inferior earning capacity and an enduring social bias against working mothers.”⁵⁴⁵

Feminist theory, being about biology and gender equality, has therefore been significantly and paradoxically influential in family law challenges to motherhood. In 1974, Finer and McGregor wrote that all major developments in family law from the mid-19th century onwards had been directed to “equality in the law for women [and] equality within the law for people of small means.”⁵⁴⁶ Subsequently, however, equality became a disputed theoretical concept.⁵⁴⁷ As discussed, formal equality, or sameness of treatment, and the goal of first and some second wave feminists then shifted focus to recognise that sameness of treatment actually failed to recognise the reality of differences and also the norm of dominance, which may require differences in treatment to compensate for the disadvantages these dynamics created.

Second wave feminism can therefore be described as having developed three broad theoretical approaches to the issue of gender and inequality: liberal feminist theory, cultural feminist theory and dominance feminist theory.⁵⁴⁸ In general terms, liberal feminist theory emphasises equality of treatment while cultural and dominance theories focus on equality of

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⁵⁴⁴ See also Martha Albertson Fineman “The Neutered Mother” (1991-2) University of Miami Law Review 653.
⁵⁴⁷ See also Elsje Bonthuys “Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?” in Margaret Davies and Vanessa E. Munro (eds) Ashgate Research Companion to Feminist Legal Theory above note 517 at Chapter 5, where Bonthuys discusses how difficult the notion of formal equality has been, both practically and theoretically. She asks, equal with whom and equal in what respects?
results.\textsuperscript{549} These theories are important contributors to how motherhood has been regarded by the law.

5.2 Liberal feminist theory

Liberal feminist theory was understood to deny any significant natural difference between men and women, requiring that both be treated equally with respect to norms, rules and the law. It advocated the abolition of gender-based law. This had a profound effect on motherhood within family law, as the natural corollary was that any maternal preference in custody disputes was seen to discriminate on the basis of sex by treating individuals differently depending on whether they were men or women. This theory regarded law that treated men and women differently on the basis of their sex as contributing to, and reinforcing, sex stereotypes and roles.\textsuperscript{550} Any difference between men and women should not be legally relevant. Women are workers just like men and, on this basis, women’s rights could then be expanded. The purpose of the feminist liberal theory was to show that distinctions based on gender, denying women the same opportunity as men, were unlawful.\textsuperscript{551}

A major limitation with this theory, or sameness doctrine as it has been called, is that it did not recognise that neutral laws in a gendered world do not operate neutrally. The reality of the differences between men and women both biologically and in gender expectation did not disappear because legal language was written neutrally. This was exacerbated by legal language being regarded as a “male language because it is principally informed by men’s experiences and because it derives from the powerful social situation of men, relative to women.”\textsuperscript{552} Legal reasoning was seen to reflect the same male bias, and for women to seek equality they needed to work with, and measure up, against male norms and interpretations, including that of neutrality, embedded in the law. That is, women were thought to need to conform to the legal reasoning, views and perspectives about equality and neutrality based in a patriarchal framework and reflecting only one sex’s universalised experience. Sunstein saw that the sameness and difference approaches were inadequate as they used men as the


\textsuperscript{550} Schwarz, above note 549.


baseline from which to measure difference. Finley regarded the language of neutrality itself as being one of the devices that was silencing women in relation to the law, failing to take into account women’s unequal starting point and not serving those who had not participated in the original creation of the law. Thus, the paradoxical difficulty with respect to motherhood within family law was identified but was not able to be addressed by liberal feminist theory. Advocating gender-neutral language and laws could, in fact, become a harmful tool in silencing mothers within family law by diminishing and inhibiting an exploration of the ways of thinking and reasoning values, structures and roles that may be uniquely gender based. Such gender based contributions could have provided for greater recognition and possibilities for not only mothers and fathers, but also for children in the present development of separated parenting laws. These second wave feminism difficulties were one of the foundational reasons for the different, and seemingly conflicting, theoretical approaches that subsequently developed within feminism, and for what became referred to as “the problem of essentialism.”

5.3 Cultural feminist theory

Cultural feminist theory, on the other hand, pursued equality through recognition of the difference between men and women (and was therefore able to distinguish motherhood and fatherhood). It considered that feminist legal theory could not be gender-neutral. It also considered that equality could not be its central goal in the traditional formal sense because gender, and therefore difference, was central to society. It promotes a feminist theory centred around women because it promotes women’s experience, but stands in tension with liberal feminist theory, as it sees that equality between men and women can only be achieved by recognising the biological, social and cultural differences between men and women and by reflecting such differences in the law, rather than deeming them irrelevant or obstacles to be overcome.

Carol Gilligan is regarded as one of the original proponents of cultural feminist theory and is referred to by Herring as “the grandmother of care ethics.” She argued that given the

553 Sunstein, above note 551 at 832.
554 Finley, above note 552 at 896.
555 See para 5.10 for a discussion of essentialism and “the problem of essentialism”.
556 Schwarz, above note 549 at 370.
557 See discussion of Gilligan’s ideas in Chapter Six The Welfare and Best Interests Principle as a Relationship Based Concept; see also Carol Gilligan In a Different Voice (Cambridge, UK: Harvard University Press, 1982).
differences in women’s conceptions of self and morality, women bring a different point of view and priorities to the ordering of human experience and existence. They therefore speak in a “different voice.” She regarded the female voice as one of caring and valuing of relationships, while the male focused more on autonomy and on the separation of self from others. Women were stereotypically portrayed as nurturers and defined by the relationship they have with others, while men were seen as abstract thinkers and defined by individual achievement.

However, in attempting to assign to women the characteristics of nurturing, care and selflessness, it created a risk that such a definition could not support women who worked outside the home. They would be seen as modelling the male stereotype, and would therefore be unsuitable as mothers as they did not possess the typical nurturing characteristics of a woman as defined by cultural feminist theory. Liberal feminist theory suggested that such women-identified values were created in response to the patriarchy, saying “[w]e value caring because that is what our oppressors have caused us to value (because we define ourselves in relation to our oppressors we aren’t really engaging in self-definition).” The major limitation of the difference approach characterised by cultural feminist theory was considered to be its lack of recognition for the pre-existing discrimination upon which the law was already founded. For both liberal and cultural feminist theories, man was the norm by which equality for women was measured, and this was going to continue to present problems for the autonomy of motherhood within family law.

5.4 Dominance feminist theory

During this same period of second wave feminism, Catherine MacKinnon proposed the dominance theory as an alternative to the above two theories. She saw the important issue

559 Gilligan, above note 557 at 22.
560 Gilligan, above note 557.
561 Schwarz, above note 549; see also Joan C. Williams “Deconstructing Gender” (1989) 87 Michigan Law Review 797.
563 Catharine A. MacKinnon Feminism Unmodified: Discourses on Life and Law (Harvard University Press, 1988); see also Andrea Dworkin Intercourse (Free Press, 1987). She said "What I think is that sex must not put women in a subordinate position. It must be reciprocal and not an act of aggression from a man looking only to satisfy himself”; see also Susan Moller Okin Justice, Gender and the Family (Basic Books Inc, 1989). Okin critiqued modern theories of justice, which she saw as written from a male perspective and which wrongly assumed that the institution of the family was just. She believed that the gender inequality within the family was
between men and women as being a difference in power and its distribution. This was based in Rich’s work with respect to the experience and institution of motherhood, where she saw that we needed and were yet to “fully to understand the power and powerlessness embodied in motherhood in a patriarchal culture.” The dominance theory therefore was about the social and legal subordination of women to men. Sunstein described it in these terms: “[T]he problem is not that those similarly situated have been treated differently; it is instead that one group has dominated the other.” And while ‘the difference approach’ of cultural feminist theory embraced a need for women’s relational connectedness, ‘the dominance approach’ saw women needing to be freed from practices that fostered subordination to men. MacKinnon saw that the impossibility of a woman’s, and therefore mother’s, point of view was being constantly reinforced by the state, reflecting as it did the rule of law from a male perspective and then “eras[ing] what it has done in the name of neutrality.”

MacKinnon did not regard the law as neutral but as reinforcing, even in the name of neutrality, the legitimacy of the male point of view as the standard upon which the law was based, saying that “[t]he state is male in the feminist sense: the law sees and treats women the way men see and treat women.” She argued that the state adopted the position of male power with respect to the relationship between law and society, criticising both the difference and sameness theories for distinguishing or aligning themselves with a male model. That is, under the sameness standard, women are measured according to their correspondence to man, and under the difference standard, women are measured according to their lack of correspondence to man. She considered that gender neutrality, as liberal feminist theory’s answer, was simply a male standard and that special protection, cultural feminist theory’s answer, was simply a female standard. She warned, however, that maleness was nonetheless the reference point for both theories. She went further, in arguing that by liberal feminist theory demanding equality through sameness, women were achieving exactly the opposite result, saying somewhat prophetically with respect to the development of separated shared care parenting yet to come, that “the sameness standard has mostly got for men the benefit of

perpetuated throughout society and no theory of justice could be complete unless it addressed such gender inequality.

564 Adrienne Rich, above note 518.
565 Sunstein, above note 551 (Sunstein reviewing MacKinnon’s Feminism Unmodified, above note 544).
566 Catharine A. MacKinnon Toward a Feminist Theory of the State (Harvard University Press, 1989) at 161-2
567 MacKinnon, above note 566; see also Drucilla Cornell “Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State” (1991) 100 Yale Law Journal 2247.
568 Schwarz, above note 549 at 373.
those few things women have historically had.” She also said that the argument was for a sameness standard that ignored the reality of women’s lives. She noted that formal equality, being the goal of liberal feminist theory, may look gender neutral but in application only entitled women to the rules and practices worked out by men for men. MacKinnon also outlined the problems inherent in the gender difference central to cultural feminist theory. By using men as the baseline upon which to measure difference, a false universalisation was created which risked being detrimental to women, when the opposite had been intended. Thus, she saw that viewing gender only as a matter of sameness or difference masked the reality of gender as a system of social hierarchy, a political system of male dominance and female subordination and one which sexualised power for men and powerlessness for women. James, in traversing gender-relations in Australia, points to evidence of this within family law, concluding that “more than other areas of family law, child custody was about power.”

5.5 Impact on the development of family law and motherhood

The feminist theories described have had a major impact upon motherhood within the law, and arguably created an inconsistent, flawed and as yet unresolved foundation for the development of family law and the models of separated shared care parenting that were to follow. Mandating equality between mothers and fathers in family law was noted by one 1985 commentator in respect of the US position, in the following terms:

Women’s … needs in this society may continue to be undervalued and ignored unless the equality rhetoric now associated with the relationship between the sexes is challenged as inappropriate for resolving situations where they stand in inherently unequal positions.

Removing any reference in the legislation to a gender classification in the area of child custody and the care arrangements for children upon parental separation, has arguably worked to the detriment of the people such attempts at formal equality in the law were designed to protect. This is because motherhood and fatherhood are the obvious gender

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569 MacKinnon, above note 544 at 35; see also Schwarz, above note 549.
570 MacKinnon, above note 544.
references that have been abolished. Women may have accordingly been more readily deprived of custody of their children, causing motherhood and its unique value to a child to be undermined. MacKinnon’s dominance theory would, on the other hand, support legislation that retained a gender classification within separated parenting law, providing such legislation does not contribute to a woman’s position being subordinate to that of the man.

The gender-neutrality of section 4(3) of New Zealand’s COCA is consistent with the formal equality requirements of liberal feminist theory, seen to enhance equality for women. Retention of the so-called mother-principle would be regarded as incompatible with this and as reinforcing the stereotype of women as maternal and based in the home, rather than enabling women to equally be able to pursue their careers the same as men. The welfare and best interests principle of section 4(4) of COCA, found in many other Western jurisdictions as well, is also consistent with liberal feminist theory as it is couched in gender-neutral language, the implication being men and women will be treated the same. Therefore, legislation that does not state a preference for mothers also refrains from promoting gender stereotypes, a further goal of liberal feminist theory. Promotion of sameness by this theory would also be seen to be advanced, on the basis that the best way to avoid sex-based discrimination is to remove sex-based classifications. However, the theory does not provide any practical means to create an equality standard with respect to separated parenting between mother and fathers, nor to recognise actual outcomes notwithstanding eliminating gender references in the law with respect to the traditional gender-based roles of motherhood and fatherhood. Schwarz describes the outcome of the application of liberal feminist theory to separated parenting laws as elevating form over substance, with the goal of equality in this area being thwarted by the theory’s disregard of the actual results.\(^\text{573}\)

Cultural feminist theory, on the other hand, would suggest the opposite with respect to legislation about separated parenting. This theory would hold that the gender-neutral parenting provisions contained in sections 4(3) and 4(4) of COCA cannot achieve equality because gender plays an important role in society, and an even more important role in the parenting of children. Therefore, the law should reflect the differences between motherhood and fatherhood, and be willing to continue to support, at least in a general way, such rules of thumb as the mother principle, and the same-sex rule.\(^\text{574}\) The ‘difference approach’ of cultural

\(^{573}\) Schwarz, above note 549 at 386.

\(^{574}\) See Chapter Three para 3.20 with respect to the historical overview of the ‘tender years’ doctrine (UK) and the ‘mother principle’ and ‘same-sex rule’ (NZ).
feminist theory takes gender into account. Without this recognition, women’s inferior position in society cannot be rectified. This theory would support whatever differential or special treatment of motherhood was required through the law to remedy the inequality. This was met, at least in part, by the apparently gender-neutral preference for the status quo principle, and more latterly pursuant to the principle of the desirability of the continuity of care arrangements pursuant to section 5(d) of COCA. This was because it was usually mothers who were undertaking the care, with the desirability of that being able to continue without any reference to gender. However, cultural feminist theory would prefer that the legislation contained gender-specific language rather than having to indirectly support gender-specific motherhood through gender-neutral means.

Dominance feminist theory would find the present gender-neutral provisions in sections 4(3) and 4(4) of COCA unacceptable. This theory considers that as there was no gender equality to start with, mothers would be subjected to a continuing power imbalance through the application of gender-neutrality within such a gender specific area, and would allow for the likelihood of a continuing patriarchy through the exercise of the discretion of the judge. The major difficulty with this theory is that care arrangements for children upon separation of their parents should not have the imbalance of power between the parents as the primary concern. The welfare and best interests of the child should retain its paramountcy status.

It is thus evident that none of these three second wave feminist theories appropriately remove the gender inequalities that have existed around the nature, role and function of motherhood. Gender-neutral laws are important in drawing attention to the need for equality, but not at the expense of protecting the gender-specific when this is required, and not if they represent a desire to eliminate discrimination but fail to achieve that goal. Worse, if they become a mechanism of discrimination against the very people they were designed to protect. Motherhood may be an example of such vulnerability and, according to cultural feminist theory, may represent the need to consider gender-specific protection of motherhood in the law, to address the power imbalance and achieve equality.

575 The status quo principle emerged in the UK in 1970 through the decision of J v C [1970] AC 665, and was adopted into New Zealand; see Chapter Three.
5.6 The language of gender-neutrality and formal equality within family law

The language of gender-neutrality and formal equality also became important in family law in both the UK and New Zealand,\(^{576}\) where it was seen as the standard for treating mothers and fathers fairly and equally in custody disputes. It arose out of the first wave feminist response against the patriarchal system of the rights and ownership by the father that existed within 18\(^{th}\) and 19\(^{th}\) century British society.\(^{577}\) This resulted in gender-neutrality being introduced into the legislation through the paramountcy of the welfare principle in the UK in 1925 and shortly thereafter into New Zealand through its adoption of the same legislation in 1926.\(^{578}\) Diduck points to this formal equality between parents falling out of favour by about the mid-20\(^{th}\) century, with the reality of gendered roles in child care during the cohabitation of parents being given legal recognition in parenting arrangements upon separation.\(^{579}\) The feminist focus then shifted to ensuring that women and children were not financially disadvantaged on separation. It has subsequently been fathers who have reinstigated claims for formal gender equality between separated parents. Germaine Greer pointed out in 1999 that “fake equality had led women into a double jeopardy.”\(^{580}\) However, feminist theory regards the formal equality for mothers in the 19\(^{th}\) century (based in fairness to the reality of the mother-child relationship and in response to the dominance of the ownership by the father and lack of similar authority by the mother in the law) as being a different claim, and having different effects to the 21\(^{st}\) century claims of formal equality by fathers. As Boyd says “the apparently benign construction of mothers and fathers as formally equal draws on a biogenetic model of parenthood that erases the deeply political and ideological nature of the legal ordering of parent-child, and parent-parent relationships.”\(^{581}\) She considers that despite the insights of feminist legal theory, its approach to motherhood has not had a marked impact on legal policy and indeed, in many jurisdictions, shared parenting based on gender symmetry between mothers and fathers has become the dominant normative framework. She suggests that this may have occurred as a result of the arguments being complex and misunderstood as reinforcing gendered roles within the family, on the one hand, and

\(^{576}\) Diduck and Kaganas, above note 20.
\(^{577}\) Susan Maidment, above note 201.
\(^{578}\) See Chapters Two and Three.
\(^{579}\) Diduck and O’Donovan, above note 535 at 11.
\(^{580}\) Germaine Greer *The Whole Woman* (Doubleday, 1999).
reflecting a backlash to social and legal approaches that appear to favour mothers, on the other.

Smart, too, argues that the current and new narrative of fatherhood has repositioned the father in post-separation parenting and has had important implications for motherhood. She describes the introduction by fathers of the ethic of justice within ethic of care claims, and refers to “the silence surrounding motherhood in the current discursive struggle and the rise of narratives of fatherhood (particularly in the form of justice and rights)”.

She concludes that no longer can Gilligan’s ethic of care be seen as a feminist corrective to the influence of the ethic of justice, because “the selfless pursuit of care and caring has become a governmental expectation within family policy.” Feminists’ ethic of care was not intended to become mainstream political policy, but was rather intended to reintroduce existing values as they related to motherhood into the public arena, where they appeared to have been ignored or denigrated. This came on top of the earlier struggle between the concept of the welfare of the child, challenging as it did former doctrines of rights, ownership and entitlement in family matters. Smart saw the inclusion of the dimension of care to welfare and rights as creating “a three-cornered debate ongoing between ‘rights talk’, ‘welfare talk’ and ‘care talk’” such that there has been created a subtle interplay and shift in the balance and influence of these claims. She argues that if fathers made their claims solely according to ‘rights talk’, they would make little headway. However, by basing their rights claim on ‘care talk’, together with fathers in any event being redefined as central to children’s welfare, the position of fatherhood has been in the ascendancy. The consequence of this may have been that motherhood has been excluded from the debate and diminished as a result. Smart suggests that the rise of the fathers’ movements based on an ethic of rights within an ethic of care, may be masking some hostile and patriarchal attitudes towards women and children, or may be seeking to express a desire to return to the past when women were dependant and powerless. However, a third possibility is that fathers may be seeking to express a change in how they wish to relate to their children, signalling a shift in fatherhood which does not require motherhood to be denigrated. Such an approach would be complementary to the possibility referred to by Diduck and O’Donovan of the transformation or reconstruction of

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582 Carol Smart “The Ethic of Justice Strikes back: Changing Narratives of Fatherhood” in Feminist Perspectives on Family Law A. Diduck and K. O’Donovan (eds) above note 80 at 123.
583 Smart, above note 582 at 124.
584 Smart, above note 582.
585 Smart, above note 582 at 126.
586 Smart, above note 582 at 136.
the feminist theory to enable it to acknowledge the uniqueness of motherhood, while not accepting its contribution to a woman’s legal oppression.587

These narratives appear to be based on an assumption that the Family Court has favoured mothers over fathers. This injustice is then regarded as self-evident because, statistically, children were more likely to live after separation with their mothers than their fathers. Then, in the face of the ‘truth’ of this ‘injustice’, it was difficult to respond in a manner which did not appear to be denying fathers their rights or saying that fathers should not care for their children. Mothers therefore became defined as objects or barriers to justice for fathers and also to the welfare of their children, if they failed to recognise the importance of the care that should be provided by fathers.588 Discussions around the significance of the primary carer or other parenting frameworks which do not suggest equality have, as Smart says, “become virtually unspeakable, and certainly suspect within family law discourses.”589 Care talk by mothers was regarded as of little value because mothers have a duty to care, and so they were not making a special claim, in contrast to the significance of fathers’ rights, care and welfare talk. That meant that motherhood had no legitimacy in the debate, despite the fact that they were usually still the primary carers of children. This also meant that motherhood has been effectively silenced in policy and law reform discussions. Further, as Smart points out, “responsible caring” (incorporating the care, rights and welfare talk of fathers) may now require that a mother be corrected to ensure that she provide contact with fathers within her ethical care obligations and what is now considered as the unfairness of her privileged position.590 Therefore, the extension of the scope of fatherhood began to redefine motherhood within the law. Mothers who appear to resist father involvement are now castigated.591 However, care must be taken not to frame these developments solely as fathers needing to achieve justice for themselves and their children on the basis of the (alleged) anti-father bias present in the Family Court, or that their claims are politically motivated strategies designed solely to defeat motherhood.592

587 Diduck and O’Donovan, above note 535.
588 Smart, above note 582 at 126.
589 Smart, above note 582 at 127.
590 Smart, above note 582 at 127.
591 See Chapter Ten with respect to the series of decisions JMC v AJHB, out of the Family Court in Dunedin.
592 See Chapter Nine with respect to the redemptive movements around gatekeeping now taking place.
The legal fragmentation of parenthood has also been subject to challenge by feminist theorists.\(^5\) The complaint was, as Diduck observed, initially quoting Mykitiuk:\(^4\)

> Whereas paternity is a construction allowing fatherhood to be established in a variety of ways - including choice – maternity is a unitary construction where women can be deprived of the status if both biological and social roles are not fulfilled. The naturalisation of maternity by law has precluded legal thinking about the distribution of maternity in a manner similar to determinations about paternity.

O’Donovan and Marshall\(^5\) reflect upon even feminists’ apparent inability to separate motherhood from maternity; it seems that men have a choice about parenthood that women do not have.

Collier and Sheldon\(^6\) suggest that the law is beginning to find different places for men to fulfil various aspects of fatherhood, coming as it does from a position where paternity does not necessarily lead to fatherhood and does not carry with it a legal responsibility to care for, or even acknowledge, a child (apart from the legal responsibility to pay child support where a biological father has been legally identified or has signed the birth registration of the child); motherhood, on the other hand, is not so easily fragmented into its social, psychological and biological components, despite motherhood and maternity becoming increasingly detachable from each other. The connection between a child and the woman who carried the child and gave birth, has long been recognised in the law, with consequent legal relationships and responsibilities.\(^7\)

Assisted reproductive technologies (ART) have also been debated within feminist theory. In the 1970s, such feminists as Adrienne Rich\(^8\) and Shulasmith Firestone\(^9\) regarded

\(^5\) For example, see Baronness Hale’s judgement in Re G [2006] UKHL 43, where she says “To be the legal parent of a child gives a person legal standing to bring and defend proceedings about a child and makes the child a member of that person’s family, but it does not necessarily tell us much about the importance of that person to the child’s welfare.”

\(^4\) Alison Diduck and Felicity Kaganas Family Law Gender and the State above note 20 at 124-5; see also Alison Diduck “If Only we Can Find the Appropriate Terms to use the Issue Will be Solved” 19 CFLQ 458 at 479; see also Susan Boyd “Gendering Legal Parenthood: Bio-genetic Ties, Intentionality and Responsibility” 25 Windsor Yearbook of Access to Justice 63.


\(^8\) An exception to this is found in France and the principle of accouchement sous x; see reference in Chapter Four.

\(^9\) Adrienne Rich in Of Woman Born: Motherhood as Experience and Institution, above note 537 explored motherhood through her own experiences as a mother, and as an institution reinforced by patriarchy where women do not seem to be treated as people. She wrote “The mother’s battle for her child – with sickness, with
motherhood as a patriarchal institution. They considered motherhood as a means to maintain the subordination and oppression of women, and they therefore saw ART as having the potential to free women from this, as they could be relieved from the physical burden and inequality of childbearing. On the other hand, post structural feminists such as Sarah Franklin and Jane Sawicki, saw that women’s procreative bodies could become objects of capitalist and patriarchal forces and, with reference to Foucault’s notion of power, regarded women subjected to ART as always powerless and always unable to practise acts of control or resistance. However, it appears these feminist theories did not gain the traction expected. ART came to be regarded as a saving means to achieve motherhood, portrayed as essential to being a woman. This could be regarded as consistent with third wave feminism.

poverty, with war, with all the forces of exploitation and callousness that cheapen human life – needs to become a common human battle, waged in love and in the passion for survival. But for this to happen, the institution of motherhood must be destroyed.” at p 280. Rich is also known for exploring the theme of ambivalence in motherhood, writing “It is the suffering of ambivalence: the murderous alternation between bitter resentment and raw-edged nerves, and blissful gratification and tenderness.” at p 21. She also wrote that “The absence of respect for women’s lives is written into the heart of male theological doctrine, into the structure of the patriarchal family, and into the very language of patriarchal ethics … where “humanity” and “humanistic values” are concerned, women are not really part of the population.” at 270-271.

Regularity cited, Foucault (1926 -1984) discusses the relationship between power and knowledge, pointing to the former being used to control and define the latter, and considering scientific knowledge to be a means of social control. Some feminist theorists consider that his analysis of power structures are an aid in the struggle against inequality. However, some philosophers argue Foucault exploited known difficulties in philosophy to “disguise unexamined premises as hard-won conclusions” (Scruton) and that he was a bad philosopher who did not properly differentiate between authority, force, power, violence and legitimacy, and who wrongly received a good response by social sciences (Wehler). Habermas saw him as covertly reliant on the very enlightenment principles he attempted to deconstruct, attempting to remain both Kantian and Nietzschean in his approach.

Third wave fertility and motherhood narratives can be found in Rebecca Walker’s Baby Love (Penguin, 2007), Evelyn McDonnell’s Mamarama (Da Capo Press, 2007), and Peggy Orenstein’s Waiting for Daisy (Bloomsbury, 2007), discussed in Bridget J. Crawford “Third Wave Feminism, Motherhood and the Future of Feminist Legal Theory” above note 533. See also the life work of Germaine Greer from The Female Eunuch (1970) in which she argues that the goal was “women’s liberation” as distinct from “equality with men”, meaning gender differences should be embraced in a positive fashion; see also her sequel in The Whole Woman, above note 580, where she saw there had been a fundamental lack of progress through the second wave feminist movement.
5.7 Gender theory

All feminist theories, including feminist legal theory, centre around gender theory, that is, the many aspects of what it means to be male and female and to live gendered lives in society.604 Alsop, Fitzsimons and Lennon discuss the different approaches to gender theory, explaining and evaluating the naturalist, psychoanalytic, materialist and post-structuralist theories, and acknowledging the tensions and often opposing differences of thought between them.605 Haraway describes gender as “a concept developed to contest the naturalisation of sexual difference in multiple arenas of struggle,”606 and that:607

Feminist theory and practice around gender seek to explain and change historical systems of sexual difference, whereby “men” and “women” are socially constituted and positioned in relations of hierarchy and antagonism.

Simone de Beauvoir’s 1949 writings that “one is not born a woman” triggered the second wave feminist theories outlined above, seeking to address in some way the issue of biological or natural differences between men and women. This issue of gender difference was engaged with in a variety of ways, some denying its existence, some minimising the importance of difference, and others seeking to eliminate it. The arguments fall into two main camps, that is, gender difference is either socially constructed or biologically determined.608 The implication of either argument is that gender difference reduces down to a natural, existing essence, biologically and psychologically. The ascendancy of the different views at different times of how to view and address gender difference has had significant ramifications for motherhood within family law.

5.8 Has a theory of motherhood been developed?

In 2007, O’Reilly described research on motherhood as having exponentially increased since the seminal work by Rich in 1976, who said at that time: “[w]e know more about the air we

604 It is beyond the scope of this thesis to explore gender theory in other than a rudimentary way.
607 Haraway, above note 606 at 131.
608 See, for example, H Eisenstein and A Jardine The Future of Difference (C K Hall & Co, 1980); see also discussion in Desiree Pushpeganday Manicom “Gender Essentialism: a conceptual and empirical exploration of notions of maternal essence as a framework for explaining gender difference”, above note 536.
breathe, the seas we travel, than about the nature and meaning of motherhood. Since then, there has been so much written on motherhood that O’Reilly sought to develop a text based on maternal theory. She saw the theory of motherhood as having developed into three perspectives: motherhood as experience/role, motherhood as institution/ideology and motherhood as identity/subjectivity.

For example, Rich distinguishes between motherhood and mothering, between experience and institution, and points to the line between the two as varying according to culture. Motherhood as experience was seen as intensely personal, Rich knowing only that “I had lived through something which was considered central to the lives of women, fulfilling even in its sorrows, a key to the meaning of life.” In a chapter she entitles ‘The “Sacred Calling”’, she also touches on these foundational theological and ontological questions by quoting writings from the American Tract Society in the 1830s:

Mothers have as powerful an influence over the welfare of the future generations, as all other earthly causes combined … When our land is filled with pious and patriotic mothers, then will it be filled with virtuous and patriotic men. The world’s redeeming influence, under the blessing of the Holy Spirit, must come from the mother’s lips. She who was first in the transgression, must yet be the principal earthly instrument in the restoration. It is maternal influence, after all, which must be the great agent in the hands of God, in bringing back our guilty race to duty and happiness.

These larger themes are also explored by Ortner, who asks whether female is to male as nature is to culture. Other theories of motherhood brought together under O’Reilly’s broad headings include Nancy Chodorow’s “reproduction of mothering”, where the development of mother-son and mother-daughter relationships are examined in light of Freud’s work. Chodorow is also concerned that if women are seen primarily as mothers, then any liberation

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610 O’Reilly, above note 609, Introduction.

611 Rich, above note 537.

612 Rich, above note 537 at Chapter II The “Sacred Calling” at 44; see also Julia Stonehouse Father’s Seed Mother’s Sorrow, e-book http://www.amazon.com/Fathers-Seed-Mothers-Sorrow-ebook/dp/B008I8ZZJC (2012) which reviews anthropological reproduction theory and its impact on gender relations.

613 Sherry Ortner “Is Female to male as Nature is to Culture?” in Michelle Rosaldo and Louise Lamphere (eds) Women, Culture and Society (Stanford University Press, 1974).

of women will be experienced as traumatic by society. She therefore sees movements towards male responsibility for childcare and females seeking economic and emotional freedom as new models for family that are potentially more life-giving for both parents and children than the gender struggles that have previously defined male-female and parent-child relationships. Ann Crittenden discusses why motherhood, as the most important job in the world, is the least valued, and Daphne de Marneffe points to the problem of society’s obscuring of maternal desire, saying “it is almost as if women’s desire for sex and their desire to mother have switched places in terms of taboo.” Sara Ruddick’s “maternal thinking” was concerned with providing an alternative framework to the devalued reproductive labour found in Simone de Beauvoir’s work. Ruddick, by way of contrast, describes motherhood as a discipline, and focuses on the distinctive thinking a mother develops, “the judgments she makes, the metaphysical attitudes she assumes, the values she affirms” in the day-to-day work of raising a child.

5.9 The discipline and value of maternal practice and thinking within maternal theory

Maternal theory would hold that it is out of mothering practice and experience that gender differences emerge. Sara Ruddick argues that:

… maternal practice begins with a response to the reality of a biological child in a particular social world. To be a ‘mother’ is to take upon oneself the responsibility of child care, making its work a regular and substantial part of one’s working life.

It is this practice which gives rise to maternal thinking, with Ruddick’s definition of a mother being in relation to both a mother’s commitment to meeting the demands made by her children and the social world which has constructed ‘maternal work’. She suggests that there are three demands made of mothers, firstly, being preservation provided through protective care, secondly, being emotional and intellectual growth provided through nurturance, and thirdly, being provision of socialisation according to the norms and values of a particular group through a mother’s social responsibility. While maternal work involves other demands, it is Ruddick’s view that these three demands are what essentially constitute maternal

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619 Ruddick above note 618 at 17; see also Manicom, above note 536 at 146.
practice, a practice required by all cultures where children are seen as requiring protection, nurturance and training. While maternal commitment is voluntary, and while there are cultural variances, it is the demands themselves that require mothers to reflect on their responses. Ruddick sees this act of reflection as generating maternal thinking. Ruddick, herself a wife and mother, became disillusioned with the kind of reason articulated by Descartes as providing the foundation for the correct way to think, such thinking involving self-control, objectivity, rationality, individualism and detachment. In her work Maternal Thinking: Towards a Politics of Peace, she saw this kind of reason not only as embodied in men and lacking in women, but also used to justify domination, violence, oppression and privilege. For Ruddick, it implied a lack of recognition for the values embodied in loyalty and affection found in women; therefore, the human good in reason must lie elsewhere and needed to be differently understood. She saw reason as defined, rather, as “learning, experimenting, imagining, discovering, designing, inventiveness, steady judgment, self-reflectiveness, clear speech and attentive listening”, and maternal thinking as “the intellectual capacities she [a mother] develops, the judgments she makes, the metaphysical attitudes she assumes, and the values she affirms” in response to a child’s demands to have its needs met. Ruddick therefore promotes a maternal theory that would re-evaluate women’s difference for the benefit of society, holding that there are distinctive maternal practices that emerge in response to a child’s needs, and that these practices are informed by a distinctive kind of maternal thinking. While she does not restrict these maternal practices solely to women, neither does she seek to neutralise their feminine nature. She sees recognition of maternal practice and thinking as providing a platform for values not generally promoted by men, and which can contribute to peace. At the same time, she recognises the essential demands that children make on mothering and maternal thinking as operating within conflicting tensions generated by the mothering experience, with mothers often having to struggle to think and act maternally. These views are consistent with research around maternal gatekeeping and the tensions that this exposes.

For Ruddick, the first demand that a mother responds to from her child is the demand for protection with preservative love. She says.

623 Ruddick, above note 618.
621 Manicom, above note 536 at 148.
622 Ruddick, above note 618 at 24.
623 See Chapter Nine with respect to gatekeeping.
624 Ruddick, above note 618 at 68.
… in protecting her child, a mother is besieged by feeling, her own and her children’s. She is dependent on these feelings to interpret the world. The world that mothers and children see and name, separately and together, is constructed by feeling.

Thus, protective love is imbued with feelings, which in turn form the basis of reflective thinking:625

… feelings demand reflection, which is in turn tested by action, which is in turn tested by the feelings it provokes.

Ruddick argues that mothers develop a cognitive style called ‘scrutinising’, where they are looking for dangers before they appear.626 She sees this attribute coupled with humility, enabling mothers to think in a particular way that does not dominate yet does not relinquish control. Thus, successful mothering means ensuring the safety of the child whose will cannot be controlled. At the same time, this does not mean falling into passivity by relying on the judgment and advice of experts. In doing so, maternal thinking is relinquishing control to such experts. This has relevance with respect to separated parenting and particularly with respect to the development of shared care parenting. Maternal thinking and practice, borne out of preservative love, may have rejected separated shared care for a young child. Within the current gender-neutral family law environment, supported by various (and at times conflicted) social science thought, it is arguable that such protective thinking was at risk of being re-interpreted as obstruction or over-protection on the mother’s part.627

Other maternal practices that mothers develop in response to the needs of their child are described by Ruddick as including “cheerfulness,” understood as the preservation of control in an uncontrollable world, as well as being a guard against a mother’s own impatience, anxiety, fatigue and self-preoccupation. In describing this as an attribute of motherhood, Ruddick points to the struggle that maternal work represents.628

She also describes mothers as developing a particular conception of “nature,” an attitude that does not try and protect her child against nature, but rather one where she comes to

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625 Ruddick, above note 618 at 70.
626 Ruddick, above note 618 at 72.
627 See Chapters Seven and Nine with respect to separated shared care parenting and gatekeeping.
628 Ruddick, above note 618 at 74 with respect to “cheerfulness”; see also Manicom, above note 536 at 153-4.
understand and appreciate the “workings of nature within herself and those she loves … like the Ghandian non-violent activist.”

“Holding” is another characteristic of maternal protectiveness described by Ruddick. Through this attribute, mothers seek to minimise risk and reconcile differences through maintaining harmony and material resources to meet a child’s need for preservation. While a human good, she also sees its capacity to degenerate into “holding too closely, too timidly, too materially”, as well as “holding” together relationships for their children which might be harmful to them.

Ruddick describes these attitudes and virtues of preservative love as being not only found in powerless people, but as also being utilised by the powerful in acts of oppression against the powerless. This view is consistent with the third strand of second wave feminism, that is, the dominance theory described above. There is work to be done for maternal practices around preservative love for it to become an instrument of political peace, but in Ruddick’s view such maternal care has the potential to keep not only a child and home safe, but also a neighbourhood, a community and a nation. That is, such maternal practice borne of preservative love is of value not only to a child but also to the health of a society as a whole. The corollary is that such qualities should be preserved and strengthened, rather than neutralised, minimised or ignored.

Ruddick sees the second maternal practice of “nurturance” as a maternal response to a child’s demand that its growth be fostered. That is, mothers have the ability to recognise that children need nurturing, to understand the changing nature of a child and to be capable of and wanting to meet this demand, despite varying social circumstances. This maternal attitude makes specific assumptions that children are naturally healthy and good, that they require fostering in an age-appropriate style and in a way that understands the need to grow and change. To assist her in this task, Ruddick argues that the mother conceptualises the mind as inseparable from feelings in the child, such that their thoughts and perceptions of the world are understood through their fears and desires. Women are understood to have a cognitive style of thinking that is more concrete than men’s, arising out of the maternal practice of fostering growth in a child, as the mother seeks to understand the child’s mind. Ruddick further postulates that because mothers want to understand, they make themselves

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629 Ruddick, above note 618 at 77.
630 Ruddick, above note 618 at 79.
631 Ruddick, above note 618 at 79.
trustworthy listeners and important instruments of confidence-building in a child. Then, through storytelling with other mothers, a broader common understanding through these shared experiences is able to develop. Ruddick describes the virtues that develop out of this maternal practice as “realism, compassion and delight.”

The third demand described by Ruddick that a child makes of its mother is for social acceptability, which is responded to through the maternal practice of “training.” While there may be cultural and individual differences, Ruddick sees this as a universal need, the maternal work focusing on developing the child’s moral conscience. There is an awareness of the contradictory nature of the maternal power, about knowing what to insist upon and what to ignore, but central to this training is about protecting and developing a child’s conscience, and building trust and trustworthiness. Ruddick adds “attentive love” as part of “training”. She draws upon the work of Simone Weil and Iris Murdoch where attentive love is understood as “really looking”, combining an act of knowing with an act of love. It is understood as similar to empathy and allows difference to safely and trustingly emerge in a child.

In summary, Ruddick argues that women’s engagement in maternal practice leads to maternal thinking, a distinct kind of reasoning different from that of men and an asset not only to children but also to society as a whole; something to be valued and protected, rather than devalued and neutralised in the drive for gender equality.

Thus, for feminist theorists such as Ruddick, it is the practice of mothering in caring, nurturing and protecting that gives rise to motherhood’s distinctive nature, her cognitive capacities, attitudes and values. These mothering practices were seen to be demanded by children according to the child’s basic needs. Therefore, rather than mothering being a source of oppression, this sexual division of labour (where women respond to the child through mothering) should be seen as valuable, and celebrated by society as a whole. These theorists argue that if there is a problem, it lies with a masculine culture which prioritises different values such as instrumentalism and rationality, and devalues feminine virtues, values and

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632 Ruddick, above note 618 at 98; see also 84-86 with respect to “nurturance”.
consciousness which emerge through motherhood. This represented a shift away from second wave liberal feminism, which sought to erase difference between men and women, and therefore between mothers and fathers, in the name of equality. Instead, it emphasises a conceptual shift, viewing gender difference as a source of enrichment for society as a whole, rather than a tool of oppression against women. Through motherhood, women develop the psychological qualities related to nurturing, cooperation and community that are considered to be valuable qualities. No longer was a woman’s body regarded as oppressive or a constraint; female physiology in itself also came to be regarded as a source of strength.

Rich distinguished between the experience of motherhood and the institution of motherhood, the latter being linked to patriarchy. Thus, in identifying and validating the biological and psychological differences between men and women that emerged through mothering, these theorists argued that uniquely female virtues and experience, though very different, should be recognised equally with the already valued male traits of competitiveness, aggression and domination. Indeed, some theorists contended that the value of these feminine traits was superior to the values of the traditional male institutions, and that this maternal essence was essential and needed to be protected for the wellbeing of society as a whole. Young describes gynocentric feminism as defining “women’s oppression as the devaluation and repression of women’s experience by masculinist culture that exalts violence and individualism.”

Unsurprisingly, there has been considerable critique of theories which celebrate women’s differences from men, and which focus on women’s experience and activities as explanations for gender difference. Such criticisms see mothering as a social construction (and therefore theoretically available to men), and difference from fathering based in gender as having been

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635 Such as in the work of Firestone, above note 599.
636 Such as in the work of Rich, above note 537.
637 Adrienne Rich, above note 537.
639 Gynocentrism is understood to promote matriarchy instead of patriarchy, and where the female view becomes the reference point from which all things are analysed. See Iris Marion Young “Humanism, Gynocentrism and Feminist Politics” in Elizabeth Hackett and Sally Haslanger (eds) Theorizing Feminisms (Oxford University Press, 2006) at 174.
640 Iris Marion Young above note 638, in Throwing Like a Girl and Other Essays in Feminist Philosophy and Policy at 73.
Lawler argues that by asserting that children have needs, and mothering is about responding to those needs, this ignores the fact that needs are a social construction, and requires children’s needs to be fixed and knowable. Thus, her criticism of Ruddick is that her ideas of maternal thinking are based on a “universal category of maternal work which exists in relation to a fixed and universal set of children’s ‘needs’.” However, for Ruddick, mothering experience is seen to exist prior to its social construction. She also sees most mothers as women, and says that:

… although maternal work can, in principal, be performed by any responsible adult, throughout the world women not only have borne but have also disproportionately cared for children. Since most of the people who have taken up the work of mothering have had female bodies, mothers, taken as a class, have experienced the vulnerabilities and exploitation as well as the pleasures of being female in the ways of their culture. Although some individual mothers may be men, the practices and cultural representations of mothering are strongly affected by, and often taken to epitomize, prevailing norms of femininity.

Accordingly, as most maternal work is carried out by women, it is this experience which renders the work gendered and equates women with maternity. In this way, Ruddick essentialises mothering, as the word “maternal” is associated with women, and opposite to “paternal.” The difficulty remained however, that:

… the biggest problem with all these accounts of gender is that they credit the differences they find to universal features of male and female development rather than to the economic and social positions men and women hold, or to the actual power differences between individual men and women.

641 For example, see Elizabeth Spelman The Inessential Woman (Boston: Beacon Press, 1988); Diana Fuss Essentially Speaking: Feminism, Nature and Difference (New York: Routledge, 1989); Judith Butler Gender Trouble: Feminism and the Subversion of Identity (New York: Routledge, 1990) in which Butler considers that both sex and gender are constructed; Donna Haraway Simians, Cyborgs and Women (London: Free Association Books, 1991), where Haraway considers that the fundamental differences in feminist theory should be conjoined rather than resolved.

642 Stephanie Lawler Mothering the Self: Mothers, Daughters, Subjects (London: Routledge, 2000).

643 Ruddick, above note 618 at 41.

In the wake of the influence of feminism and the development of feminist theories during the 1970s and 1980s, which regarded gender essentialism as something of a problem, there are nonetheless signs that the notion of ‘essential’ gender differences may now be undergoing something of a revival. This can be seen in such disciplines as genetics, evolutionary psychology and neurology. In popular culture, self-help manuals seeking to explain the differences between men’s and women’s behaviours, have become bestsellers. A closer examination of the theory of essentialism and the idea of the maternal essence and motherhood being different from fatherhood, follows.

Essentialism is a longstanding theoretical framework that holds to the view that objects possess certain essential properties that distinguish one from another. Speake defines it as:

A metaphysical view dating back to Aristotle … It maintains that some objects – no matter how described – have essences; that is, they have, essentially or necessarily, certain properties, without which they could not exist or be the things they are … there is also a related essentialist view, presented originally by Locke, that objects must have a ‘real’ – though as yet unknown – ‘essence’, which (causally) explains their more readily observable properties (or ‘nominal essence’).

Fuss examines whether essentialism has received “a bad rap.” She says that “few other words in the vocabulary of contemporary critical theory are so persistently maligned, so little

645 While beyond the scope of this paper, see for example, the work of Simon Baron-Cohen in systemising-empathising which lead him to investigate whether higher levels of foetal testosterone were responsible for an increased prevalence of autism spectrum disorders amongst males. His theory is known as the "extreme male brain" theory of autism. He discusses his work in *The Essential Difference: Men, Women and the Extreme Male Brain* (Penguin, 2003) and based on his research in this area, essentially proposes that the male brain is programmed to systemise and the female brain to empathise; See also Madhura Ingalhalikar et al “Sex Differences in the Structural Connectome of the Human Brain” Proceedings of the National Academy of Sciences Vol 111 Jan 2014. The brains of 428 males and 521 females aged eight to 22 years were studied. It was found that on average, women's brains were more highly connected across the left and right hemispheres, in contrast to men's brains, where the connections were typically stronger between the front and back regions. The findings pointed to men's brains apparently wired more for perception and co-ordinated actions, and women's for social skills and memory, making them better equipped for multitasking, intuitive thinking, and higher levels of emotional engagement.

646 For example, see John Gray’s *Men are From Mars, Women are From Venus* (Harper,2002); Steve Harvey’s *Act Like a Lady, Think Like a Man* (Amistad, 2011); Sheryl Sandberg’s *Leaning In: Women, Work and the Will to Lead* (Knopf, 2013).

647 Note, however, that a close reading of the history and development of essentialism, constructionism, reductionism, gender theory and their associated theorists is beyond the scope of this paper.

648 J. Speake *A Dictionary of Philosophy* (London: Pan Books, 1979) at 112; see also discussion in Manicom above note 536.
interrogated and so persistently summoned as a term of infallible critique” and comments on the “the sheer rhetorical power of essentialism as a term of disapprobation and disparagement.” She sees the essentialist/non-essentialist (or constructionist - the position that differences are constructed, not innate -) debate as marking an impasse in feminist theory on the one hand, while on the other signifying “the very condition and possibility of our theorising.” Fuss describes essentialism and constructionism as being at their most polarised around the issue of the relationship between the social and the natural. Essentialism points to the natural as being the raw material. Therefore, that is the determinative starting point to the practices and laws of social order, which come after. In the example of man and woman, the natural sex difference between the two can therefore be seen as being repressed, (or elevated), by social practices and the law, with motherhood and fatherhood being overlaid onto the natural. On the other hand, constructionism sees the natural as itself being a construction and a result of social practices and the law. This difference in position can be summed up by Ernest Jones who asks “Is a woman ultimately born or made?” For an anti-essentialist like Simone de Beauvoir, a woman is made not born. For Jones, a woman is born, not made.

Fuss seeks to utilise John Locke’s distinctions, that is, between real and nominal essences. Real essence is Aristotelian and refers to the irreducible, the unchanging thing. Nominal essence refers to a linguistic convenience, a classification. Real essence is empirically observable. Nominal essence is ascribed by language. Fuss saw these distinctions as not only describing in a general way the difference between essentialism (real essence) and constructionism (nominal essence) but also in seeking to break the tension between the two apparently apposite positions. Fuss suggests that both essentialism and constructivism share the classification of “essence”, concluding that social constructionism cannot escape the pull of essentialism. In effect, constructionism operates merely as a more sophisticated form of essentialism and that the bar between the two is “by no means unassailable.”

651 Diana Fuss, above note 649.
652 Diana Fuss, above note 649 at 3.
653 Simone de Beauvoir, above note 617.
654 Diana Fuss, above note 649 at 4; see also John Locke An Essay Concerning Human Understanding (London: printed by Elizabeth Holt for Thomas Bassett, 1690).
655 Diana Fuss, above note 649.
Marshall refers to three types of essentialism within feminist theory. Biological essentialism is found in the works of Firestone, Rich and others, then philosophical essentialism as found in Simone de Beauvoir’s and others. Thirdly, in the work of Nancy Chodorow and others, is a cultural essentialism identified by the emergence in early human development of the essentially different male and female natures reflected in different emerging practices, including mothering practices. In common to all, however, is a connection between the female body and reproduction of humankind, and that the gender difference between men and women is found in what is known as the maternal essence. The maternal essence is understood to comprise a biological essence of reproductive functioning, a psychological essence of emotional drivers and cognitive abilities, and the social essence of mothering. On their own, each component cannot explain the maternal essence. For example, women assuming primary responsibility for mothering within families is as much a factor of external social conditions as it is a factor of their biological ability to bear a child. Crowley and Himmelweit suggest that feminism, in its theorising about motherhood either as an institution that creates obstacles and limitations for women’s self-realisation or as a positive experience that is a resource and strength for women, creates an insoluble tension. In addition, empirical studies and reviews of motherhood in attempting to analyse different conceptions and theories of motherhood have added to this tension. However, they do identify how social, economic, cultural, historical and political factors have influenced mothering and, more particularly, how different definitions and theories of motherhood are located according to different historical periods. Snitow refers to the writings about motherhood in the 1960s and 1970s as questioning motherhood as a destiny, and framing it as oppressive and a constraint to gender equality. The ideas of Simone de Beauvoir and Shulasmith Firestone resonate during this period. Then, in the late 1970s, feminists began

657 Nancy Chodorow, above note 593. It is beyond the scope of this thesis to explore theories of essentialism beyond the notion of the maternal essence and whether this is a source of oppression and therefore should be erased, or whether it is something valuable to be celebrated and protected.
660 Ann Snitow above note 659.
exploring women’s actual experience of motherhood, Chodorow referring to women as having a different voice. In the 1980s, such writers as Sara Ruddick reaffirmed and celebrated motherhood and explored mothers’ work and feelings about their children. Since then, the third wave of feminism has emphasised the unique experience of motherhood.

**Summary**

Thinking about the essential differences between men and women, mothering and fathering, and their relationship to each other needs to continue. As Alice Jardine puts it, “think about it [difference] we must, because if we don’t, it will continue to think us, as it has since Genesis at the very least.” A discussion of feminism’s approaches to gender, motherhood and the maternal essence (as opposed to the paternal), while only able to offer a partial understanding of the complexities of human behaviour and experience, has drawn attention not only to the significance of motherhood as an individual gendered experience, but also as significant within the broader historical and contemporary social contexts, institutions and the law.

However, further examination of maternal theory is beyond the scope of this thesis, save to say that the diversity of thinking found within its framework is vast, and contributes to an understanding of the foundational layers of complexity, lack of voice, power struggle and paradox found with respect to motherhood and family law. It is self-evident that the issue cannot be addressed, indeed may be further complicated, by legislatively requiring the Family Court to ignore any gender difference between mothering and fathering in determining what the welfare and best interests of a child might require.

Whether the law in New Zealand should consider again the welfare principle as a relationship-based, rather than a more neutrally rights-based, paradigm, and thereby be able to consider the differences found in parenting gender through recognition of each of the equally valuable mother-child and father-child relationships, is explored in the following chapter. The unease evident in the law with respect to these issues is also examined.

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661 Alice Jardine, above note 638 in the prelude to *The Future of Difference* at pxxvi.  
662 Section 4(3) Care of Children Act 2004.
Chapter Six


Introduction

The principle of the paramountcy of the welfare of the child is an example of a legal transplant from the UK to New Zealand. Chen-Wishart\textsuperscript{663} says that the resulting outcome can occupy any point along a spectrum from faithful replication of the legal principle to outright rejection. Her study asks why the Singaporean Courts have applied the doctrine of undue influence in family guarantee cases to such divergent effect when they profess to apply the same law.\textsuperscript{664} Similarly, the question can be asked as to why the New Zealand Family Court has applied the principle of the welfare of the child to such a different effect to that in the UK when it professes the same common law heritage. Chen-Wishart says the answer lies in a careful examination of the nature of the transplanted law within each of the originating and recipient societies. It is an important question, given the scale of legal transplant in colonial history, and raising as it does the bigger jurisprudential and philosophical questions about whether law changes society or whether law is changed by society?

6.1 The divergent effect of a legal transplant

The UK’s Guardianship of Infants Act 1925 was legally transplanted into New Zealand law through the Guardianship of Infants Act 1926 (NZ). As previously discussed, it brought with it the elevation of the welfare principle to a position of legislative centrality, and created neutrality between fathers and mothers in relation to custody arrangements for their children, based in recognition of the importance of relationship, namely that of mother and child.\textsuperscript{665} The English political and societal context from which this principle originated was not gender-neutral. It was still a society dominated by patriarchal power and the superior rights of fathers. This was very different to the New Zealand context, an egalitarian colonial society founded on gender equality, into which the principle was received. The gender-neutrality of the welfare principle in England was based in a need to develop for mothers a fairer rendering

\textsuperscript{663} Mindy Chen-Wishart “Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?” ICQL vol 62 January 2013 1-30.
\textsuperscript{664} Mindy Chen-Wishart, above note 663.
\textsuperscript{665} See Chapters Two and Three.
of the legal advantage held by fathers through ‘ownership’ of their children, thereby protecting the mother-child relationship. It was not based in the gender equality found in New Zealand society into which the principle was transplanted. In New Zealand, the notion of gender equality was already established. Therefore, the gender-neutrality of the welfare principle that had been developed in England for the purpose of protection of the mother-child relationship, (and so that gender equality did not have to be more broadly addressed), transplanted comfortably onto a foundation of gender equality not found in England.

At first, the significance of this difference was not apparent, and the approach of the early New Zealand judges was to draw heavily on English case law precedent. In reviewing the case law discussed in Chapter Three, it also appears that they were more cognisant of the natural differences between mothering and fathering. For example, in Re Thomson, Williams J described the mother “as genuinely anxious about her children.” In 1911, in Morton v Morton, the same judge said:

… One must look not only at the state of things existing at present, but at the future. The two girls have ceased to be little children, and are growing up into womanhood. A man cannot look after them properly. It is right that there should be some woman to whom they can talk, and in whom they can confide, and who will advise and direct them.

However, he saw the boy’s situation differently:

As to the boy, it is different. His father is very much attached to him, and he to his father. As growing girls want a woman to look after them, so growing boys are better in charge of a man.

The ‘same-sex rule’ became known as ‘the mother principle’ and ‘the father principle’. That is, beyond tender years a girl was better off with her mother and a boy with his father. In 1928 in Parsons v Parsons, with respect to a three-year-old boy, Smith J said:

A woman may be a great deal to a child in its earliest years, but a male child has very many difficult years in front of it, and in all ordinary circumstances … it is very desirable that a male child should have the care and guidance of its father … and [if]

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666 Re Thomson above note 384.
667 Re Thomsen, above note 384 at 423.
668 Morton v Morton, above note 395.
669 Parsons v Parsons [1928] NZLR 477.
the parties remarried, then … it would be preferable that this boy should be brought up by his own father and a second wife, with rights of access to the natural mother, rather than by the mother with a second husband with rights of access to the father.

In 1930, in the Supreme Court, (the then equivalent of New Zealand’s current High Court), in *in re Winter*, with respect to an eighteen-month-old girl, Kennedy J said:

> It is the notorious observation of mankind that the loss of a mother is irreparable to her children and particularly so in the young. … a child of such tender age … essentially requires a mother’s care … and it will be better for her to be surrounded in her upbringing, when she has left her very tender years, with her mother’s love and care … 671

In 1940 in *Re H*, involving two boys aged thirteen and three, the Supreme Court confirmed the general view that a male child beyond tender years be brought up by his father, but confirmed there was “no rule which can supersede the rule that the Court will regard the welfare of the infant as paramount.” By 1951, motherhood’s unique value was cemented in the law, as seen in the example of *Norton v Norton*, where the Supreme Court said:

> There is scarcely need to quote authority for the proposition that, other things being equal, children of tender years should be in their mother’s care; … or for the proposition that a mother’s care is to be preferred to that of a father in the case of girls, even after they have ceased to be of tender years.

Also in 1951, with respect to ten-year-old twin girls, was the previously discussed appellate decision of *Miller v Low*, considered by the Full Bench of the Court of Appeal. It overturned the decision of Gresson J in the lower Court, making strong comments about the unique and significant role of motherhood and, in particular, the relationship between mothers and daughters.

The effect of the more gender-neutral decision in 1950 of *Lovell v Lovell* has also been previously discussed, and by 1961 in New Zealand, as evidenced in the decision of *Palmer*
the courts had become careful to confirm that ‘the mother principle’ should not have inflexible application, much less application as a rule of law.

Nonetheless, a high point of recognition and respect in New Zealand law for motherhood continued through the 1964 decision of Mitchell v Mitchell. The divergent effect of the transplant of the welfare principle was not yet evident, North P saying:

It has long been recognised that a child of tender years should not be separated from its mother unless in the interests of the child such a course is clearly and unmistakably necessary. It has never been doubted that there is wisdom in the observation of Sir John Romilly MR, in Austin v Austin, that:

‘… no person, and no combination of them, can…with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place.’

The Guardianship Act 1968 went on to provide for equal and shared guardianship between mothers and fathers when married, and for the mother as sole guardian when unmarried and not living with the father at the time of the birth of the child. There was no prohibition against considering the sex of the parent in making a welfare assessment, the welfare of the child being confirmed as the paramount consideration pursuant to section 23 of the Act.

In 1971, in D v R, North P continued to confirm the mother principle as “vitally important” and acknowledgment of the importance of the mother’s role was also found in Woodhouse J’s dissenting judgment in the 1978 appellate decision of G v G, where he reviewed the significance of the mother principle to a best interests assessment through the case law over the years. He said:

There can be no doubt that the Courts have consistently accepted as a matter of common sense (not as a matter of law) that in general young children (and girls of any age) should be in the custody of their mother. … The principle has not got the status

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677 Palmer v Palmer, above note 418.
679 Austin v Austin, above note 391 at 636.
680 Section 6 Guardianship Act 1968.
681 D v R, above note 428.
682 D v R, above note 428 per North J.
of a rule of law but, as a factor based on long experience … it cannot now be in issue that it is something that must be given careful and deliberate attention by any Court before a decision is made that young children, particularly girls, should go to their father. … It is the very kind of case where the Court should pay heed to the principle, as a starting point at least.

However, in the late 1970s in New Zealand, just as in the UK, there was political activism by fathers’ groups. This meant that the ‘mother principle’, rather than having a secure place as a relevant consideration in a best interests enquiry, was now being reframed as gender bias against fathers and should have no place in the law at all.

The second reading of the Guardianship Amendment Bill (No 2) was introduced on 27 November 1980 by the Hon J K McLAY, Minister of Justice, in the following terms:

There are those who believe that fathers do not gain custody of their children more often because the judiciary discriminates in favour of mothers. If any lingering trace of the so-called mother principle does in fact survive, it will be eradicated by the proposed new subsection (1A) of section 23, inserted by clause 8 of the Bill.

This introduced s23(1A) of the Guardianship Act 1968, which was carried forward in New Zealand’s family law legislation into s4(4) of COCA. This became the present s4(3) of COCA by amendments, which came into force on 1 April 2014.684

What has been observable in the case law since the original legislative inclusion of the current s4(3) of COCA is that there has been a declining reference to motherhood in New Zealand, to the point where motherhood now appears to receive no legal reference at all. This is notwithstanding the reality of parenting gender differences continuing to exist and mothers continuing to do more of the caring.685 The development of the welfare principle in England had occurred because it was fair to both mother and child that the law should provide this protection, and a gender-neutral principle was introduced so that fathers were no longer advantaged by their absolute position in common law. However, the welfare principle as a

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684 Care of Children Amendment Act (No 2) 2013.
legal transplant into New Zealand has had a divergent effect, influenced as it was by the
egalitarian nature of New Zealand society where gender equality, not patriarchy, prevailed.
That meant that equality, not fairness to mother and child, was the key factor. Further, this
foundation was a principle of gender equality or sameness, which is not the same thing,
though compatible with gender-neutrality (which was part of the English transplant). In
England too, additional weight was given to the custodial mother’s health and happiness as a
factor in a welfare assessment.\textsuperscript{686} In New Zealand, the custodial mother’s health and
happiness has not been accorded much, if any, weight in a welfare assessment, even if this
was a relevant issue. Weight instead began to be given, wherever possible, to developing or
maintaining a care relationship with the other parent (usually the father).\textsuperscript{687}

This movement culminated in a series of decisions of Judge Inglis QC in \textit{W v C},\textsuperscript{688} followed
by the \textit{D v S} series of decisions (including two Court of Appeal judgments), and the decision
of Baragwanath J in \textit{L v A}.\textsuperscript{689} These were all influential in the trend towards gender-neutral
parenting, and to the law reform which occurred in the early 2000s and resulted in passage of
\textit{COCA}.\textsuperscript{690}

In England, however, while there was also increasing agitation by fathers’ action groups, the
role and place of motherhood continued to be recognised. The effect in New Zealand of
liberal feminist theory was also becoming evident, that is, in seeking gender equality, gender
difference needed to be denied or eradicated. In the UK, cultural feminist theory appeared to
have greater application. It appeared to recognise to a greater extent than New Zealand, a
continuing gender difference within the pursuit for gender equality. This has contributed to
different outcomes for motherhood within each of the UK and New Zealand jurisdictions, and
is discussed further with respect to the example of relocation, and how it is addressed by the
law within each of these jurisdictions.\textsuperscript{691} The divergence between New Zealand and England
with respect to the meaning and application of the welfare principle was accordingly
becoming increasingly pronounced, despite the principle having been legally transplanted in
its entirety from England to New Zealand, and despite the law apparently intending the same
thing.

\textsuperscript{686} Payne v Payne above note 28.
\textsuperscript{687} DMS v PAL CIV 2007-404-005486, (11 December 2007, HC Auckland), Harrison J; \textit{LH v PH} (HC Auckland, 21 March 2007), Winkelmann J.
\textsuperscript{688} W v C, above note 67.
\textsuperscript{689} W v C, above note 67; D v S, above note 27; L v A above note 39.
\textsuperscript{690} These decisions and subsequent legislative change are described in Chapters Seven and Eight, with reference
to the development of gender neutral shared care parenting and relocation in New Zealand.
\textsuperscript{691} See Chapter Eight.
6.2 The welfare principle as a relationship-based concept

Herring argues that a contemporary application of the welfare principle, rather than the child being viewed atomistically, should be considered in a way which takes account of the rights of others and their relationship to the child. This would include consideration of the mother’s relationship with her child, and he calls this “relationship-based welfare.” This is consistent with the origins of the principle, that is, based in a recognition of the significance of the mother-child relationship. The application by the New Zealand courts of the principle pursuant to section 4(1) of COCA could be seen at times to reflect an understanding of a relationship-based approach. For example, in _Auckland District Health Board v Z_, a 2007 High Court decision concerning the religious beliefs of Jehovah’s Witnesses around blood transfusion, Baragwanath J said:

Certainly the power of a parent as guardian includes decision-making in relation to the child's medical treatment. But the statute emphasises that the welfare and best interests of the child are the sole focus of the consideration by the Court which may override parental rights. That does not mean however that the parents' interests and wishes are of other than very great importance. There is a presumption that they will receive effect and to the extent that they do not receive complete effect they will be recognised as far as is possible compatibly with the predominant interests of the child. That is because a child is not to be considered as a microcosm insulated from her parents but as far as practicable as part of the family of which she and they are the components.

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693 Care of Children Act 2005 (as amended by the Care of Children Amendment Act 2013):

4 Child’s welfare and best interests to be paramount

(1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—

(a) in the administration and application of this Act, for example, in proceedings under this Act; and

(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

694 _Auckland District Health Board v Z_ (2007) 26 FRNZ 596 (HC) at para [20].
However, other decisions reflect an approach where the child is indeed atomised through a different understanding and application of the paramountcy principle. For example, in the 2010 Family Court decision of JMC v AJHB, Judge Coyle said:

To put it bluntly, it is his [the two-year-old child’s] best interests and welfare I need to consider, and not those of Ms H-B or Mr C.

This latter approach is described by Herring as an interpretation by the Court that means, in effect, that the child’s welfare is the sole consideration, regardless of the impact such an order will have on the interests of the child’s parents or any of their children in the family, or the wider community. This narrow and strict statutory interpretation appears to require the Court to make an order that could cause harm to others while perhaps only slightly improving the welfare of the child. He argues that there should be no difficulty in interpreting the welfare principle based on an approach that recognises that children are raised in relationships. He goes further and says a child’s welfare also means supporting the caregiver, and that the Court “can legitimately make an order which benefits a parent, but not a child, if that can be regarded as appropriate in the context of their past and ongoing relationship.” This includes the mother-child relationship.

Woodhouse similarly says:

A truly child-centred perspective would also expose the fallacy that children can thrive while their care givers struggle, or that the caregiver’s needs can be severed from the child’s, which has led to the attitude that violence, hostility, and neglect toward the care giver are somehow irrelevant in the best interests calculus.

Welfare and best interests requiring a relational, rather than a rights-based, approach was borne out of a rejection of autonomy and individualism. As Becker says:

Patriarchy values power, control, autonomy, independence, toughness, invulnerability, strength, aggressiveness, rationality, detachment (being

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697 Herring, above note 696 at 438.
non-emotional), and other traditionally masculine attributes that have proven effective in the battle against other men.

Herring points to the relational approach as rejecting these values. Rather, people are understood as relational, connected and interdependent. They are also worthy of dignity, respect and trust. Thus, the value of the intimacy of the mother-child relationship should not be allowed by the law, through application of the welfare and best interests principle, to be diminished or put at risk by an approach based in seeking to protect the rights or interests of just one party. This is because, as Herring says:

… people do not understand their personal lives as involving clashes of individual rights or interests, but rather as a working through of relationships. The muddled give and take of everyday caring life, where sacrifices are made and benefits gained without them being totted up on some giant familial star chart, chimes more with everyday life than the image of independent interests and rights.

Notwithstanding, this approach appears to contrast with that of Eekelaar. He sought a welfare decision making structure that would allow children to make decisions for themselves (unless to do so would infringe upon their development) and to:

… bring children to the threshold of adulthood with the maximum opportunities to form and pursue life goals which reflect as closely as possible as autonomous choice.

However, as Herring says, while autonomy itself may be good, what really needs to be exercised is good autonomy. Further, this represents only one of a number of values we may consider our children should have in determining what their welfare and best interests might look like. Other values might include such things as the ability to form and maintain relationships, to be kind, to have a sense of obligation, to be altruistic and to have a sense of respect for others.

The significance of identity is also important. Provision to a child of his or her identity is one of the desirable welfare and best interests norms found in section 5(f) of New Zealand’s

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700 Jonathan Herring “Forging a Relational Approach: Best Interests or Human Rights?” Medical Law International 2013 at 32-54 (Sage Publications).
701 See comments in Chapter One with respect to work by Waldron, Eekelaar, and Henaghan in relation to these values.
702 Herring, above note 700 at 35.
704 Eekelaar, above note 703 at 48.
Yet character and identity is formed and anchored by our relationships with others, and the nature of the self can only be properly understood in terms of relationships. The mother-child relationship must be regarded of particular importance, given its foundational primacy. Frazer and Lacey go on to say that:

… the notion of the relational self, in contrast to both atomistic and intersubjective selves, nicely captures our empirical and logical interdependence and the centrality to our identity of our relations with others … whilst retaining an idea of human uniqueness and discreteness as central to our sense of selves.

Therefore, to interpret section 4(1) of COCA in an atomistic way with respect to the child is contrary to these tenets, and diminishes the unique value of motherhood. Herring challenges the law to see as a central part of its mission the task of it instilling values, citizenship and a sense of responsibility in children. He sees there as being nothing in the welfare and best interest principle that would stop a court from doing that and indeed he suggests, to the opposite, it requires it. That suggests that separated parenting arrangements should be viewed through the lens of relationship and not through the lens of rights. For young children, this may require according a greater recognition and protection of the mother-child relationship, which has arguably been compromised by the fathers’ drive for equal parenting rights. The identity of each of the mother and of the father are important, not only as to their different biology, but also in their different roles and relationships with the child.

There also remains an important distinction between the ethic of care and the ethic of justice. Held describes the difference in the following terms:

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705 5 Principles relating to child's welfare and best interests:
The principles relating to a child's welfare and best interests are that—
(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.


707 Herring above note 696 at 492.

708 See Chapters Seven and Eleven for discussion of shared parenting, the risk of commodification of the mother's breast within separated parenting orders and the notion that motherhood may have already been silenced or diminished through the impact of the fathers’ rights movement and the existence of s 4(3) of the Care of Children Act 2005 (requiring gender neutrality with respect to application of the welfare and best interests principle).

709 See Chapter Five with respect to the relevance of identity theory.

710 Carol Gilligan is referred to by Herring as “the grandmother of care ethics”. Her work is found in Carol Gilligan In a Different Voice (Cambridge, UK: Harvard University Press, 1982).

An ethic of justice focuses on questions of fairness, equality, individual rights, abstract principles, and the consistent application of them. An ethic of care focuses on attentiveness, trust, responsiveness to need, narrative nuance, and cultivating caring relations. Whereas an ethic of justice seeks a fair solution between competing individual interests and rights, an ethic of care sees the interest of carers and cared-for as importantly intertwined rather than as simply competing. …

There can be care without justice. There has historically been little justice in the family, but care and life have gone on without it. There can be no justice without care, however, for without care no child would survive…

Gilligan’s original thesis, published in her 1982 work, is that there are masculine and feminine ways of moral reasoning, which supports the uniqueness of each of motherhood and fatherhood. The differences and tensions around this were debated during the 1980s and 1990s. Smart acknowledged all the valid criticisms of Gilligan’s work, but nonetheless she confirms its continuing, evident reality in everyday life. She describes Gilligan as having triggered a revitalisation of feminist moral philosophy. Smart argued that while she did not consider there was either a feminine or female way of reasoning, our cultural constructions had lead men and women to experience different conditions of existence. This resulted in differences of form and articulation of their consciousness in different ways, as well as prioritising different issues. She describes this as close to Tronto’s formulation of different modes of moral reasoning, with that articulated by women as derived from a position of subordination (and which would be similarly found in other areas of subordination such as class, race, religion, disability and the like).

Indeed, while Smart did not set out to prove the value of this dualist typology in understanding social and gender issues, she nonetheless found that during her research this was confirmed. She describes hearing, broadly, mothers talking in the framework of an ethic of care and fathers speaking in terms of an ethic of justice. She reported that mothers wished to retain connectedness, expressed worries and hurt, their desires to keep their children in contact with their fathers and their views about what was damaging to their children. Fathers talked about their anger with the law for failing to respect their rights, their need to fight the system and generally framing their views in terms

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714 J. Tronto “Beyond Gender Difference to a Theory of Care” in Larrabee (ed) above note 691 at 240-257.
of objective fairness, equality, due process and rights. Smart counselled caution in seeking to operate in terms of Gilligan’s simple binary model, as fathers also talked about caring and mothers also talked about rights. This is where she found Tronto’s work useful. Her ethic of care identified two modes of caring, one ‘caring about’ and the other ‘caring for’. In orthodox moral theory, while caring is a recognised moral position, some forms of caring are excluded from this recognition because they are seen as instinctual behaviour and not an ethical act in the sense of choice or action. Thus, when mothers ‘care for’ their child, it is assumed this is instinctive behaviour and therefore not an ethical act. By contrast, fathers who ‘care about’ are regarded as good moral actors and deserving of recognition. This has played out in the Family Courts in New Zealand, Australia and England and Wales in the last forty to fifty years such that, arguably, the role of the mother became devalued in the ‘trumping’ of rights and the ‘caring about’ by the father. The voice of the mother may therefore have been diminished as a result.

6.3 The problem with rights-based approaches to the welfare principle

A recognition of rights should ensure that every person has their fundamental interests treated fairly. Michael Freeman says, in writing about children’s rights:

… To accord rights is to respect dignity; to deny rights is to cast doubt on humanity and on integrity. Rights affirm the Kantian principle that we are ends in ourselves and not means to others’ ends. It is therefore important that, as Ronald Dworkin so eloquently reminded us, we see rights as ‘trumps’. They cannot be knocked off their pedestal because it would be better for others, or even society as a whole, were these rights not to exist. Of course for the powerful – and for children, adults are always powerful – rights are an inconvenience. The powerful would find it easier if those below them lacked rights.

Feminist commentators have argued that a rights based approach to welfare means that because rights are of the most benefit to those who have the power to assert them, they can in

715 Carol Smart “Losing the Struggle for Another Voice”, above note 713 at 176.
practice work against the interests of women and children, and therefore the mother-child relationship. This is consistent with dominant feminist theory.717 As Lacey says:718

… Rights may operate, in Dworkin’s memorable phrase, as trumps: but trumps are of little use if there are many trumps in the pack. And this multiplicity of rights brings with it a reliance on a coercive framework of enforcement which, as Carol Smart has argued, inevitably depends on violence of legal power: rights are a creature of the state and hence a function of existing configurations of power. This means, it is argued, that they are of limited use to the politically marginalised or for the construction of claims oppositional to prevailing power relations.

These arguments are relevant in assisting to discern why the voice of motherhood may have become muted within contemporary New Zealand Family Court considerations, particularly with respect to decisions with respect to father contact, shared care and relocation. Herring sees that claims of rights talk promote an individualistic conception of people. He describes the central rights of autonomy and privacy as “designed to preserve the rugged individual, free from the ties that bind.”719 As the image that is being promoted by rights, it is the opposite to that of a relational person. Yet he considers that inherent in the welfare principle is the intimate relationship, based in the relational person. Central to this must be the mother-child relationship. Yet it appears to be at risk by the law’s application of the welfare principle. This is because of the tension between rights and relationship with respect to the application of the welfare principle. The irony is that the development of the welfare principle in the first place was as a measure to protect the mother-child relationship.720

Herring further describes how rights work against a relational perspective.721 He sees firstly that a rights focus tends to operate at a particular point in time, whereas a decision that interferes with an individual right and may therefore appear unjustified, may appear more justified if considered within the context of a wholistic relationship. Secondly, he describes how a rights-based approach in identifying each party’s rights and points of view tends to assume that each interest can be isolated, whereas a relational perspective would see each

717 See a discussion of the theoretical framework of the dominance feminist theory in Chapter Five.
719 Herring, above note 700 at 47.
720 See Chapter Two with respect to the discussion of the history and development of the welfare principle in the UK; see also Chapter Six with respect to the discussion of the legal transplant of the welfare principle form the UK to New Zealand, and the shift in foundation from fairness to equality.
721 Herring above note 700 at 47-48.
party’s rights and interests as intermingled. He sees the individualised focus of rights as causing the failure of a rights-based approach to appreciate the systemic disadvantages caused to groups and collective interests. This would include the rights, interests and value of mothers generally, as opposed to “this particular mother”, and may explain why fathers’ rights understood as a collective interest were rebadged as a child’s welfare and best interests issue to gain traction by fathers’ interest groups. Herring challenges the assumption that the rights and individual interests of each party can be isolated. He suggests that a relational perspective means that each person’s rights and interests are intermingled and it is oversimplified to suggest otherwise. Thirdly, he sees that ‘rights talk’ means that “real experiences” are converted into “empty abstractions.” Carol Smart describes this process in the following way:

... the rights approach takes and translates personal and private matters into legal language. In so doing, it reformulates them into issues relevant to law rather than to the lives of ordinary people.

Jennifer Nedelsky also confirms the difficulty for mothers being created by the law:

... the selves to be protected by rights are seen as essentially separate and not creatures whose interests, needs and capacities are mutually constitutive. Thus, for example, one of the reasons women have always fit so poorly into the framework of liberal theory is that it becomes obviously awkward to think of women’s relation to their children as essentially one of competing interests to be mediated by rights.

Tapp and Taylor suggest that the application of the welfare principle within New Zealand’s relocation context should be in a manner consistent with Herring’s relational perspective. They suggest shifting the focus to one where information and resources are being constructively provided to the parents, re-empowering them to make parenting decisions that recognise all the factors involved, both short- and long-term. The adult interests would also be openly acknowledged, with a transparent balancing of all the relevant issues. This is a

723 S 4(1) of the Care of Children Amendment Act 2013 refers to “The welfare and best interests of a child in his or her particular circumstances” as being the first and paramount consideration.
724 See Pauline Tapp and Nicola Taylor “Relocation: a Problem or a Dilemma?”, above note 359 101.
725 Herring, above note 700 at 47.
726 Herring, above note 700 at 47-48.
727 Nedelsky, above note 722 at 145; see also Herring, above note 700 at 47.
728 Tapp and Taylor above note 359.
move away from the Court making “sub silencio decisions by ‘re-badging’ adult interests as an interest related to the child’s welfare.”

It is also a move away from the Court treating the child as an isolated, rights-bearing individual rather than a relational member of a family household.

The final concern expressed by Herring about a rights-based approach to welfare is that it downplays responsibility, failing to place value on issues such as altruism, commitment and obligation. The essence of motherhood is that it is a relational obligation, which, by its nature, compels sacrifice and a foregoing of rights. While rights can impose an obligation to respect the rights of others, it does not capture the nature of the rights found within the sort of caring relationship described here. They are rights that are “other-focused,” where obligation, commitment and love are at play. An application of a rights-based perspective to the welfare principle should not take advantage of a mother’s propensity to sacrifice and forego her individual rights. Arguably, it should be protective of her capacity to do so.

The problems with a rights-based approach to the welfare principle, and the risks that this presents to the diminishment and compromise of motherhood as an outcome, have been described. However, rights may still have a place within a relational conception of the welfare principle. For example, they might be used as effective protection from abuse within the parenting relationship. They could also be the framework for safe relationships to develop. Minnow and Shanley suggest that a relational concept of rights could embrace the person as both individual and as situated within a context of relationships of care, attachment and interdependency. The family would also be understood as determined by the individuals it comprises, but also as a unit that exists according to social, historical and political contexts. The child could then be understood as not only an individual with rights, but also as dependant on the love and care of others including that bestowed by the mother, as well as the father.

729 Tapp and Taylor, above note 359 at 96.
731 The idea of relationship and identity only being able to exist in relation to the other is explored by Miroslav Volf in Exclusion & Embrace: A Theological Exploration of Identity, Otherness, and Reconciliation (Abingdon Press: Nashville, 1996).
732 Martha Minnow and Mary Lyndon Shanley “Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law” Hypatia 11 (1996) 4-20 at 16, and as discussed by Herring, above note 700 at 48.
Family law cases often involve clashes between the competing rights of children and adults. For example, in relocation cases the right of the mother to have the freedom of movement to return home to the emotional care and support of her family, or to take up an employment opportunity elsewhere to better her career and income prospects, may compete with a shared care arrangement with the father already in place. The European Court of Human Rights and the Courts of England and Wales are developing jurisprudence around this issue in both family and medical law cases. Choudry and Fenwick suggest ‘paramount’ could be interpreted as ‘primary’ and that it is time to accept the adoption of a new model of judicial reasoning in the context of disputes over children, that of the ‘parallel analysis’ or ‘ultimate balancing act’. Herring and Taylor suggest a principled balancing of rights could be achieved by focusing on the values that underlie each right. If cases involve people in intimate caring relationships and those relationships are regarded as the key value, then it can be argued “that the value of relational promotion should be one of the central values.” This would introduce a relational perspective into a rights-based approach as central to determining situations where rights of participating individuals clash. An application of this to the mother-child relationship (and the father-child relationship) within a welfare and best interests assessment should therefore require focus on the offerings of each to a child, such that differences as well as similarities within an ‘equality of value’ rather than an ‘equality as same’ equation is considered. A recognition of the father-child relationship should therefore not have to cause a compromise to the mother-child relationship.

6.4 Rethinking contemporary understandings of the welfare principle

Herring supports the notion of vulnerability as the start point for a different approach to an understanding and application of the welfare principle. This is also discussed by

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733 See D v S (CA No 1) [2002] NZFLR 116 which referred to seven points, the first of which was that the welfare of the child, while the paramount consideration, it was not the only consideration. One of the other points referred to the value of the right to freedom of movement. This specific reference to the value of freedom of movement should be given appropriate meaning, but within the context of the paramountcy of the welfare principle.


It would start with an acknowledgement of the vulnerability of everyone involved, and because all personal and social lives are thus marked and shaped by vulnerability, “a vulnerability analysis must have both individual and institutional components.” Dodds suggests that:

It may be easier to recognise the social value of provision of care if it is viewed as something on which we all have been dependent at different points in our lives, rather than altruistic behaviour extended to those who lack ‘full personhood’.

This reintroduction of relational values into the welfare principle could thereby restrain the notion that the principle is now based in “an individualistic conception of personhood” with people, including children, being separate and independent from each other.

6.5 New Zealand’s expansion of the welfare principle to include best interests

With the passage of COCA, New Zealand expanded the welfare principle to additionally include a child’s best interests. The terms do not mean the same thing, as discussed by Judge O’Dwyer, who said:

The addition of the term ‘best interests’ in s4 of COCA underlines that a decision must focus not only on the immediate day to day welfare of a child such as care and nurture, but also the long term interests of ideally maintaining relationships with both parents. It had become common under the Guardianship Act for ‘best interests’ to be considered alongside ‘welfare’ although that Act only used the term ‘welfare’. The inclusion of ‘best interests’ in the new legislation highlights the importance of the Court looking at the longer term developmental, educational, cultural and familial needs of a child.

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737 Martha Albertson Fineman and Anna Grear (eds) Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (Ashgate, 2014); see also Martha Albertson Fineman The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies (Routledge, 1995).
739 P. Blaikie, T. Cannon, I. Davis, and B. Wisner At Risk: Natural Hazards, People’s Vulnerability, and Disasters (Abingdon, UK: Routledge); see also Herring, above note 700 at 52 and his discussion of the care and needs of vulnerable adults and those who lack capacity within medical law.
740 Fineman, above note 737.
741 Dodds, above note 738 at 507.
742 Herring above note 700 at 53.
744 C v W [Custody] [2005] NZFLR 953 at [24].
The inclusion of ‘best interests’ alongside ‘welfare’ was intended to make application of the paramountcy of the welfare principle more extensive. However, such inclusion did little to address the law’s shift towards a rights-based, gender-neutral approach to its application of such principle. It also did little to address gendered parenting responses to the perceived care needs of a child.

Summary

The law’s emphasis on autonomy and rights appears to devalue the care which is central to human thriving. This care particularly includes that of a mother towards her child. Thus, consideration of a move by the law towards recognising again the relational values that underpin the welfare principle, even within a rights-based approach to welfare, may be a worthy goal and redemptive of the unique place of motherhood within family law.

Without this recognition, motherhood within contemporary family law has been, arguably, further compromised by being framed as negatively ‘gatekeeping’ the development of a father’s relationship with the child, an issue that is discussed further. The theoretical foundations considered earlier also provide, in part, an explanatory basis for the challenges to motherhood with respect to the rise of contemporary shared care separated parenting, which is explored in the following chapter.

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745 See commentary to the Care of Children Act Bill [http://www.parliament.nz/resource/en-nz/00DBHOH_BILL5507_1/83fe1265ee105cc8d3ea3887958107389747c8c2](http://www.parliament.nz/resource/en-nz/00DBHOH_BILL5507_1/83fe1265ee105cc8d3ea3887958107389747c8c2) with respect to inclusion of reference to children’s rights; searched 4 May 2015.

746 See Chapter Nine.

747 See Chapter Five.
Chapter Seven

Shared Care Parenting

Introduction

The development of gender-neutral post-separation shared care parenting arrangements (‘shared care’) within the Family Court in New Zealand, and in other jurisdictions, has increased in legal application in recent years. Also known as ‘shared-time parenting’, ‘joint physical custody’ or ‘dual residence’, it describes a new family form following separation or divorce (in New Zealand, known as dissolution of marriage) where children spend 30 to 65 per cent of their time with each parent.\(^{748}\) Shared care has, however, created tension with the expectations and experiences of mothers, who may disagree that such an arrangement is in the best interests of their young children. This is because shared care may not reflect the reality of the gendered nature of caring for children, that is, the differences between mothering and fathering, nor the work being undertaken by mothers within the home carried out on a disproportionately greater basis than by fathers.\(^{749}\) Boyd discusses shared care as constraining maternal autonomy, yet the value of the caregiving that mothers provide is to enable children to become autonomous persons, something that she sees as a deep irony and compromising of motherhood.\(^{750}\) The way fathers care about their children was also identified by Smart as distinguishable from the way mothers care for their children.\(^{751}\) The new moral imperative seems to require mothers to maintain the presence of the father in the lives of their children and to ensure that their children receive quality fathering, in addition to caring for, protecting and putting their children’s needs first. Decisions by mothers to re-partner or move away, that is, to relocate, thereby creating a tension with sharing the child’s

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\(^{748}\) B M Smyth, J E McIntosh, R E Emery and S L Higgs Haworth “Shared-time parenting: Evaluating the evidence of risks and benefits to children”, Chapter 6 in L Dozd, M Saini and N Olesen (eds) Parenting Plan Evaluations: Applied Research for the Family Court (NY: Oxford, in press). Smyth et al. reviewed 17 quantitative studies between 2000 and 2014 with respect to shared-time children’s outcomes relative to children in other post-separation arrangement and identified that only about one-third of the studies used a 50:50 split of time to “operationalise” shared-time parenting, with the remaining studies using some other threshold between 30 and 65 per cent. They pointed out that such different understandings reduces reliability and comparability.

\(^{749}\) See Chapter Four.


\(^{751}\) Carol Smart “Losing the Struggle for Another Voice: The Case of Family Law” above note 713.
care with their natural father, are then construed as morally questionable. This chapter thus examines the rise of the phenomenon of shared care within contemporary family law. Its politicisation, the challenges faced by the social sciences in researching shared care, and the implications for motherhood and the law are also discussed.

7.1 The development of shared care in contemporary family law

The potential for problems in founding separated parenting arrangements upon gender-neutrality was identified in the 1990s in England by Carol Smart. In 1995, she published her findings that fathers tended to speak of caring about their children, that is, feelings of care. Mothers, on the other hand, emphasised caring for their children, that is, the everyday physical and emotional input associated with care. Smart noted that these separate foci each received a different reception: “the caring about” of fathers was lauded by the courts while mothers who focused on “the caring for” were “ignored or denigrated.” The work and sacrifice of mothers was “seen as being as normal as breathing and thus as worthy of as much acknowledgment as such taken for granted activities usually generate. But when fathers articulated their care about their children … their utterances seemed to reverberate around the courts with a deafening significance.” On the other hand, the significance of fathers’ relationships with, and care of, their children is an increasingly relevant and important issue. The tension between motherhood and fatherhood in relationship with each other within the separated parenting arena has therefore intensified, as the boundaries and roles between them have been challenged and shifted.

Doucet, in Do Men Mother?, discusses where gender similarities are in evidence, where gender differences ignite and where gender is muted in the parenting context. She suggests the problem may be in the question itself, and writes that “women are judged when they care too little. Men are judged when they care too much.” She links this to the moral responsibility of motherhood identified by Martha McMahon, who said:

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753 Carol Smart “Losing the Case for Another Voice: The Case of Family Law” above note 713.
754 Smart, above note 713, at 177.
755 Smart, above note 713, at 173.
756 Andrea Doucet, above note 10.
757 Andrea Doucet “Between Two F- words: Fathering and Feminism” http://www.huffingtonpost.com/andrea-doucet/feminism-fathering_b_840421.html searched 13 June 2013; see also Andrea Doucet Do Men Mother? above note 10, where at 210, she discusses the concept of borderwork between mothering and fathering such that fathers taking on the day-to-day care of children are reconfiguring fathering and masculinity. While further
What I didn’t know, and still find difficult to put into words, is how becoming a mother can provide some women with symbolic and relational opportunities for human experiences, that, when experienced by men have been called heroic: that is, transformative of self and potentially redemptive.

Either way, there was potential for difficulty in developing legally-oriented regimes of care by separated parents based on gender-neutrality where the focus was on equality of treatment of mothers and fathers.

The expansion of shared care did not sufficiently take into account the impact on young children of living in two homes rather than being based in one, nor the impact of conflicting feminist theories upon which such developments were founded. There is much literature on the resilience of children, but each child is different and it is understood that young children, in particular, need the opportunity to develop at least one secure attachment very early if there are to be positive long-term outcomes for them as socially functioning adults. There were no clear guidelines about when, from a developmental point of view,

discussion is beyond the scope of this thesis, ‘mothering’, the work of motherhood, could arguably have meaning ascribed to it as the simple provision of love and comforting nurture, something a father or any combination of parenting figures could therefore provide (for example, the ‘mothering’ provided by a sibling or two gay men towards the children they may be raising together). Nonetheless, ‘mothering’ as well as ‘motherhood’ retains the sense of being essentially female, just as ‘fathering’ as well as ‘fatherhood’ retains the sense of being essentially male.

Martha McMahon Engendering Motherhood: Identity and Self Transformation in Women’s Lives (New York Press, 1995) at 265. Doucet, above note 10, identifies in McMahon’s work the argument that motherhood can be seen in terms of moral transformation and reform. This is a redemptive view of the role and value of motherhood in relation to children, fathering and indeed the whole of society, which is discussed further in the conclusions contained in Chapter Twelve.


The work of John Bowlby and Mary Ainsworth has been revisited by a number of current commentators. Jennifer McIntosh says that attachment in the first two years of life is different to the third and fourth years and to stress the attachment in the first two years has a more far reaching negative impact, but children remain sensitive to attachment distress throughout childhood. She points to overnight caregiving as not essential for attachment formation with second or subsequent attachment figures, and that frequent shifts in care and location disorient a young child requiring adaptation for which they are not yet equipped. She further confirms infants do not have a gender bias but need responsive, attuned, predictable, warm care within one caregiving relationship and then subsequently others. Mother care of infants is not just sociologically informed; current neuroscience points to the female brain being specifically equipped for the largely nonverbal, affiliative, nurturant aspects of attachment formation with an infant. See Jennifer McIntosh “Guest Editor’s Introduction to Special Issue on Attachment Theory, Separation and Divorce: Forging coherent understandings for Family Law” et al in July 2011 edition of the Family Court Review, other contributors including Main, Hesse, Isaacs, Marvin, Waters, Sroufe, Schore and Seigel, Lieberman and Zeanah, George and Solomon, Bretherton, Crowell, Seligman.
such an arrangement should desirably start and where the bar lay with respect to “low level conflict” to enable shared care to be mandated in the first place. The social sciences were conflicted, the issue of overnights for young children away from their primary attachment figure having been hotly contested among developmental psychologists and the international family justice sector for the last decade. Had Bowlby’s theory about the need for a baby to develop a strong single attachment from birth, generally with the mother, to enable further healthy attachments to develop been debunked, or did it still have currency? Did Michael Lamb’s view that children form multiple attachments from the outset, that is, with both parents at the same time carry more weight, the corollary being that the development of the two home shared care model should not be compromised by disaffected mothers? Why did Judith Wallerstein and Joan Kelly ultimately hold apparently incompatible views when their original and important work had been undertaken jointly? Would it have assisted if there had been a greater awareness and understanding of the different underlying feminist theories that were at play: one seeking equality of treatment requiring a denial of gender difference, Michael Lamb counterclaimed that infants form attachments to fathers and mothers at the same time, rather than sequentially and challenged the methodologies employed in the FCR July 2011 issue, highlighting how hotly contested is the issue within social science circles. Michael Lamb “A Wasted Opportunity to Engage With the Literature on the Implications of Attachment Research for Family Court Professionals” Family Court Review vol 50 July 2012 481-485. With respect to the impact upon the issue of shared care Liz Trinder points to its introduction largely having run ahead of empirical research and while clear messages are emerging from current research largely reaffirming older studies, challenges remain. Liz Trinder “Shared residence: A review of recent research evidence” Child and Family Law Quarterly (2010) vol 22 no 4 475-498.

L v A above note 39. At the time of the hearing, week about shared care had been in place for sixteen weeks notwithstanding continuing and unresolved conflict between the parents, described as “continuing conflict, a low level of communication and a low level of ability to communicate with the other partner.” Justice Baragwanath said: “I have declined to accept the argument of law that continuing low level conflict is itself a barrier to such an order as that made by the Judge.”

Kelly and Lamb emphasised the importance of overnights to establish/maintain meaningful relationships between an infant and the other parent (usually the father); other researchers citing Solomon and George point to disproportionately high rates of insecure attachments between infant and mother where the father had one overnight per week. See Liz Trinder above note 762.


Michael E Lamb “A Wasted Opportunity to Engage with the Literature on the Implications of Attachment Research for Family Court Professionals” Family Court Review July 2012 481-485 where he discusses the empirical research of the 1970s displacing Bowlby’s view of monotrophy.


the other seeking equality of outcome through recognition of difference, and both based in a power imbalance?

### 7.1.1 The Demographic Data

Shared care has, nonetheless, increased in popularity in recent years in a number of jurisdictions. In 2009, shared care was estimated in the UK to represent 12 per cent of separated care arrangements with about 3 per cent of parents saying they share care equally,769 and in Australia at that time, this was understood to be 16 per cent.770 Wisconsin, US, increased from 2 per cent in 1981 to 32 per cent in 2001.771 Sweden, in 2009, reported shared care (defined there as a 50:50 division of time) as being 28 per cent of care arrangements, while Norway reported an increase from 4 per cent in 1996 to 10 per cent in 2004.772 Smyth, McIntosh, Emery and Higgs Haworth point to shared care being approximately 20 per cent in the US (the estimate now being as high as 45 per cent in some states), with estimates ranging between 11 per cent and 22 per cent in Australia, Canada, Denmark, Norway, the Netherlands and the UK.773

Taylor and Freeman note the research limitations with respect to shared care including the use of small samples, the difficulty in statistically identifying mutually agreed shared care arrangements, (that is, without Family Court intervention), and variations both within and between jurisdictions as to what actually constitutes shared care.774 Nonetheless, they confirm its increasing use and implementation in recent years.775 Accordingly, the clean break principle that dominated family law policy appears to be a thing of the past.776

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769 V Peacey and J Hunt “I’m not saying it was easy ... Contact Problems in Separated Families” (2009) England: Ginger Bread and Nuffield Foundation.
773 Smyth et al., above note 748.
775 Taylor and Freeman; Taylor, above note 774.
776 S Boyd Child Custody, Law and Women’s Work (Oxford University Press, 2003); see also Theresa Glennon “Still Partners? Examining the Consequences of Post-Dissolution Parenting” (2007) 14 Family Law Quarterly 105; Belinda Fehlberg also discusses the link between shared finances and shared parenting, pointing Australian research suggesting that negotiation and trade-offs between children, money and property occur across the board: B Fehlberg, C Millward and M campo “Post-Separation Parenting Arrangements, child support and
7.1.2 Measuring the effectiveness of shared care

Trinder, in reviewing the research available until 2010, reports the position in England with respect to the development of shared care as being similar to that in Australia, that is, shared care can be positive where parents are able to cooperate and arrangements are centred around children’s needs. However, in the higher conflict cases, typically the result of litigation, shared care may be associated with negative outcomes for children, and also for mothers. The statistical evidence available from Australia suggested that, at 34 per cent, shared care orders being made by the Family Court was two or three times higher than that type of care arrangement found in the wider community. Trinder’s caution, echoed by Taylor in New Zealand, is that litigated cases resulting in shared care have run ahead of empirical research as to the advantages and disadvantages for children, the reforms having been introduced in response to pressure from fathers’ groups. Trinder also notes that fathers with shared care are consistently more positive about the care arrangements, even in high conflict situations, than fathers with primary care or with mothers in either care arrangement. Further, that where there was little or no conflict, mothers were also positive about either primary or shared care, but where conflict existed 57 per cent of mothers in shared care arrangements were reported as not being satisfied with it.

The work in Australia by McIntosh and others, with respect to the impact on children under four years of age of spending nights away from their primary carer, tended to confirm the validity of the concerns expressed by mothers. A four year longitudinal study by McIntosh et al. explores the different pathways into shared care. The cooperative group, more likely to have higher education and income and more involved fathers prior to separation, sustained positive relationships and continued to share care over time. The rigid care group

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778 Trinder above note 777 at 475; Taylor and Freeman, above note 774.


780 See also Jennifer E McIntosh “Guest Editor’s Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law” Family Court Review Vol 49 July 2011, 418-425.
continued with a shared care pattern of a fixed division of time with minimal flexibility, and was characterised by repeat litigation and conflict, mothers feeling threatened, lower levels of cooperation, and low regard by fathers for mothers’ parenting skills. The “formerly shared care” group was characterised by dissatisfaction by both parents and children, was often the outcome of a mediation where no shared care had previously been in place and resulted in a reversion to primary care, usually by the mother.\(^\text{781}\) The study also examined the effects of shared care on under-two-year-olds and on under-four-year-olds, concluding that in infants under two, overnight care with the non-resident parent (usually the father) once or more a week was associated with high irritability and more vigilant efforts by the infant to watch and stay near the resident parent (usually the mother). In children aged two to three, shared care at five or more nights per fortnight was associated with lower levels of persistence, that is, playing continuously, staying with tasks, practicing new skills, coping with interruption, and greater levels of more problematic behaviour such as crying or hanging on to the caregiving parent, high anxiety, being frequently upset, eating disturbances and aggressive behaviour.

The conclusions were that rigid, conflicted parenting arrangements, often imposed by court order, appeared to be associated with higher depressive and anxiety symptoms in children. Rather than the focus being simply on the provision of a shared care relationship as being in their best interests, for young children at least, their needs were found to be best met by two factors. One was a conflict-free parenting relationship; the other was warm, emotionally attuned, relational parenting.\(^\text{782}\)

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Cashmore and Parkinson\textsuperscript{783} endorsed the McIntosh\textsuperscript{784} findings that two-to-three-year-old children with conflicted parents do less well when each parent has the care of the child for at least five nights a fortnight. They also confirmed that what is now known about young children’s attachments and sense of time means that a primary residence with one parent, regular contact with the other parent and limited periods of separation from both parents may be better for young children and especially those under four years of age.

The development of shared care in Australia since its 2006 legislative reforms has been thoroughly reviewed by a number of researchers and legal commentators including Kaspiew, Gray and others,\textsuperscript{785} McIntosh, Smyth and others,\textsuperscript{786} Cashmore, Parkinson and others\textsuperscript{787} and Fehlberg, Smyth and others.\textsuperscript{788} Taylor and Freeman\textsuperscript{789} have also reviewed the available research across jurisdictions, and counsel caution when a decision is contemplated to split a child’s time approximately equally. They consider that such a decision needs to be carefully made and skilfully implemented to ensure it does not disregard the child’s need for secure attachments, nor creates psychological strain on the child. Otherwise, it may be a decision that best suits the rights of one or both parents, rather than the child.

7.1.3 The place of the social sciences in Family Court decision-making

In making decisions about the day-to-day care of children after a parental separation, including shared care, the Courts in a number of jurisdictions had begun increasingly to turn

\textsuperscript{789} Taylor and Freeman, above note 774.
for assistance to the social sciences. This added another layer of complexity to an already fraught area. As a result, the role of the social sciences in Family Court decision making processes also came under scrutiny. Rathus points to the ambiguous relationship between family law decision making and social science research in contemporary Australian family law, from a position of acknowledgement in 1976 to a high point over the next few years after the introduction of the 2006 Australian reforms. The 2007 decision of *Murphy v Murphy* is one example. There, the judge referred to over thirty books, scholarly articles and conference papers about shared care, parenting plans and the use of social science research in the Family Court. Concerns began to arise about the liberal use of social science literature by judges. This was particularly because it is such a contested field, and evolves over time (as does the law). The issue was addressed head-on by Australia’s Full Court in 2012 in the decision of *McGregor v McGregor*, with a rejection of such wholesale judicial use of social science material in a judge’s decision making. The lower court judge had made extensive use of social science material with respect to alienation, also a deeply contested and arguably gendered area of research. In relying on one particular view, the lower court was found to have failed to admit such social science evidence properly, such that there was an inability to “challenge the expertise of the authors … or to call other evidence from experts who might have a different view.” The Honourable Diana Bryant AO, the Chief Justice of the Family Court of Australia commented later in 2012 that “social science research has proved a seductive force in family-law decision-making”, and spoke of the “exquisite dilemma” of judges regarding the use of “extrinsic materials.” These comments and the issues raised by Rathus have relevance to the New Zealand context where contested social science material has also been regularly used within Family Court hearings, such material appearing to be selectively utilised to bolster the position of one parent ahead of the other. Baragwanath J’s decision in *L v A* is one example. Within the judgment can be found acceptance of one expert’s view which prioritised the developing week-about shared care

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791 *Murphy v Murphy* (2007) FamCA 795.
793 Rathus, above note 790 at 82.
794 *McGregor v McGregor*, above note 792 at (117).
795 Chief Justice of the Family Court of Australia the Honourable Diana Bryant AO, Judicial Conference of Australia Colloquium, October 2012; see also Rathus, above note 790 at 69.
796 *L v A*, above note 39; see also the example of Judge Coyle in the series of decisions commencing with *JMC v AJHB* FAM 2008-012-000055, where he relies on social science material to promote continuing contact in a situation of high conflict and against a background of domestic violence. See discussion of these decisions in Chapter Eight.
arrangement by seeking to manage the conflict between the parents, ahead of the views of another expert who was not willing to confirm the appropriateness of developing or continuing shared care where conflict was present in the parenting relationship. At the same time, Joan Kelly’s work gained traction within the New Zealand Family Court. It became known as the 2:2:5:5 “Joan Kelly model” of equal time shared care, its application being seen as an appropriate mechanism to meet the informal presumptive weighting of section 5(b), as it then was, of COCA that had developed. This provision provided that “the child’s relationships with his or her family, family group, whānau, hapū or iwi should be stable and ongoing” but it also provided in parentheses that “(in particular the child should have continuing relationships with both of his or her parents).” The principle, pointing to the desirability of a child having ongoing relationships with both of his or her parents, resulted in an increased emphasis on sharing day-to-day care of the child as the preferred mechanism to achieve that, usually meaning greater care by the father by reducing the care provided by the mother. The “Joan Kelly model,” based on promoting equality between mothers and fathers through an equal division of care time, was seen as providing the means to practically implement and provide for such legal desirability within the care arrangements.

7.1.4 The social sciences debate

The Australian movement was not without its detractors. The significance of attachment theory within separated parenting considerations and a lack of consensus by social scientists as to its meaning and application was reaffirmed by a special issue of the Family Court Review published in July 2011. Jennifer McIntosh was the guest editor. She recorded that all contributors agreed on the essential role of a primary attachment figure in the first year or two of a child’s life, and affirmed Bowlby’s sentiment that “what is sociologically popular and what is developmentally necessary are at loggerheads.” She pointed to agreement being clear, firstly, as to the need for the care arrangements for infants to support the growth and consolidation of the primary attachment while allowing for a growing attachment with

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797 L v A above note 39.

798 Section 5(b) of the Care of Children Act 2004 was amended on 31 March 2014 and became section 5(e) that “a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened.” The 2:2:5:5 shared care model is reflected in one parent undertaking care on Monday and Tuesday nights, the other on Wednesday and Thursday nights, and alternating Friday, Saturday and Sunday nights. This also achieved equal time shared care between the parents over a two week cycle.

799 Family Court Review Vol 49 No 3, July 2011 Special Issue on Attachment Theory, Separation and Divorce: Forging Coherent Understandings for Family Law.

800 Jennifer McIntosh “Guest Editor’s Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law”, above note 780 at 422.
the second parent and, secondly, as to the term “primary” parent not denoting a better parent but primary in the sense of the fundamental aspects of attachment development. She also highlighted neurologists’ research as confirming that attachment drives a child’s brain’s developing capacity to know, express and self-regulate their emotional world, and that such right brain circuitry development takes place in a critical period of formation during a child’s first two years of life. In the third and fourth years she says they understand a child’s full cognitive system as starting to mature. Her conclusions, then, were that to stress a child’s attachment system in the first two years has a greater negative consequence than in the third and fourth years.\textsuperscript{801} Waters, another commentator in this edition, pointed to attachment as continuing throughout childhood, and that “Bowlby … suggested it wrapped up very early – we now know differently.”\textsuperscript{802} He further saw that within the separated parenting context “focusing on time only, you could never guarantee the best attachment experience for a child.”\textsuperscript{803} The commentators in this issue challenged many of the paradigms around which separated shared care parenting had developed and, in particular, the benefits of frequent contact to the development and maintenance of the second attachment relationship for an infant or very young child. They also saw such benefits being outweighed by such stressors as frequent or long-distance travel to achieve such contact, and conflict between the parents. In addition young children are not seen as equipped to be developmentally able to adapt to frequent shifts in care and location, such that they may become disoriented. Seigel saw such extreme solutions to these difficulties, such as month-about shared care, as leaving a child in a perpetual state of loss and such arrangements needing to be discouraged.\textsuperscript{804} McIntosh also described a concurrence of expert views within the publication to the effect that overnight care was not essential to a child’s ability to form a healthy attachment to the second parent (usually the father) and indeed, that repeated overnight stays away from the primary caregiver (usually the mother) in the first year or two of life may disrupt the formation of a secure

\textsuperscript{801} McIntosh, above note 780 at 422-423.
\textsuperscript{802} Family Court Review above note 780, Everett Waters and Jennifer McIntosh “Are We Asking the Right Questions About Attachment” 474-482.
\textsuperscript{803} Everett Waters above note 802.
\textsuperscript{804} Family Court Review above note 799, Allan Schore and Jennifer McIntosh “Family Law and the Neuroscience of Attachment Part I” 501-512; Daniel Siegel and Jennifer McIntosh “Family Law and the Neuroscience of Attachment Part II” 513-520.
attachment with both parents. With respect to the gender of the parent, McIntosh describes the point being consistently made that while an infant does not have a gender bias with respect to attachment formation, there is a bias “for responsive, attuned, predictable, warm care within one consistent caregiving relationship, and then, subsequently with others.”

This was linked to motherhood by the evidence of neuroscience. Schore suggests that “dominant mother-care of infants is not just sociologically informed: in normal development, the female brain is specifically equipped for the largely nonverbal, affiliative, nurturant aspects of attachment formation with an infant.”

The special issue confirmed that attachment theory and research remain applicable to family law and separated parenting considerations, but saw difficulties with the language of attachment. The authors proposed that, instead of the word becoming shorthand for the relational support of a complex range of developments in a child, family law professionals should instead be clear about what they are referring to when using the word “attachment” within the adversarial context of the Family Courtroom. Questions were then raised as to whether the separated parenting arrangements being developed through shared care were promoting or interfering with a child’s optimum psychological and emotional development, with a recommendation that reconsideration and use of attachment theory could provide an appropriate and robust developmental framework for the problematic decision making that marks this area of family law.

There was a sharp response by two US commentators, Michael Lamb and Pamela Ludolph. In separate articles published in the July 2012 edition of the Family Court Review, each sought to diminish the impact of revisiting attachment theory in the terms presented by the earlier edition. Michael Lamb described it as “a wasted opportunity to engage with the literature on the implications of attachment research for Family Court professionals.” He considered the edition had presented a narrow and incomplete view of attachment theory, and

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806 McIntosh, Family Court Review above note 780 at 424.

807 Schore above note 804; see McIntosh above note 780 at 424.

808 McIntosh, Family Court Review above note 780 at 425.

809 McIntosh, Family Court Review above note 780 at 425.

saw it as a platform for opinion rather than critical examination of the existing literature. This included his own work around multiple attachments, that is, that infants form attachments to fathers and mothers at the same time, rather than sequentially. He further considered Bowlby’s “monotrophy”, that is, that infants form an initial or primary attachment to the mother or mother-figure, before forming subsequent attachments with others, as being without supporting empirical evidence and out-dated.

Ludolph acknowledged that the “central idea of attachment theory, that early sensitive care is of great importance to children” was well supported and of interest for its implications for children upon divorce. She then said she had little to say about the papers contained within the edition, apart from commenting that “while the summary states briefly that the primary caregiver need not be the mother, the interviewees tended to talk about mothers as the primary caregivers and the fathers as the visiting parents.” Her focus was on the methodology and format of the publication, and she concluded that the tone of the publication suggested a certainty that, in her view, the literature did not warrant, and “safer by far, and truer to the state of the literature, is a caveat that individual children require individual decision making, whether by their parents or by the courts.”

McIntosh was provided with a right of reply. She reiterated that the special edition had focused on attachment as understood in the Bowlby tradition, and drew a distinction between the specific mechanisms of attachment-based interaction and the broader concept of attachment referring generally to parent-child relationships. She pointed again to the need for clarity around what professionals were now meaning when they used the term attachment within separated parenting considerations. She also highlighted the problem of polarisation that was evident around the issue, identifying an attempt through the responses to frame the edition’s work with respect to attachment theory as portraying “anti-father sentiments.”

McIntosh also pointed to claims by Lamb that the 2010 study by McIntosh, Smyth, Wells and

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811 Lamb referred to a forthcoming work with Charlie Lewis as reviewing all the relevant research, much of which he says was published in the 1970s, to confirm this position.
812 Lamb, above note 810 at 482.
814 Ludolph, above note 813 at 486.
815 Ludolph, above note 813 at 493; in her article, Ludolph acknowledges encouragement from such other social science researchers and practitioners as Bud Dale, Bill Austin, Judy Cashmore, Leslie Drozd, Robert Emery, Joan Kelly, Michael Lamb, Patrick Parkinson and Richard Warshak.
817 McIntosh, above note 816 at 499.
Kelaher\textsuperscript{818} was conducted with a small sample of parents “who had resorted to litigation”, as being inaccurate. She described general population data as having been used, one study comprising 5000 infants and the other 5000 young children between four and five years of age. In addition, she corrected Lamb’s suggestion that the data was from “the uncorroborated reports of parents (mothers) who opposed overnight arrangements”.\textsuperscript{819} Rather, she indicated that the data was from multiple informants wherever possible.

This social science polarisation was followed by the 2014 publication by Richard Warshak of a “consensus report”, which pointed to the value of shared overnight care between separated parents of infant and young children as protective of the father-child relationship, and that depriving young children of overnights with their fathers could compromise the quality of the developing father-child relationship.\textsuperscript{820} Warshak says that the research does not support an assumption that “parents of infants and toddlers can be rank ordered as primary or secondary in their importance to the children, and that mothers are more likely to be the ‘psychological parent’.”\textsuperscript{821}

The intensity of the debate was also evident in the 2011 edition of the Australian Journal of Family Law, which contained articles by Patrick Parkinson and Judy Cashmore on the one hand, and Jennifer McIntosh, Bruce Smyth and colleagues on the other, about the findings and meaning of the Australian research with respect to shared care separated parenting and the care of infants and young children.\textsuperscript{822} The tensions also spilled over into mainstream media, particularly in Australia, essentially seeking to reject the caution espoused by


\textsuperscript{819} McIntosh, above note 816 at 500.

\textsuperscript{820} Richard Warshak “Social Science and Parenting Plans for Young Children: A Consensus Report” 2014 \textit{Psychology, Public Policy and Law}, Vol 20 No 1, 46-67. The report was recorded as having been read and endorsed by 110 researchers and practitioners who provided comments and offered revisions, “although they might not agree with every detail of the literature review”, at 46.

\textsuperscript{821} Warshak, above note 820 at 48.

McIntosh with respect to the introduction of overnight care of infants away from a primary carer (such overnights usually with the father away from the mother).\textsuperscript{823}

In summary, over this period, the conflict between social science views was pronounced. The work of Jennifer McIntosh and others in Australia appeared to identify differences between parenting gender, while continuing to support the equality of value of each parent developing a relationship with the child within a separated parenting regime. However, McIntosh’s work with respect to protecting the primary attachment (usually the mother) for under-four-year-olds and challenging an automatic introduction of overnight care with the other parent based in the shared care model, was not well received. By the time of the Family Court Review’s July 2011 Special Issue on attachment, Lamb in response was pointing to the Hippocratic dictum “do no harm” and criticised the use of “simplistic” rules of thumb “that ignore both the complexity of specific family circumstances and the nature of children’s relationships to both of their parents, as well as the large and growing body of literature on attachment”.\textsuperscript{824} His view was that while they may once have been helpful, they now “should be consigned to the past.”\textsuperscript{825}

In response to this continuing struggle between the professionals with respect to the validity of attachment theory, its application to the development of separated shared care parenting and McIntosh and others’ work suggesting that caution was needed in the introduction of shared care for under-four-year-olds,\textsuperscript{826} the AFCC convened a 32 member think tank in 2013 for the express purpose of seeking consensus on the direction of public policy with respect to shared parenting, given the conflict that had emerged amongst the professionals. While it resulted in the Family Court Review publishing a further special issue in April 2014 on closing the gap with respect to the research, policy, and practice with respect to shared parenting,\textsuperscript{827} it did not achieve the consensus it had been seeking. The outcome was rather

\textsuperscript{823} See for example social commentator Bettina Arndt “Empty Days, Lonely Nights” The Age, 29 April 2014 who described some fathers considering they had been “McIntoshed”, and blogs found on websites such as http://equalparenting.wordpress.com (searched 5 August 2014) with entries such as “Splish-splish goes McIntosh” and “ McIntosh: mendacious meanings and multiple motives?” See also http://www.thelizlibrary.org (searched 5 August 2014) with entries such as “The Misrepresentations of Michael Lamb and Joan Kelly”.

\textsuperscript{824} Michael Lamb above note 810 at 482.

\textsuperscript{825} Lamb, above note 810 at 485.

\textsuperscript{826} See Australian studies McIntosh, Smyth and Kelaher (2010) and Smyth, McIntosh and Kelaher (2011); see also Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells and Caroline Long “Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes. Studies of Two Risk Groups” Family Matters 2011 No 86.

\textsuperscript{827} See Kline, Pruett, McIntosh and Kelly (Part I) and McIntosh, Likne, Pruett and Kelly (Part II), and Robert E. Emery and Andrew Schepard in the “Special Issue: AFCC Think Tank on Shared Parenting – Closing the Gap:
described as a shift from Fisher and Ury’s seminal negotiation text “Getting to Yes,”828 to Mayer’s more recent work entitled “Staying With Conflict.”829 It did enable some consensus to be reached within the social sciences field with respect to its contested views around separated shared care parenting. However, the consensus points did not identify and address the broader tensions with respect to gender equality and difference, an issue that is directly relevant to motherhood; rather they focused on the narrower issue of the impact of conflict and domestic violence upon the viability of shared care within the law.830

7.1.5 The Current Position

More recently, Smyth, McIntosh, Emery and Higgs Haworth evaluated the available international research evidence with respect to shared care.831 They describe their methodology as searching for and assessing English language articles published from 2000 through 2014 that included children in shared-time arrangements and presented data on child outcomes, with 17 empirical studies during this period being identified for inclusion in their research. They concluded that the international research literature on post-separation shared-time arrangements is presently “a conceptual and methodological quagmire.”832 Nonetheless, they point to some key trends, distilled into five key domains which deserve consideration in assessing the viability and safety of a shared care arrangement. While they understand that shared care may be seen as the ‘Rolls Royce’ of separated parenting, appearing fair and simple, they also consider it is not typical of broader separated parenting arrangements. They also point to the potential for such an arrangement to undermine a child’s need for stability, and prolong or intensify a child’s exposure to conflict, neglect, violence and abuse.833 They confirm that the research identified that separated mothers with shared care arrangements provided the least favourable assessment of their child’s well-being.834 Emery describes shared care as the “best and worst” post-separation parenting arrangement, depending on how parents get along, resources available to the family, and how responsive the arrangements are.

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830 See discussion by Peter Jaffe “A Presumption Against Shared Parenting for Family Court Litigants” April 2014 Family Court Review 187-192.
831 Smyth, McIntosh, Emery, and Higgs Haworth, above note 748.
832 Smyth et al., above note 748 at 13.
833 Smyth et al., above note 748.
834 Smyth et al., above note 748.
to a child’s temperament and developmental needs. Smyth et al. identify five factors as emerging from the research, and central to the considerations to be undertaken in measuring the risks and benefits of a shared care arrangement for a particular child. These are:

- Safety and security in the caregiving environment (including emotional wellbeing, protection from family violence and protracted parental conflict, and protection from being drawn into hostile levels of anger, contempt and dysfunctional communication);
- Parenting quality and parent-child relationship (seen as key to a child’s safety and security);
- Child-specific factors (with consideration of the age and stage of development as well as the gender of the child, and noting the special risks for infancy (understood to be 0-3 years inclusive) in the context of a shared care arrangement);
- The nature and exercise of the parenting arrangements (addressing such issues as the structure, predictability and flexibility of the arrangement, management of changeovers, and access to the absent parent); and
- Practical issues (including financial resourcing, geographic proximity, work requirements and support of new partners).

An important issue that has emerged from this review is the recognition that it is likely that the quality of a child’s relationship with each parent is more important than the significance of the quantity of time expended in it. This provides for a move away from assessing the value of each of motherhood and fatherhood to a child by calculating the time spent with the child, as the predominant relationship-valuing mechanism. It is arguable, then, that motherhood is no longer under such pressure to surrender part of what she may consider her role to be, through a requirement to implement a post-separation, time-calculated shared care parenting arrangement which she may not agree with, or to accept a minimisation of the reality of the unique differences between motherhood and fatherhood through the introduction of shared care as a demonstration of fatherhood’s equality with motherhood. Equality, trust and respect between mothers and fathers, and a good quality relationship of each with their child remain desirable goals. There does appear some recognition that these can be achieved through more nuanced measures additional to, and perhaps separate from, shared care. A deeper understanding of gatekeeping is one example, and is discussed in Chapter Nine. It offers the possibility of restoration to motherhood of her unique contribution

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835 Smyth et al., above note 748.
836 Smyth et al., above note 748.
to not only the child but also to fatherhood, particularly within separated parenting arrangements.

7.2 The development of shared care in New Zealand

The ‘shared care’ story in New Zealand has its roots in earlier legislative amendments. Through the insertion of section 23(1A) into the Guardianship Act 1968,837 which came into the legislation through the Guardianship Amendment Act 1980,838 a foundation was laid for enforced gender-neutrality with respect to separated parenting arrangements, focusing on equality of treatment rather than equality of outcome. Such a foundation, whether intentional at the time or not, shaped the developments that were to occur over the next thirty years and had a significant effect upon diminishing the voice and status of the mother. This was because during the 1970s there emerged considerable political activism by fathers’ groups, which continued on throughout the 1980s, 1990s and into the 2000s, and which built on the liberal feminist foundation demanding equality of treatment of mothers and fathers.839 As a result the ‘mother principle’, rather than having a continuing place in a welfare and best interests enquiry as a relevant factor for a child, was vulnerable to being reframed as a gender bias against fathers and responsible for a perceived inequality of treatment between them, which needed to be addressed. The ‘mother principle’, in recognising differences between mothers and fathers, was therefore discounted as a factor of value that should be taken into account in a welfare enquiry.

The introduction of specific gender-neutrality into the law paved the way for the development of shared care as the preferred separated parenting model within an egalitarian society which prided itself on having led the Western world in its early acceptance of gender equality, where gender differences were neutralised.840 What was not immediately evident, were the several competing priorities, and challenges, which would emerge: that of the desirability of

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837 Section 23(1A) Guardianship Act 1968. For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.
839 See Chapter Three; see also Chapter Five with respect to feminist theory, which in various ways contributed to the growing strength of the fathers’ groups movements. For example, see Stuart Birks “Gender Analysis and the Women’s Access to Justice Project” Centre for Public Policy Evaluation, Massey University, March 1998 where Birks, in providing men’s perspectives that there was a prevailing failure to support fathers as parents which arose in part by the women’s movement, refers to Professor Ruth Wisse from Harvard University, who said that “… by defining relationships between men and women in terms of power and competition instead of reciprocity and cooperation, the movement tore apart the most basic and fragile contract in human society, the unit from which all other social institutions draw their strength” at 36.
840 See Chapter Three with respect to New Zealand’s early enfranchisement of women and similar indicators.
both parents’ being involved in a child’s care (including when the parents were separated),
that of a young child’s need for stability, and whether the best of each of motherhood and
fatherhood could be provided to a child simply by dividing the care time between them, based
on gender-neutrality.  

The potentially negative consequences for mothers and children of the inclusion of gender-
neutrality in the legislation were also not immediately evident. In 1994, research initially
suggested that:

… for a joint custody arrangement to work, it would appear that the parents need to
have a good cooperative relationship … while joint custody was a suitable and
beneficial custody arrangement under the right circumstances, an unwilling parent
should not be forced or pressured into accepting a joint custody arrangement …
According to New Zealand judges who were surveyed for this research programme,
the indicators for making a joint custody order in a disputed case were good
communication or cooperation between the parents.

At the same time, in 1995, Butterworths, one of the leading family law texts, said:

Shared custody proceedings will usually be the result of agreements rather than court
proceedings but sometimes the courts find it appropriate to make orders for genuine
joint custody. The fact that the parents do not get on well at all is no bar to the Court
ordering genuine shared custody.

The mother, as whistleblower with respect to the shortcomings for children of shared care
within New Zealand’s Family Court system, was explored in a small research study carried
out by Tolmie, Elizabeth and Gavey in 2009. They concluded that there is a discrepancy
between what was being professionally advised to mothers within the New Zealand Family

841 Maria P. Cognetti and Nadya J.Chmil “Shared Parenting – Have We Really Closed the Gap?”: A Comment
on AFCC’s Think Tank Report” April 2014 Family Court Review 181-186 at 185. These priorities are without
also considering the added complexity of the impact of domestic violence and conflict in a shared parenting
relationship.
Department of Justice, Wellington, at 76
844 Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Raising Questions about the Importance of Father
Contact Within Current Family Law Practices” [2009] New Zealand Law Review 659; see also Vivienne
Elizabeth, Nicola Gavey and Julia Tolmie “Between a Rock and a Hard Place: Resident Mothers and the Moral
Dilemms they face During Custody Disputes” Feminist Legal Studies (2010) 18 at 253-274, and Vivienne
Elizabeth, Julia Tolmie and Nicola Gavey “Gendered Dynamics in Family Court Counselling” New Zealand
Court system with respect to the promotion of shared care, and what research was saying about parenting arrangements that best serve children post-separation. They found that most of the mothers interviewed believed that contact with the father was in their child’s best interests, but that when “the conflicting gendered moral accountabilities of contemporary motherhood are overlooked”, mothers can then be defined as hostile and alienating. They also suggested that family law practice would lead to better outcomes for children when professionals listen to the history of, and reasons for, the mother’s position. Legal commentators and research evidence, in suggesting that it is likely that the quality of the child’s relationship with the other parent is more important than the significance of the quantity of time expended in it, also suggests an incongruence with the professional advice being given and the Family Court decisions being made.

Boshier and Spelman record that between 2006 and 2010, mothers were the applicant in 53 per cent of cases, fathers in 29 per cent and another party in the remaining 18 per cent. Of the 82 per cent of applications for a parenting order filed by the mother that were finalised, 10

845 Tolmie, Elizabeth and Gavey, above note 844 at 665. This was an issue also identified in the UK with respect to advice offered to mothers by Cafcass – see “Valuing Motherhood: Meeting the Needs of Women and Children at Separation and Divorce” (July, 2010) Maypole Women at 48, Appendix B; see also Carol Bruch “Sound Research or Wishful Thinking in Child Custody Cases: Lessons from Relocation Law” (2006) 40 Family Law Quarterly 281: Bruch says that the two most important things for a child after divorce is firstly, to maintain and strengthen their relationship with their primary caregiver and secondly, to minimise their exposure to inter-parental conflict; see also R Emery, R Otto and W O’Donohue “A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System” (2005) 6 American Psychological Society 1 at 14: “[i]n most studies of children from divorced families the quality of the relationship between a child and his or her primary residential parent is the strongest predictor of that child’s psychological well being.”

846 Helen Rhoades “The ‘no contact’ mother: Reconstructions of motherhood in the era of the ‘new father’ ” (2002) International Journal of Law, Policy and Family 16 at 71-94. Such negative connotations of mothers were described by Rhoades as typically framed as “hostile and possessive mothers on the one hand, and frustrated men on the other, men who have had to resort to court action in an attempt to see their children and who have found the legal system wanting” at 73. The ‘no contact ‘ mother has become the “bad” mother of family law, described variously as immature, unable to recognise the best interests of her child, prioritising her own needs over that of her child, in need of therapy or in need of punishment. See Carol Smart “The New Parenthood: Fathers and Mothers After Divorce” in The New Family by Elizabeth B Silva and Carol Smart (eds) (Sage, 1999).

per cent resulted in shared care orders; and of the 29 per cent finalised applications for a parenting order filed by the father, the father was granted sole day-to-day care in 30 per cent of cases, the mother sole care in 45 per cent and in 21 per cent of cases, there was a shared arrangement.\textsuperscript{849} It is not known what numbers of private arrangements are being made in anticipation of what an imposed order might reflect, that is, bargaining in the shadow of the law,\textsuperscript{850} or the effect of increasing numbers of mothers being employed fulltime along with the fathers, upon shared care orders being made by consent. These issues are also placed within a context and history of conflicting social science views about what is best for a child, particularly a young child, with respect to post-separation parenting.\textsuperscript{851} In New Zealand, the importance of preserving and strengthening the existing primary caregiver’s relationship with the child, usually the mother-child relationship, no longer appeared to be as important in post-separation care arrangements\textsuperscript{852} because increasing recognition was given to preserving and strengthening a child’s relationship with the non-caregiving parent, that is, the father-child relationship. The Family Court became proactive in promoting new care arrangements to address this, introducing the two-home shared care model into situations where that had not been the status quo. These challenges to motherhood were also noted by Taylor, Gollop and Henaghan, who said in the conclusions to their June 2010 Research Report with respect to their significant relocation study that:\textsuperscript{853}

\begin{quote}
… some relocations have been denied to allow a previously relatively uninvolved parent to maintain or build a relationship with their child, or a child’s care has been reversed from their relocating primary carer to the other parent in face of serious obstacles to its success.
\end{quote}

\begin{footnotes}
\textsuperscript{849} Peter Boshier and Julia Spelman, above note 515 at 61-69; see also Peter Boshier, above note 515 at 24-25.
\textsuperscript{852} Tolmie, Elizabeth and Gavey, above note 844 at 664; “ … for more than half of the women in our study, father contact after separation primarily involved creating a relationship rather than preserving one that already existed between the children and their father.”
\textsuperscript{853} Dr Nicola Taylor, Megan Gollop and Professor Mark Henaghan “Relocation Following Separation: The Welfare and Best Interests of the Child” Research Report, June 2010, above note 470.
\end{footnotes}
There have also been challenges to motherhood through the perception, originally encouraged by fathers’ action groups, that the Family Court was biased against fathers and that it was “pro-feminist and anti-male.” However, the experiences of the 21 New Zealand mothers interviewed in relation to Family Court processes revealed their sense of powerlessness, of their feelings their views were not listened to or respected, and of being bullied into arrangements they did not consider were best for their children, despite supporting father contact. This resulting tension between motherhood and the law also became evident with respect to the issues of relocation and gatekeeping, discussed in Chapters Eight and Nine.

7.2.1 Family law decisions influential in the development of shared care

Several leading family law cases have significantly influenced the development of shared care based on the gender-neutrality embodied in New Zealand law. The decisions point to a diminished recognition given to motherhood, its difference from fatherhood and its value to a child. This position has opened the way for the activism of the fathers’ groups to seek shared care parenting reform, requiring mothers and fathers to be treated equally and the same, and with the increasing preference for the development of the two-home shared care model, to enable such equality of treatment to occur. These developments run counter to the pursuit of equality through the recognition of difference between mothers and fathers and increased the tension in the relationship between motherhood and contemporary family law.

A discussion of the decisions contained in the cases of W v C and L v A follows.

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855 Tolmie, Elizabeth and Gavey above note 844. The small size of the sample, being 21 women, is noted.

856 W v C, above note 67; L v A above note 39.
The first significant series of decisions that had a profound effect on the development of shared day-to-day care arrangements were those of Judge Inglis’ QC in *W v C*.  

C and W were married in 1993 and their son J was born in November 1995, in England. They separated in March 1996, reconciled briefly and separated again. C applied for joint custody, ultimately seeking equal time shared care. W cross-applied for a custody order. The matter first came before the Family Court in October 1999, by which time C, apparently on his election, was not exercising contact with J apparently because W did not accept the principle of equal sharing.

The Judge considered that a joint custody order works well “only where there is a significant amount of respect between each parent for each other’s parenting and cooperation between parents”. Nonetheless, he made a joint custody order, C’s care times being two hours twice a week, with W having the care for the balance of the time. A review was directed, to increase C’s care time if all was going well.

A second hearing took place in June 2000 before Judge Inglis QC, and it is this judgment which is generally referred to as the *W v C* decision. Judge Inglis viewed his decision as the Family Court “at least partially” confronting, and addressing, the concerns “of a then vocal group of disaffected fathers” who considered that the Family Court acted with a gender bias against fathers, that is, that it operated in a manner that was contrary to children’s best interests.

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858 Above note 857. See the discussion of these decisions in Marion Evans “An Examination of Some Relationships Between the New Zealand Jurisprudence of Shared, Equal Parental Rights and Responsibilities and the Gendered Hierarchy of Care 1994-2002”, Masters of Laws thesis, University of Otago, Dunedin, 2004, and F A Mackenzie, above note 77. Note also that in his text B D Inglis *New Zealand Family Law in the 21st Century* (Thomson Brookers Wellington, 2007) 296 Inglis says that the report of the decision found at [2000] NZFLR 1057 “does not always follow the exact text of the judgment and has a headnote which (with respect to the editor) has a misleading focus. The headnote in 19 FRNZ 457, 458 provides an accurate summary of the essentials of the reasons for judgment, from which the following summary in the text has largely been taken. The whole judgment naturally has to be read in the light of the later decision of the Court of Appeal in *D v S* (2001) 21 FRNZ 331; [2002] NZFLR 116 (CA)."

859 *W v C*, above note 67, FP 070-216-96 at 3, per Carruthers J.

860 Above note 859 at 5 per Carruthers J; reference was also made to *R v R* (1994) 12 FRNZ 211 (HC).

861 *W v C*, above note 67, per Inglis J.

862 B D Inglis *New Zealand Family Law in the 21st Century* above note 68 at 295.

863 B D Inglis, above note 68.
The Judge’s central thesis was about gender-neutralisation between mothers and fathers.\textsuperscript{864} … that when parents separate consideration of the welfare and interests of their child should always start from two propositions. First, that the child is entitled to retain the advantage of being nurtured by both parents. Secondly, that neither parent has a greater right than the other to nurture the child.

The Judge confirmed that the law provided that both parents have equal guardianship rights which included, pursuant to the definition of guardianship provided by section 3 of the Guardianship Act 1968, custody and the right of control over the upbringing of a child, as well as all rights, powers, and duties in respect of the upbringing of a child irrespective of gender. He also accepted the then Principal Family Court Judge Mahony’s view of the application and overarching nature of section 23 of the Guardianship Act, that:\textsuperscript{865}

It is not defined in the statute because case by case the elements of welfare to be taken into account will vary … the Court must look at the circumstances of ‘this child with this father, this mother … and these particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child.

Judge Inglis then further considered that:\textsuperscript{866}

The presumption of gender equity in s 23(1A) was introduced in 1980 to correct a developing assumption that girls were best in the custody of their mother while boys beyond infancy were best in the custody of their father, but of course it has a wider effect than that.

He discussed how parents after separation might carry out, in practice, their joint and equal responsibilities of guardianship. He considered the spectrum of variables, from two parents both able and willing to exercise their guardianship functions and responsibilities on a joint basis of equality, to two parents where one was unable or unwilling to exercise any of his guardianship functions or obligations. In respect of the former, he saw the issue as being how to divide a child’s time between them based on such considerations as the child’s routines and stage of maturity, and parental employment responsibilities. With respect to the latter, he

\textsuperscript{864} Above note 67 at 460. 
\textsuperscript{865} Above note 67 at 462; \textit{VP v PM} (1998) 16 FRNZ 621 at 625, per Mahony J. 
\textsuperscript{866} Above note 67 at 463.
accepted the remaining parent, by default, was required to assume sole responsibility for these functions and obligations. Then he considered it would be acceptable for custody to vest in the available parent, with the child having contact with the other parent in an appropriate way.\(^{867}\) The Judge further discussed other variables between those extremes, which included the need to protect a child from a parent’s unsafe behaviour. However, he did not refer to any parenting variables arising through gender difference and the desirability of the recognition of these from a child’s point of view. Rather, he said, as a result of these considerations, that:\(^{868}\)

The starting point must be whether there is any valid reason relevant to the welfare of the child why the respondent’s legal right - identical to the legal right of the applicant - to exercise guardianship responsibilities and obligations jointly and equally with the applicant should be restricted.

The start point, founded in the equality view of liberal feminist theory, was one of gender sameness of a mother and father from a guardianship and parenting point of view.\(^{869}\) The cultural and dominance feminist theories based in the irrefutable natural differences between mothers and fathers, irrespective of their equality in value, was not addressed.

Counsel for the mother referred to judicial criticism, in the \textit{Haslett v Thornton} decision, of any approach that involved “calculations as to exact times the child spend with each parent with a view to achieving parity or equality.”\(^{870}\) The Full Court of the High Court in that decision also said that while it is the right of the child to have healthy, beneficial contact with each parent, “what is necessary for the child’s welfare cannot be measured in arithmetical or mathematical terms.”\(^{871}\) In other words, there appeared to be an attempt by the Court to recognise gender difference by articulating an approach founded on equality of outcome, rather than equality of treatment.

Judge Inglis prefaced his final comments by saying that his judgment should not “be seen as an attempt to stand the law of custody and access on its head,”\(^{872}\) before concluding that:\(^{873}\)

\(^{867}\) Above note 67 at 467.
\(^{868}\) Above note 67 at 468.
\(^{869}\) Above note 67 at 468.
\(^{870}\) Haslett v Thornton [2000] NZFLR 200 at 211.
\(^{871}\) Haslett v Thornton, above note 70 at 211.
\(^{872}\) W v C, above note 67 at 473.
\(^{873}\) Above note 67 at 474.
I do not accept on the whole of the evidence that the ultimate goal of shared and equal guardianship in its broad sense (not necessarily any rigid 50:50 sharing of J’s time) would be contrary to J’s welfare provided the parents control their behaviour as responsible parents and do not involve J in any of their adult differences. … For the reasons expressed there must be now a firm and managed progression towards a situation in which J comes to appreciate that the responsibility for his parenting and welfare is shared equally between his mother and his father.

The Judge varied the joint custody order made to provide for an increasing care time by the father of J, such that by the end of four months from the hearing, it was to be every weekend from 6pm Friday until 6pm Sunday. Then, by the time J started school at age five years, the parents were expected to have commenced making their own arrangements about J’s shared care, including, by way of an example given by the Judge, an additional overnight stay with the father during the week. It was anticipated that the father’s weekend contact would also then increase to a Friday afternoon pickup after school until Monday morning, when he would be returned to school. Finally, the Judge said that J’s transitions between the two homes were not to be represented to him as something which the Court had imposed upon his parents, “but as something which is necessary and fair and part of the parents’ joint and equal responsibility.”

While the arrangements imposed on the parents by these orders broke down, the decision significantly influenced the subsequent development of shared care and legislative reform through COCA, and, while recognising and supporting the value of fatherhood, overshadowed, and arguably diminished, motherhood during this time.

7.2.3 \textit{L v A}^875

The 2003 decision of \textit{L v A} by Baragwanath J\textsuperscript{876} contributed to the securing of shared care in New Zealand, by reducing the weight to be given to the effect on a child of continuing conflict between the parents, in preference to elevating the importance of continuing a day-to-day shared care regime. Management of parental conflict, rather than its avoidance, enabled a shared care regime to be developed notwithstanding. In the decision, Baragwanath

\footnotetext{874}{Above note 67 at 475.} \footnotetext{875}{\textit{L v A} [2004] NZFLR 298 per Baragwanath J, above note 39.} \footnotetext{876}{\textit{L v A}, above note 39.}
J upheld the introduction of a week-about shared care arrangement. At the time of the hearing, such an arrangement had been in place for 16 weeks, notwithstanding continuing and unresolved conflict between the parents. The conflict was described as “continuing conflict, a low level of communication and a low level of ability to communicate with the other partner”, the Judge stating:

I have declined to accept the argument of law that continuing low level conflict is itself a barrier to such an order as that made by the Judge.

Consequently, the health and happiness of a parent, usually the mother, in the face of continued parental conflict, may then have been accorded less weight and respect than was desirable in a welfare and best interests assessment.

The contribution of the social sciences to the development of shared care within New Zealand family law, led by the views of Kelly and Emery, was also influential. This created tension with the law’s earlier protection of the primary attachment (usually the mother). The decreasing importance of the issue of conflict, as opposed to the increasing importance of shared care, was referred to by Baragwanath J where he preferred the Kelly approach.

New reports of joint custody, rather than sole custody … suggest a protective effect for some children. … Studies indicate that those parents who continue in high conflict range from 8-12 per cent (Hetherington, 1999), 2-3 years after divorce. The relatively small group of chronically contentious and litigating parents are more likely to be emotionally disturbed, character-disordered men and women, still intent on vengeance and/or controlling their former spouses and their parenting (Johnston and Campbell, 1988; Johnston and Roseby, 1997). … Where one or both parents continue to lash out at transitions

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877 L v A, above note 39 at [59].
878 L v A, above note 39 at [91].
879 See F A Mackenzie, above note 77.
881 A 2:2:5:5 equal time shared care arrangement gained considerable traction in New Zealand; it became known as the Joan Kelly model.
882 Kelly, above note 880 at 237.
883 L v A, above note 39 at [58].
between households, mediation experience indicates that children can be protected from this exposure through access arrangements that incorporate transfers at neutral points, such as school, day care or after school activities. … Although there are distinct advantages of cooperative co-parenting for children, children thrive as well in parallel parenting relationships when parents are providing nurturing care and appropriate discipline in each of their households (Hetherington, 1999; Hetherington & Kelly, 2002; Maccoby & Mnookin, 1992; Whiteside & Becker, 2000).

An alternative social science view was also recorded in the judgment, in the following terms:

Shared parenting, its benefits notwithstanding, should not be seen as the panacea for all separating families and certainly not as a means of resolving highly conflictual custody situations. … Where shared parenting is seen either as a means of controlling the other parent or where there has persisted a high level of inter-personal hostility, distrust, and lack of respect between parents, then the experience is more likely to be difficult for all family members to manage [and] … is significantly more difficult, and at times impossible, to achieve.

The recent assessment of the research evidence with respect to the risks and benefits of shared care, undertaken by Smyth et al., suggest that, notwithstanding the acknowledged importance of the availability of relationship with both parents to a child within a separated parenting arrangement, the imposition of the Baragwanath J. approach may have diminished the value and respect accorded to mothers in New Zealand, caught in court-imposed shared care regimes where hostility, conflict and mistrust were evident. Linking the quality of a parent-child relationship with time expended as the primary mechanism to achieve this, thereby encouraging the imposition by the law of a shared care arrangement and challenging motherhood in

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884 Dr Anne Opie “Shared Parenting, the Best Custody Alternative?” (1989) Family Law Bulletin 2 at 2-9, based on research into the concept of shared parenting or joint custody as a mode of promoting a more cooperative and flexible style of parenting for separating families. A qualitative, longitudinal study of 16 parents, their children and current partners was undertaken over an 18 month - 2 year period; see also “Shared parenting: part two” Family Law Bulletin January 1990 at 58-61, which discusses the consequences of the decision to share parenting and outlines the drawbacks for both parents.

885 L v A, above note 39, at [57].

886 Smyth, McIntosh, Emery and Higgs Haworth, above note 748.
the process, does not appear to have the same currency it once did. This, in turn, may reduce some of the challenges experienced by motherhood as a result of these earlier developments.

7.2.4 Comparing legal developments between New Zealand and the UK

The proactiveness by New Zealand’s Family Court to promote and introduce shared care appears to be contrary to the position in the UK during the same period, as recorded in the 2006 House of Lords decision *In Re G (Residence: Same Sex Parents)*.887 There, the thrust of the decision was to confirm that unless there were strong reasons to make a change, a child’s existing care arrangements should normally be maintained. Thus, the key determinant was that the mother had cared for the child for the previous four years - continuity of care being the critical factor - and that this should continue as being best for the child.

Gilmore identifies from English case law the main principles that have since emerged for shared residence orders in that jurisdiction,888 and Harris and George also point to the legislative emphasis in the UK’s Children Act 1989 on parental responsibility rather than equality of care time between the parents. They consider that its dilution in recent years, nonetheless, has created an apparent shift away from case law from the original principles underpinning the Act, such that it risks re-creating problems similar to those the Act was designed to remedy.889 For example, in *Re K (Shared Residence Order)*,890 Wall L J said that a shared residence order emphasises the fact that both parents are equal in the eyes of the law, and in *Re W (Shared Residence Order)*,891 Wilson L J said that “a shared order would be psychologically beneficial to the parents in emphasising the equality of their responsibilities towards [the child]”.892 The position in the UK therefore appeared to move closer to the New Zealand position.

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887 *In Re G (Residence: Same Sex Parents)*[2006] UKHL 43.
890 *Re K (Shared Residence Order)* [2008] EWCA Civ 526
891 *Re W (Shared Residence Order)*[2009] EWCA Civ 370
892 Above note 891 at para [16].
7.2.5 Governmental response to political pressure

In 2000, the New Zealand Government released a discussion paper “Responsibilities for Children: Especially When Parents Part – The Laws About Custody Guardianship and Access.” Its associated commentary suggested that the Guardianship Act 1968 needed to keep pace with New Zealand’s changing society and to be more consistent with other legislation. A significant number of submissions were received. Those of the professionals were similar. That is, the approach of the Court system should stay the same, that the best interests of the child were best addressed by legal representation, and that guidelines were not regarded as helpful to particularised situations.

Individual views were significantly more gender based. One stream emphasised the safety and security of children, and of mothers who had been subjected to domestic violence. Other views were based on the promotion of parenting equality, and sought a fundamental move away from custody and access arrangements towards a shared parenting model, giving fathers a greater role in the day-to-day upbringing of the child.

This created a tension between parenting arrangements as they had been before separation, and of the status quo continuing into post-separation care arrangements (particularly where the mother had been the primary carer of the children) as introduced by the UK decision of J v C, and the development of a new shared care regime as a result of the separation. The strength of the uptake of this new regime lay in the legislative mandate of section 23(1A) of the Guardianship Act 1968, based in a denial of parental gender difference while at the same time supporting parental gender equality.

7.2.6 New Zealand’s attempt to legislate for shared care parenting

Also in 2000, a private member’s Shared Parenting Bill was drawn out of the ballot. Attributed to Dr Muriel Newman, of the minority Act Party, it proposed a rebuttable presumption of shared (50:50) custody for the children of separated parents and described separated shared care parenting as having “been highly successful in other western countries over the past two decades.”

893 Government Discussion Paper: Responsibilities for Children: Especially When Parents Part, August 2000, Chapter 7 Overview of Responses. Three hundred and fifty nine submissions were received.
894 See Chapter Three.
895 Shared Parenting Bill, Explanatory Note.
The Government, in response, said:896

The Government does not consider that the one size fits all solution promoted by Ms Newman through this Bill is appropriate. In attempting to legislate preferred or favoured custody arrangements the Bill places the rights of parents above those of children and as such it is inconsistent with other family law statutes.

The issue became a political one, and men’s action groups adopted and advocated the liberal feminists’ arguments that required the law, in pursuing gender equality, to deny any significant natural difference between mothers and fathers.897 The Bill was, however, unsuccessful in obtaining the cross-party support necessary for it to be further advanced.

7.2.7 The Care of Children Bill 2003

Then, in 2003, the Government’s Care of Children Bill was introduced and the following year, the Law Commission issued its discussion paper looking at new issues in parenthood.898

In the background discussion, it said:899

Obviously, a child cannot live in two places at once. The Court will often make a sole custody order in favour of one or other parent. The courts have been more inclined recently to make a divided custody order (sometimes known as shared custody or joint custody).900 Divided custody orders stipulate that one parent shall have custody of a child for certain days of the week and the other parent for the remaining days. The courts have tended to move away from the traditional custody/access dichotomy. In the words of Baragwanath J:

To assume that the paradigm of a unified marriage in a single home means that the child of separated parents must live primarily with one parent or another unless the relationship is harmonious overlooks the possibility that in some cases it may be in the child’s best interests to have two homes – not one.901

897 The 1980s reform of the Guardianship Act was also driven from the perspective of fathers.
899 Above note 898 at par 2.42.
901 L v A, above note 39 at [48].
The Law Commission referred to the UK decision of *Gillick*\(^{902}\) and the New Zealand decision of *D v S*\(^{903}\) as reminders that rights conferred on parents must be exercised for the benefit of the child, and that guardianship, in giving a guardian rights, does not confer rights against the child but against others. From the outset, the potential for a power struggle with respect to shared care was evident, notwithstanding the Court of Appeal in *D v S*\(^{904}\) making it clear that the law required that the best interests of the child was to be arrived at by the weighing and balancing of the relevant factors without any a priori assumptions.

The Care of Children Act did not, in its final form, create a presumption in favour of shared custody as Dr Newman’s Shared Parenting Bill had sought to do. This was a position that had been unequivocally rejected by Parliament. At the same time, as noted by Atkin, the Bill did not contain a primary caregiver principle either, the position “advanced by the former Commissioner for Children, which would have seen custody presumptively going to the party who has played the greater role in the past in caring for the child.”\(^{905}\) This party was usually the mother.\(^{906}\) In a briefing paper, the Ministry of Justice noted: \(^{907}\)

> The Bill does not … create a presumption of shared parenting, and nor does it create a right to contact. Instead, the Bill focuses on encouraging cooperative parenting by focusing on the ongoing role both parents should have in a child’s upbringing. Any presumption on the form the arrangements should take would be inconsistent with the principle of taking into account the individual circumstances of each child to ensure that the care arrangements are in the welfare and best interests of that child.

Subsequently, the section 5 principles were incorporated into the Act, intended to be non-exhaustive, and designed to give some context to the welfare and best interests assessment.\(^{908}\)

At the time, the then Principal Family Court Judge Boshier said: \(^{909}\)

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\(^{902}\) *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; 3 All ER 402 (HL).

\(^{903}\) *D v S (CA No 1)*, above note 27 at [29] and [31].

\(^{904}\) Above note 903.


\(^{908}\) Justice and Electoral Committee “Report on the Care of Children Bill”, 1-3.

\(^{909}\) Boshier, above note 515 at 81.
There is no indication in this report that the principles are intended as anything more than a guide, and nothing to suggest a presumption of shared parenting should be adopted.

However, he also pointed to the Australian position with respect to its Reform Act,\textsuperscript{910} with an expectation of the likelihood of a similar change of approach occurring in New Zealand. This was anticipated to occur by a change in the standards and attitudes of judges, lawyers, parents and the community generally, based in a gender-neutral approach to separated parenting, and was going to, arguably, result in a diminishment of the uniqueness of each of the roles of motherhood and fatherhood.\textsuperscript{911}

### 7.2.8 Tensions between politics, policy and legislation

While Judge Boshier indicated the “the onset of a third approach, where enabling the child to have a relationship with both parents is to be accorded greater weight over any other consideration”,\textsuperscript{912} it appeared that gender politics were driving COCA reforms.\textsuperscript{913} The inclusion in the law of section 23(1A) of the Guardianship Act 1968 (to become section 4(4), and later section 4(3), of COCA), served to strengthen the fathers’ groups position. This provided that gender should be neutralised, and men and women should be treated equally and the same. This logically led to the argument that there should be no reason why the care of the children upon separation should not be undertaken by shared care, and preferably equal time shared care. The gender of the parent was not relevant to these considerations.

However, while New Zealand’s Parliamentary processes resisted the introduction of either shared parenting, or of primary care-giving by one parent as the norm, pointing instead to the continuing paramountcy of the welfare and best interests principle as the test to be applied in each individual situation, it is arguable that after the introduction of COCA, the Family Court subsequently moved towards shared care as if it was legislatively mandated.\textsuperscript{914} This was notwithstanding the restraint counselled by Priestley J in the High Court, in \textit{Brown v Argyll}.

\textsuperscript{911} Boshier, above note 515, at 82.
\textsuperscript{912} Boshier, above note 515, at 77.
\textsuperscript{913} See discussion in F A Mackenzie, above note 77.
\textsuperscript{914} \textit{Brown v Argyll} [2006] NZFLR 705 (HC).
In that decision, one of the first appellate relocation decisions after the passage of the new Act, the judge said, firmly, that there had been no change post-COCA to the pre-COCA approach, requiring no a priori assumptions approach to an assessment of a child’s welfare and best interests, as established by the Court of Appeal in the earlier relocation decision of *D v S*. He went further, suggesting that any change to this approach was “untenable.”

The tensions and difficulties for judges in interpreting and applying the law, but not making it, are very real in family law in both first instance and appellate jurisdictions. This is because they must work in a discretionary area of the law, influenced by subtle shifts in societal attitudes, expectations and change. In Australia, for example, Justice Alwynne Rowlands AO, in response to encouragement given to the Court to normalise shared care parenting within judge-made law, referred again to his views in the Australian decision of *B v B* with respect to the elevation of shared parenting, where he said:

> It is not for the Court to experiment with emerging ideas espoused by exciting thinkers which may or may not stand the test of time. The function of the Court is not to lead society upon new adventures for its own good but to apply values which have broad acceptance.

However, while patterns of family life, the demands of employment, expectations of society and legislation have developed to the extent that there appears to no longer be any effective legal difference between mothering and fathering, there still remain inherent natural differences with respect to essentialism and the maternal essence. McClain describes the movement in the law as “establish[ing] sexual equality as an important public value and constitutional principle, and signals a shift from marriage as a hierarchal relationship, premised on gender complementarity, to one of mutual self-government, premised on gender equality.” Neutralising gender within parenting law and the consequence of a recognition of equality of men and women as though they are the same, does not address the issue for

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915 *D v S (CA No1)* above note 27.
916 *Brown v Argyll*, above note 914 at [63].
918 *B v B* [2002] Fam CA 250.
919 *B v B,* above note 918 at [18].
920 See Chapter Five.
mothers or children. If there are differences in the role and function of mothers and fathers that are important to a child at various stages of the child’s development, such differences are not presently able to be explicitly acknowledged by the law.\textsuperscript{922} As a consequence, there have been ebbs and flows in these tensions, such that the voice of the mother in speaking out of gender difference, may not have been understood or well received.

\textbf{7.3 Shared care and legislative reform}

New Zealand, as discussed, ultimately rejected legislative reform as a mechanism to introduce shared care into the law. Other jurisdictions were also having to address the issue. In November 2012, the UK Government released its responses paper,\textsuperscript{923} and recommended legislative reform with respect to the introduction of shared care parenting. Subsequently, its Children and Families Act 2014 was passed. It introduced wide ranging family justice reforms including the establishment of a single Family Court, improving the process for children in state care and adoption, introducing mediation as a cornerstone for addressing private parenting disputes, and creating a new emphasis on the concept of parental involvement, seeking to shift the focus towards involvement by both parents in separated parenting arrangements.\textsuperscript{924} However, it did not, in the end, further legislate for the concept of separated shared care parenting. In considering the present position in the UK, Fehlberg, Smyth, McLean and Roberts identified the unhelpfulness of the mixed messages generated in Australia by the 2006 legislative changes being grafted onto an existing “best interests”

\textsuperscript{922} However, in \textit{D v S (CA No 1)}, above note 27, reference was made to the Family Court evidence about the importance of fathering per se to a child, with respect to adventure and building resilience in an attempt to highlight what only a father generally can provide to a child; evidence was also given about the importance to these particular children of their close emotional attachment to their mother and the emotional nurturing she provided.

\textsuperscript{923} http://media.education.gov.uk/assets/files/pdf/g/government%20response%20to%20the%20shared%20parenting%20consultation.pdf accessed 30 November 2012. However, a comprehensive briefing paper by the University of Oxford, Department of Social Policy and Intervention, Family Policy Briefing 7, May 2011 by B Fehlberg, B Smyth, M MacLean and C Roberts “Caring for children after parental separation: Would legislation for shared parenting time help children?” concluded that: “This paper reviews the evidence on legislating for shared time parenting, especially the Australian experience of this. It reports serious difficulties with legislating for shared care especially in litigated cases, but also in privately agreed cases. The changes have resulted in increased use of family law services as fathers have misunderstood the legislation to mean that they have a right to equal time, and to an increase in court imposed shared parenting orders. This has led to an increased focus on father’s rights over children’s best interests, and has increased the reluctance of mothers to disclose violence and abuse. As a result additional legislation has now been presented by the government to the Australian parliament to deal with the safety issues. This evidence indicates the need for caution before following the Australian approach of legislating to encourage litigating parents to share parenting after separation.”


framework, suggesting dangers in even subtle legislative encouragement towards shared care. They distilled their key findings down to these three main points:

1. Other things matter more than time (and without specifically noting this, the implication appears to include the importance of the difference between motherhood and fatherhood);

2. Positive outcomes for children in shared care are more to do with the sort of families who choose this arrangement (that is, parents who are not in conflict and who respect the different contribution that each of the mother and father provide); and

3. Shared care is workable for some families but risky for others.

In discouraging legislative reform with respect to shared care across jurisdictions, Smyth et al. described the situation as being better focused on.925

More clearly and consistently toward encouraging both parents to be actively involved in their children’s lives post-separation, including maximising [parent-child] contact, rather than specifically toward legislating for shared time.

Such approach leaves open to both motherhood and fatherhood the opportunity to work together in the future by embracing the differences arising through gender, as well as the similarities derived through their roles as parents.

Summary

The development of shared care as a model of separated parenting has presented challenges for motherhood. While positive when parents can cooperate and the arrangements are centred around the needs of the children, it has, in other circumstances, been associated with negative outcomes for mothers and children. The law in New Zealand, in its approach to the implementation of shared care separated parenting arrangements without being able to take into account the gender of the parent, has at times been something of a blunt instrument as mothers have sought to navigate the issues that have arisen in relation to such arrangements. Problems first arose because, as Smart identified, mothers tend to focus on caring for their children, while fathers tend to care about them. The former was expected; the latter was

regarded as heroic. The law, in focussing on issues of rights and gender equality (according to liberal feminist theory, meaning same with a denial of gender difference), did not tend to recognise the differences between mothering and fathering. This led to escalating conflict when mothers, generally understood to be more emotionally attuned to their children, began to protest that such court-imposed care arrangements were not working, particularly for their young children. The voice of the mother was not understood nor respected during this time, framed instead as being obstructive to fathers’ rights to share the care of their children, preferably equally, with the mothers. Social sciences, too, contributed to the conflict with competing theories, particularly with respect to the issue of the importance of the primary attachment (usually the mother) versus the importance of the development of contemporaneous multiple attachments (which included the father). Political, economic and policy considerations were also influential. These included such issues as parents more commonly both engaging in the workforce, with an expectation that fathers would then assume a greater responsibility for domestic and childcare duties, such that the division of role and function between mothers and fathers was reduced. The fathers’ rights movements were, at the same time, pressing for the legislative introduction of separated shared care parenting. More recently, through the research of Smyth and others,926 more refined understandings are emerging that point to others things in the parenting relationship mattering more than time (that is, there may be differences between mothers and fathers that should be recognised), and that shared care is workable for some families but risky for others.

There have been shifts over time in thinking about mothers within the family law context, and the development of shared care has demonstrated this. A refocusing on the welfare and best interests of the child as being the paramount consideration in law, rather than legislating for shared care, does provide an opportunity for motherhood to reconfigure her role and relationship with fatherhood without the unique aspects of both attributable to gender having to be necessarily surrendered, notwithstanding the continued existence of s4(3) of COCA. An understanding of the positive contribution a mother can make to the development of a father’s relationship with their child through facilitative gatekeeping, including within a shared care context, is explored in a subsequent chapter. However, other challenges have emerged for motherhood as shared care continued to develop. When a mother seeks to keep her child safe by engaging in protective, inhibitory gatekeeping, perhaps arising out of issues of domestic violence or conflict in the parenting relationship, but is then misunderstood as

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926 Smyth et al, see above note 748.
being obstructive, is one example. Another challenge relates to the issue of relocation, which is discussed in the following chapter.
Chapter Eight

Relocation

Introduction

Parenting disputes associated with the issue of relocation are regarded as some of the most difficult cases within contemporary family law. Mothers are usually the applicants as they seek to relocate and take the children with them.\textsuperscript{927} As shared care became more common, relocation posed a challenge to such post-separation arrangements. At times, it was regarded as an infringement upon either an existing shared care arrangement or the development of such an arrangement in the future. These tensions are reflected in the relocation statistics gathered during the 20 year period from the early 1990s to 2014.\textsuperscript{928} At first, a mother’s health and happiness was recognised and given weight within the matrix of welfare and best interest factors. The New Zealand position was initially similar to that in the UK, and relocation was more readily granted. Then, through a growing understanding and emphasis upon the value to a child of a relationship with both parents, relocation in New Zealand became more difficult to obtain and the consequential challenge to motherhood increased. New Zealand’s position thereby diverged from that in the UK, which continued to place an increased weight on the mother’s desire to relocate with less weight on a child’s continuing relationship with the father. This difference in judicial approach between New Zealand and the UK as to the meaning and application of the welfare and best interests principle within the relocation context, has in recent years been ameliorated by a change in emphasis in both jurisdictions. In New Zealand, this has meant a restatement of the no a priori approach to all relevant welfare and best interest factors as required by the law, while the UK began to place greater weight

\textsuperscript{927} See Taylor, Gollop and Henaghan 2010 Research Report, above note 853: “In the 12 successful relocation cases, ten (83%) of the relocating parents were mothers and two (17%) were fathers. In the 19 cases where the relocation was refused by the Court, 18 (95%) of the parents were mothers who wanted to move and one (5%) was a father who wanted to move.” at 72, and “It was the mothers who most often wished to move with 61 (84%) of the mothers desiring to relocate, compared to only two of the fathers. Thirty-one fathers (76%) had opposed their ex-partner’s proposed relocation – 11 successfully, 19 unsuccessfully, with one case still to be determined by the Family Court at the time of the interview. There were more mothers who successfully relocated (39) than those who were prevented from moving or who, after parental discussion, had agreed not to move (19).” at 85

\textsuperscript{928} See statistics gathered by Professor Mark Henaghan, above note 76; see also statistics with respect to relocation outcomes in para 8.9; Stephen van Bohemen “International Relocation Cases” 2007 NZLS Family Law Conference Papers 307; Mark Henaghan, Bronwyn Klippel, Dugald Matheson “Relocation Cases” NZLS CLE Seminar 27, 2000; Mark Henaghan “Relocation – Taking the Baby and the Bath Water” 2003 NZLS Family Law Conference Papers 193; Pauline Tapp and Nicola Taylor, above note 359 at 96.
on the child’s relationship with the father such that relocation, if sought by a mother, was no longer readily and automatically granted. The impact upon motherhood of these shifts in approach by the law are traced in this chapter.

8.1 Relocation within New Zealand family law

No legislative definition for relocation exists within New Zealand’s family law. Relocation disputes are, however, defined by Taylor et al. as arising: 929

... when, following parental separation or divorce, a primary caregiver wants to move with the children a significant distance away from their present locality, thereby disrupting the children’s contact with their non-resident parent. They involve two competing claims set within the context of determining the child’s welfare and best interests – the primary caregiver’s desire to relocate nationally or internationally with the children versus the non-resident (or shared care) parent’s desire to maintain contact with the child in their present locality.

Relocation disputes are accordingly considered in contemporary family law as some of the most controversial and difficult issues to be found in modern family law “and have been described as being ‘some of the knottiest and most disturbing problems that our Courts are called upon to resolve’”. 930

A relocation is understood to mean a shift by one parent, seeking to also relocate their child. It is a guardianship decision requiring the consent of both guardians, failing which a decision of the Court based on the welfare and best interests of the child may be sought. This is because, pursuant to section 16(2)(b) of COCA, such a shift involves “changes to the child’s place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child’s relationship with his or her parents and guardians”. Location may also be a condition of a parenting order pursuant to section 48 of COCA, with a variation to such a parenting order sought if such location is sought to be changed. It includes consideration of a request by one parent to shift either to another country and therefore from one jurisdiction to another, or to shift domestically within New Zealand.

8.2 Comparing legal approaches between New Zealand and the UK

The opposing legal positions taken between New Zealand and England/Wales with respect to relocation outcomes are discussed by George. In 2009, using the same set of facts with practitioners across both jurisdictions where a similar welfare principle applies, he explored whether or not they would be likely to allow or refuse the proposed relocation.

George’s results were startling, as Figure 1 highlights. In England, the practitioners would more readily allow relocation, while the New Zealand practitioners would not.

Figure 1: Practitioners’ responses from England/Wales and New Zealand in George’s research

![Diagram showing practitioners' responses from England/Wales and New Zealand](image)

The welfare principle, as a legal transplant into New Zealand, has had a divergent effect for motherhood, where it was influenced by the egalitarian nature of New Zealand society where gender equality prevailed. This is in contrast to England’s patriarchy and its offering of gender fairness with respect to the mother-child relationship. That meant that, in New Zealand, the practitioners would more readily allow relocation, while the New Zealand practitioners would not.

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932 George, above note 75, Figure 1 table of results.

933 The significance of fairness to wives and mothers in family law jurisprudence in the UK continues to be a central feature. For example, in relationship property considerations, unlike New Zealand’s Property (Relationships Act) 1976 which is based on the principle of equal sharing, in the UK, the focus remains on fairness. In the Supreme Court decision of Prest v Petrodel Resources Ltd [2013] UKSC 34, Justice Thorpe, although dissenting with respect to the corporate veil issue, said at para 65: “Once the marriage broke down, the husband resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Amongst them is his invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him so to do it defeats the Family Division judge’s overriding duty to achieve a fair result.” The wife is reported as saying that the case could have been avoided if her husband had “played fair”; see [source](http://www.telegraph.co.uk/women/sex/divorce/10115554/Oil-tycoons-wife-...
Zealand, equality between mothers and fathers was the key factor after transplant of a principle from England that had been based in fairness to mother and child. Further, New Zealand’s foundation was based on a principle of gender equality, which is not the same thing as, though compatible with, gender neutrality (being a part of the English transplant). In England too, additional weight was given to the custodial mother’s health and happiness as a factor in a welfare assessment.\(^\text{934}\) In New Zealand, the risk has been that the custodial mother’s health and happiness was not accorded much, if any, weight in a welfare and best interests assessment, even if this factor was relevant and central. Weight was, instead, preferentially given to maintaining or developing a shared care relationship with the other parent (who was usually the father).\(^\text{935}\) This created challenges for motherhood with respect to the curtailment of her freedom of movement, her inability to automatically return to the support and geography of her own family, and an acceptance of financial restraints (and perhaps poverty) through an inability to pursue post-separation study, career development and employment opportunities if these required her to relocate.

The divergence between jurisdictions was highlighted in New Zealand through the 2002 Court of Appeal decision in \(D v S\),\(^\text{936}\) by its rejection of the UK decision in \(Payne v Payne\).\(^\text{937}\) \(D v S\) confirmed that the law requires no preferential weight to be given to any of the relevant factors, nor to the gender of the parent, in a welfare and best interests assessment. Nonetheless, the judgment refers to the qualities that fatherhood, as opposed to motherhood, brings to parenting (together with comment on the mothering qualities of this particular mother), providing clear judicial recognition of differences in parenting gender that may be relevant to an assessment of the welfare and best interests of a child, notwithstanding the import of the legislation. The essential features of the decision are discussed below.

\(^\text{934}\) Payne v Payne above note 28.
\(^\text{935}\) DMS v PAL CIV 2007-404-005486, (11 December 2007, HC Auckland), Harrison J; LH v PH (HC Auckland, 21 March 2007), Winkelmann J.
\(^\text{936}\) D v S above note 27.
\(^\text{937}\) Payne v Payne, above note 28.
8.3  *D v S* 938

The *D v S* series of decisions939 first came before the Family Court a few months after *W v C*940 had been decided. By the time it reached the High Court,941 the *Payne*942 decision had just issued out of the English Court of Appeal. While a relocation decision, it also had implications for the development of shared care, and for motherhood.

The mother was on a working holiday in New Zealand in 1986, when she met the father, D. He was a New Zealander, and the mother, S, was an Irish Catholic. They married in Ireland in 1988, returning to New Zealand shortly afterwards. Their three sons were born in 1991, 1993 and 1995 respectively. In 1997, S took the children to Ireland to spend time with her parents. D then visited her there, telling her that the marriage was at an end. While initially remaining in Ireland, under pressure from D and the threat of The Hague Convention, S returned to New Zealand where she found D had a new partner, with a child born into this relationship. S remained the primary carer of the children and returned to Ireland twice with them before D, in 1999, applied to the Family Court for a shared custody order. At the same time, he sought an order preventing removal of the children from New Zealand. In response, S applied for a custody order and for an order allowing her to relocate the children from New Zealand to Ireland, and to the support of her family.

The matter was heard in the Family Court in late 2000. S was seen as “desperately unhappy”943 if the Court did not allow her to return to Ireland with the children. However, the Judge also understood that S would not abandon the children, but would remain living with them in New Zealand if the children were not permitted to leave. He therefore made a joint custody order, directing the care of the children be shared between the parties on the basis of what was roughly a 60:40 split of time in favour of the mother. The Court further ordered that the children live in Christchurch and not be removed from New Zealand without the leave of the Court, or the written agreement of the parties. The mother appealed to the High Court against the order that the children not be removed from New Zealand, returning to Ireland for a few weeks without the children. Upon her return to New Zealand, S indicated that she was going back to Ireland to live whatever the outcome of the appeal. This new

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938 *D v S (CA No 1)* above note 27.
939 *D v S* (FCt) FP 09/1607/99 Christchurch 2 November 2000; see also discussion in F A Mackenzie, above note 77.
941 *D v S* (HC) AP39/00 2 April, 11 May, 5 July 2001, Panckhurst J.
943 *D v S*, above note 939 at 181.
evidence, together with the evidence of the mother’s counsellor that “the decision disallowing her to live in Ireland with her children was psychologically damaging to her,” resulted in the High Court determining that “the very premise upon which the Family Court decision was reached, namely that the boys could have ‘the best of both worlds’ through the presence of both parents in Christchurch, no longer obtains.” Panckhurst J referred to the recently released decision of Payne v Payne, and concluded that:

I have derived some assistance from a reading of Payne v Payne. It seems that a rather more prescriptive approach to cases such as the present is followed in England as compared to here. For all that the case does contain a number of observations which I think are helpful provided they are not applied in a mechanical fashion.

After reviewing the evidence, Panckhurst J said:

I have reached the conclusion that the best interests of the boys will be promoted if they accompany their mother to Ireland. To my mind there is clear evidence that the emotional needs of the boys are best met by [S], and that over the next few years at least that need is of paramount importance. … In short, I see the detriment and risks involved in a shift to Ireland as justified when measured alongside the gain which will flow from the presence of [S] as a mother. That, to my mind, is the bottom line.

D, as self-represented litigant, sought leave to appeal on a question of law, namely that Panckhurst J had erred by relying on the Payne decision which conflicted with the decision in Stadniczenko v Stadniczenko. The application was granted on the basis that it was prosecuted with due diligence, on the grounds that it raised an issue of increasing general importance.

The Court of Appeal allowed the appeal (Blanchard J dissenting) on the basis that the High Court had been materially and wrongly influenced by the Payne decision, by giving too much weight to the mother’s decision to return to Ireland and her need to fulfil her role as a mother.

944 D v S, above note 939 at 183.
945 D v S, above note 939, at 183.
946 Above note 939, at 183.
947 Above note 939, at 183.
948 Above note 939, at 183.
away from New Zealand. The Court of Appeal also said that the Payne approach, with its greater emphasis on one of the relevant factors to be weighed when considering a relocation application, was inconsistent with the no a priori assumption, all-factors and child-centred approach required by New Zealand law, and as already established in Stadniczenko v Stadniczenko. As a result of the appeal being allowed, the earlier orders were discharged and the matter was remitted back to the Family Court for a rehearing of the original applications or for the hearing of fresh applications. Pending further order of the Family Court, D and S were given joint custody. The children by now were living in Ireland, but were due to travel back to New Zealand for the Christmas holidays 2001/2002. While they were in New Zealand, D filed a further application for an order preventing the removal of the children from New Zealand and a joint custody order in his favour whereby the children would live in New Zealand with him, with access to their mother in Ireland.

In the Family Court, Judge Somerville noted that while the children were “relatively unscathed,” D was now “angry, frustrated and bitter” and “firmly of the view that the children’s interests would be best served by having input from both parents in New Zealand”, and S was still “deeply affected by the end of the marriage” and “upset at the deterioration in their relationship as parents and would like to see it improve.” D was granted joint custody, which appeared to be based on Judge Inglis QC’s principles in W v C.

S appealed this decision to the High Court, on the basis that the Family Court Judge had erred in law by being unduly influenced by the need for fairness between the parties, and adopting as a starting point the rights and obligations of the parents rather than the best interests of the children. She also pointed to the Family Court’s failure to properly consider the factors of the sustenance of the children’s relationship with S if they lived in New Zealand with D, the youngest child’s wish and need to live with S, the significance of the previous primary care by S, the extent to which she had encouraged the children to retain a positive view of D and the risk to which the children were being exposed by removing them from her care. The High Court decided that they needed to determine the matter to achieve

950 D v S (CA No 1), above note 27.
951 Stadniczenko v Stadniczenko, above note 842 at 145.
953 D v S, above note 952, at 6.
954 D v S, above note 952, at 6.
955 D v S, above note 952, at 6.
956 W v C, above note 799.
finality as quickly as possible. The appeal was allowed, S was granted custody which included the right to relocate and D was granted access. D sought leave to appeal to the Court of Appeal, which was refused.

8.4 Limits placed on the gender-neutral W v C equality approach

The second Court of Appeal decision with respect to D v S confirmed the second High Court’s decision. That is, that the Family Court was in correct to rely on W v C, which wrongly sought to create an a priori assumption that on separation joint guardianship rights were the starting point, and that shared care between the separated parents is the most desirable and appropriate discharging of their joint guardianship responsibilities. This position was rejected by the High Court and the Court of Appeal as being inconsistent with the legal position in New Zealand established by D v S (CA No 1), that the law requires that there can be no a priori assumptions with respect to a welfare and best interests enquiry. In the High Court, Chisholm and Fraser JJ said:

If the concept of equal and shared parental obligations or nurturing rights is allowed to represent the starting point for assessment of a proposal to relocate … there must be a presumptive or a priori (from what is before) weighting against the relocation application because equal and shared parental obligations or nurturing rights could only be achieved by preserving the status and declining the application. Put another way, one factor (the importance of equal and shared parental obligations or nurturing rights) is being isolated and given presumptive effect … It seems to us that … the W v C approach cannot be reconciled with the D v S principles which emphasises an all-factor child-centred approach with no room for a priori assumptions or weightings. Ironically, if applied to a relocation case the W v C approach must be close to the flip side of Payne v Payne and it must follow for that reason alone that it is contrary to the relocation principles prevailing in New Zealand.

958 S v D, above note 957 at 885.
959 D v S (CA No 2) [2003] NZFLR 81.
960 D v S (CA No 2), above note 959.
961 D v S (CA No 2), above note 959.
962 S v D, above note 851 per Chisholm and Fraser JJ, at 885.
963 W v C, above note 799.
964 D v S (CA No 1), above note 27
965 S v D, above note 958.
The Court of Appeal was also clear. It said:  

[I]n our view it was not seriously arguable that the High Court was wrong to find that the particular passage from *W v C* was inconsistent with this Court’s statement of the proper approach to *D v S*. … it can no longer be good law to use as starting point “the equal and shared legal right to exercise” guardianship responsibilities and obligations. It is clearly wrong to say that a deviation from that position is justified only by circumstances demonstrating that the child’s welfare and interests require it. Rather it is the child’s welfare and interests in the future which must be the centre of the inquiry. This must be assessed in terms of available options. Here shared parenting was no longer an option.

Judge Inglis subsequently sought, extra-judicially, to clarify the principal message he had intended convey by *W v C*, saying that:

> [J]ust as it is an impermissible *a priori* assumption that on separation one parent will normally assume sole day-to-day care, so it is equally impermissible to assume that on separation joint guardianship responsibilities will justify each parent assuming shared day-to-day care in substantially equal segments of time.

He accepted that the *W v C* decision could not be interpreted as suggesting that the presumptive starting point in determining care of a child post-separation was the parents’ entrenched joint guardianship responsibilities, because such a position could not stand in light of the Court of Appeal’s decision in *D v S (CA No 1)*. That the appropriate starting point might be the parents’ status as joint guardians, rather than the welfare of the child as the first and paramount consideration, would be an impermissible *a priori* assumption. He also confirmed that presuming that the welfare and best interests of a child of separated parents should be met through a shared day-to-day care regime, particularly an equal shared care regime, would also be an impermissible *a priori* assumption. He did, however, consider that:

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966 *D v S (CA No 2)*, above note 959, at 203.
967 B D Inglis *New Zealand Family Law in the 21st Century*, above note 68 at 258.
968 *D v S (CA No 1)*, above note 27.
969 Inglis, above note 68, at 211.
970 Inglis, above note 68, at 297.
It is unfortunate that certain passages in *W v C* failed adequately to articulate the necessary distinction between the “rights” of a guardian and the inherent obligations and responsibilities of a guardian … so leading to the inaccurate impression that what was proposed was some new principle that preservation as between separated parents of full joint guardianship “rights” instead of being the legal “default position” in the absence of any order to the contrary, was *prima facie* in the welfare and best interests of the child. It is, however, difficult to understand how recognition of a legal “default position,” with the acknowledgment that the welfare and best interests of the child may require its adjustment, amounts to an a priori assumption.

The focus in these considerations was on rights and equality, understood within a gender-neutral framework. The challenge for motherhood was that there appeared to be no recognition of differences between mothering and fathering, nor of the welfare principle as being relationally based, particularly with respect to mother and child.

### 8.5 The dissenting judgment in *D v S* 971

The dissenting judgment 972 of Blanchard J in *D v S (CA No 1)* 973 recognises the emotional needs of the children as relevant. The judge considered that at that time in their lives, these were best met by their mother, rather than a father. In reviewing the High Court decision, Blanchard J considered Panckhurst J was referring, not to mothers generally, but to this particular mother, thereby avoiding any breach of section 23(1A) of the Guardianship Act. 974 However, he also referred to the Family Court evidence relating to a more general contribution of fathers with respect to the issues of resilience and self-reliance. These comments highlight the value of fatherhood generally to a child, 975 and were, arguably, not gender-neutral issues but recognitions of the reality of the different, gender-based

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971 *D v S (CA No 1)*, above note 27, per Blanchard J.
972 Michael Kirby “Judicial Dissent – Common Law and Civil Law Traditions” (2007) 123 LQR 2007, 379 at 388; see also Jeremy Waldron “The Supreme Court Battlefield” New York Times Review of Books, review of Cass R Sunstein *Constitutional Personae* (Oxford University Press, 2015), March 24, 2016 where he says “Dissents help chasten the judicial majority, by forcing them publicly to answer objections. And by staking out his or her own ground, a dissenting judge may provide a better basis for predicting the future than an artificial and papered-over consensus”, at 3.
973 *D v S (CA No 1)* above note 27.
974 *D v S (CA No 1)*, above note 27 at 138 per Blanchard J.
975 Evidence by Ian Grant, recognised as a New Zealand expert in the value and promotion of fatherhood, was given. It was not evidence about this particular father as the law would require, to address the requirements of the equivalent provision to s4(3) of the Care of Children Act 2004. Rather, it was evidence, uncontested, about the unique value of fatherhood to a child.
contributions that mothers and fathers respectively make to the optimum development of their children. This judicial suggestion appears to regard these factors as relevant, as child-centric, and to be appropriately taken into account in a welfare and best interests assessment. Implicit, is that such factors are not based in the gender-sameness of liberal feminist theory. Accordingly, the Court is faced with complexities in addressing a welfare and best interests assessment. The law imposes a requirement of gender-neutrality through section 23(1A) of the Guardianship Act, yet expert evidence and uneasy attempts by the court to recognise these realities suggest that such issues may not be gender-neutral.

The dissenting judgment also suggests that the recognition of the mother’s health and happiness, a factor that appears to have been given less weight in relocation decisions since the D v S decision, was accorded appropriate weight within the totality of the weighing and balancing of all relevant factors by the High Court. It had not been elevated to an inappropriate level in the process. Nonetheless, the Court of Appeal’s position in D v S, in its rejection of Payne, arguably came to be understood to mean a rejection of the mother’s health and happiness, as well as the significance of the role of a mother to a child, as relevant factors to be properly taken into account in an appropriate way. The dissenting judgment of Blanchard J is an example of the judicial efforts being made to recognise motherhood as a unique and discrete offering to a child, notwithstanding the gender-neutrality contained in the law. The judgment, arguably, also leaves room for the Court to consider the gendered qualities of a particular mother (or father) in relation to a child “in his or her particular circumstances,” as consistent with the current law. However, judges remain legislatively constrained from including consideration, in a particularised situation, of the more general and unique, gender-based contributions with respect to each of motherhood or fatherhood.

8.6 The link between D v S and the development of shared care

The Court of Appeal’s decision in D v S was about an international relocation, but it became recognised as the most authoritative guidance available in New Zealand with respect to the welfare principle, enshrined in section 4 of COCA. It is described by Judge Inglis as:

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976 Now section 4(3) of the Care of Children Act 2004.
978 D v S (CA No 1), above note 27.
979 D v S, above note 27.
980 Inglis, above note 68, at 247.
…the Court’s clear intention to restate the welfare principle as one of general application binding on the New Zealand Courts in all cases where there is a dispute over a child’s future.

Judge Inglis saw the effect of the decision as confirmation that a relocation case was no different to any other determination that a court was called on to make with respect to a child’s future care, and that the welfare principle was to be applied as the first and paramount consideration in the same way.\textsuperscript{981}

… with such elements as are added by the issue of relocation being no more than elements to be balanced with all others in the wider all-factor child-centred approach which the welfare principle requires.

\textit{D v S (CA No 1)}\textsuperscript{982} records eight factors to be taken into account in correctly approaching New Zealand law with respect to a relocation application, and more generally to the application of the welfare principle.\textsuperscript{983} These included confirmation that the introduction of section 23(1A), now section 4(3) of COCA, was designed to dispel any gender-based assumptions as to whose parental care will best serve the welfare of the child, thus restating the gender-neutrality required by the law.

Then COCA was passed, coming into force on 1 July 2005, its architects having been influenced by these decisions. The new legislation provided guidelines in the section 5 principles but gave no one factor statutory priority over any other in the section 4 welfare and best interests assessment. The drafting of the new legislation also, arguably, left open for further consideration the different theoretical foundations upon which the issue of gender-neutrality and gender-equality in parenting law should be based, and therefore to be able to also consider the importance of early attachment, and the unique role of motherhood with respect to such issues as breastfeeding. However, the new legislation included section 4(4)\textsuperscript{984} as a carryover from section 23(1A) of the Guardianship Act 1968, being the need to make a welfare and best interests assessment in a gender-neutral way. Therefore, a genuinely child-centered approach, able to take into account any relevant factor, remained compromised in its continuing inability to recognise the value of gendered care based in the differences between mother and fathers.

\textsuperscript{981} Inglis, above note 68, at 248.
\textsuperscript{982} \textit{D v S (CA No 1)}, above note 27.
\textsuperscript{983} \textit{D v S}, above note 27 at 126-135.
\textsuperscript{984} Now section 4(3) as a result of the 2013 amendment to the Care of Children Act 2004.
A shift in judicial thinking in the Family Court developed, with increased weight being given to the factor of the importance of a child’s relationship with the non-relocating parent (usually the father). There also appears to have been decreased weight given to the factor of the relocating parent’s (usually the mother’s) emotional health and happiness, all within the matrix of a welfare and best interests enquiry. The result was that relocation was more difficult to obtain. The Family Court did not examine whether there were gender-based issues relevant to relocation, or to separated shared care. In any event, it was legislatively constrained from presumptively considering whether there were differences between mothers and fathers relevant to a welfare and best interest enquiry, through s4(3) of COCA.

Nonetheless, the repeal of the Guardianship Act 1968, and the introduction of COCA did signal change. It also created tension between the Family Court and the High Court, as a divergence between law and practice began to emerge. The then Principal Family Court Judge Boshier considered that the addition of the section 5 principles in COCA into a previously unregulated area could restrict the approach available to the Court, and that:

The weight to be given to the relationships with parents is signaled as being greater than the relationships with other family members or of cultural considerations. The section states “in particular”, the child should have ongoing relationships with both parents. Splitting up a relationship between parent and child for a move that would take the child closer to family and cultural ties appears to be discouraged.

Inglis, too, considered that the new legislation brought with it a change in emphasis, but acknowledged that his view was not shared by appellate judges Priestley J, nor Panckhurst J.

However, in the Family Court, Judge Callinicos similarly expressed in MBF v SRF, that.

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985 See Pauline Tapp and Nicola Taylor “Relocation: a Problem or a Dilemma?”, above note 359.
986 Section 4(4) of the Care of Children Act 2004 said “regardless of a child’s age, it must not be presumed that placing the child in the day to day care of a particular person will, because of that person’s sex, best serve the welfare and best interests of the child. This was amended to Section 4(3), such amendment dated 31 March 2014. The legislative provision now requiring that “it must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person’s gender.”
987 Boshier, above note 515 at 79.
988 Boshier, above note 515.
989 Inglis, above note 68.
The express and clear inclusion in the Care of Children Act of sections 4 and in my view sharpens or shifts the Court’s focus to a more individualized view than that which existed before.

In *Downing v Stamford*, the tension continued to intensify between the High Court and the Family Court as to the correct emphasis required by COCA of the factors relevant to a welfare and best interest enquiry with respect to relocation. Priestley J, while he dismissed the appeal and confirmed the decision of Judge Callinicos, also said:

If Judge Callinicos is hinting that the High Court and Court of Appeal authorities, which were binding on him, were not adopting the appropriate focus or, stating as he does in [31] that the focus “sharpens or shifts” to a “more individualised view” thereby suggesting that the focus is indeed different, then, quite apart from principles of *stare decisis*, the Judge was wrong. … To the extent that the *M B F v S R F* dicta may be deflecting the Family Court from a correct approach, they are over-ruled.

Priestley J continued, saying:

Certainly ss 4 and 5 of the Care of Children Act are more detailed than was s 23 of the Guardianship Act 1968. But the focus and the primary inquiry remain unchanged.

The argument was not recognised as having a gender component. It was seen rather to be about elevating one of the section 5 principles (that a child should have a continuing relationship with both parents) above all other relevant factors in a welfare and best interests enquiry, which was not the law. New Zealand’s Principal Family Court Judge in his extra judicial 2005 article “Relocation cases: an International View from the Bench,” relied on to support shared care and militate against relocation, said that parents should not relocate if to do so would have a detrimental impact on the [child’s] relationship with the other parent.” These trends inevitably did support the development of shared care in New Zealand and militate against relocation. This included shared care in the face of a mother’s desire to go home to the support of the maternal family, seeking to remove herself from what may have

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991 *Downing v Stamford* [2008] NZFLR 678.
992 Above note 991, at paras [50] – [54].
993 Above note 991.
994 Principal Family Court Judge Peter Boshier “Relocation cases: an International View from the Bench” (2005) NZFLJ 77.
been a violent or abusive relationship, or simply the stress and unhappiness of going it alone without family support. It is arguable that motherhood was compromised by these developments, exacerbated by the development of gender–neutral shared care and the consequent consideration of relocation, at times, as an infringement upon such development.

8.7 Relocation, considered as an infringement upon the development of shared care

Responses of mothers and fathers to the issue of relocation may differ through gender. However, because of the imposition of gender neutrality, such responses are not seen in this light, and from the point of view of the child, do not then appear to represent their welfare and best interests in the fullness intended by the court’s legislative mandate. D v S was interesting in this regard. A Roman Catholic mother, whose life revolved around motherhood, in the end conveyed her decision to relocate to Ireland irrespective of the appeal court’s decision with respect to her children. The assumption was that although she was desperately unhappy in New Zealand, she would stay if her children were here. That way, the children could “have the best of both worlds.” There appeared to be inherent in the Family Court’s decision, a reliance on her anticipated mother response that she would not leave her children and she would therefore stay. An allied consideration relates to whether judicial perceptions exist within a gender-neutral legislative framework of gendered “good” mother and “bad” mother responses. That is, mothers are judged according to this measure on whether they stay with their children if they are not permitted by the Court to relocate on the one hand, or if they go irrespectively on the other.

995 Statistics suggest New Zealand has a high rate of domestic violence, with between 33 and 39 per cent of women experiencing physical or sexual violence from a partner in their lifetime. The New Zealand Medical Association associate domestic violence with increased risk of depression, anxiety, substance abuse, and self-injurious behaviour, including suicide. Of those arrested for family violence, 84 per cent were men. Police estimate only 20 per cent of domestic violence is reported. See media report 18 June 2013 http://www.stuff.co.nz/entertainment/celebrities/8807299/Saatchi-admits-assaulting-Nigella , discussing New Zealand’s domestic violence situation. Domestic violence as a gendered, not a genderless, issue between separated parents is touched on but is intended to be explored further by this paper.

996 Above note 927 and statistics with respect to relocation outcomes in para 8.9. See also Stephen van Bohemen “International Relocation Cases” 2007 NZLS Family Law Conference Papers 307; Mark Henaghan, Bronwyn Klippel, Dugald Matheson “Relocation Cases” NZLS CLE Seminar 27, 2000; Mark Henaghan “Relocation – Taking the Baby and the Bath Water” 2003 NZLS Family Law Conference Papers 193; Pauline Tapp and Nicola Taylor, above note 359 at 96. Of note is that in the period November 2010 to September 2011, immediately following the Supreme Court’s decision in Kacem v Bashir [2010] NZFLR 84 (SC), there were 29 relocation decisions. 19 decisions involved a domestic relocation of which 66 per cent were allowed. 10 decisions involved an international relocation and 80 per cent of those were allowed.

997 D v S (CA No 1), above note 27.

998 D v S [2002] NZFLR 881 (HC), Pankhurst J.

999 See Evans, above note 858; see also Taylor, Gollop and Henaghan, above note 853, and works with respect generally to the feminist perspective, eg Smart and Sevenhuijsen (eds) Custody and the Politics of Gender (UK Routledge, 1989).
In New Zealand, it appears that the development of shared care became a priority, attractive because it seemed to be able to provide quite simply to a child an equal and fair relationship with both parents.\textsuperscript{1000} While the Court would always enable a mother to relocate if she had good reason for doing so and balancing the relevant factors in a welfare and best interests assessment, it was determined that relocation should be permitted, there were also circumstances where an attempt by a mother to relocate with her children was seen as an infringement upon shared care being able to develop and militated against it.\textsuperscript{1001} During the 2000s, an uneasy tension developed between motherhood and the Family Court as a result of the informal presumptive weighting that appeared to judicially be given to the value of developing a shared care parenting arrangement ahead of recognising a mother’s health and happiness within the parenting arrangement, this emphasis impacting upon the diminishing success of relocation applications during this period.

8.8 The corrective provided by the Supreme Court in Kacem v Bashir\textsuperscript{1002}

Subsequently, the series of decisions which culminated in the 2010 Supreme Court decision in Kacem v Bashir,\textsuperscript{1003} provided a corrective to the movement in the law after the introduction of COCA.\textsuperscript{1004} Correction was provided, not just in respect of the development of an informal and elevated weighting of the then section 5(b) of COCA over other relevant factors in a welfare and best interests assessment, but also with respect to the extra-judicial comments of the then Principal Family Court Judge.\textsuperscript{1005} The Court confirmed that the principle contained

\textsuperscript{1000}Judge Inglis QC in W v C [2000] NZFLR 1057 said: “The starting point must be whether there is any valid reason relevant to the welfare of the child why the respondent’s legal right – identical to the legal right of the applicant – to exercise guardianship responsibilities and obligations jointly and equally with the applicant should be restricted.” The Court of Appeal in D v S (CA No1) [2002] NZFLR 116 confirmed that there could be no a priori assumptions with respect to any of the relevant factors in an assessment of a child’s best interests (reconfirmed by the Supreme Court in Kacem v Bashir [2010] NZFLR 84 (SC)) and in D v S (CA No 2) [2003] NZFLR 81 said that the Family Court had been wrong to rely on W v C. In its view, Judge Inglis QC had incorrectly sought to create joint guardianship rights as the starting point for a best interests assessment, with shared care between separated parents being the most desirable way of discharging joint guardianship responsibilities. Nonetheless, the decision remained influential in promoting the development of shared care in New Zealand, in conjunction with the subsequent informal weighting being given to a child having a relationship with both parents after the introduction of the Care of Children Act 2004 and the import of s5(b), notwithstanding such informal weighting being wrong in law.

\textsuperscript{1001}See for example the decision of Judge Callinicos in M B F v S R F above note 990, overturned on appeal in Downing v Stamford [2008] NZFLR 678 per Priestley J.

\textsuperscript{1002}Kacem v Bashir, above note 40.

\textsuperscript{1003}Kacem v Bashir, above note 40; see also B v K FC Auckland FAM 2006-004-1761, 5 September 2008; K v B (2009) 27FRNZ 417 (HC); B v K [2010] NZCA 96.

\textsuperscript{1004}See also a detailed study of the impact of the rise of shared care as an informal presumptive factor in relocation disputes in New Zealand as outlined in Rob George Relocation Disputes: Law and Practice in England and New Zealand (Hart Publishing, 2014), above note 75.

\textsuperscript{1005}Kacem v Bashir, above note 40 at f/n 21 of the decision “It follows that the view expressed by Principal Family Court Judge Peter Boshier in his article entitled “Relocation cases: an international view from the
in section 5(b) contained an internal weighting within its own provision with respect to a child’s relationship with its parents. It was not an external weighting to be applied in relation to other section 5 welfare and best interest factors.\textsuperscript{1006} It also provided a corrective to shared care being seen by the Family Court as the preferred separated parenting model. These movements appeared to be based on an informal and incorrect elevation by the then Principal Family Court Judge and some judges within the Family Court of the weight to be given in a welfare and best interests assessment to the significance of a child of a relationship with both parents through shared care, which in turn made relocation (usually sought by the mother) more difficult to achieve. This elevation and weighting was found to be incorrect by the Supreme Court because the law continued to require a lack of presumption or a priori weighting of any of the relevant factors in a welfare and best interests enquiry.

8.9 The ebb and flow of relocation statistics

The \textit{Kacem v Bashir}\textsuperscript{1007} decision resulted in the clarification, and a subsequent legislative re-ordering, of the section 5 principles in the Care of Children Amendment Act (No 2) 2013.\textsuperscript{1008}

\begin{footnote}{
Section 5 Principles relevant to child’s welfare and best interest: (a) the child’s parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child’s care, development, and upbringing; (b) there should be continuity in arrangements for the child’s care, development, and upbringing, and the child’s relationships with his or her family, family group, whānau, hapū, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents): (c) the child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child’s parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child: (d) relationships between the child and members of his or her family, family group, whānau, hapū, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child’s care, development, and upbringing: (e) the child’s safety must be protected and, in particular, he or she must be protected from all forms of violence as defined in section 3(2) to (5) of the Domestic Violence Act 1995 (whether by members of his or her family, family group, whānau, hapū, or iwi, or by other persons): (f) the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened. Section 5 was then replaced on 31 March 2014 by section 4 of the Care of Children Amendment Act (No 2) 2013 (2013 No 74) and came into force on 1 April 2014. It now reads: 5 Principles relating to child's welfare and best interests. The principles relating to a child's welfare and best interests are that—

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:

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The Supreme Court did not consider the deeper, and conflicted, underlying theoretical issues to be in tension with each other. However, the statistics with respect to relocation would suggest that there have nonetheless been subtle shifts in judicial approach and, therefore, relocation outcomes for applicant mothers have again improved.

An analysis of relocation decisions for the period 1 July 2005 (immediately after the commencement of COCA) and 31 December 2006 revealed that of the 51 decisions involving relocation applications, 28 were granted and 23 were declined.\textsuperscript{1009} Of the 28 granted, 13 were for a relocation within New Zealand while 15 were overseas. From 1 January 2007 to 31 December 2007, there were 23 decisions. 10 were granted and 13 were declined. Of the 13 that were declined, 10 were proposed to be within New Zealand, and 3 were proposed to be outside New Zealand. For the period 1 January 2008 to 31 December 2008, there were 29 decisions. 17 were granted and 12 were declined. Of the 17 that were granted, 6 were domestic and 11 were international. Of the 12 that were declined, 6 were domestic and 6 were international.\textsuperscript{1010} Mothers were more usually the applicants.

These results are consistent with statistics gathered by van Bohemen with respect to relocation decisions (30 international applications granted and 35 domestic applications granted) between 1 January 2005 and 31 August 2007, where 75 per cent of the international relocations were successful and only 33 per cent of the within New Zealand applications succeeded.\textsuperscript{1011}

Henaghan’s statistics demonstrated that in the 10 years from 1988 to 1998, where there were 75 relocation cases, the majority (62 per cent) were decided in favour of the custodial and relocating parent (usually the mother).\textsuperscript{1012} From 1999 to 2000 there were 33 decisions. Sixteen allowed the relocation and 17 did not, being a success rate of 48 per cent. For the

(c) a child’s care, development, and upbringing should be facilitated by ongoing consultation and cooperation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
(d) a child should have continuity in his or her care, development, and upbringing:
(e) a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
(f) a child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.
\textsuperscript{1009} See Henaghan’s statistics, above note 76; see also above note 996.
\textsuperscript{1010} See statistics from Henaghan, above note 76; see also above note 996.
\textsuperscript{1011} Stephen van Bohemen “International Relocation Cases” 2007 NZLS Family Law Conference Papers 307.
\textsuperscript{1012} Mark Henaghan, Bronwyn Klippel, Dugald Matheson “Relocation Cases” NZLS CLE Seminar 27, 2000.
period 2001 to 2003, the success rate dropped further to 38 per cent. These statistics confirmed that the rate of successful applications stood at 62 per cent for the ten year period 1988 to 1998 but from that point on, it progressively declined to 48 per cent in 1999-2000, and then to 35 per cent for the period 2005-2007.

Henaghan considered that the key factor in refusing relocation at that time was the Court’s increasing emphasis on the relationship of the child with the non-moving parent (usually the father) and the impact of the interpretation of section 5(b) of COCA. This provided to the non-relocating parent considerable power. During this period, the value placed on a child’s relationship with that parent was considered so important that if they opposed relocation of the child sought by the other parent (usually the mother), the basis for the Court’s decision provided a better than an odds-on chance that permission for the relocation (usually requested by the mother) would be declined.

According to statistics for 2008-2009, 50 per cent of relocation applications were successful, but this dropped to a low of 32 per cent in 2010. However, after the decision in Kacem v Bashir, delivered in late 2010, there appears to have been a marked shift. In 2011, 62 per cent of relocation applications were allowed, this statistic being repeated in 2012 at 58 percent before dropping to 42 per cent in 2103 but rising again to 60 per cent in 2014. Of the 57 relocation decisions between 2 November 2010 to 19 July 2012, being the period immediately following the Kacem v Bashir decision, 65 per cent of relocation applications were allowed. 31 of the 57 decisions involved a domestic relocation, 18 (58 per cent) being allowed and 13 (42 per cent) being declined. The remaining 26 of the 57 decisions involved applications for international relocations. Nineteen (73 per cent) were permitted, while 7 (27 per cent) were declined.

It is noteworthy that within these statistics, significantly more international relocations are allowed than domestic relocations. There are a number of factors common to successful

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1014 These statistics were also confirmed by Tapp and Taylor above note 359, at 95.
1015 Henaghan, above note 996.
1016 Statistics provided by Professor Mark Henaghan and Ruth Ballantyne, University of Otago, December 2015.
1017 Kacem v Bashir, above note 40.
1018 Henaghan and Ballantyne, above note 1016.
1019 Henaghan and Ballantyne, above note 1016.
1020 The 19 decisions that were considered are as follows: RMB V ARZB FC Dunedin FAM -2010-017-000023, 2 November 2010 (Judge Coyle), AMH v SH HC Napier CIV-2010-441-347, 4 November 2010 (Justice Young), MHK v AGE FC Hamilton FAM-2010-019-001401, 16 December 2010 (Judge Cocurullo), TJS v ESS FC Palmerston North FAM -2008-054-000676, 24 June 2011 (Judge Ullrich), JAN v AJL FC Christchurch FAM-
international relocation cases during this period, Henaghan and Ballantyne recording these as follows:1021

- The mother is the party seeking to relocate.
- The mother suffers from depression as a result of having to remain living in New Zealand with the child.
- A wider family support network exists in the country to which relocation is sought.
- The mother is the primary caregiver to whom the child has a strong attachment.
- The father is in a position to relocate as well, enabling increased contact to occur in this manner.
- Greater weight is accorded to the child’s views and wishes than in situations where relocation is declined.

There is longstanding recognition that with respect to relocation cases, it is mothers who are usually seeking to relocate.1022 This is also reflected in the UK, where George identifies in his 2012 study that 95 per cent of the relocation applications in England that year were brought by mothers.1023 In New Zealand, prior to Kacem v Bashir,1024 judicial determinations more frequently declined relocation applications than permitted them. This was difficult for a mother who, in light of the increased value placed on the child’s relationship with the non-relocating parent (usually the father), may have been required to continue with, or support the

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1021 Henaghan and Ballantyne, above note 1016, Relocation Collection, 23 August 2012.

1022 Henaghan and Ballantyne, above note 1016, also identified that of the 58 per cent of domestic relocations allowed during the same period, common themes that emerged in the judicial decisions to permit a relocation were an attempt to keep the child with his or her primary attachment figure who was usually the mother, a recognition of the wider family relationships available to the child and therefore support available to the relocating parent (who was usually the mother) if relocation was allowed, and the ability of the non-relocating parent (usually the father) to also relocate; see also Taylor, Gollop and Henaghan, above note 927.


1024 Kacem v Bashir, above note 40.
introduction of, a shared care arrangement with the father. This included circumstances where she may have been suffering from depression and/or geographically unable to be supported by her wider family. She may also have been required to manage a conflicted parenting relationship. Since then, there appears to be an increasing judicial recognition of the reality of a mother’s position, such that consideration of the matrix of welfare and best interest factors to be determined in a relocation application now appears to be more balanced by inclusion of this additional factor, based on the no a priori weight or elevation of relevant factors as required by the law. These subtle shifts in judicial emphasis appear to have resulted in greater success with respect to relocation applications\(^\text{1025}\) and, arguably, they have resulted in an easing of the associated tension that had developed between motherhood and the law.

**Summary**

This chapter has examined the relationship between motherhood and family law through the lens of relocation. The analysis of New Zealand relocation decisions confirms that, notwithstanding the existence of a legally gender-neutral parenting framework, mothers are overwhelmingly the majority of applicants to the Court for permission to enable their child(ren) to relocate. Statistics also reflect that over the 20 year period from the mid-1990s until 2014, there has been an identifiable fluctuation in the success of such applications. There appears to be a connection between the development of a father’s day-to-day care of a child in conjunction with the mother through shared care, and the diminished success of relocation applications such that, by 2010, approximately two thirds of such applications were being declined. Relocation was also, at times, regarded as an infringement upon shared care, cutting across the ability to provide to a child relationships with both parents through the medium of shared day-to-day care. For motherhood, this limitation upon the value of freedom of movement presented additional challenges. The divergence between the approaches of England/Wales and New Zealand to the issue of relocation had also reached its most extreme point during this time. The corrective provided in New Zealand by the Supreme Court’s 2010 decision in *Kacem v Bashir*\(^\text{1026}\) and the subsequent 2013 amendment and reordering of COCA’s section 5 principles have contributed to a swing back in the statistics such that by 2014, 68 per cent of relocation applications in this jurisdiction were recorded as

\(^{1025}\) In 2012, George records successful English international relocation applications at 66.7 per cent. He notes that for a jurisdiction that had previously been considered “pro-relocation”, this statistic was very similar to that of Canada at 68 per cent, a jurisdiction regarded as “neutral”, and of New Zealand also at 68 per cent, a jurisdiction previously regarded as “anti-relocation”. See George, above note 1023, at paras 4.4-4.7.

\(^{1026}\) *Kacem v Bashir*, above note 40.
being successful (mothers continuing to make up the majority of the applicants), surprisingly consistent with the UK’s statistic recorded by George in 2012 of 62 per cent. The pendulum between the two jurisdictions, the UK having been regarded as pro-relocation and New Zealand having been regarded as anti-relocation, appears now to be settling at a level consistent across both jurisdictions. This has meant that in New Zealand, a more favourable approach is allowing more mothers to relocate than not.

The following chapter discusses gatekeeping as a further example of a contemporary legal challenge to motherhood and the fluctuating tension in the relationship between motherhood and the law. It also explores the constructive possibility of an expanded understanding of gatekeeping as a means of enhancing the development of a father’s relationship with a child achieved, in part, through recognising and harnessing motherhood’s unique capacity to facilitate the father-child relationship.
Chapter Nine

Gatekeeping

Introduction

McKinnon’s dominance feminist theory suggests the impossibility of a mother’s point of view being understood and supported by a state judicial system. That is because in feminist theory the state reinforces, even in the name of neutrality, the male point of view since patriarchy is the standard upon which the law is founded. Therefore the law sees and treats women the way men see and treat women. McKinnon warned that the sameness or difference of liberal feminist theory or cultural feminist theory both had maleness as their reference point, and therefore masked the reality of gender as a system of social hierarchy, a political system of male dominance and female subordination.

The gendered nature of the issue of gatekeeping, as well as the issues of imprisonment and breastfeeding discussed in the following chapters, are arguably examples of motherhood’s gendered responses within a legal framework that, in seeking gender equality, is gender-neutral. These examples demonstrate contemporary family law’s difficulty in addressing gendered aspects of motherhood, notwithstanding sympathetic attempts by some judges to do so.

9.1 Gatekeeping

Gatekeeping is a factor that can facilitate or hinder separated parents’ connections with their children and with each other. It has been identified as a maternal issue, and also as a

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See Chapter Five.

See, for example, with respect to breastfeeding, Judge Ellis in LJJ v RFF [2012] NZFC 5867; Judge O’Dwyer, with respect to gatekeeping, “A Better Understanding of Maternal Gatekeeping: A View From the Bench” Paper presented at 2nd International Family Law and Practice Conference “Parentage, Equality and Gender”, Centre for Family Law and Practice, London Metropolitan University, London 3-5 July 2013; and Justice Priestley in PJM v Family Court at Waitakere HC CIV-2010-404-3306, 9 September 2011, with respect to re-humanising the legal process, as discussed by Pauline Tapp in “Judicial Engagement with the parties - a means of facilitating compliance with, and respect for, orders of the court?” (2011) 7 NZFLJ 104.

complex gendered issue or a gender-neutral issue. Close attention has been paid in recent years to the ways in which mothers encourage or resist fathers’ involvement in child care and family work, that is, gatekeeping in this context is seen as a maternal issue such that it has even been referred to as maternal gatekeeping. On the other hand, with respect to intact families, research has identified a diversity of parenting practices particularly with the rise of the dual-income household. Changes in employment patterns have shifted gender relationships, and maternal and paternal roles are being negotiated according to complex structural and gender influences. Hochschild highlights strategies used by couples to avoid seeing the obvious discrepancies between their ideal of equality and the practices of their everyday life. An Irish study identified that traditional practices of time division between men and women remain pervasive. In 2008, McGinnity and Russell’s findings were that “there are still gender differences in the allocation of time to employment and unpaid tasks in dual earner couple, with women having on average a higher domestic workload than men.” Such unequal division of labour in the pre-separation relationship can as a natural consequence lead to women being more experienced and therefore seen as superior in issues of child care and family management. Doucet sees that “fathers and mothers have a different connection to their children and that the one held by the mother is strong, vaster and more profound.” Austin takes a more gender neutral approach, and reflects upon the bi-directional and mutual processes that are at play in parental gatekeeping. He utilises the concept of gatekeeping to frame the analysis in litigation as to how supportive one parent

1032 Allen and Hawkins above note 1031, Arrendell above note 1029, and Fagan and Barnett above note 1031.
1034 Hochschild above note 1033; Elena Moore above note 1029.
1036 McGinnity and Russell above note 1035 at xi; Moore above note 1029.
1037 Andrea Doucet, above note 10.
may be of the other and the other’s relationship with the child. This then becomes a key determinant in judicial decision making, particularly with respect to relocation.\textsuperscript{1039}

9.2 Definitions of gatekeeping

Gatekeeping was a term that was originally used in research in a critical sense against mothers. In 1999, Allen and Hawkins defined maternal gatekeeping as:\textsuperscript{1040}

… a collection of beliefs and behaviours that ultimately inhibit a collaborative effort between men and women in family work by limiting men’s opportunities for learning and growing through caring for home and children.

In 2003 Fagan and Barnett provided a blunter definition, gatekeeping being defined as:\textsuperscript{1041}

… mothers’ preferences and attempts to restrict and exclude fathers from child care and involvement with children.

These views regarded the behaviours and beliefs of mothers as seeking to limit fathers’ involvement with their children. Austin described this as restrictive gatekeeping\textsuperscript{1042}, while Berger, Brown, Joung, Melli and Wimer referred to it as negative control.\textsuperscript{1043} Judge O’Dwyer described the consequence for the New Zealand Family Court as a negative focus on mothers, who have been seen as using child care as a means of power and control and as reinforcing a stereotype, also negative.\textsuperscript{1044} She raised an alternative and preferable perspective to be considered, that is, that there could be a recognition of mothers’ abilities to manage relationships and to have the capacity to develop strategies that promote fathers’ involvement. Her concern was that mothers have not been treated well in the New Zealand Family Court and that it was outdated practice to focus solely on mothers, particularly in this negative way. The corollary of this is that motherhood, as well as the assessments of the welfare and best interests of children, may have been compromised. However, motherhood is

\textsuperscript{1039} Austin above note 1030 at 149.  
\textsuperscript{1041} Fagan and Bennett, above note 1031 at 1021.  
\textsuperscript{1044} Judge Mary O’Dwyer, above note 1028.
also capable of restoration by the court reviewing its approach, choosing to view motherhood as a unique, gendered offering in respect of the mother-child relationship, and also by motherhood having special skills to be able to assist in the healthy development of the father-child relationship.

9.3 Austin et al’s benchbook

Current trends, as discussed by Austin, Drozd and Dale, are based in parental gatekeeping within a broader, more neutral approach.

Parental gatekeeping refers to how parents’ attitudes and actions affect the involvement and quality of the relationship between the other parent and child.

Austin, Fieldstone and Pruett have undertaken additional work in this area, providing a formal benchbook for Family Court Judges based on a hypothetical continuum from facilitative to restrictive gatekeeping. At one end is restrictive gatekeeping (for protective or inhibitory reasons). Examples of such behaviours might be making contact by the other parent difficult or limited, conflicted pick-up and drop-off arrangements, not facilitating telephone contact, rigidity around the parenting arrangements and speaking negatively about the other parent in front of the child. The reasons for these behaviours may be based on such issues as unresolved conflict in the adult relationship, a lack of confidence in the parenting competence of the other parent, or issues of child support. However, they could also emerge from concerns relating to domestic violence in adult relationships, abuse and safety issues and a desire to avoid destabilising the child’s attachment through an undermining of the mother-child relationship. Austin describes these latter issues as protective gatekeeping for which a conservative approach to contact with the other parent may be appropriate and warranted. Nonetheless, it appears that they may be placed at the restrictive end of the gatekeeping continuum without demarcation between protective and inhibitory gatekeeping.

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1045 William G Austin, Linda Fieldstone, Marsha Kline Pruett “Benchbook for Assessing Parental gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Gate Opening for the Best Interests of Children” (2013) Journal of Child Custody 10 1-16 (Routledge, Taylor & Francis Group). The benchbook emphasises specific considerations such as the danger of using a gatekeeping analysis solely for the purposes of labelling a parent a restrictive gatekeeper without specifying the behaviours that demonstrate the label, drawing the distinction between negative-restrictive attitudes about the other parent and inhibitory-restrictive behaviours, and the importance and positive nature of the social capital that each parent as to offer the child though not in such situations of abuse, domestic violence or harsh parenting


1047 Austin above note 1030 at 151.
These protective behaviours are more often demonstrated by the mother and, at this end of the spectrum, may cause her to be regarded negatively for engaging in inhibitory behaviours. At the other end of the continuum is the facilitative gatekeeping, described by Austin as reflected in such behaviours as talking positively about the other parent, assisting in smooth, conflict-free changeovers and being flexible with respect to changes to the care arrangements. These behaviours are regarded as beneficial to the other parent-child relationship and are therefore obviously more desirable.

The benchbook enables the other parent-child relationship, through the lens of gatekeeping, to be assessed and addressed by the court in a principled and forensic way.\textsuperscript{1048} It confirms that gatekeeping conflict is normal as post-separation parental roles are renegotiated, the new focus being upon how open or restrictive a parent might be to the other parent’s relationship with the child in the new parenting arrangements to be implemented. The corollary of this is a new focus on the development of strategies that might move a parent from being a restrictive to a facilitative gatekeeper. This emphasis recognises that gatekeeping is a dynamic process to which both parents contribute, with the attitudes and actions of each parent being acknowledged as affecting the quality of the other parent’s relationship with the child. It suggests that there should no longer be automatic criticism of a protective parent, or a mother who is restrictively gatekeeping. Her reasons for doing so may be important and derive from intimate partner violence or other valid concerns yet to be identified. However, Trinder considers that to date, most attention has focused on ways in which mothers inhibit fathers’ involvement, with little examination of the facilitative processes which mothers also engage in.\textsuperscript{1049}

\textbf{9.4 Trinder’s research}

Trinder’s 2008 study\textsuperscript{1050} explored the processes by which custodial mothers supported or inhibited father’s relationships with their children following separation. She identified that mothers adopt a range of strategies, from proactive gate-opening to gate-closing. These strategies were found to be influential to outcome. The position taken by the mother varied according to paternal competence, beliefs about what a child’s welfare requires, and the

\textsuperscript{1048} William G Austin, Linda Fieldstone, Marsha Kline Pruett “Benchbook for Assessing Parental gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Gate Opening for the Best Interests of Children”, above note 1045.


\textsuperscript{1050} Liz Trinder, above note 36.
quality of the parental relationship. Trinder draws on interviews from 54 separated families and found that gate work, whether gate opening or gate closing, can be a dynamic transactional process rather than a “linear and unidirectional process running from mothers to fathers.”

She refers to gatekeeping as a non-directional concept, implying neither facilitative nor inhibitory processes, contrary to the directional and inhibitory understandings intended by the 1999 definition of maternal gatekeeping by Allen and Hawkins. Trinder then introduces the terms “gate-opening” to describe beliefs and behaviours that enhance parental involvement and “gate-closing” to describe beliefs and behaviours that inhibit parental involvement. She also discusses the three disparate strands of research in this area. Firstly, are those researchers interested in fathers’ involvement in parenting and who focus on how mothers can effectively limit fathers’ involvement through beliefs and behaviours that inhibit a collaborative effort between men and women in family work, whether in intact or separated families. Secondly, are those researchers who have been developing the concept of women’s relationship management work which explores maternal strategies to manage and promote father-child relationships. Thirdly, is the focus on the extent to which parents reinforce or undermine each other’s parenting and how that relates to a child’s welfare and best interests.

Trinder seeks to integrate these research strands and, drawing on systems theory, explores the possible interdependencies and reciprocal influences between mothers and fathers that underpin maternal gatekeeping. She identifies five types of gatekeeping behaviour on a dynamic continuum. Two types of gatekeeping behaviour, being proactive gate-opening and passive gatekeeping, were evident and consistent in the accounts of both mothers and fathers. The remaining three types of gatekeeping behaviour, being contingent gate opening, and justifiable and proactive gate-closing, were articulated by mothers or fathers, but not both. The main contribution of this study was to provide an understanding of the processes by which mothers influence fathers’

1051 Trinder, above note 1031 at 1298.
1052 Allen and Hawkins, above note 1031.
1053 Trinder, above note 1031 at 1299.
1057 See Chapter Five with respect to a description of systems theory.
1058 Trinder, above note 1031 at 1299.
involvement. The findings suggest that mothers and fathers exert a continual, bidirectional, relational and reciprocal influence on each other, such influence resulting in gatekeeping behaviours ranging from inhibitory through to facilitative.

Thus, these various authors show that the ways in which one parent tries to involve the other parent can vary along a continuum from very restrictive at one end to very inclusive, proactive or facilitative at the other. However, what seems to be emerging is an understanding that, irrespective of whether gatekeeping is viewed in a gendered or a gender-neutral light, mothers appear to have a pivotal role in the facilitation of the father-child relationship.

9.5 The New Zealand position

In New Zealand, Judge O’Dwyer suggests that the judicial focus should be on recognising the importance of clear judicial findings with respect to domestic violence within the relationship, and upon the “other parent mending their ways” rather than continuing to view mothers’ positions negatively and designed to restrict or exclude fathers from involvement with their children, as has been the traditional approach. The Judge identifies that the use of the terminology of “gatekeeping” has rarely been found in the reported decisions of the New Zealand Family Court and, when it has been, it has usually been in the context of criticism of the mother for her beliefs, attitudes and attempts to manage contact with the father. The Court’s approach in this regard appears more consistent with the original views of gatekeeping that focussed negatively upon mothers. The new considerations signalled by Judge O’Dwyer seek to introduce a focus upon understanding why a mother may have acted in an inhibitory way with respect to contact with the father, associated with the need for clear findings to be made in domestic violence situations. Austin, reflecting US trends, describes the spectrum of gatekeeping behaviours from inhibitory to facilitative in a gender-neutral way. However, Judge O’Dwyer appears to recognise the place of the mother in her


\[1061\] O’Dwyer, above note 1028.
considerations. This approach suggests a direction more aligned with Trinder’s mutual but
gendered approach to gatekeeping, as reflected in her UK research. That is, there are a
number of different gatekeeping behaviours, some common to both mothers and fathers and
some indicated by mothers or fathers but not both, all contributing to an understanding of the
relational and reciprocal influence mothers and fathers have upon each other within their
parenting relationship. This new focus may herald something of a redemptive approach
towards motherhood by New Zealand’s Family Court.

Summary

Greater recognition is now being given to the positive contribution mothers can make in their
children’s lives through protective or facilitative gatekeeping. This is based in their ability
and willingness to manage relationships constructively, identifying in particular the “emotion
work” undertaken by mothers and allowing for the development of strategies based
around these attributes, to promote fathers’ involvement in their children’s lives. This is in
contrast to the earlier approach of the Family Court that focused on and viewed maternal
gatekeeping, including protective gatekeeping, in a negative light as a mechanism of control
to hinder and obstruct a child’s relationship with the father. Thus, while gatekeeping may
have initially viewed motherhood’s natural attunement to a child’s emotional needs through a
negative lens, more recent work in this field suggests a positive way forward, with a renewed
understanding of the contributions that each of motherhood and fatherhood make towards
their gendered and different, but mutually supportive, parenting roles.

I now turn to discuss in the next chapter three examples where a mother has been imprisoned
for contempt for resisting the law’s attempts to impose a contact regime for her child with the

1062 Brenda C. Seery and M. Sue Crowley “Women’s Emotion Work in the Family Relationship Management
M Bach and Kathleen S Bahr Towards More Family Centred Family Services: Love, Sacrifice and
Transcendence (Lexington Books, 2009); Nussbaum describes emotion work as appraisals or value judgments
which ascribe to things and persons, outside the person’s own control, a great importance for that person’s own
wellbeing and flourishing: Martha Nussbaum Upheavals of Thought: The Intelligence of Emotions

1063 For example, see the series of decisions JMC v AHB, FC Dunedin, 2008-012-055, 19 February 2010; 10
June 2010. 8 November 10 and 5 April 2012, involving a child aged 12 months at the commencement of Family
Court involvement in 2008. There had been domestic violence and a protection order had been made against the
father in favour of the mother. The mother’s resistance to the father’s contact resulted in matters in the end
being framed as a contempt of court by the mother, resulting in her imprisonment on two occasions,
 admonishment and the child being removed from her care. It is not clear what the outcome might have been if
the focus was instead upon clear findings with respect to domestic violence by the father and focussing on the
remedial changes expected of him in the relationship bridge building that was required for contact to take place
constructively and positively for the child.
father. A refusal by a mother to obey court-ordered contact is a very serious form of restrictive gatekeeping, or gate-closing. The law, in seeking to develop a father’s relationship with the child in circumstances where the mother is resistant, has on occasion exercised its ability to imprison, ensuring the mother’s subordination to the power of the law and seeking her obedience to its orders. The following chapter considers motherhood’s relationship with contemporary family law within this context.
Chapter Ten

Imprisonment

Introduction

Throughout history, there have been ebbs and flows in the continuum that represents motherhood’s relationship with the law. The imposition of terms of imprisonment for a mother’s disobedience of the law in relation to court orders about her child’s care arrangements could be regarded as a low point in both historic and contemporary times.

In this chapter, the tension between motherhood and the law is explored through three specific contemporary case examples, where imprisonment is judicially imposed in the face of disobedience with respect to legally imposed contact arrangements with the father. The law understandably seeks obedience to its framework with the likelihood of penalties being imposed when court orders are flouted or disobeyed. This helps to ensure respect for a robust judicial system within a healthy democracy. At the same time, within the separated parenting arena, it is an extreme response to a complex, gendered issue.

In each of the cases discussed, the mother was imprisoned as punishment for her insubordination to the law in relation to the contact issue. The conduct of each mother was at times extreme, undesirable, reprehensible, and her litigation stance in one case was described as “outrageous in many areas.” However, there appears to have been little consideration given to the underlying drivers for each mother’s intense resistance of the law as it related to her child, the reasons for her restrictive gatekeeping and the complex, gendered dynamics between the parents. There is little follow-up research available to assess the risk to the mother-child relationship or to the child itself, arising out of these judicial interventions. Judicial power was exercised as a means of enforcing a mother’s compliance with the law for the purpose of developing a contemporaneous father-child relationship through a legally imposed contact regime. The law also appears to have been applied to seek as a priority, within the context of a welfare and best interests assessment, the development of a father-child relationship through utilisation of power to introduce and enforce a contact regime.

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1064 R v Kay Halton Skelton BC200895866, 18 December 2008, High Court, Hamilton per Priestley J at para [14].
notwithstanding the mother’s perception of the legitimacy of her resistance to it and her reasons for doing so.

10.1 The story of Elizabeth Morgan, Eric Foretich, and their daughter Hilary

This story begins in the US in the 1980s during the shift from the tender years doctrine, where a young child was regarded as being best in the care of the mother, towards post-separation shared parenting. The discovery of child sexual abuse and the almost immediate backlash against such allegations were also emerging. Research into this issue was in its ascendancy, focussing on Freud’s theories and intra-familial abuse. The topic of child sex abuse, once unmentionable, was becoming “something of a national obsession.”

There was an increase in reports of child sex abuse, feminist concerns were mounting and there were publicised allegations of sex abuse practices within day care centres. In one of the subsequent Morgan v Foretich decisions, the Court recorded that: “Figures from 1976 to 1983 reflect an 852 per cent increase in the number of child sexual abuse cases reported. However, in two-thirds of child abuse cases, the incident is never even reported. Even when the incident is reported, prosecution is difficult and convictions are few.”

10.1.1 The US social and legal context into which Hilary was born

The 1980s in the US was therefore a potent social and legal milieu, with the heightened awareness of the issue of child sex abuse, the rise of the feminist movement, and shared care...
parenting arrangements being increasingly favoured by a court that relied on judicial discretion to determine what a child’s best interest might be. Allegations of child sex abuse increased to approximately 30 per cent in complex custody cases, with some experts suggesting that a number of fathers were being falsely accused by mothers. It was against this background that Elizabeth Morgan voiced the allegation that Hilary was being sexually abused by her father.

Elizabeth Morgan and Eric Foretich were both highly educated and accomplished, he an oral surgeon and she a cosmetic surgeon. He was older and had been married before, with a young child. They had a whirlwind romance and were married in Haiti in 1981, when Elizabeth was already pregnant with Hilary. Dr Morgan and her mother (who was at the time separated from her father) moved into Dr Foretich’s home in Virginia. Some months later, shortly before Hilary’s birth, Dr Morgan moved out and the relationship was over.

Hilary was born in August 1982 and the litigation with respect to her care arrangements began soon after. In the District of Columbia, where the parties then lived, case law in the early 1980s still favoured a maternal preference with respect to young children, although by then not strongly so. The leading case at the time was Coles v Coles. There, the Court found that both parents would be suitable custodians of their four-year-old child and made an order granting custody to the father. The mother appealed, arguing that to overcome the maternal preference, the mother would need to be found unfit. That is, there was effectively an informal presumption in favour of the mother which would need to be displaced. However, the appellate court held that a finding that a child’s best interests were served by placement with the father overcame the maternal preference; in addition, the scope of an appeal was limited to whether the judge at first instance had wrongly exercised his discretion and that could not be said to be the case. Other appellate case law had also developed,

1071 Carbone and Harris above note 1066 at 4.
1072 C L Gordon “False Allegations of Abuse in Child Custody Disputes” (1985) 2 Minnesota Family Law Journal 225; then in 1987 psychologist Richard Gardner published The Parental Alienation Syndrome claiming the majority of children who make claims of sexual abuse are liars. Subsequent research in 1989 found no evidence of increase in numbers or fabrication, but sensitivity towards false claims for tactical reasons continued to persist. See Carbone and Harris, above note 1066 at 5.
1073 In Bella English’s newspaper article “In the Best Interests of the Child? The Case of Morgan v Foretich is made up of the unthinkable and the intractable: Accusations of Sexual Abuse, Parents at War, a Legal Standoff, and a Mother in Jail” Boston Globe 16 July 1989, Dr Foretich was quoted as saying “We had a ceremony in Haiti, and as soon as I came back I found out it was never a legal ceremony”. He is further quoted as saying he married Dr Morgan because she was pregnant. “It was the noble thing to do, but it was the wrong thing to do. I wanted to give my baby a name.” Dr Foretich’s first wife is also reported to have found out about the divorce he obtained from her ex parte shortly before the trip, through a Washington post newspaper column.
1074 Coles v Coles 204 A.2d. 330 (D.C. App. 1964); see discussion in Carbone and Harris, above note 1066 at 2-3.
expressly disapproving of joint physical custody orders as not consistent with a child’s need for stability. At the same time, in *Hamel v Hamel*, the Court made it clear that denial to a parent of contact to his or her child in the care of the other parent “is a drastic action … justified only in extreme cases.”

10.1.2 The parents’ custody dispute

Against this background, both Elizabeth Morgan and Dr Foretich sought custody. The law was no longer protective of the mother-child relationship. Liberal feminist theory had introduced the idea of formal equality, or sameness. The expectation that fathers should participate in child care and mothers should take up employment outside the home had gained traction. Therefore, baby Hilary faced being required by the law to be parented by a mother and father who had separated before she was born, and in the context of a limited inter-parental relationship with insufficient opportunity to develop mutual confidence and trust in each other. While Elizabeth Morgan was awarded custody, the Court at the same time directed overnight contact with Dr Foretich, which commenced when Hilary was 10 months old. Dr Morgan expressed concerns from the outset about the nature of the contact, writing that “I am utterly convinced that when a little child is taken from its loving mother, even for visitation, it may lose its natural protector and its security. Men are all very well, but nature didn’t make men for rearing little children.” She was reported as observing Hilary reacting badly to the overnight stays, screaming and suffering from nightmares, and considered that, ideally, overnight contact should not commence until Hilary was aged five.

10.1.3 Had Hilary been sexually abused?

Hilary’s maternal grandfather was apparently the first to suggest that Hilary may be the subject of sexual abuse, she having returned home as a baby with red thighs after an

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1076 *Hamel v Hamel* 489 A. 2d 471 at 471 (D.C. App. 1985); see discussions by Carbone and Harris, above note 1066 at 3.
1077 *Hamel v Hamel*, above note 1076 at 475.
1078 See Chapter Five.
1081 Carbone and Harris, above note 1066 at 3; see also Chapter Seven with respect to more recent research suggesting care is needed with respect to shared care arrangements for young children, particularly where the parents are conflicted and the care arrangement between them is court imposed.
overnight visit with her father. These suspicions were initially rejected by Elizabeth Morgan but by 1985, when Hilary was about two and a half years old, Elizabeth reported that Hilary had begun to make sexually explicit and inappropriate comments. She was also continuing to cry upon return from her father. Elizabeth Morgan considered that Foretich may be sexually abusing Hilary and that his contact should cease. Hilary was assessed by a number of experts, including a psychiatrist who concluded that Hilary’s anger was a response to the tension between her parents. Some of the other experts considered that some form of abuse had taken place, while others did not. The matter was heard before Judge Dixon in November 1985. At this hearing, the judge found that the evidence was insufficient to establish that sexual abuse had taken place and ordered that unsupervised contact should continue.

In July 1986, there was a second hearing at which the social worker who had investigated the case gave evidence that Hilary was too young to be a reliable witness but that the evidence suggested she may have been abused. The social worker talked to Hilary’s older half-sister, who was also making statements suggesting that she too had been sexually abused by Dr Foretich. The social worker labelled this allegation as “founded”, meaning that it warranted further investigation. Dr Foretich vehemently denied the allegations, voluntarily taking and passing two lie detector tests. Elizabeth Morgan remained concerned about Hilary’s emotional presentation, which she considered was deteriorating with the unsupervised contact having to continue. She took Hilary to a psychologist specialising in child sex abuse, who met regularly with Hilary and advised that she considered it was one of the clearest cases of sexual abuse she had encountered. She recommended that Hilary stop the contact with her father as she had suicidal tendencies, post-traumatic stress disorder and was developing multiple personalities. Elizabeth Morgan followed this advice in February 1986 and withheld Hilary from contact, whereupon Dr Foretich filed proceedings to have Dr Morgan held in contempt of court, and to change the custody arrangements to him. Elizabeth Morgan responded with an application to suspend the contact. A guardian ad litem was appointed for Hilary. On her behalf, he opposed a continuation of the unsupervised visits on the basis that the child’s emotional and mental health was at risk, and sought an assessment of Hilary and her parents with respect to the child sex abuse allegations. This was supported by

1082 Carbone and Harris, above note 1066 at 3; Elsa Walsh and Sandra Torry “Elder Morgan first to say Hilary was sexually abused”, The Washington Post, Feb 28, 1990.
1084 Carbone and Harris, above note 1066 at 5-6.
1085 Morgan v Foretich III, 546 A. 2d at 408.
Elizabeth Morgan and opposed by Dr Foretich. The requests were denied. A closed hearing took place in July 1986; Elizabeth Morgan refused to obey the order. The judge did not accept her actions were justified and indicated he would hold her in contempt if she did not comply by 19 July 1986. She again refused and a contempt order was made in August 1986. The order was stayed pending appeal. Judge Dixon again ordered unsupervised contact take place during this period, Dr Morgan again refused and Judge Dixon again found her to be in contempt. She was imprisoned for two days in February 1987, and upon her release she allowed Hilary to begin visiting again. The judge gradually extended the contact so that by April 1987, Hilary was spending weekends in her father’s care. The appeal against the contempt order was unsuccessful, the appellate court finding that the lower court’s findings with respect to the sexual abuse allegations were not “clearly erroneous.” Dr Morgan filed proceedings against Dr Foretich and his parents for damages, claiming they had all participated in the abuse scenario, and Dr Foretich filed in defamation.

In August 1987, the judge found the evidence of child sex abuse against Hilary neither proved nor disproved the allegations against Dr Foretich. The facts were, according to Judge Dixon, “in equipoise.” That is, there was a 50 per cent likelihood Hilary had been abused and 50 per cent chance she had not.

10.1.4 The mother’s continued opposition to court-directed father-contact

After hearing the issue of whether Hilary had been sexually abused by her father, with no findings being made either one way or the other, Judge Dixon then directed a two week unsupervised visit by Hilary with her father. Dr Morgan appealed, but by now she believed that Judge Dixon would never find in her favour and would continue to exercise his judicial power against her. However, while the judge had confiscated her passport and the deeds to her house, her parents were willing to hide Hilary to avoid unsupervised contact taking place. Her mother, Antonia, born in England to an upper class British family, had a Master’s degree in Classics from Oxford and another Master’s degree in education from the University of London. She also spoke six languages (and after her time in New Zealand this included Māori), and could write fluently in Latin and Greek. Dr Morgan’s father, William, was born

1086 Carbone and Harris, above note 1066 at 7.
1087 Morgan v Foretich III, 528 A. 2d at 429.
1088 These claims are set out in Foretich v Capital Cities/ABC, Inc 37 F. 3d 1541 being an interlocutory appeal as to whether the grandparents were public figures for the purposes of their claim in defamation, based on a docudrama about the case.
1089 Morgan v Foretich III, above note 1087 at 410.
1090 Above note 1087.
in New York to an Italian immigrant family, changing his name from Mitrano to Morgan to avoid anti-Italian prejudice. He was a Psychology graduate from Yale and worked in the Office of Strategic Services during World War II, testing and training spies. He also parachuted into occupied France to organise guerrilla attacks against the Germans, and fought the Japanese in China.\footnote{Yvonne Shinhoster Lamb “Antonia Morgan: Fled US with Granddaughter” The Washington Times, April 21 2006 and Los Angeles Times, 22 April 2006; Robert McG Thomas Jr. “William Morgan, 85, Part of Famed Child-Custody Case, Dies” New York Times, March 5 1996; William Morgan The OSS and I (1957); see also Carbone and Harris, above note 1066 at 9, Carbone incorporating material from her personal interview of Elizabeth Morgan in Los Angeles in 2006.} They met and married in Britain during the war, returning to the US where they established a private psychology practice for counselling children, and had their family. They had separated, but reconciled for the purposes of hiding Hilary. Carbone describes how William, with his war training, knew just what to do.\footnote{Carbone and Harris, above note 1066 at 10.}

Dr Morgan believed that Hilary may be directed by the Court to be uplifted prior to the scheduled contact with her father. William therefore moved Hilary with her babysitter to Virginia a week before the contact was due. Carbone records Dr Morgan’s descriptions of going to visit, realising she was being followed and pulling off the road into the car park of a country tavern when police came running at her, guns drawn. She describes driving off quickly with her lights off, pulling off the road into bushes and waiting in the dark as the cars went past looking for her, and then returning. She then went on to visit her father and daughter. However, she was concerned that she may end up facing further charges if the guardian ad litem was not able to verify Hilary was alive, though hidden. A meeting was therefore arranged at a diner in Virginia. She describes how William “armed himself to the teeth”, wearing a vest with guns visible. Dr Morgan protested, but William told her that he did not believe the Washington DC police would try to take Hilary if it risked a gun battle in a public diner outside of their jurisdiction. When William returned with Hilary to his home in Virginia, he saw the police surveillance stationed outside. He therefore “orchestrated ‘confusion and drama’ to create an opportunity to spirit Hilary away.”\footnote{Carbone and Harris, above note 1066 at 10.} Dr Morgan has described how for the next two days, William and his look-alike brother brought trucks to the house, loading and unloading them several times throughout the day, and leaving with them sometimes together and sometimes separately. Then William had a taxi company send a cab to the house every hour for the next few days, sometimes coming to the front of the house and sometimes to the rear. On one of these occasions, he and Hilary slipped into a cab at the back of the house, ducking down as they were driven to the airport where they met up with
Antonia and flew to the Bahamas, on their own passports. The taxis continued to come and go at the house for another day, and when that stopped the police searched the house. William’s brother had remained there, and let them in to find William Morgan and Hilary no longer present.

Elizabeth Morgan is reported to have said “I thought my father was crazy. But it worked.” She did not know where they had gone; only her older brother, handling the finances, had this information.

10.1.5 The mother found to be in contempt of court and imprisoned

Contact by Hilary with her father fell due and did not occur, and Dr Morgan was unable to disclose Hilary’s whereabouts. Judge Dixon therefore found her in contempt of law and imprisoned her in a Washington DC prison, effective immediately, being 28 August 1987. He also ordered that the $200,000 bond she had previously provided be forfeited at the rate of $5000 per day. Dr Morgan appealed; it took a year to hear the appeal at which time Hilary was still in hiding and she was still in prison.

In 1988, the appeal court determined that the judge had erred in excluding out-of-court statements that Hilary had made to her mother and two psychologists, as well as evidence about Hilary’s older half-sister about whom allegations of sexual abuse by Dr Foretich had also been made. However, with respect to the contempt issue it said that: “Civil contempt could become meaningless if a lawful defence could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance” and accordingly “the defier acts at his or her peril in so doing.”

Dr Morgan sought a writ of certiorari from the Supreme Court. This was declined and she remained in prison, steadfast that she could not reveal Hilary’s whereabouts.

Shortly prior to her imprisonment, Dr Morgan had become engaged to Paul Michel, an attorney who was subsequently appointed to judicial office. While he took no part in the
matter, he did assist her in appointing a new attorney who crafted a more politically savvy defence, portraying her as having been the victim of an unfair process and imprisoned after a ‘secret’ trial because the record of the proceedings were sealed. Her legal team also argued that Judge Dixon had developed personal animosity towards her and should be recused on the basis of his personal bias. The Court refused to do this, and this decision was upheld on appeal.

In September 1988, Dr Morgan then filed a writ of habeas corpus for her release, arguing that her incarceration had now become punitive rather than remedial and she was therefore being held for criminal rather than civil contempt, without having the appropriate procedural safeguards in place required by the constitution. Judge Dixon rejected her claim, saying that she may now have to start seriously considering the orders and “[i]n that sense, the coercion has just begun.” This was appealed. There was a series of hearings with respect to the habeas corpus application, based on the argument that imprisonment for contempt had moved from remedial to punitive. Judge Dixon agreed that “[i]t is unlikely that continued incarceration will cause Dr Morgan to deliver the child directly to Dr Foretich at any time within the foreseeable future if for no other reason than Dr Morgan’s personal pride.” He offered an alternative, that is, that Hilary be handed over to a child welfare agency, and on the basis that Elizabeth Morgan might accept this considered that the continued imprisonment therefore should be regarded as still having a remedial purpose. This was appealed, the appellate court finding in favour of Dr Morgan that there was insufficient evidence to support Judge Dixon’s position. His order was vacated so the matter could be reheard by a full court.

1099 Barton Gellman “It was Like a Wartime Romance’: Morgan, Fiancé Find Love Amid Turmoil” The Washington Post, 1 Oct, 1989.

1098 However, in December 1988, Michel testified before Judge Dixon that he regretted having advised Morgan to obey the court’s order for overnight contact. Foretich filed judicial misconduct charges against him because of this evidence, but the chief judge dismissed the charges as “frivolous, unsupported, irrelevant and conjectural.” See Bella English, above note 1072 at 16; see also Carbone and Harris, above note 1065 at 12.

1097 Morgan v Foretich III, 546 A.2d at 411-412.

1096 Carbone and Harris, above note 1066 at 12.

1095 Morgan v Foretich , 564 A.2d1,2 (DC 1989) (Morgan v Foretich V).

1094 Morgan v Foretich V, 564 A.2d at 10.

1093 Morgan v Foretich V, 564 A.2d at 2. The Court noted that the option of Hilary being handed over to a child welfare agency had always been available but Morgan had always been clear that this was not acceptable either “because of the risk that unconditionally turning the child over to the Court will result eventually in turning the child over to Foretich” at 10. Judge Dixon had also threatened to hold Morgan’s brother in contempt for refusing to answer questions about the whereabouts of Hilary and his parents. He refused to answer questions 27 times. See David Grogan, Jane Sims Podesta & Margie Bonnett Sellinger “Elizabeth Morgan’s Brother Risks Jail as he Joins Her in Defying a Washington Judge” People Magazine 3 July 1989; see also Carbone and Harris above note 1066 at 15.
10.1.6 The role of the media

Meantime, the media coverage was increasing. The Friends of Elizabeth Morgan (FOEM) was formed, holding candlelight vigils outside the prison, picketing in front of the Washington DC Court and undertaking a national campaign on her behalf. The US News and World Report ran an article on Dr Morgan and carried her picture on its front cover.\footnote{Elizabeth Morgan “A Year Behind Bars; A Mother’s Tale: Why I’m Taking No Chances with the Courts” \textit{US News and World Report}, 13 June 1988.} The Washington Post wrote an article commenting that the judge had “ignored evidence he didn’t want to hear, then tossed the key away on a mother trying to protect her child”\footnote{Don Kowet “The Friends of Elizabeth Morgan: How a Strange Alliance of Washington Insiders, Feminists and the Religious Right Freed the Controversial Doctor” \textit{The Washington Post}, 17 October 1989.} and another publication suggested that “the Morgan case typifies Dixon’s reputation as a stern disciplinarian and tough sentencer who is unsympathetic to women’s issues.”\footnote{The Legal Times, a Washington based newspaper, quoted in Bella English, above note 1073 at 16.} There were a number of other articles sympathetic to Morgan’s position.\footnote{For example: Bob Trebilock “Hiding Hilary” \textit{Glamour Magazine}, 1 Nov 1988; Anthony Lewis “Judgment of Solomon” \textit{New York Times}, 15 Dec 1988 and “The Limits of the Law” \textit{New York Times}, 22 Dec 1988; Mary McGrory “When a Judge and Mother Collide in Court” \textit{Newsday}, 16 Dec 1988; see also Carbone and Harris, above note 1066 at 13.} A few publications wrote articles from Foretich’s perspective.\footnote{Eric A Foretich “My daughter Hilary” \textit{The Washington Post}, 30 April 1989; Barbara Reynolds “I’ll Do Anything I Can to See My Child Again” \textit{USA Today}, 24 July 1989.} However, the support was essentially for Morgan, as a mother, against the power of the law. Christian evangelical groups joined in, including Charles Colson of “Prison Fellowship Ministries” and James Dobson of “Focus on the Family”, who interviewed Dr Morgan from prison. Politicians took up her cause and in the end, a bill designed to free her was introduced into the Senate.\footnote{Myron S. Waldman “An Exception to the Rule Congress Doesn’t Usually Consider Legislation to Benefit Only One Person, but, with prodding from Charles Colson and H, Ross Perot, They’ve made an Exception for Elizabeth Morgan” \textit{Newsday}, 31 July 1988; David J. Harmer “Limiting Incarceration for Civil Contempt in Child Custody Cases” (1990) \textit{BYU Journal of Public Law} 239; see also Carbone and Harris, above note 1066 at 14.} In response to the pressure, Foretich had a letter published in the Washington Post in which he offered to support Morgan’s release from prison and drop his requirements that her parental rights be terminated, if Dr Morgan would produce Hilary when she would be placed in a foster home. Then he proposed a psychological assessment take place to determine whether he should give up contact and to determine whether Dr Morgan should have custody. His other requirement was that Morgan not publish any further articles, books or authorise the making of a movie about the case.\footnote{Eric Foretich, above note 1109.} In another, subsequent, interview Foretich went on to say that the experts...
doctor who said that both girls had vaginal scarring was a fraud. He further claimed that his second wife had brainwashed his older daughter, and that Dr Morgan had abused Hilary. 1112

10.1.7 A political solution

In September 1989, the US Congress unanimously passed legislation to free Elizabeth Morgan. The effect of The District of Columbia Civil Contempt Imprisonment Limitation Act 1989 was to limit the amount of time to twelve months that a person could be imprisoned on civil contempt charges for failure to comply with a court order in a custody case. She was released after having spent more than two years in prison.

Shortly afterwards, Dr Foretich discovered that Hilary and her grandparents were living in Christchurch. He flew to New Zealand. Dr Morgan’s passport was released to her so she was also able to travel to New Zealand.

10.1.8 The role of the New Zealand Family Court

Meanwhile, William and Antonia sought assistance from the New Zealand Family Court. An interim custody order was made in their favour, with a direction that Dr Foretich not see Hilary (who was now known as Ellen) until it could be determined that such contact would not be psychologically harmful to her. Counsel for Child was appointed. 1113 Although the US was a party to the Hague Convention, it had no application as New Zealand had not yet acceded to it. 1114 A further Family Court hearing resulted in a final custody order being made in favour of Dr Morgan, with no contact to Dr Foretich as it was understood that for Ellen whether the allegations of sex abuse against her were true or not, she believed they were true such that any contact with her father would disrupt her emotional stability. Dr Foretich did not further contest the outcome. Ellen and Elizabeth remained living in Christchurch. Ellen attended Selwyn House School for eight years and her mother commenced doctoral studies in psychology. Dr Morgan’s husband Paul Michel visited several times a year but, in the end, their marriage did not survive. By the mid-1990s, Dr Morgan recognised that to work she needed to return to the US. However, Judge Dixon’s contact order in favour of Dr Foretich was still in force.

1112 See Carbone and Harris, above note 1066 at 14.
1113 Isabel Mitchell was, at the time, one of New Zealand’s most experienced family lawyers. She obtained records from Hilary’s psychologist in Washington DC, Dr Mary Froning, and arranged for them to be reviewed by a New Zealand psychologist skilled in child sex abuse matters. In the end, however, the Family Court at Christchurch did not seek to reconsider the sex abuse allegations, determining that what was more important was that Ellen believed she had been sexually abused, whether it was true or not.
Congress, for a second time, came to her aid enacting legislation that removed the Washington DC courts of their jurisdiction over Ellen’s custody or contact arrangements. The legislative provision, as a rider to the Department of Transportation and Related Agencies Appropriation Act 1997, provided a limited window for any child 13 or over to have the right to choose whether or not to visit with a noncustodial parent. Ellen, then 13, wrote to Congress saying that she believed her father had sexually abused her and that she did not want any kind of contact with him.\(^\text{1115}\) Dr Foretich challenged the constitutionality of the legislative provision, saying that it was a bill of attainder, that is, legislation that targets an individual for punishment. In 2003, the Courts of Appeal for the District of Columbia agreed with him,\(^\text{1116}\) but Ellen was now over 16 and the custody litigation that had started shortly after her birth was over.\(^\text{1117}\)

### 10.1.9 The consequences for mother and child

After she and her mother returned to the US, Ellen engaged for a period in self destructive behaviour, later saying “I was so angry with people, and I wanted to punish them. I didn’t know how to take it out on other people, so I took it out on myself.”\(^\text{1118}\) She describes having profoundly missed her mother during the time she was in prison\(^\text{1119}\) but also that “my grandparents went out of their way to give me a semblance of normality and regularity,”\(^\text{1120}\) notwithstanding her grandfather’s sense of wartime adventure. “He told me ‘We’re going to take you across enemy lines.’”\(^\text{1121}\) With acknowledgment to her singing teacher from her Christchurch school days, and having changed her name to Elena Mitrano (her grandfather’s Italian surname), Elena is now a successful singer songwriter in Los Angeles, where she and her mother Elizabeth share a home together.\(^\text{1122}\)

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\(^{1115}\) Carbone and Harris, above note 1066 at 18.

\(^{1116}\) *Foretich v US* 351 F.3d 1198 (DC Cir. 2003).

\(^{1117}\) Carbone and Harris, above note 1066 at 18; Dr Foretich also sued Dr Morgan for defamation, as well as many US publishers and broadcasters throughout the 1990s. The only one that was successful had included Ellen, based in breach of privacy. A guardian ad litem for Ellen negotiated a $200,000 settlement which she was to receive on her 18th birthday.


\(^{1119}\) *NBC Today Show*, 1 Sept 2000; see also Carbone and Harris, above note 1066 at 23.


\(^{1121}\) *The Christchurch Press*, above note 1120.

\(^{1122}\) *LA Weekly* “Morgan v Foretich Twenty Years Later” 4 Feb 2009.
10.1.10  Review and summary

In retrospect, the Morgan case could be regarded as highlighting the intractable custody case. However, it also reflects the difficulties that arise when child care arrangements, based in an acknowledgment of differences between gender, the role of motherhood is protected, and where “old, tested, gendered rules that permitted predictable, inexpensive decisions to be made without protracted litigation,” shift towards a foundation that seeks to ignore differences between motherhood and fatherhood in the name of equality, as this paves the way for continuing involvement of both parents in a child’s life in the name and manner of gender neutrality. The consequence may also be to throw a mother into a power struggle with the law as she seeks to protect her child through extremely restrictive gatekeeping behaviours. If there are allegations of domestic violence or, as in the Morgan case, child sex abuse, it would appear that the court has a responsibility to seek to make findings wherever possible. When a court concludes the evidence is in “equipoise”, that is, the allegations are neither proven nor disproven, there is no way of resolving the dispute satisfactorily. There is also no way of determining whether there may have been a protective legitimacy in the mother’s inhibitory gatekeeping response.

It is also possible that Dr Morgan, in continuing to resist the court’s orders, may have led to the court’s eventual response being a transfer of care to Dr Foretich. This was the outcome in the second case example to be discussed, that of the Skelton series of decisions out of the Hamilton Family Court. As in the Morgan situation, familial support was also a feature.

Played out over about a decade, a mother pitted herself against the law in increasingly extreme ways, seeking to avoid the development of the child’s relationship with the father, to the point where she lost the care of her child altogether to the father.

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1123 Martha Albertson Fineman The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (University of Chicago Press, 1994); Fineman discusses how “no fault” and “gender neutral” divorce reforms actually harm the women and children they were designed to protect, and argues that liberal feminist theory in focussing on equality of treatment rather than measures of outcome, is disregarding the reality of difference and need.

1124 Fineman, above note 1123 at 79-80.

1125 Joan S Meier “Understanding Judicial Resistance and Imagining the Solutions” (2003) 11 American University Journal of Gender, Social Policy & the Law 657. At 676-7, she says: “In contrast to a presumption of equal fitness, allegations of domestic violence or child abuse seem to frame the parties at the start as “innocent victim” vs “evil perpetrator”. This makes such allegations appear almost unfair, tilting the scales before a court hears and sifts all the evidence. Courts may resist such allegations because to accept them can have the effect of replacing the court’s unconstrained discretion under ‘the best interests of the child’ test with an implicit presumption of one parties unfitness (effectively erasing judicial discretion). Courts are reluctant to cede their discretion and judgment in this manner.”
10.2 The story of Kay Skelton, Christopher Jones and their son Jayden

The proceedings in relation to Kay Skelton (the mother), Christopher Jones (the father), and Jayden Headley (the child) began in 2001 in the Family Court in Hamilton. They were in relation to custody and access matters between Mrs Skelton and Mr Jones, with regard to Jayden, then just a few months old. Mrs Skelton had always had the primary care of Jayden and was reluctant to allow contact by Jayden with Mr Jones or for a contact regime to be developed, which the Family Court was keen should occur. She was supported in her reluctance by the maternal family. Matters remained before the Court, with contact to Mr Jones being developed and extended by court order notwithstanding Mrs Skelton’s unhappiness about this. She breached the orders on a number of occasions and, by 2006, a two day hearing was scheduled seeking to address this. One outcome that had been signalled by the court was that in response to such breaches, a change of Jayden’s care arrangements from his mother to his father could be directed.

On the morning of the hearing, Mrs Skelton applied to have the proceedings struck out on the basis of the results of a home DNA kit which purported to indicate that Jayden Headley was not Mr Jones’ biological child, but was rather the child of Mrs Skelton’s husband, Brett Skelton. The Court did not strike the proceedings out, but instead ordered an independent DNA test which established that Mr Jones was indeed Jayden’s biological father and the home test kit was not accurate. On 22 June 2006, the Family Court then made an interim parenting order in favour of Mr Jones, transferring Jayden’s care to him. By August 2006, Mrs Skelton and her father had taken matters into their own hands, removing Jayden from his father’s care and from Hamilton. Jayden and his grandfather lived remotely at an unidentified address in Northland for five months, while Mrs Skelton was imprisoned in October 2006 for defiance of a writ of habeus corpus made by the High Court on the father’s application, seeking the return of Jayden to his care. Jayden was returned to Hamilton in January 2007 by his grandfather, and his mother was released from prison. Justice Heath in Jones v Skelton (No 3)\textsuperscript{1126} said, upon releasing Mrs Skelton from prison as a result of Jayden being returned, that:

It is a shame that things had to get to this stage. The Courts must ensure that the integrity of orders it makes are upheld. That is the reason why it was necessary for

\textsuperscript{1126} Jones v Skelton (No 3) [2007] BCL 246 per Heath J.
you to serve so long in prison. This community cannot countenance decisions by
individuals to ignore the law.

Steps were then taken by the Principal Family Court Judge to release the otherwise restricted
Family Court decisions into the public domain as being in the public interest, to justify the
stance it had taken in relation to the mother’s conduct and seeking to quash any misguided
sympathy for the mother’s position. The mother sought an injunction from the High Court
against the Family Court seeking to prevent further publications, and it was acknowledged
that she, as a party, ought to have been given notice of the intention by the Court to carry out
publication of decisions that involved her, the High Court directing that the Family Court not
publish anything further in relation to these matters until further order of the High Court.1127

Then, in November 2008, the mother and maternal grandfather faced charges of abduction as
a result of events in 2006.1128 They had no previous convictions, Mr Headley in particular
being described by the sentencing judge as having lead “an exemplary and hard-working
life.”1129 They were sentenced to home detention, in part to ensure that Jayden was protected
from any sense of his own guilt and responsibility for what had happened to his mother and
grandfather.1130 Mrs Skelton was subsequently, in 2010, also charged with perjury in relation
to the evidence she gave in the Family Court with respect to the home DNA testing process
and the evidence that Mr Jones was not Jayden’s father,1131 and was sentenced to two years
and eight months imprisonment. There were unsuccessful appeals by Mrs Skelton and Mr
Headley against their abduction convictions,1132 and there were also unsuccessful appeals
against Mrs Skelton’s sentence for her conviction for perjury.1133 The effect upon Jayden of a
loss of his relationship with his mother is not clear, but the victim impact statement provided
to the High Court on his behalf by Lawyer for Child at the mother’s sentencing for abduction
suggested that he engaged in avoidance strategies, pretending that the events had not taken
place and choosing not to repeat or discuss them.1134

Tapp asks whether parents might be encouraged to let go of litigation if they were assisted to
understand the values of the family justice system by a judge who showed respect for their

1127 Skelton v Family Court at Hamilton CIV-2007-419-97, 26 January 2007, per Heath J.
1129 Above note 1128 at para[16].
1130 Above note 1128 at para [38].
1131 R v Skelton DC Hamilton CIR-2008-019-7272, 1 October 2010.
1134 Heath J, above note 1127 at para [7].
context and perceptions, and further, that respect for and compliance with court orders by parties is more likely “if parties feel they have been heard, respected as people and their perspectives understood.” These comments are appropriately framed in a gender neutral way. However, McKinnon’s dominance feminist theory would suggest that gender neutrality in these situations is an impossibility, as the state judicial system reinforces the male point of view upon which it is founded. Nonetheless, a male point of view can still show understanding, empathy and respect for the female point of view, as demonstrated by the judicial conduct modelled by Priestley J in the decisions of PJM v Family Court at Waitakere, the Applications by the Hanover family, and Joshua v Love, echoing the emergence of the original welfare principle as being relationally founded. The mother’s own conduct, as well a lack of respect and understanding for the mother’s position and the negative perceptions of her held by the Court, may have contributed to this unhappy sequence of events.

In the third example to be discussed, that of JMC v AJHB, McKinnon’s dominance theory and the apparent impossibility of a mother’s position being understood and supported by the judicial system, is explored. This mother, defiant, affected by poverty and against a background of domestic violence, is pitted against the power of the law seeking to have her child develop, facilitated by her, a relationship with the father. There also appears to be an irreconcilable tension between the poor regard by the law of the mother’s obstructive behaviours, with her belief in the protective legitimacy of her actions.

10.3 The JMC v AJHB decisions

Heard before Judge Coyle in the Dunedin Family Court, this series of decisions track applications to the Court by the father over a three year period from December 2009 until September 2012, seeking punishment of the mother for breaches of his guardianship rights, breach of his supervised contact, and seeking to extend his contact.

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1135 Pauline Tapp, above note 1028.
1136 PJM v Family Court at Waitakere HC Auckland CIV-2011-404-3306 9 September 2011 per Priestley J.
1137 Applications by the Hanover Family HC Auckland CIV-2007-404-7415, 18 August 2011 per Priestley J.
1138 Joshua v Love HC New Plymouth CIV-2010-443-443, 21 October 2010 per Priestley J.
1139 See Chapter Three with respect to the development out of the UK of the original welfare principle, seeking to protect the mother-child relationship within a social context of ownership, power and control by the husband and father.
10.3.1 The mother had initially sought the Court’s protection

There had been earlier Family Court involvement which had commenced in early 2008 with an application by the mother for a protection order against the father and for a parenting order in respect of the child born in July 2007. The child had always been in her care. The mother appeared to have been seeking from the Family Court protection from domestic violence, and the security of confirmation of her existing day-to-day care of the child. The protection matter proceeded to a defended hearing, where it was found that domestic violence had occurred through the father punching the mother in the mouth and the side of the head for an unspecified time while she was pregnant with the child.\textsuperscript{1141} Fortnightly supervised contact to the father was then reserved utilising Barnados facilities and judicial comment was made about the mother not wanting the father to see the child (then 10 months old). The supervised contact did not occur, the mother and child having shifted from Dunedin to Christchurch.

10.3.2 The Court focuses on the father’s contact

The father filed an application against the mother for admonishment.\textsuperscript{1142} On 22 September 2009, the mother accepted admonishment and consented to a variation to the order providing supervised contact to the father by the end of October 2009 with Barnados in Dunedin, in Christchurch with Barnados in December 2009 and prior to Easter 2010 in Dunedin, again utilising Barnados.

The reason the mother did not attend the October 2009 contact arrangement in Dunedin is not clear, although later decisions suggest the mother’s lack of finance to afford the travel, and that she was a beneficiary. However, it was the cause of a further application for admonishment filed by the father which was addressed on 21 December 2009. At the same time, the mother had pending before the Court an application to suspend the father’s contact. She indicated to the Judge that she did not intend complying with the existing contact order until her application to suspend had been addressed. She was advised “bluntly”\textsuperscript{1143} that if she did not comply she would be found in contempt of court, which could result in her being

\textsuperscript{1141} \textit{AHB v JMC} FAM 2008-012-000055, 23 May 2008 per Somerville J; Coyle J in later reviewing this decision notes that most of the other domestic violence allegations were rejected by Somerville J; see \textit{JMC v AHB} FAM 2008-012-000055, 10 June 2010 paras [24] and [25].

\textsuperscript{1142} Section 68(1)(a) Care of Children Act 2004 provides that the Court may admonish a party for contravening a parenting order. The meaning of “admonish” varies from “reprimand firmly” (Oxford Dictionary, \url{http://www.oxforddictionaries.com/definition/english/admonish} searched 9 Oct 2014), to “friendly, earnest advice or encouragement” or “express warning or disapproval to especially in a gentle, earnest or solicitous manner” (Merriam–Webster Dictionary \url{http://www.merriam-webster.com/dictionary/admonish} searched 9 October 2014).

\textsuperscript{1143} \textit{AHB v JMC} FAM 2008-012-000055, 10 June 2010 at para [31] per Coyle J.
placed in custody. She therefore capitulated with contact taking place in December 2009, January 2010 and February 2010.

The Judge made further orders extending the father’s contact on 19 February 2010 to one weekend per month and directed that the child not be moved again, this time from the Timaru area. Medical information was to be provided, the mother was to pay $60 towards the father’s transport costs for supervised contact in Timaru and the mother was to bring the child to Dunedin to enable supervised contact to also occur there. The mother did not pay the $60 and did not bring the child to Dunedin for supervised contact. She was also criticised for not engaging with the s133 report writer, who had been directed by the Court to carry out a psychological assessment with respect to the child.

10.3.3 Escalation of the conflict between the mother and the Court

The judge then discovered that the mother had shifted from Timaru to Fairlie (a distance of approximately 50 kilometres). This contravened his direction that her place of residence not be outside the Timaru area until further order of the court, or by the written agreement of the father. A contempt hearing was therefore scheduled by the judge on his own initiative on 8 June 2010, at which he said that what needed to be brought home to the mother was that there are real and serious consequences for flagrant breaches of court orders. He further said that “additionally, I have reached the view that the short term pain suffered by O in not seeing his mother for a period is outweighed by the longer term benefits of being able to continue to develop a relationship with his father.” The judge went on to find the mother in contempt of court and sentenced her to imprisonment for 14 days.

There continued to be relational, geographical and financial constraints. There had been domestic violence in the relationship; therefore any contact needed to be supervised, at least initially, to ensure the child would be safe in the father’s care. Neither party was in employment, neither had much by way of financial resource and they did not live in the same town. The mother was a domestic violence victim at the hand of the father and did not want there to be any further contact with him by her or the child. That there be no face-to-face contact for a period in this situation, does not appear to have been considered by the Court as one outcome that could be considered in all the circumstances; the mother’s view was rather

\[1144 \text{ Above note 1143 at para [42].} \]
\[1145 \text{ Above note 1143 at para [45].} \]
\[1146 \text{ Above note 1143 at paras [46] and [47].} \]
described as “devoid of reality.” He further considered that she “continues to want to remain in control and dictate to everyone, including the Court, what O’s contact arrangements will be with Mr C.”

10.3.4 Pressure on the mother

Upon the father’s application, the mother consented to a discharge of the protection order that had been in place against him. The reasons for her consenting do not appear to have been recorded but, by November 2010, the judge said that there had been an underestimation of the obstinacy of the mother and, after parenting orders, admonishment of the mother and contempt findings against her for which she had been imprisoned, the judge considered the time had come to place the child under the guardianship of the Court to ensure that contact with the father could be developed. Accordingly, while the protection order against the father was discharged, the child was placed under the guardianship of the Court with Child Youth and Family Services (CYFS) appointed the Court’s agent to ensure the child was transported between Timaru and Dunedin and to ensure that the contact plan that the judge was developing would take place. In June 2011, the matter came back before the court at the request of Lawyer for Child because the agent had reported further breaches of the judge’s directions. The judge in response said “I will not tolerate any breaches of this Court’s orders. There will not be any failure of O to attend any of the scheduled visits without good cause.”

Against this background, a consent position was then worked out between the parties, with the assistance of their lawyers. The judge, professing surprise that this could have occurred, discharged the order placing the child under the guardianship of the Family Court and made a parenting order by consent on 12 October 2011. This provided for continuation of the day-to-day care by the mother and fortnightly weekend contact (unsupervised) by the father subject to certain conditions, including requiring him to keep the child away from one Ms W, arising out of the mother’s concerns with respect to drugs, alcohol and domestic violence in Ms W’s home. The mother appeared to have been re-empowered and, of her own volition, was

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1147 AHB v JMC FAM 2008-012-000055 8 November 2010 at para [10] per Coyle J.
1148 Above note 1147 at para [9].
1149 Above note 1147 at para [10].
1152 AHB v JMC 2008-012-000055 5 April 2012 at para [17] per Coyle J.
reported also to be communicating with the father, and facilitating further contact beyond that of the parenting order.

**10.3.5 The mother seeks the support of the Court but the tensions appear irreconcilable**

By late October 2011, the mother had become aware that the father was not respecting the condition that she had required, and was taking the child to Ms W’s home. The mother also became aware of a notification having been made to CYFS that the father had assaulted one of Ms W’s children. The mother, as a result, unilaterally suspended the father’s contact and indicated to him that it would need to be sorted out in court.\(^{1153}\) The Court raised issues around the father’s credibility, but also criticised the mother for not facilitating a resumption of the father’s contact when it became apparent he was not going to be criminally charged and CYFS were going to be taking no further steps after investigations were completed.

The father had, in March 2012, filed a without notice application for a warrant and seeking further admonishment of the mother for her suspension of the contact order with a formal variation from the Court to do so. The matter was heard in April 2012. There was a breakdown in the execution of the warrant the judge had issued, described by him as appearing “to have been a monumental failure in communication and I am incredulous as to why the police did not simply execute the warrant … [b]ut by the same token, I am equally incredulous that Ms H-B, in the knowledge that the court had issued a warrant and thus had, in effect, approved contact resuming, did not herself comply with the order.”\(^{1154}\) The judge then considered the application by the father for further admonishment of the mother for breaching the parenting order by her informal suspension of contact. He indicated that he gleaned that the father was willing and available to care for the child and, while the application before the Court was for admonishment, if he was to consider a contempt application he had the ability in that context to vary the parenting order and place the child in the care of the father.\(^{1155}\)

The judge was urged by counsel for the mother to take a step back from issues of admonishment and/or contempt, and to give the mother the opportunity to comply with the order, which she indicated she would do subject to being satisfied that the father would not allow the child to come into further contact with Ms W and therefore that her child would be

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\(^{1153}\) Above note 1152.

\(^{1154}\) Above note 1152 at para [28].

\(^{1155}\) Above note 1152 at para [34].
safe. The judge, however, was not prepared to do this as he considered she had made these sorts of overtures in the past but, in his view, when the scrutiny of the Court was not upon her, she tended to revert to obstructive and resistant behaviours. Therefore, on the basis of his finding of further contempt and in considering that the child could be cared for by the mother’s partner, the judge sentenced her to a further term of imprisonment, this time for six weeks. He said this was because the integrity of the Court needed to be upheld and “to ensure that O can have the relationship with his father that he should be having in the future … the Court’s response needs to be stern.”

Upon the mother’s release from imprisonment, she filed an application to vary the parenting order, seeking that the father’s contact be supervised. Her application was struck out by Principal Family Court Judge Boshier, who said that orders made by the Family Court must be complied with. The mother sought assistance from her local Member of Parliament, concerned that her view of the father and the appropriateness of unsupervised contact arrangements were not being properly assessed by the Court, and that she was being made to enforce contact when the child did not want it and was physically resistant. Contact did not occur on the scheduled weekend in July 2012 because the child threw a tantrum and the mother left it to the father to handle. The father declined to take up the contact, considered he was entitled to contact the following weekend and, when that did not occur, made a further application for a warrant to ensure contact occurred the next time. The warrant was issued. The mother was upset and angry at the father that the police had become involved again, and when the police arrived to uplift the child for contact, she advised them that the child was unwell. Nonetheless, the warrant was executed.

The mother subsequently provided a doctor’s report to the Court, where the child’s unwellness was described as a runny nose and a mild wheeze consistent with a viral exacerbation of his asthma. However, the Court considered that indications of the child’s unwellness at the time of contact, being based on the mother’s self-reporting, was unreliable. Additionally, it was the view of the policeman involved in the execution of the warrant that the mother was prone to coming up with excuses as to why contact should not occur, and the father considered the child was fine when he was delivered to him. Subsequently, the mother enlisted the help of her mother at contact changeovers so there would be no contact

1156 Above note 1152 at para [35].
1157 Above note 1152 at paras [50] – [52].
1158 JMC v AHB FC Dunedin, 2008-012-000055, 9 July 2012 per Boshier PFCJ at para [4].
by her with the father, which apparently did assist. However, the Court considered that the mother was “incapable in any way of supporting O’s relationship with his father.”

10.3.6 The power of the Court

Judge Coyle made it clear that he had relied heavily in his decisions thus far upon the then section 5(b) of COCA in giving great weight to the preservation and strengthening of the child’s relationship with the father. That he was now being asked to transfer the care of the child to the father as the correct response to the father’s further application for admonishment and his own determinations with respect to the issue of contempt, meant that he was obliged to also address the then section 5(d) of the Act. That is, that continuity of care should be recognised as desirable when assessing a child’s welfare and best interests. The judge, however, determined that the risk to the child in being removed from his mother’s care was outweighed by the risk of leaving him there when the mother did not support the development of the child’s relationship with the father. The judge considered this was akin to psychological abuse and therefore a safety issue pursuant to the then section 5(e) of COCA.

The judge also made a notification of his own motion to CYFS with respect to the mother’s care of her other children, and directed that Lawyer for Child file an application to place these children also under the guardianship of the Family Court, as had previously been the case for O. Then, while he considered that the low level of contact the father had had with the child to date meant that there would be a need for monitoring and support of O in the care of the father, he nonetheless placed O in the interim day-to-day care of the father and directed that O have no contact with the mother in the interim.

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1160 Above note 1159 at para [24]. See also Chapter Nine with respect to the issue of gatekeeping and the historically negative connotations attributed to the term, focussing on maternal responses to father involvement. See also Judge O’Dwyer’s subsequent view that this was an outdated practice of the New Zealand Family Court, and as a result mothers had not been treated very well by the Court.

1161 Above note 1159 at para [30]. Around the time of this series of decisions, the Supreme Court in Kacem v Bashir [2010] NZSC 112 provided a corrective to the Family Court, which had become prone to giving additional weighting to principle 5(b) in relation to the other s5 principles. The Supreme Court said (Elias CJ dissenting) that the s5 principles do not create any presumptions and also that no one factor has any greater weight than another. In addition, the parenthesis found in s5 (b) referring to a particularity with respect to a child’s relationship with each parent was an internal weighting in s5(b) itself, a provision referring to various familial relationships that should desirably be available to a child, and not a particularity and weighting in relation to other s5 principles as had wrongly considered to be the case within the Family Court. That Judge Coyle in this series of decisions gave great weight to s5(b) and the development of the child’s relationship with his father may be in a part a reflection of this erroneous approach that had emerged in the Family Court, and which the Supreme Court sought to address. The consequence of this approach may therefore have been an increasing under-emphasis on the role and voice of the mother.

1162 Above note 1159 at para [42] 6 September 2012, per Coyle J.
Eventually, and with subsequent involvement and assistance from CYFS, the other children were returned to the mother’s care with support being provided to her, and a shared care arrangement for O was entered into between the mother and the father. There was then a further complaint with respect to the father’s inappropriate use of discipline against the child, which resulted in another CYFS intervention and a police investigation. It is apparently now the position that the father no longer cares for the child in a shared care arrangement, (the care having reverted to the mother), and the father does not, by choice, have any contact with the child nor is apparently seeking to.

10.4 Further cases of mothers versus the power of the law

Judge Coyle also found two other mothers in contempt for breach of court orders and considered committal in *DJP v KDF*,¹¹⁶³ and also in *GCF v FMC*.¹¹⁶⁴ Both involved a mother’s unilateral relocation of a child in her primary care, where the father, while a natural guardian, had a limited relationship with his child prior to the move. Both cases were accordingly with respect to a breach of the father’s guardianship rights pursuant to section 44 of COCA.

In the first decision, the mother had relocated two and half hours away from Cromwell, where the parties had been living. The judge ordered the mother’s return to Cromwell within 24 hours, directing a contempt hearing if she failed to do so and also indicating that if the child was not returned, he would make an interim parenting order placing the child in the day-to-day care of the father.

In the second decision, the mother relocated with her child 45 minutes out of Dunedin where the parties had both been previously residing, in breach of a Family Court order made two years earlier that the child reside in Dunedin. Upon hearing the father’s without notice application, the judge ordered the mother to return the child to Dunedin. The mother did not do so, and when the matter came back before the Court a month later for review, the judge advised that she had to comply and set the matter down for a contempt hearing.

At the contempt hearing, Judge Coyle determined that the mother was in contempt and considered whether she should be imprisoned. He then determined that as the mother was genuinely remorseful, that she did not have the financial resources to return immediately to

¹¹⁶³ **DJP v KDF** [2011] NZFLR 386.
¹¹⁶⁴ **GCF v FMC** FC Dunedin FAM-2003-005-57, 4 April 2011.
Dunedin as directed, that imprisonment would not be in the child’s best interests as the mother had always been the child’s primary carer and that the father was in any event not immediately available to care for the child, she would be directed to return the child to Dunedin over the next few weeks. He also authorised a release of his judgment to Work and Income New Zealand (WINZ) so they could assist the mother financially. However, if the child was not so returned, the day-to-day care would be placed with the father.

Then, in *PJM v Family Court at Waitakere*, the parents of a nine year old girl had been engaged in a dispute over her contact since she was 15 months old. A protection had been made against the father on the mother’s application, and the father was subsequently convicted for its breach. The parenting relationship was described as “seriously dysfunctional.” In the end, the mother applied to the High Court for a judicial review of two Family Court decisions relating to a section 60 hearing process and the reappointment of Lawyer for Child for the purposes of the judicial review, alleging, among other things, a breach of natural justice and predetermination. The father had also applied for a warrant to enforce contact and had filed an appeal against the Family Court’s refusal to discharge the protection order.

Tapp describes how the system’s framing of the relevant issues as being about correct procedure “increasingly distanced the matter from what was relevant and real to the parents, creating a disjunct between their reality and that of the system, making it increasingly unlikely that the matter could be resolved.” Framing the issues in this way also points to the strength, power and black letter resolution intended to be found in the law.

It was Justice Priestley in the High Court, in this case, who “consciously stopped the merry-go-round.” He was described as connecting with the parents and showing respect for them as people. In naming their feelings, he was able to acknowledge to the mother that he

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1165 *PJM v Family Court at Waitakere* HC Auckland CIV – 2011-404-3306, 9 September 2011.
1166 Tapp, above note 1028 at 111.
1167 The then s60 of the Care of Children Act 2004 provided a mandatory statutory mechanism to ensure a finding was made in circumstances where there had been an allegation of physical or sexual abuse. Until then, the Court could not make orders providing for unsupervised care and/or contact, and in the event that there was a positive finding that there had been physical or sexual abuse, there then needed to occur a risk assessment as legislatively prescribed in ss 58-62 before any unsupervised care or contact pursuant to a court order could occur. The process had been designed to address safety issues for a child. These provisions have now been repealed, replaced only by the requirement that the Court must address a child’s safety pursuant to s5(a) and s5(A) of the Care of Children Amendment Act (No 2) 2013 and in the event that it is not satisfied a child would be safe, it can direct that any contact be supervised.
1168 Tapp, above note 1028 at 111.
1169 Tapp, above note 1028 at 111.
understood her view that her consent had not been given to an unsupervised contact order being made, her safety concerns for her child and the importance to her sense of justice that she be heard.\textsuperscript{1170} As a result, he was able to introduce a process that authoritatively, yet sensitively, managed the conflict and increased the father’s contact to the child “without resort to heavy-handed measures such as warrants and imprisonment for contempt, guardianship of the Court etc.”\textsuperscript{1171}

10.5 The relationship between imprisonment for contempt and inhibitory gatekeeping

There is a tension between the need for a legal system whose orders are respected, and the appropriateness of the imposition by the courts of such dire consequences as imprisonment for breaches of such orders. The cases discussed in this chapter point to a link between a mother’s belief in the legitimacy of her actions in withholding a child from court-directed father contact, and protective, inhibitory gatekeeping. The law, in nonetheless regarding such actions as contempt resulting in imprisonment, is not an appropriate response where there has been no finding, or consideration of such findings, with respect to the mother’s reasons for withholding contact. In the Skelton series of decisions, while the mother was punished for her disobedience of court orders and for her dishonesty to the court in relation to the home DNA testing kit issue, there does not appear to have been a close analysis of her reasons for seeking to withhold contact in the first place. In the \textit{JMC v AJHB} situation, the proceedings had commenced with domestic violence allegations by the mother against the father with a protection order having been made. This order was subsequently discharged, the domestic violence findings thereafter appearing to be effectively ignored. In the Morgan-Foretich case, the evidence was “in equipoise” (that is, after hearing the evidence the court could not determine whether the safety issue – in that case, whether Hilary had been sexually abused by her father - is proven, or not). This is of concern. A lack of symmetry and necessary connection between a mother’s imprisonment for contempt, and her behaviour in breaching a court order requiring father-contact to occur as being obstructively, inhibitory gatekeeping, that is, without a protective cause, is also of concern. It is recommended that the Court engage in a closer examination, and be prepared to make findings, of a mother’s reasons for withholding contact and engaging in inhibitory gatekeeping behaviours. Only then can the


\textsuperscript{1171} Above note 1170 at para [30]; see also Tapp above note 1028 at 112. Tapp discusses several other decisions where Priestley J’s judicial style was evident, that is, to respect the humanity of the parents and to positively exhort them to cooperate and prioritise the interests of their child over their own, rather than to use the power of the Court to punish; see Applications by Hanover Family HC Auckland CIV-2007-404-7415, 18 August 2011 per Priestley J; see also \textit{Joshua v Love} HC New Plymouth CIV-2010-443-443, 21 October 2010 per Priestley J.
Court determine whether such inhibitory gatekeeping is protective, for which imprisonment should never be the outcome, or obstructive, for which imprisonment for contempt may continue to be considered an appropriate consequence.

10.6 A holistic approach

Tapp discusses the use of contempt by Family Court judges, and in particular the *JMC v AHB* series of decisions, not so much to highlight the utilisation of power within a patriarchal system as found in McKinnon’s dominance feminist theory, but to more gently suggest that imprisonment for contempt is also rarely likely to be compatible with a child’s immediate welfare, and is also unlikely to resolve the personal, relational and contextual issues which resulted in breaches of court orders in the first place.¹¹⁷² She points to consideration of the issue in the UK, where the Advisory Board on Family Law: Children Act Subcommittee commented:¹¹⁷³

> Once again, the overwhelming weight of the responses to the consultation was that enforcement of contact orders by proceedings for committal leading to fines and imprisonment is not only a crude way of enforcing contact orders: it is also ineffective. Whatever the intellectual force of the argument that it is in a child’s interest to enforce a contact order because the order for contact was made on the basis that it was in the child’s interest to have contact, the simple facts remain that it is very difficult to see how it can ever be to the benefit of children for their primary carer to be sent to prison.

Tapp also reminds us that the law is not the whole story when seeking to resolve family relational issues where children are involved.¹¹⁷⁴ She suggests that the number of parenting disputes where there is repeat litigation and the parties take up increasingly entrenched positions “might be reduced by pre-court processes designed to recognise, respond to and manage the personal, relationship, family, social, cultural and economic context of the dispute.”¹¹⁷⁵ This is particularly given the view of the Ministry of Justice that the court system should not have a role in resolving the intractable family dispute which comes before it, saying “[C]ourt procedures are designed to determine facts and enforce law. A court

¹¹⁷² Tapp, above note 1028 at 108.
¹¹⁷⁵ Above note 1174; see also Pauline Tapp, above note 1028.
setting is not well suited to resolving non-legal, personal and emotional issues as well as legal ones.”  

Tapp however, considers that in the absence of “a properly resourced, multi-disciplinary triage system designed to ensure that all personal and other contextual issues triggering the dispute are dealt with out of the court system, a court dealing with a family dispute must take a holistic approach if it is to be seen as relevant and responsive by its clientele.”

Tapp also highlights an urgent need for legislative amendment with respect to section 44 of COCA to provide for specific enforcement remedies with respect to breaches of guardianship consultation or decision-making, thereby avoiding such draconian demonstrations of power against a parent, usually a mother, by imprisoning her when it is highly questionable if such a response is ever in the welfare and best interests of her child. She additionally points to the disjunct between a focus on the system to establish the legal rights of parties, the concept of the welfare of the child, and the perception of the parties as to what was important to each of them and their families, and explores how the system’s framing of the problem can lead to the law taking on a life of its own. Recognising that there may be, in these circumstances, an underlying theoretical foundation based in dominance feminist theory, the issues can then take on a damaging potency, particularly for children.

Judge O’Dwyer, too, has reviewed the treatment some mothers have been receiving at the hands of the New Zealand Family Court, pointing to the need for there to be a better understanding and further research with respect to maternal gatekeeping. She describes mothers’ reasons for restrictive gatekeeping as often being linked to a fear of abuse, this reality not being adequately recognised, yet illustrative of the importance of clear judicial findings with respect to violence in the parenting relationship. She concludes that because protective or facilitative gatekeeping has not been adequately recognised, in conjunction with an insufficient analysis of both parents, mothers in such circumstances may not have been served well by the Family Court. She proposes that steps need to be taken to research, understand and address the perceptions, attitudes and behaviours underlying the dispute, and for clear findings to be made in cases of domestic violence. The issues should then be

1176 The Ministry of Justice Reviewing the Family Court: A public discussion paper 2011; see also Tapp above note 1028 at 113-4.
1177 Tapp, above note 1028 at 114.
1178 Tapp, above note 1028 at 111; this issue was also highlighted by the Ministry of Justice paper in Reviewing the Family Court. A Public Consultation Paper, 20 September 2011: “Consultation and Research highlights that the current adversarial court system can be harmful for families. For example, … it permits lawyers representing parties to largely control the process, and can entrench conflict between parties” [para 27].
1179 Judge O’Dwyer, above note 1028.
reframed with a child-centric approach. She saw more care being needed in crafting parenting plans to meet actual needs, and she further identified relocation issues as being helpful opportunities to assess each parent’s ability to promote the other to the child, rather than being an exercise of power over a parent, usually the mother, to force her return. 1180

Summary

The situations described in this chapter point to challenges for both motherhood and the law. It is possible that the reality and effect of relationship and gender in parenting matters could be better recognised through more sophisticated judicial understandings of the mutual gender dynamics at play within the concept of gatekeeping. The application of these more nuanced understandings could mean that such draconian responses by the law including imprisonment for breach of a parenting order, could be ameliorated. At the same time, respect for and adherence to the law is an important feature of a healthy legal system.

The following chapter explores a further lens through which the relationship between motherhood and the law may be examined, that of the breastfeeding mother within a separated parenting context.

1180 Judge O’Dwyer, above note 1028.
Chapter Eleven

Breastfeeding

Introduction

Breastfeeding is an example of one of the challenges faced by motherhood in New Zealand in its relationship to contemporary family law. Such challenge has broad application across all forms of separated parenting. This is because separated parenting laws in New Zealand are based upon gender neutrality when parenting is not gender neutral and breastfeeding, being a gendered role, is uniquely motherhood’s domain. The difficulties for the law created by the application of the welfare and best interests principle not being able to take into account the gender of the parent and, in particular, the breastfeeding mother, are highlighted in relation to this issue. The tensions and differing judicial approaches are further discussed in this chapter.

11.1 Breastfeeding as a public policy issue

A mother breastfeeding her baby is regarded by the World Health Organisation (WHO) as a relationship of critical importance to the health and wellbeing of both mother and child. WHO and UNICEF together say:1181

Breastfeeding is an unequalled way of providing ideal food for the healthy growth and development of infants; it is also an integral part of the reproductive process with important implications for the health of mothers. As a global health recommendation, infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Thereafter, to meet their evolving nutritional requirements, infants should receive nutritionally adequate and safe complementary foods while breastfeeding continues for up to two years of age or beyond.1182

New Zealand’s health care policies are consistent with this international approach, supporting
and encouraging breastfeeding by mothers.\textsuperscript{1183} The Ministry of Health’s 2008 Background
Report “Protecting, Supporting and Promoting Breastfeeding in New Zealand” confirms the
adoption of a national health policy endorsing solely breastfeeding for the first six months of
a baby’s life, and also beyond that after the introduction of solid food. It refers with approval
to WHO as supporting breastfeeding into the second year of life. In discussing legislative
support for such policies, it suggests considering the protection of breastfeeding in custody
decisions as an innovative legislative measure that could be introduced.\textsuperscript{1184} Both the
Children’s Commissioner and the Family Court are listed as key governmental stakeholders
with respect to the encouragement and protection of breastfeeding.\textsuperscript{1185} The report quotes from
about breastfeeding at work, and calls for stronger protection of breastfeeding mothers and
babies in New Zealand. It records the report as noting that “although there is no specific law
in New Zealand on the right to breastfeed apart from anti-discrimination measures, the right
is given meaning in a variety of ways through measures to respect, protect and promote the
right to breastfeed.”\textsuperscript{1186} It also points to one of the barriers to the support and protection of
breastfeeding for mother and child as being a partner belief that artificial feeding will
enhance the opportunities for the father to bond with the child.\textsuperscript{1187}

11.2 Tension between public policy and New Zealand’s family law

The denial by the law of a unique and gendered aspect of a parent-child relationship, one that
can only arise through breastfeeding by a mother towards her child, would seem to place the
law in tension with the clear policy direction. This is in circumstances where it should be
expected that legislation be consistent with, and reflective of, policy.

As a result, New Zealand Family Court decisions addressing the issue of breastfeeding are
mixed, as judges grapple with the issue. In \textit{SAQ v LRER}\textsuperscript{1188} Judge Ellis described events
where the father manipulated the mother and retained the children in his care as “an

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\textsuperscript{1183} \url{http://www.health.govt.nz/publication/national-strategic-plan-action-breastfeeding-2008-2012}
Searched 20 November 2014; Code of Practice for Health Workers in Implementing and Monitoring
the \textit{International Code of Marketing Breast Milk Substitutes} in New Zealand also refers to
“breastfeeding as the best and safest way to feed infants”.
\textsuperscript{1184} Above note 1183 at para 4.2.1.
\textsuperscript{1185} Above note 1183 at 39.
\textsuperscript{1186} Above note 1183 at 31.
\textsuperscript{1187} Above note 1183 at 42.
\textsuperscript{1188} \textit{SAQ v LRER} FAM-2009-091-000618, 12 November 2010, Family Court Wellington per Ellis J.
\end{flushleft}
unscheduled interruption in the children’s natural development with their mother and the progression in their developmental move away from an infant attachment to her and towards a more independent life with their father”.

He went on to say:

That is a perfectly natural progression in any child’s life, commencing from the most intimate attachment with the mother and the womb, through the processes of fundamental, maternal bonding and breastfeeding and then toddling towards dad and beginning to explore the world outside with him. These are perfectly natural processes which need, for the best interests of the children, to be achieved, to be supported, nurtured and carefully managed by the parents.

Although section 4(3) of COCA appears to preclude him from doing so, the judge was commenting that there are gender differences that should be recognised between mother and father roles and functions. Notwithstanding that the children had been in the care of the father, the judge went on to say: “I do not describe this as a very finely balanced judgment. I am clear in my view, that there must be a parenting order in favour of the mother and I do make that order now”.

The uniquely gendered nature of breastfeeding by a mother was addressed squarely by the same judge in the 2012 decision of *LJJ v RAF*, where the father’s position was that the welfare and best interests of a not quite two-year-old child would be served by an equal time shared care arrangement. The judge prefaced his comments by saying: “Lest it be thought, as it is in some quarters, that the Family Court has a preference for women or mothers, I emphasise again that the law makes it clear there is to be no presumption or preference on the basis of gender”. He then went on to say:

It is a fact that the child was breastfed. That is not a matter of presumption or of preference. It is simply a biological fact: some children are, some children are not. The benefits of breastfeeding are certainly well known in the literature and the evidence most commonly heard in this Court is that it is generally regarded as beneficial for children that breastfeeding should continue for at least the first three months and up to the first six months of a child’s life. There is no hard-and-fast rule,
but that is a common approach, and I accept on the evidence that I have heard that it is an approach that was followed here. I am told that the mother’s feeding of the child was not without difficulty and that early breastfeeding was supplemented by bottle; that is not uncommon. Why do I comment on this at all? Because very obviously there is a naturally strong biological attachment formed between infant and feeding mother in that early stage. This is not a discrimination against fathers, or if it is, it was designed by a power greater than this Court.

He further commented that it was also well understood that a child at this age will frequently show signs of separation anxiety if they are separated from the person with whom they have the most stable and close attachment, and that “the parents may not have appreciated that what they were telling me was altogether familiar and describes … the behaviour of an infant who is insecure and anxious about being parted from his mother”. The judge went on to direct a one home care model for the child, with the mother. He then directed contact with the father, to whom the child was acknowledged to have a close attachment, three times a week for up to three hours at a time.

These decisions reflect cultural feminist theory and a central understanding of gender difference with respect to parenting. They therefore affirm, respect and support breastfeeding by a mother towards her child and take this gender-specific aspect of a mother-child relationship into account in the care arrangements between the parents.

11.3 Family Court decisions which do not recognise gender difference

Other Family Court decisions, however, involve judicial attitudes derived from liberal feminist theory, that is, that in a pursuing equality between the parents, there should be no appreciable difference between mothers and fathers to be recognised with respect to the care arrangements.

MT v AK was a case about a nearly five month old baby who was breastfed on demand by the mother, which entailed at that time feeding approximately every one and half hours. The father was seeking to commence, through contact, his own care of the baby, which he regarded as his right. The mother opposed the introduction of such contact, seeking

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1195 LJJ v RAF above note 1192 at para [22].
1196 See Chapter Five.
1197 See Chapter Five.
uninterrupted stability to care for the child in this early period without pressure from the father. The baby was breastfed and the mother wanted to continue to breastfeed, as she had done with her other four children. Evidence was provided for the mother by a trained midwife that “during breastfeeding the attachment between mother and baby is strengthened and significant brain development occurs”. Judge Coyle, in response, said: “That may or may not be correct but in the absence of any literature, any peer-reviewed research or any medical evidence I cannot give that statement any more weight than simply the personal view of [the midwife]”. The midwife had also offered evidence that “it is widely accepted that breastfeeding results in significant health benefits for babies and mothers. Formula does not provide the same health benefits”. In response to this, Judge Coyle said: 

Again, there is no evidence to back up those assertions … It seems to me to be no more than a wide-ranging statement which may indicate a particular bias on the part of [the midwife]. Indeed the Court is aware of significant debate as to whether breastfeeding in fact provides better health benefits for children than formula, and that opinion is squarely divided on the issue.

The judge went on to determine by way of interlocutory hearing that the evidence of the midwife as to these matters could not be considered as the evidence of an expert witness, as she had clearly stated in her affidavit that she was giving evidence in support of the mother and was therefore not neutral, and further that “the fact she is qualified as a midwife does not make her an expert in midwifery”. Therefore, he considered any opinions she expressed as “simply her personal opinions and those then become an issue of weight for me.” He struck out those paragraphs of the midwife’s affidavit evidence which he regarded as simply her opinion, and then proceeded to hear the matter without the evidence of the midwife as to her view of the value of breastfeeding to mother and child. In his final judgment, he acknowledged that the mother was breastfeeding and wanted to continue to do so, and confirmed that he had had his attention drawn to WHO’s support for breastfeeding and Article 24(2)(d) of UNCROC that the state shall support access to education by parents and

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1199 Above note 1198. This discussion is in relation to the oral judgment of His Honour Judge Coyle with respect to the application by counsel for father to strike out the affidavit of the midwife, being a witness for the mother. Paragraph 12 of the midwife’s application refers.
1200 Above note 1198 at para [12].
1202 Above note 1198 at paras [12]-[13].
1203 Above note 1198 at para [6].
1204 Above note 1198 at para [10].
children of the advantages of breastfeeding. However, he said “to argue … that Article 24 supports the use of breastfeeding, in my view elevates that article to a level which is not consistent with what is in fact stated in Article 24(2)(b)”\(^{1205}\). He further recorded that the mother’s “desire to maintain breastfeeding is laudable but must be subservient to the welfare and best interests of A”\(^{1206}\); that is, breastfeeding must not be a barrier to contact between A and her father and that “if there is not a willingness by Mrs H to work with Mr T to ensure that A is able to be breastfed when she is in her father’s care, then bottle-feeding will be the only option and if Mrs H continues in her view that she refuses to express breast milk then Mr T has no option but to use formula”\(^ {1207}\). The judge also considered that the mother was “using the breastfeeding issue to keep Mr T at arm’s length”\(^ {1208}\).

Echoes of a similar approach can be found in Thomsen v O’Leary\(^ {1209}\), a 2013 decision of Judge Walsh declining the mother’s application to relocate the parties’ twenty-month-old child from Timaru to Thames. The child was breastfed and it was the mother’s position that he wanted the child to self-wean. Judge Walsh said:\(^ {1210}\)

\[
\text{… further, I question if perhaps this is a strategy designed to control the nature and quality of the father’s contact with Travis to thwart overnight contact.}
\]

He went on to say:\(^ {1211}\)

\[
\text{Travis has undoubtedly benefitted from breastfeeding. I recommend, however, that the mother after having come to terms with my decision could perhaps consider bringing forward Travis’s weaning, and Travis could be transitioned into overnight stays in his father’s care.}
\]

It is arguable that the basis for the judicial encouragement to curtail the breastfeeding was that overnight stays with the father could then be developed. If breastfeeding was not a continuing issue, there would then be no impediment to the achieving of equality between the parents, any gendered difference no longer needing to be acknowledged or overcome.

\(^{1205}\) Above note 1198 at para [19].
\(^{1206}\) Above note 1198 at para [26].
\(^{1207}\) Above note 1198 at para [31]; earlier in his decision, Judge Coyle recorded that “A being breastfed is extremely important from Mrs H’s perspective. I record that in her evidence she has refused to express breast milk for the purpose of facilitating Mr T’s care of A but instead indicated a willingness to breastfeed A while she is in her father’s care.” Para [26].
\(^{1208}\) Above note 1198 at para [27].
\(^{1209}\) Thomsen v O’Leary [2013] NZFC 5373 per Walsh J.
\(^{1209}\) Above note 1198 para [97].
\(^{1211}\) Above note 1198 at paras [114] and [115].
The *MT v AK* and *Thomsen v O’Leary* decisions also appear to frame breastfeeding as a utility. Such an approach assists in neutralising its naturally gendered nature. However, it also then appears to diminish the significance and value of the intimate relationship between mother and child which the welfare principle was originally designed to protect, and which breastfeeding secures. It also arguably challenges the human dignity of a breastfeeding mother in proposing such a utilitarian approach, where the mother’s breasts should be available within a separated parenting context. For example, in *C v W*, to enable and prioritise the development of a separated shared care arrangement for an infant between the mother and the father, the child remained in the home with the parents taking turns to vacate. Because the child was being breastfed, the mother would regularly visit to feed the child when in the father’s care. Then in *MT v AK*, while the judge said that he hoped “that once orders are made, Mrs H and Mr T will work together to discuss … how [A] can continue to be breastfed while in her father’s care …”, he also chided the mother if she refused to express breast milk that the father could then bottle-feed to the child while in his care through his court-directed contact, such contact requiring the child to be away from the mother when breastfeeding would ordinarily have occurred.

**11.4 The tension between breastfeeding as a gendered issue, and welfare and best interests as a non-gendered principle**

Breastfeeding remains a welfare and best interests issue, yet is determined by the sex of the parent. As a result, section 4(3) of COCA would appear to be in an inappropriate tension with this fact of nature. At times, breastfeeding is seen to be supported by the Family Court as an important aspect of motherhood and significant to the development of the intimacy of the mother-child relationship, as the decisions by Judge Ellis demonstrate. At other times, the Family Court does not support breastfeeding to this extent, and the contested nature of the issue is evident. The Court may regard it as a utility, whereby the mother makes herself available to both the father and child during his care time to enable breastfeeding to continue,

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1212 *MT v AK* CRI-2009-012-000413 22 September 2009 per Coyle J; *Thomsen v O’Leary* [2013] NZFC 5375 per Walsh J.
1215 *MT v AK* above note 1212 at para [31].
1216 Above note 1212 at para [31].
1217 *MT v AK*, above note 1212 at para [26], Judge Coyle said “Central to this case is the issue of breastfeeding. The fact that A is breastfed is a relevant matter which I need to consider as well as the s5 principles”. 

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or the mother may be judicially encouraged to wean the child to enable contact with the father to more easily take place.

The courts, in supporting breastfeeding on some occasions but not others, also appears to be in tension with New Zealand’s health care policies to support, encourage and facilitate breastfeeding. If breastfeeding is accepted as a matter of gender and is in a child’s welfare and best interests, a further issue to therefore be addressed is whether breastfeeding should be proactively protected, encouraged and facilitated by the courts in determining separated parenting arrangements. The pursuit of equality through recognition of the differences between men and women, can accommodate the value to a child of a breastfeeding mother without diminishing the equal value of a father who cannot breastfeed. However, this does not sit comfortably with section 4(3) of COCA. That is because it is a provision which requires that the gender of the parent not be taken into account in determining a welfare and best interests matter. Therefore, while the existence of breastfeeding may be recognised as a relevant factor in a welfare and best interests enquiry for a particular child, it appears that it cannot be recognised more broadly as a self-evident gender difference that should be taken into account in determining the best care arrangements for a child in a pro-active, provisioning manner. As a result, there appears to be an inherent tension within the welfare principle itself created by the presence of section 4(3) within the legislation.

**Summary**

Breastfeeding, as an example of gendered care provided by motherhood to a very young child, is not easily accommodated within the gender-neutral legislation of COCA. Judges have addressed the tension between breastfeeding and separated parenting, including the development of overnight shared care, in different ways. Some have recognised its reality and the importance of the intimacy of the mother-child relationship being developed through breastfeeding; others have addressed breastfeeding as a utility, arguably diminishing the value of motherhood in the process. Still others have suggested that a mother may use continued breastfeeding to negatively gateway a child’s relationship with the other parent, usually the father, which should be resisted.

Restoring dignity to the participants in contested court matters, and re-integrating the purpose and process of family law with the people involved, may re-humanise motherhood and fatherhood, and thereby provide increased protection to a child of both relationships. It may also address the disconnect that appears to have occurred in some of these circumstances,
where the law appears to have taken on a life of its own. These matters are further discussed in the following and final chapter. In exploring various themes with respect to motherhood that have emerged in the preceding chapters, a redemptive approach is also explored. This would enable motherhood, equal to and complementary of yet not in competition with fatherhood, to be recognised as a respected, dignified and centrally-placed component, along with fatherhood, within New Zealand’s legal parenting framework.
Chapter Twelve

Discussion and Conclusions

Introduction

This thesis has canvassed many aspects of motherhood, commencing with such foundational issues as the theological underpinnings of motherhood, the complex relationship between male and female, reproduction theory, and the very source of life. These underlying issues have contributed to the contestable nature of motherhood, in tension with other ideas and ideals as they have unfolded throughout the centuries, from Roman times through to modern-day life. Tracing social and legal history, it is evident that motherhood has experienced the extremes of both prominence and protection, and anonymity and a lack of recognition. A number of key themes have emerged from my enquiry, which are explored in the following discussion.

12.1 Discussion

12.1.1 The context for motherhood

Historically, marriage was the preferred context for motherhood, and, informed in the Western world by Christian doctrines, was formative to the development of the roles of mother and father, and the acceptance of the one by the other.

There were also consequences and stigma for motherhood outside marriage, that is, giving birth ‘illegitimately’. However, the impact on motherhood of illegitimacy faded into insignificance as legal reforms removed the concept from the law. The bastard child, that is, a nullius filus (a child of no-one), gained the same legal status as any other child. Subsequently, the introduction of welfare benefits financially enabled sole and separated mothers to keep and raise their children. They also contributed to the loss of stigma of motherhood outside of marriage. As a result, there were a diminishing number of mothers

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1218 The biblical teaching that human sexuality is linked with the statement found in Genesis 1:26-27 that humans are created in the image and likeness of God, male and female, is discussed by theologian Karl Barth in Ray S. Anderson Empowering Ministry With Theological Praxis (InterVarsity Press, 2001) at 272. He links human sexual differentiation at the biological level, and therefore the differentiation between motherhood and fatherhood, with the divine image of God including both male and female.

1219 See Chapter Two.

1220 See Chapter Two, paras 2.9 and 2.10.
giving their babies up for adoption.\textsuperscript{1221} The scope for, and context of, motherhood was therefore enhanced by these developments. On the other hand, new challenges arose as the protections previously provided to motherhood by the development of the welfare principle through the patriarchy of a society that did not recognise gender as equal, were removed in the name of gender equality.\textsuperscript{1222}

12.1.2 Prominence and protection; anonymity and a lack of recognition

Tracing social and legal history, it is evident that motherhood has experienced the extremes of both prominence and protection, and a lack of recognition.\textsuperscript{1223} The laws of 18\textsuperscript{th} and 19\textsuperscript{th} century England, founded originally on the \textit{patria potestas} of Roman law, who had the power of life and death over his children, his wife and his slaves, continued to reflect the supreme social and legal authority of husbands and fathers. Wives and mothers had no authority, requiring the ‘coverture’ of their husbands to be able to be meaningful and respected participants in society.\textsuperscript{1224} At the same time, during this period, there was also an uncontested acceptance of the natural order with respect to motherhood and the intimacy of the mother-child relationship, notwithstanding the extreme inequality between gender that continued to exist socially and legally.\textsuperscript{1225} It was not until gender equality emerged in the law through the work of the second wave feminist movement during the second half of the 20\textsuperscript{th} century that motherhood, ironically, entered a period of anonymity and lack of recognition.

12.1.3 Motherhood – a gendered or a gender-neutral concept?

As history unfolded, a transformation of motherhood took place within the law, from a female biological imperative, and a gendered theological and social institution, to the more neutral concept of parenting, within or without marriage.\textsuperscript{1226}

While motherhood figured centrally in her work, the late Sara Ruddick in her 1989 book, “Maternal Thinking: Toward a Politics of Peace,”\textsuperscript{1227} did not specifically define mothering as a gendered activity, considering only that the work of motherhood shaped the parent as much as the child and gave rise to unique cognitive capacities and values of both mother and child.

\textsuperscript{1221} See Chapter Two para 2.10 and f/n 160.
\textsuperscript{1222} See Chapter Three, particularly paras 3.12, 3.19 and 3.20, and Chapter Four para 4.1.
\textsuperscript{1223} See Chapter Two.
\textsuperscript{1224} Blackstone, above note 96.
\textsuperscript{1225} See Chapter Two.
\textsuperscript{1226} See Chapters Two and Three, and Chapter Four para 4.1 culminating in the current gender neutral parenting legislation found in New Zealand’s Care of Children Act 2004.
\textsuperscript{1227} Sara Ruddick, above note 618; see also discussion in Chapter Five.
She considered that doing the activities of motherhood shaped thinking unique to a mother. This may have been a careful recognition of feminism’s problem with essentialism. It is also consistent with current developments in the field of neuroscience that would suggest that there are, notwithstanding social and legal movements towards gender neutrality in parenting function as reflected in the law, certain biological aspects to the female brain that may more naturally provide to a female mother a capacity for warm, emotionally attuned nurturing, particularly towards her very young child. Accordingly, it is reasonable to suggest that, despite the social and legal developments over the last 150 years, resulting in the current legal position where parenting laws are now couched in gender neutral terms, motherhood may, nonetheless, remain an essentialist and gendered concept.

12.1.4 An uneasy tension

It is evident that while motherhood is understood to be foundational and important to human relationships, rather than supported by the law, it seems to have, over time, existed in an uneasy tension with it.

The welfare principle, a cornerstone of family law, is a central example of such tension. Devised as a legal mechanism to protect the mother-child relationship in patriarchal 18th and 19th century England, it was a legal transplant into New Zealand’s younger, more egalitarian society; a society which focused early in its history on reforms designed to achieve gender equality. Fairness to the mother, not the pursuit of equality between mothers and fathers, appears to have been the driving value in the creation of the original UK-based welfare

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1228 See Chapter Five with respect to the issue of maternal essentialism.
1229 See Chapters Two, Three and Four as they traverse the social and legal history of motherhood from a gendered to a gender neutral concept.
1230 See above note 804
1231 See Chapter Four para 4.1 with respect to New Zealand’s Care of Children Act 2004.
1232 See Chapter Three; see also, for example, Dr Colin James in “Winners and Losers: The Father Factor in Australian Custody Law”, above note 571, in describing the consequences of the 1995 child custody legislation in Australia, pointing, at 25, to the incongruity of “the concluding reform in the century of family law return[ing] to men some of the privileges they had enjoyed in the nineteenth century under father-right prior to the liberal reforms”, and concluding that, as a result, “the welfare principle … was reinvented once more, but without considering the child’s interests and despite the rhetoric of equality and justice.”
1233 New Zealand is regarded as having been at the forefront of gender equality reforms, being the first nation to recognise women’s suffrage by passing legislation in 1893 providing women with the right to vote and achieved through the work of Kate Sheppard and others, supported by Julius Vogel but not by Richard Seddon. Also in 1893, Elizabeth Yates became Mayor of Onehunga, the first time such a position had been held by a woman anywhere in the British Empire. Full women’s suffrage in the UK, supported by the work of the Pankhursts and others, was not achieved until 1928 (although from 1918, women over 30 and meeting certain property owning requirements were granted the right to vote from that date). This was against UK background legislation passed in 1832, which explicitly denied women the right to vote.
principle. In New Zealand, the key influence with respect to the transplanted principle appears to have been the evolution of gender equality. This was not immediately evident, as New Zealand followed the English welfare principle and precedents for a long time. The 1980 legislative introduction of gender-neutrality and ‘no fault’ divorce into New Zealand parenting laws, together with New Zealand society’s broader, long-held beliefs and values as a young, pioneering colony and the effect of different aspects of feminist theory, seeking gender equality by either denying (liberal feminist theory) or embracing (cultural feminist theory) gender difference, eventually signalled a divergence between New Zealand and the UK as to the meaning and effect of the welfare principle. Such influences had considerable impact upon how motherhood came to be perceived by, and, arguably, to be completely left out of, New Zealand’s current parenting laws.

Thus, the effect of the transplant of the welfare principle ultimately resulted in a divergence of approach and application between the UK and New Zealand, which began to emerge in the 1970s. While both jurisdictions experienced fathers’ rights movements and political pressure to legislatively introduce equal time shared care with respect to separated parenting, the UK appeared to continue to recognise, to a greater extent than New Zealand, the difference between motherhood and fatherhood in the law. In the 1970s in both the UK and New Zealand, legal interpretation of the welfare principle subtly shifted to neutrality and deliberate indeterminancy, on the basis that society changes over time. At the same time, it was reframed as a preference for the ‘status quo’ or the principle of ‘continuity of care’. However, as mothers continued to do most of the caring, these changes did not, initially, harm or undermine motherhood. Such shifts occurred, in part, as a result of the rise of the influence of the social sciences in legal decision-making. This included Goldstein, Freud and Solnit’s concept of the ‘psychological parent’ and the use by the social sciences of a different language, such as ‘continuity of care’. Therefore, motherhood as an expressed concept was,

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1234 See above note 930 with respect to fairness, rather than equality, as a continuing foundational and central value in UK jurisprudence, while the emphasis in New Zealand appears to rest on equality first (out of which the implication is that fairness can be achieved).
1235 See Chapters Two and Three.
1236 See Chapter Two, para 2.8, and notes 837 and 838.
1237 See Cameron, Robson and Belich above note 319.
1238 See Chapter Five paras 5.2 and 5.3.
1239 See Chapter Eight and the discussion of the differences between New Zealand and the UK with respect to the issue of relocation during the 2000s.
1240 See the neutrally framed parenting laws contained in New Zealand’s Care of Children Act 2004.
1241 See Chapter Seven, para 7.2 and Chapter Three.
1242 See Chapter Four para 4.6.
1243 See Chapter Three paras 3.15 and 3.16.
as a result, largely retired from the law; arguably an unintended consequence of seeking to follow best practice. The leading UK decision of *J v C*1244 with respect to these issues was applied by the New Zealand Courts, as they continued to follow English precedent. While not necessarily intended, the effect was that it obviated any need to refer specifically to motherhood, consistent with the movement towards gender equality based in liberal feminist theory. This shift in the interpretation of the meaning of the welfare principle occurred at a time when there were continuing and complex gender tensions.1245 The removal of reference by the law to the ‘tender years’ doctrine in the UK and the ‘mother principle’ in New Zealand1246 was, ironically, consistent with the outcomes sought both by fathers and liberal feminists but, arguably, based on different drivers. The emergence of a gender bias against mothers over this period became evident, and this was particularly the case in New Zealand.1247 The welfare principle’s protection of motherhood morphed into a challenge to the uniqueness of motherhood, through fathers’ rights being rebadged as an issue of a child’s welfare.1248 The fathers utilised, in this pursuit, the gender-neutral nature of the welfare principle, as well as the formal equality sought by liberal feminist theory, which diminished the unique contribution of motherhood to parenting. The attractiveness of liberal feminist theory, seeking to achieve gender equality by denying any gender difference, was picked up by the law. This can be seen through the passage in 1980 of New Zealand’s s23(1A) of the Guardianship Amendment Act,1249 the then Minister of Justice being very clear as to the Bill’s purpose, saying “If any lingering trace of the so-called mother principle does in fact survive, it will be eradicated by the proposed new subsection (1A) of section 23, inserted by clause 8 of the Bill.”1250 Now in the form of s4(3) of COCA, it appears to have become a legislative tool by which motherhood has been significantly challenged over the last 30-40 years. Motherhood as a concept in law has been replaced by the concept of parenthood.

1245 See Chapter Five; see also Germaine Greer *The Female Eunuch*, above note 603.
1246 See Chapter Three, para 3.20.
1247 See Chapter Seven, para 7.2 and the discussion of the story of the development of shared care separated parenting in New Zealand, together with Chapter Eight and the examination of relocation in New Zealand as compared to the UK.
1248 See notes 80, 724, and 854.
1249 S23(1A) of the Guardianship Amendment Act, above note 837, 838.
1250 See Chapter Four.
12.1.5 Linking motherhood with the feminist movement

The link between the fortunes and regard for motherhood by the law, and the struggle for gender equality can also be observed through three waves of feminism.\textsuperscript{1251} The first wave, which was focused around the suffrage movement, resulted in New Zealand being the first country to grant women the right to vote. This occurred in 1893,\textsuperscript{1252} at a time when New Zealand society was establishing itself as egalitarian, with the principle of gender equality being established early in its developing nationhood. In the UK, there was less willingness to allow this. As a result, the political activism of the suffrage movement was assuaged, in part, by Parliamentary recognition of fairness to mothers and children upon parental separation, by the development of the welfare principle. It was understood to mean that young children were better off with their mothers, and was a mechanism designed to protect the mother-child relationship within the context of a prevalent and continuing gender inequality. To prevent husbands and fathers from exercising their supreme authority in law, the welfare principle was rendered gender-neutral. The gender-neutrality created by a principle to be applied in an area of law that was quite clearly not gender-neutral appears to have been regarded in the UK as something of a fiction. Even in contemporary English family law, unlike New Zealand, the significance of biological motherhood continues to be acknowledged, notwithstanding the tension created by the continuing pursuit of gender equality. In \textit{Re G},\textsuperscript{1253} for example, one partner within a lesbian relationship gave birth to two children, on each occasion utilising donor sperm. The relationship between the two women broke down, and as a result of continuing tension and the actions of the biological mother in unilaterally seeking to relocate the children contrary to a shared residence order with her former female partner, lower court orders were made reversing the care arrangements such that the former female partner and non-biological mother was granted the primary care, contrary to the previous orders and care that had been taking place. The rationale was that the biological mother could not be relied upon to support her children’s relationship with her former partner. However, even though such an order was made, there can be detected in the Court of Appeal some judicial discomfort at this step, Hallet LJ saying:

I am very concerned at the prospect of removing these children from the primary care of their only identifiable biological parent ... Mindful as I am of the changing social and

\textsuperscript{1251} See Chapter Five.
\textsuperscript{1252} The Electoral Act 1893, assented to on 18 September 1893, gave all women in New Zealand the right to vote.
\textsuperscript{1253} \textit{In Re G (children)} [2006] UKHL 43.

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legal climate, on the facts of this case, I would attach greater significance perhaps than some to the biological link between the appellant and her children.

The decision was appealed to the House of Lords by the biological mother. The House of Lords concluded that the majority in the Court of Appeal had not given sufficient weight to the place of the biological mother and allowed the appeal, reversing the shared residence order and reinstating the original care arrangements. The House of Lords considered that the natural mother should still be regarded as special and unique, notwithstanding current law addressing separated parenting matters on the basis of such gender neutral principles as ‘continuity of care’. Baroness Hale of Richmond said in the judgement:

While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.

Further, she said:

Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique.

Her Ladyship made an important re-statement within contemporary family law of this fundamental issue. That is, while parents (whether a biological mother and father, a biological mother and a psychological mother, a biological father and psychological father, or additional and further combinations) should now be regarded by the law as equal, their equality does not mean they are the same. The natural mother is still understood as making a unique contribution to the welfare of her child, perhaps advantaged by the initial and formative relational work which takes place in utero. This application of cultural feminist theory (namely, that the pursuit of gender equality is required to embrace gender difference) in UK family law is not found to the same extent in New Zealand. This may be because, while there have been significant advances for women in areas such as suffrage, equal rights, employment opportunities, and social recognition, the first and second wave feminist

1254 In Re G, above note 1253 at para [34].
1255 In Re G, above note 1253 at para [36].

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movements contributed to tensions and confusion for motherhood within the law, particularly with respect to post-separation parenting. In New Zealand, unlike the UK, gender difference in parenting law evolved into a position of its lack of recognition, influenced by liberal feminist theory (namely, that the pursuit of gender equality requires the denial of gender difference). This occurred over time, New Zealand initially receiving UK law that had imposed gender-neutrality, not to deny gender difference but to enable the law to overcome the supreme power of the father over the mother. The ultimate effect within the New Zealand context was a gender-neutral law that also denied gender difference.

However, the connection between the female body and the creation of life through the birth process establishes a gender difference between men and women that is difficult to refute. Known as the maternal essence, it is understood to comprise the biological essence of reproductive functioning, the psychological essence of female emotional drivers and cognitive abilities, and the social essence of mothering. Liberal feminism was, arguably, not successful in seeking to ignore this reality by requiring the law to accept gender-neutrality in its pursuit of gender equality. It may therefore have contributed to the difficulties faced by motherhood, being diminished by a law no longer able to dignify her unique contribution. This evolutionary, probably unintentional, process of the law left behind some important things about motherhood and maternal essentialism, which should be recovered if they can.

12.1.6 The severance of maternity from motherhood

Further complexities in the relationship between motherhood and the law have emerged with respect to the relationship between, and severance of, maternity and post-birth legal recognition and responsibility of motherhood. Such division had developed in civil jurisdictions such as France, but in the common law systems of the UK and New Zealand, legal recognition and responsibility of motherhood (apart from adoption) continues to flow unbroken from parturition. Technological developments with respect to human assisted reproduction and surrogacy now require the law to address an increasing lack of symmetry between the gestational mother, the mother who provides the genetic material and the post-birth role of motherhood. Diduck and Kaganas suggest that the law might consider the need to legally expand upon the present priority afforded to the gestational mother, to accommodate within post-birth care arrangements the reality of a genetic mother, a

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1256 See Chapter Five at para 5.10.
1257 See Chapter Four at para 4.5.
1258 See Chapter Four at para 4.5.
gestational mother and a care mother, given these new technological possibilities.\footnote{1259} However, care should be taken in such considerations not to under-value the importance of the gestational mother (including a surrogate mother), by reducing or removing the present legal recognition of the mother who gives birth in favour of the commissioning genetic mother. The essential qualities of motherhood should continue to be recognised in the order that they happen. That is, the initial mother-child relationship forged by the gestational mother reflects a foundational and unique relational intimacy, taking place in an environment of nurture, care and dependence within the mother’s body. This should be recognised for its relational primacy between mother and child and should not necessarily end at the point of birth. The mother who may have supplied the genetic material but is unable to develop her own pre-birth mother-child relationship is in an uncertain legal position, in a similar way to that of an adoptive mother. However, strengthening a genetic mother’s legal rights at the expense of a surrogate or gestational mother may fail to adequately protect the intimate mother-child relationship that already exists through parturition. Both the gestational/surrogate mother and the genetic/post-birth mother may develop a mother-child relationship which exhibit important qualities, but they are not the same and, ideally, both should be recognised and protected for the child. The central emphasis should be on the nature and protection of the mother-child relationships, reflecting a mutuality that is the defining hallmark of relationships. There is a continuing need for adoption reform with respect to the original artificial fiction created by a denial of the natural (and therefore gestational) mother, as created in New Zealand by the Adoption Act 1955. This is consistent with the need for the symmetry and recognition in the law as a result of these new and additional forms of motherhood. Adoption law reform could include recovery and protection of the original birth mother-child relationship, rather than to deny its existence as is presently the case.\footnote{1260}

It is also of note that a gendered role of motherhood continues to be identified from a Māori perspective within the cultural context of whāngai,\footnote{1261} notwithstanding New Zealand broadly

\footnote{1259} Above note 1257, Chapter Four at para 4.5.  
\footnote{1260} Adoption Act 1955; see also New Zealand Law Commission Preliminary Paper 38 Adoption: Options for Reform; A Discussion Paper, October 1999.  
\footnote{1261} See above note 87 with respect to a discussion of the practice of whāngai, or Māori customary adoption.
having moved away from a recognition of gender-based motherhood and fatherhood, in favour of more neutrally framed parenting.\textsuperscript{1262}

12.1.7 Attachment and the ‘psychological parent’

Other legal developments have impacted not only on motherhood, but also on the mother-child relationship. These include contemporary law’s conflicted relationship with early theories of attachment, as researched by John Bowlby in the 1940s and contained in his originating works of \textit{Attachment, Separation and Loss}.\textsuperscript{1263} This conflict is based in the more recent social science debates with respect to the significance and need for protection of a child’s primary attachment, usually the mother, as opposed to attachment theory which holds that a child can and should form multiple attachments at the same time, that is, with both mother and father (and potentially others) contemporaneously.\textsuperscript{1264} The development, in the 1970s, of the ‘psychological parent’ through the work of Goldstein, Freud and Solnit,\textsuperscript{1265} created further challenges for motherhood, the legal significance and value of the natural mother no longer being prioritised or articulated within the language of the social sciences exploring these concepts.

At the same time, as recent scientific research has enabled the growth of surrogacy across international borders and enabled the sharing of genetic material beyond one mother in the creation of a child, it has also provided increased scientific understanding with respect to neurology. Different brain composition and function are being identified in each of the brains of the female/mother and male/father.\textsuperscript{1266} These suggest differences between motherhood and fatherhood that may not be simply the consequence of societal expectations and social construction, and that men and women in their roles as parents do indeed deal with things differently. Such developments also suggest that there may be a scientific basis to revisit the significance and understanding of attachment theory.\textsuperscript{1267} Such theory, in the Bowlby tradition,\textsuperscript{1268} did not distinguish between attachment based on gestational motherhood (including the breastfeeding mother) or attachment based on the physical care of a child

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\textsuperscript{1262} An in depth examination of a Māori perspective of motherhood and child rearing, including further discussion of the concept of whāngai, is beyond the scope of this thesis.
\textsuperscript{1263} See Chapter Four, and Chapter Seven with respect to the contemporary social science debates around primary attachment and multiple attachments within the context of shared care developments.
\textsuperscript{1264} Chapter Seven, para 7.1.4.
\textsuperscript{1265} Goldstein, Freud and Solnit, above note 362; see Chapter Three, para 3.16.
\textsuperscript{1266} See above notes 71, 645, 762, 804.
\textsuperscript{1267} See the discussions in Chapter Seven with respect to the social sciences debate.
\textsuperscript{1268} See above note 435 and Chapter Seven, para 7.1.4.
\end{flushleft}
provided through post-birth motherhood. Mothers, in the majority of cases, provided both in an uninterrupted way, along with the third component of the maternal essence, that of the psychological parent. However, the implications for the contemporary issue of surrogacy, with a division of the role and function of motherhood now possible between a surrogate, a provider of genetic material and a post-birth care-giver, need to be considered in relation to attachment theory. It is suggested that recognition and protection should be given to the surrogate mother, as, according to the theory of primary attachment, the initial mother-child relationship established during gestation is the first and primary attachment. If secure and protected, it should then enable a child to form secure, healthy multiple attachments thereafter, including with the post-birth care-giving mother (who may also be the genetically related mother). However, proponents of multiple attachment theory might suggest that protection of the surrogate mother-child attachment is not necessary, as a child is capable of forming healthy, multiple post-birth attachments at the same time. What is not clear is whether to enable such healthy, multiple post-birth attachments, protection also needs to be given to the pre-birth mother attachment where that is a separate relationship from the post-birth, mother-child relationship.

12.1.8 Politics and power

There have been, throughout the last 150 years, political, policy, legislative and legally-focused interpretative impacts upon motherhood. Prominent were the responses to the suffragette demands that women be granted the right to vote, resulting in the emergence in the UK of the welfare principle. As a result of the politics of the fathers’ movements in New Zealand, Australia and the United Kingdom, a shift, during the 1970s, took place towards interpretation of the welfare principle, not as being based on protection of an intimate relationship, and in particular the mother-child relationship, but instead as a principle based in rights, (that is, a focus on the rights of parents, and in particular fathers’ rights, rather than concepts of relationship), that can change with time and expectations of society. New Zealand and Australia appeared to move faster than the UK in response to, and in the direction of, the demands of rights ahead of relationships as the premise central to the application of the welfare principle. A reconsideration of the central significance of relationship to the meaning of the welfare principle may therefore be warranted.

1269 See Baroness Hale in G v G, as discussed in Chapter Twelve, para 12.1.5.
1270 See Chapter Seven.
1271 See Chapter Six with respect to discussion of the welfare principle as a relationship-based concept, or not.
12.1.9 The rise of shared care separated parenting

The gender-neutrality and a rights-based approach to the welfare principle embraced within family law, particularly in New Zealand, provided a platform to support the development of shared care parenting arrangements which challenged the more traditionally understood role of motherhood but, at the same time, did not appear to recognise the reality of the greater share of child-care work still being undertaken by mothers.\textsuperscript{1272} This tension was further exacerbated by such gendered issues as gatekeeping and breastfeeding, which were difficult to accommodate within a gender-neutral framework. Gatekeeping (now refined and referred to by Trinder as gate-opening or gate-closing) reflected a generally negative view of mothers’ approaches to the issue of father-contact in a separated parenting context, and the differences between, and reasons for, protective and inhibitory gate-closing have not yet been teased out. The nature and intimacy of the mother-child relationship no longer appear to enjoy the protection of the law through the welfare principle as it once did. While a rights-based approach to the welfare principle, and the development of children’s rights generally, are important, there is a compelling argument, according to Herring, to re-visit the welfare principle as a relationship-based concept, even within a rights-based paradigm. This means that people are understood as relational, connected and interdependent. Their lives not defined by the clamour and clashes of individual rights, but rather as the working through of the give and take of relationships.\textsuperscript{1273} The welfare of the child is, accordingly, not then viewed through a lens where a child is atomised and individual, but is rather considered within a wider network of relationships where each has influence and effect on the other and no participant can be viewed in isolation. The mother-child relationship is, arguably, foundational, central and pivotal to such an approach. In New Zealand, the inclusion in the law of an encouragement towards gender-neutrality created by s4(3) of COCA adds to these complexities. The issues do not appear to be easily reconcilable.

12.1.10 Relocation

Between the UK and New Zealand, the application of the welfare principle had, by the 1980s, become particularly divergent with respect to the issue of relocation.\textsuperscript{1274} The recognition of a mother’s health and happiness within the welfare principle’s post-separation context

\textsuperscript{1272} See Chapter Four, para 4.6.
\textsuperscript{1273} See Chapter Six, para 6.2.
\textsuperscript{1274} See Chapter Seven, paras 7.15 and 7.16.
assessment was found in the UK decision of *Payne v Payne*.\(^{1275}\) In New Zealand, however, through *D v S*,\(^{1276}\) the *Payne* approach was specifically discounted, given the ‘no a priori assumptions’ approach to the welfare principle required by New Zealand law. In distancing itself from this factor, the New Zealand courts appeared, during the 2000s, to then elevate the power of the father, particularly in the relocation situation, preferring the mother to remain geographically close and for her to participate in a shared care arrangement. This may have been against her better judgment for the child, the parenting relationship may have been conflicted, and, as a result, the mother’s own life may have been put on hold.\(^{1277}\) The uncertainty about relocation outcomes created difficulties, particularly for mothers. At times, seeking relocation may have been regarded as an infringement upon shared care. At other times, a mother’s desire to return to the support of her family (and her health and happiness) as a consequence of a relationship breakdown has resulted in a successful relocation outcome, with the courts recognising the mother’s position and permitting her application. Outcomes fluctuated; however, there is little doubt that a judicial approach to relocation which elevated the importance of the issue of a child developing a more meaningful relationship with the father through shared day-today care, presented significant challenges for motherhood. This is because if a mother is to adopt a child-centric view of relocation, the value of the father-child relationship has to be a central consideration. Arguably, this does not mean that the call to mothers is to approach relocation from a sacrificial point of view to enable the father-child relationship to flourish at her cost. The issue is more nuanced than this. The court may find that relocation should occur as being in a child’s welfare and best interests in some circumstances, notwithstanding that this requires a child’s geographical shift away from the father. The 2010 Supreme Court decision in *Kacem v Bashir*\(^{1278}\) introduced greater balance into relocation considerations, and the most recent statistics suggest that a mother’s application to relocate is now usually more successful than not.\(^{1279}\) The ability for a mother to keep a child’s relationship with the father alive, notwithstanding physical distance, is a relevant consideration as to whether a relocation should be permitted. Thus, a deeper judicial

\(^{1275}\) *Payne v Payne*, above note 28.

\(^{1276}\) *D v S*, above note 27; see also Chapter Seven.


\(^{1278}\) *Kacem v Bashir*, above note 40; see also Chapter Eight, para 8.8.

\(^{1279}\) See Chapter Eight, para 8.9.
understanding of the concept of gatekeeping would support these deliberations, bringing with it the potential for the law to better align motherhood’s desire to support the father-child relationship with her view and reasons for safe and appropriate gate-opening or gate-closing and her ability to facilitate the development of the father-child relationship, irrespective of location.

12 1.11 The voice of the mother

The voice of the mother has waxed and waned over various eras. For example, in patriarchal, Victorian England where the mother had no public, legal rights in relation to either herself or her child, she was still regarded in the private, domestic sphere of the home as having considerable authority, arising out of an understanding of Christian marriage and an acceptance of the different spheres, roles and functions between motherhood and fatherhood. This was notwithstanding a continuing patriarchy and lack of equality between the genders. Through the first half of the 20th century, and as equality between men and women was legislated through the suffrage, mothers continued to have a voice and a secure, respected place within the home. However, through the second wave feminist theories of the 1970s, the 1980s introduction of gender neutrality and gender neutral language into New Zealand’s parenting laws, changed understandings of the application of the welfare principle and as the fathers’ rights movements throughout the 1980s and 1990s gained political currency, the voice of the mother was muted and came to be regarded with suspicion.

Mothers’ concerns about the effect of shared care arrangements on their children, particularly in high conflict or parental domestic violence situations, have at times been interpreted as gatekeeping or alienation. The actions of mothers, including seeking to relocate, perhaps to obtain family support and/or to reduce the adult conflict through geographic distance, have

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1280 See Chapter Two, particularly para 2.2, 2.3 and 2.6.
1281 See above notes 1279 and 1232.
1282 See Chapter Five.
1283 See Chapter Three, para 3.20.
1284 Chapter Six.
1285 See Chapter Five, para 5.1.
1286 See Chapter Nine. Maternal gatewaying is a process which can both support and inhibit a father’s relationship with his child post-separation. See Liz Trinder “Maternal Gate Closing and Gate Opening in Post Divorce Families” Journal of Family Issues vol 29 no 10 (Oct 2008) 1298-1324; the “alienating mother” and this theory’s rise to prominence within family law is discussed by Christine Harrison “Implacably Hostile or Appropriately Protective? Women managing child contact in the context of domestic violence” Violence Against Women 14 (2008) 381-405.
also been described in negative terms by the courts including “demonised,”1287 “implacably hostile,”1288 “wilful,”1289 “vengeful,”1290 and “obstructive.”1291 On some occasions, mothers may have been deserving of such labels; however, on other occasions, they may have been acting in ways that they believed were legitimately protective of their children.

One small 2010 New Zealand study concluded that “when mothers attempt to raise their concerns about their children’s wellbeing in the family law process, they are not heard as someone who is uniquely placed to know about their children but were instead heard as ‘obstructive’.”1292

1289 Julie Wallbank “Getting Tough on Mothers; Regulating Contact and Residence” Feminist Legal Studies 15 (2007) 189-222.
1292 Through a 2010 New Zealand interview-based, small-sample study of 21 women conducted by Tolmie, Elizabeth and Gavey, they concluded that “such pejorative constructions only arise when the conflicting gendered moral accountabilities of contemporary motherhood are overlooked. We found that mothers tend to believe that contact with non-resident fathers is generally in a child’s best interests. However, as a result of balancing complex moral obligations for the care of their children, they may raise questions about particular kinds of arrangements for contact with particular fathers. We argue, therefore that family law practice will lead to better outcomes for children when professionals listen to the history of, and reasons for, mothers’ positions.” V Elizabeth, N. Gavey and J. Tolmie. "Between a rock and hard place: Resident mothers talk about the moral dilemmas they face", Feminist Legal Studies 18(3), 2010, above note 844. This commentary reported some mothers as feeling pressured to agree against their better judgment to a shared care arrangement when they had concerns with respect to the father’s parenting skills or the level of conflict in the relationship that might mitigate against proceeding with such arrangement; see also Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Raising Questions About the Importance of Father Contact Within Current Family Law Practices” [2009] New Zealand Family Law Review 659; Julia Tolmie Vivienne Elizabeth and Nicola Gavey “Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand” (2010) New Zealand Universities Law Review, 24(1), 136-166; see also Catriona McLennan “Family Court Failing Women and Children” NZ Lawyer 12 September 2012, a report of a September 2012 seminar entitled “Silent Injustice: Women’s Experiences of the Family Court” organised by the University of Auckland, Women’s Health Action and Auckland Women’s Centre with speakers including Associate Professors Tolmie and Gavey, and Vivienne Elizabeth. See also a description of the “Cassandra Syndrome”: Cassandra was a Greek mythological figure, the daughter of the last King of Troy and appointed by Apollo with an inability to lie, yet cursed by having no one believe her prophecies. Accordingly, the condition has come to be known as one of speaking the truth but having no-one believe it, with a significant level of distress arising as a result. http://www.britannica.com/EBchecked/topic/98088/Cassandra searched 10 November 2012. Stark notes that women may be blamed or negatively judged depending on context: “In criminal court a victim’s testimony about abuse is highly valued. If the same woman presses claims of abuse during a custody dispute, she is likely to be labelled selfish, uncooperative or even vindictive.” E Stark “Rethinking Custody Evaluation in Cases Involving Domestic Violence (2009) 6(3-4) Journal of Child Custody 287-321; J Wallbank “Getting Tough on Mothers: Regulating Contact and Residence” Feminist Legal Studies 2007 (15)2 189-222; E Trinder, A Firth and C Jenks “So Presumably things have moved on since then?” The management of risk allegations in child contact dispute resolution” International Journal of Law Policy and the Family (2010) 24(1) 29-53.
The voice of the mother appeared to have become regarded by the law, not as a protective warning to the welfare of the child arising out of a uniquely gendered role and perspective but, rather, as a negative, anti-father and obstructive opposition to imposition by the law of separated shared care parenting. It is therefore unsurprising that, at times, mothers’ attempts to resist court orders designed to develop and strengthen the father-child relationship, were met by a stern judicial response and resulted in her imprisonment for a breach of such orders. Sometimes, these were in situations of parental conflict and alleged domestic violence, where the law could be regarded as a blunt instrument, continuing to seek to maintain respect and adherence to court orders as a public good. There have also been exercises by the law of the imposition of its power to its fullest extent, enforcing obedience to its determinations about what it considered best for the child in circumstances where a mother may have strongly disagreed with such assessment. This contemporary low point for motherhood can be distinguished from the historical low point experienced by mothers in patriarchal, Victorian England when both mother and child were regarded as owned by the father, and there was no gender or parenting equality. The current situation presents an apparently irreconcilable tension. Parenting equality is now accepted and is commendable, yet the position of motherhood appears to have been compromised in the process. The need for integrity of, and obedience to, the law is important, but there also appears, at times, to be a lack of respect for a mother in speaking out about or disregarding care arrangements she does not agree with, and a lack of understanding of her belief in the moral legitimacy of her extreme actions in disobeying the law. Recovery of an ability by the law to hear and compassionately understand the mother’s voice would be helpful. In conjunction with this, a closer examination of the effects of domestic violence, adult conflict and aspects of a mother’s gatekeeping behaviours in these circumstances, seen as positively protective rather than negatively obstructive, would also be desirable.

12.1.12 The effect of subtle shifts in the law, not wholesale change

The Supreme Court’s 2010 corrective in *Kacem v Bashir* has re-focused New Zealand’s Family Court decision-making, according to the ‘no a priori assumptions’ approach as to what is in a child’s welfare and best interests. That is, the development of a father’s

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1293 See Chapter Nine.
1294 See Chapter Eleven.
1295 See the discussion of three case examples found Chapter Ten.
1296 See Tapp, Chapter Ten, para 10.6.
1297 *Kacem v Bashir*, above note 40; see also Chapter Seven, para 7.16.
relationship with the child, while important, was not to be given priority nor treated as an informal presumption, as that was not the law. However, the attractiveness, simplicity and apparent fairness of shared care between mothers and fathers as a separated parenting model meant that it continued to be supported.\textsuperscript{1298} This presented continuing challenges for motherhood, left to bargain in the shadow of the law.\textsuperscript{1299}

Within the social science field, Smyth et al. have identified that even subtle legislative encouragement towards shared care is risky, and they do not promote legislating for shared care. They recognise, instead, that other things matter more than dividing time between mothers and fathers within a separated shared care regime, with the implication appearing to include recognition and identification of differences between motherhood and fatherhood.\textsuperscript{1300} They also considered that positive outcomes for children in shared care arrangements are more to do with the sort of families who choose this arrangement (that is, parents who are not in conflict and who respect the different contribution that each of the mother and father provide) than the imposition of such arrangements by the law in conflicted and resistant parenting relationships. That is, shared care is workable for some families but not for others.

The effect upon motherhood by these family law developments has been significant, particularly with respect to such specific issues as shared care, relocation, gatekeeping and breastfeeding.\textsuperscript{1301} It is hard to avoid the conclusion that the value, and voice, of motherhood appears to have been compromised and diminished by these movements in contemporary family law.

\textbf{12.1.13 Motherhood remains a contestable concept}

The clear implication from the drawing together of all these threads, is that motherhood has faced significant challenges throughout history in her relationship with the law, and continues to do so. In contemporary times, the law has sought to provide in a child focused manner, a meaningful relationship for a child with both their mother and father. Mothers have therefore needed to accommodate the reality and practicalities of sharing day-to-day care with fathers.

\begin{itemize}
\item \textsuperscript{1298} See Chapter Seven.
\item \textsuperscript{1299} Bargaining in the shadow of the law, above note 850.
\item \textsuperscript{1300} The different offerings of each of motherhood and fatherhood are understood to include such attributes as, for the mother the emotional attunement and protective, warm nurture towards her child, and for the father the physical stimulus, encouragement towards risk taking and contribution to the development of resilience capacity in the child; see above note 804; see also the dissenting judgment of Blanchard J in \textit{D v S} above note 27 and Chapter Eight para 8.5, where he discusses the contribution of fathers as including building a child’s capacity for resilience and self-reliance.
\item \textsuperscript{1301} See Chapters Seven, Eight, Nine, and Eleven.
\end{itemize}
The role of the mother has become contestable as fathers have taken up a greater share of what was previously considered ‘mother-work’. Mothers have responded, within a gender-neutral legal context, to such gendered issues as shared care, relocation, gatekeeping and breastfeeding. Some responses, particularly when extreme and in breach of court orders, have been viewed as contempt, and in some circumstances have led to imprisonment. The voice of the mother has, at times, become muted, if not silenced, and the concerns expressed by mothers for their young children when overnight contact has been introduced and concerning behaviour in the child emerged have also, at times, been negatively framed and viewed as obstructive with respect to legal processes seeking to develop a child’s relationship with the father. This is not to argue that a mother is always ‘right’; at times, it is clear that she is not. Rather, it is to highlight the complex issues and tensions that have arisen between motherhood and the law over time. It also points to a need to understand and accommodate, within a contemporary family law context, a continuing gendered relationship between motherhood and fatherhood, and to value the contribution they each make to the raising of their child within modern society. Motherhood’s more protective parenting approach, and her ability to be relationally and emotionally attuned to her child (including her understanding and capacity to support the development of the father’s relationship with their child) may, at times, stand in tension with fatherhood’s encouragement towards greater risk-taking and development of the child’s increased self-reliance and resilience capacity, but both are unique and important contributions to the upbringing of a child.1302

12.1.14 The relationship between motherhood and fatherhood

In most parenting situations, a mother matters very much to a child, but so does the father. In relation to their child, they do their best parenting work in a holistic and unified manner, respecting the different contributions1303 each make, even if they are separated. It may therefore be time to return to first principles with respect to the relationship between fatherhood and motherhood.1304 Doucet’s ‘borderwork’ between mothering and fathering.1305

1302 Above note 1300.
1303 With respect to the kinds of different contributions that a mother and father may each make, see above note 1300.
1305 Andrea Doucet, above note 10.
points to fathers taking on the day-to-day care of children and reconfiguring fathering and masculinity in a manner that may have caused fatherhood to take ground from motherhood in an unintended way. A first principles approach could enable motherhood to resume again a greater responsibility for the physical care of her very young child, being supported in her breastfeeding and being able to provide the warm, emotional attunement and nurture that is naturally her offering. The father could be encouraged to take up again a greater protective role and function towards the mother as she undertakes this initial mothering role and, rather than seeking to compete, be willing to receive her support in the development of his own relationship with the child. Without diminishing the unique value of fatherhood, it is perhaps therefore time to focus again on the unique value of, and respect for, motherhood. McMahon has suggested that motherhood could be seen in terms of moral transformation and reform, offering a redemptive view of the role and value of motherhood in relation to children, fathering and indeed the whole of society.\textsuperscript{1306}

### 12.1.15 A redemptive approach

A redemptive approach by the law towards mothers and motherhood is not a new idea. Tapp\textsuperscript{1307} promotes a more holistic, respectful approach, based in a judicial demonstration of understanding and sensitivity towards the relational humanity on display in many of the situations the Court is required to address within family law, as it exercises its judicial power and function.

New Zealand’s Judge Mary O’Dwyer also signalled the possibility of a redemptive approach by reframing a judicial understanding of gatekeeping.\textsuperscript{1308} Rather than gatekeeping being a concept to enable the court to criticise a mother’s beliefs, concerns and views about her child as negative or obstructive, it could rather be viewed as a concept that enables motherhood to make a unique and positive contribution to the management of a separated father’s contact with his child. That she might be encouraged and not discouraged, that she might be viewed by the court positively and not negatively, and that she might be understood as possessing unique gendered skills able to undertake important ‘emotion work’ in the management of a child’s relationship not only with her but also the father, could provide a platform for a recovery of the respect and dignity of motherhood. It could also provide for a recognition of


\textsuperscript{1307} Tapp, above notes 1028, and 1174.

\textsuperscript{1308} O’Dwyer, above note 1028.
its value and role, as distinct from fatherhood. 1309 This new approach to gatekeeping by the Family Court could lead to a more holistic understanding being developed, including one where mothers may have a pivotal role in the facilitation of the father-child relationship. Mothers’ views should be sought and listened to. They should not be ignored or regarded with suspicion or as untrustworthy, unless there is good reason to do so after an examination of the circumstances.

The Family Court and family law practitioners should also be encouraged to firmly apply the requirements of the ‘no a priori assumptions’ approach with respect to a welfare and best interests assessment pursuant to section 4(1) of COCA, as set out by the Court of Appeal in D v S,1310 and confirmed by the Supreme Court in Kacem v Bashir.1311 This should assist in redressing any further extension of an informal presumption that development of a child’s relationship with the father should be prioritised ahead of other welfare and best interest factors (including maintaining the quality of a child’s relationship with the mother) which had begun to uneasily creep into New Zealand family law and had the potential to compromise motherhood, and which Kacem v Bashir1312 sought to address.

Adoption of the Herring approach1313 within New Zealand family law of the central, relational aspect of the welfare principle could also be considered, notwithstanding the increasing complexity and focus on gender-neutrality and rights within contemporary family law. Herring also considers that the parenting relationship, as well as the parent-child relationship, should be one of inherent and deep cooperation; one parent’s role makes no sense unless in relationship with the other. Similarly, our value lies not in intellectual connection but in our caring relationships where attributes such as joy, kindness, touch and care may be found. He says that being loved is the most important thing of our lives, it is what makes us a person, it gives our lives meaning and moral value and is something we cannot do on our own.1314 How this would practically play out within the context of our current rights-based parenting law is a challenging consideration. That should, however, not be a barrier to pursuing and implementing such an alternative way of thinking about the welfare principle and, in particular, the mother-child relationship.

1309 See the discussion of the recognition of the differences between motherhood and fatherhood, above note 1297.
1310 D v S above note 27.
1311 Kacem v Bashir, above note 40.
1312 Above note 1311.
1313 Jonathan Herring, above note 63 and 1213; Chapter Six, para 6.2.
Should family law, with respect to motherhood and its role in determining a child’s welfare and best interests, reflect the principles of legal positivism, with motherhood rendered a state of gender-neutral parentage and a legal construct, designed to and purposed for meeting the rights of a child? Alternatively, should it hold to a view that recognises an inner morality to the law, with the inherent gendered and relational qualities of motherhood and her intimate relationship with her child being recognised and protected? Or is there a more nuanced balance somewhere in between? These are important considerations for the law in its future regard of the mother-child, surrogate-fetus, genetic mother-child, surrogate-genetic mother, father-child and mother-father relationships. In addition, such fundamental aspects of our relational personhood such as dignity, respect, trust and vulnerability as they relate to fatherhood, motherhood and the law may also be relevant to the development of a healthy, real and holistic approach to separated parenting relationships and the law. This means that the law’s response, for example through imprisonment of a mother for contempt and breach of the father’s rights, could be reconsidered as inconsistent with a relationship-based approach to the welfare principle. There could be a focus, instead, on the dignity of the parents, compassion being extended and attempts made to protect these significant relationships. This may include prioritising the mother-child relationship, depending on the age of the child, in a manner not evident within the present rights-based approach to the father-child relationship.

12.1.16 A proposal to repeal section 4(3) of COCA

New Zealand law attempted to remove any last vestige of ‘the mother principle’ by the introduction in 1980 of an amendment to the Guardianship Act 1968. Its attempt to neutralise parenting gender was carried through to the current legislative provision found in section 4(3) of COCA. This subsection says:

It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person’s gender.

1315 Hart and Fuller, above note 50; see also discussion in Chapter One.  
1316 See Chapter Ten.  
1317 Section 23(1A) Guardianship Act 1968, which said “For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child” has since been repealed and replaced by s4(3) of the Care of Children Act 2004. Gender differences with respect to the issues of domestic violence, safety and conflict in the parenting relationship are also relevant to this consideration. However, further exploration of these issues is beyond the scope of this paper.
The difficulty created by maintaining this legislative provision is that the law, while seeking to neutralise gender in the name of equality, has failed to recognise and address the inherent and essentially gendered nature and relational qualities of parenthood. In seeking to maintain this neutral position, the law has found itself straining to apply the legislation in its current form. This can be seen in a number of areas of family law as it relates to separated parenting, including shared care, relocation, gatekeeping and breastfeeding. The law does not appear to have been able to adequately recognise and accommodate gender difference and relationship within these areas when seeking to determine a child’s welfare and best interests, and has therefore, arguably, contributed to the complexity and conflict for all parties. Not only does s4(3) of COCA legislatively constrain the application of the welfare principle as having a gendered, relationship-based component, it also constrains recognition of the reality of gendered issues in a gendered area of law.

Accordingly, it is proposed that section 4(3) of COCA could be repealed in the interests of recovery of the value, respect and dignity of motherhood, without reducing or impinging upon the value, respect and dignity of fatherhood. Indeed, such a step has the potential to add to, and enrich the one by the other. Eekelaar calls this the ‘purposive abstention model’, where the law does not offer prescription within family law. In other words, the law is not required to prescribe that the role and function of motherhood should be gender-neutralised, and therefore should not do so. A recognition of the unique and different roles that each of motherhood and fatherhood may play in the life of a child can then continue to be recognised as relevant factors for a particular child in a welfare and best interests assessment, in a manner that the law is presently limited in doing because of the existence of this provision.

12.2 A remodelled judgment

Assuming the repeal of s4(3) of COCA and a renewed focus on relationships rather than rights as central to the welfare principle, I turn again to the judgment of MT v AK, a decision with respect to the separated parenting arrangements for a five month old breast-fed baby (see Appendix I). I have now remodelled the judgment (see Appendix II), based on fictional legislation that no longer hinders the gender of the parent from being taken into account.
account in giving consideration to all the factors relevant to the application of a relationship-based, rather than rights-based, welfare and best interests principle as contained in s4(1) of COCA. The key differences found in the remodelled judgment include a recognition of the unique strengths that each of mothering and fathering bring to parenting, an increased focus on relationships as foundational and central to understanding and applying the welfare and best interests principle (with a consequential decreased emphasis on rights), and the need to protect and dignify the intimacy and value of the breastfeeding relationship between mother and child.

12.3 Conclusion

In conclusion, a redemptive approach by the law could enable recognition again that ‘mothers are special’\(^{1322}\) without this being a challenge to, or in competition, with fathers. It could also allow for a renewed emphasis on Smart’s ‘morality of caring’.\(^{1323}\) That is, there could be a rebalancing from the overemphasis on ‘psy professions’ who focus on children’s welfare and fathers’ rights, while a mother’s interests are lost’,\(^{1324}\) to a renewed focus on what mothers and fathers each ‘do’ for their children, rather than what their respective rights might be. Smart suggests the day-to-day care of a child, that is, the ‘doing’ of parenthood, should be given more weight than the law presently provides. This is the work, at present often undertaken in a greater way by mothers than fathers notwithstanding care being shared,\(^{1325}\) which in reality could be better recognised if the law was able to better accommodate differences in parenting function through gender, by a repeal of s4(3) of COCA.

The law, as it stands, also appears to give a greater weight to rights, and particularly the rights of fathers to contact and/or to develop shared care, and perhaps does not therefore provide a balanced approach to the issue. It also continues to give, in surrogacy situations, rights to the gestational mother without automatically recognising either the biological or post-birth mother (recognising that these can now be three different people). That advances in science and technology have enabled these developments, as well as providing increased understanding about the differences between the male and female brains in the context of

\(^{1322}\) “Mothers are special” is the often quoted comment found in the 2006 House of Lords decision in Re G (children) (FC) [2006] UKHL 43 per Lord Scott of Foscote, at para [3].


\(^{1324}\) Herring, above note 63 at 27.

\(^{1325}\) See Chapter Four with respect to statistical information which supports this.
parenthood, creates an impetus for the law to keep up and change where necessary, recognising that the resultant ‘doing’ of motherhood is increasingly nuanced in both pre- and post-parturition situations through such advances in science and technology. These different, yet essential, relationships of mother and child may now be separated into component parts by the use of technology. However, all require recognition and protection, commencing with the surrogate mother who may not be genetically related to the child but who develops an intimate mother-child relationship during gestation, nonetheless. This relationship provides the foundation for the post-birth mother-child relationship, where there may or may not be a genetic connection that was not supported by gestation. Relationships, not rights, should therefore be the focus.

Finally, current, third wave feminism (the reclaiming and personalisation of motherhood as a rite of passage, as reflected in the last twenty years) additionally offers the hope of acceptance, not denial, of the maternal essence, as women integrate the achievements of second wave feminism (the political movement of the 1960s, 1970s and 1980s which sought to address gender inequality by critiquing the effect of state systems, particularly the law, on motherhood as a status and practice), while also clarifying the confusion it created, and going on to embrace and give voice, through storytelling, to a women’s unique motherhood experiences.  

A refocusing, as coined by Smart, on relationships and the essentials of motherhood, may assist in reintroducing respect and a growing understanding by the law of these issues and for the morality of both motherhood and fatherhood, in all their likenesses and differences, as important, discrete issues for a child.

The nature of motherhood will have ongoing contest and challenge as all aspects of society continue to wrestle with such concepts as equality and gender, and advances in technology push social and legal limits with respect to issues of conception, surrogacy and the very creation of human life. Notwithstanding, recognising and dignifying the unique nature of

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1326 See a discussion of third wave feminism in Bridget J Crawford, above note 533; see also Emily Jeremiah “Motherhood to Mothering and Beyond: Maternity in Recent Feminist Thought” Journal for the Association for Research on Mothering, Vol 8, Nos 1 and 2, 21-33, where the problems with a shift from essentialism to poststructuralism, expressed as a change from motherhood to mothering, are discussed, concluding that ‘maternal performativity’ needs to continue to be associated with maternal ethics, characterised by ‘relationality’ and ‘bodiliness’.

1327 Carol Smart, above note 713.

1328 See Chapter Twelve, paras 12.1.11, 12.1.12 and 12.1.13, and above note 1300.
motherhood, motherhood’s relationship with fatherhood, and motherhood’s value to society as a whole, must remain a worthy goal.
Appendix I

MT v AK[Interim parenting orders]
[2010] NZFLR 613

Family Court Dunedin
FAM-2009-012-413

22 September 2009
Judge Coyle

Parenting orders -- Interim orders for contact -- Five-month-old baby -- Baby result of sexual relationship outside mother's marriage -- Father seeking contact arrangements -- Mother seeking to keep contact to minimum -- Mother using breast feeding to minimise contact -- United Nations Convention on the Rights of the Child, arts 5, 7(1), 8(1), 14(2), 18(1) and 24 -- Care of Children Act 2004, ss 4, 5 and 6.

A was born in May 2009. Her mother was Mrs H and her father was Mr T. Mr and Mrs H had had some difficulties in their marriage. While on a break, Mrs H had a sexual relationship with Mr T. She immediately fell pregnant and after some thought decided to carry through with the pregnancy.

During her pregnancy, Mr and Mrs H attended relationship counselling and as a consequence they decided to resume their marriage relationship and remain together. A had been embraced by Mr H as his own and was part of the H family. Mr and Mrs H had four other daughters in their family and A had now become their fifth child.

Prior to A's birth, Mr T decided that he wanted to be an involved father and to be an active participant in A's life. Mrs H, on the face of it, was reluctant to allow Mr T to have any more than minimal contact at this point and she perceived Mr T's desire to have contact as "bullying behaviour" which she maintained acted as a constant reminder of past mistakes which added pressure to the H's marriage.

The issue for the Court, therefore, was what contact with her father was appropriate and in A's best interests and welfare so as to preserve and strengthen her relationship with both the H and the T families.

Held (making interim parenting orders)

1 There was a clear intention expressed by Parliament that there was more than a mono-cultural view of family contained in s 5 of the Care of Children Act. A had a family/family group in the H house. She also had a family/family group on her father's side of the family. Thus, in terms of the principles in s 5 of the Act, both those relationships had to be preserved and strengthened throughout her life (see [8]).

[2010] NZFLR 613 page 614

2 Mr T's proposal for contact with A was unrealistic given her age and her stage of development in life. She needed stability and security and her contact with her father should increase as she got older and as she developed cognitively. Conversely, the contact proposed by Mrs H was not
enough. Her desire to maintain breastfeeding was laudable but had to be subservient to the welfare and best interests of A. In the absence of evidence of clear risk to A, breastfeeding should not operate as a barrier to contact between A and her father (see [30], [31]).

Application

The applicant father applied for parenting orders seeking day-to-day contact with the child A, who was five months of age.

I Stewart and A Klinkert for the applicant.

R Brown for the respondent.

C Medlicott, lawyer for the child.

JUDGE COYLE.

[1] A was born on 1 May 2009. She is therefore nearly five months old. Her mother is Mrs H and her father Mr T.

[2] Mr and Mrs H had had some difficulties in their marriage. While on a break, Mrs H had a sexual relationship with Mr T. She immediately fell pregnant and after some thought decided to carry through with the pregnancy and on 1 May this year she gave birth to A.

[3] During her pregnancy, Mr and Mrs H attended relationship counselling and as a consequence they decided to resume their marriage relationship and remain together. A has clearly been embraced by Mr H as his own and she is very much seen as part of the H family. Mr and Mrs H have four other daughters in their family and A has now become their fifth child.

[4] Prior to A’s birth, Mr T decided that he wanted to be an involved father and to be an active participant in A’s life. Mrs H, on the face of it, is reluctant to allow Mr T to have any more than minimal contact at this point and she perceives Mr T’s desire to have contact as “bullying behaviour” which she says, "acts as a constant reminder of past mistakes which adds an unspoken pressure to our marriage”.

[5] The Court is therefore being asked to determine today what contact Mr T is to have with A.

[6] It is quite clear to me that the adults in this matter see this case as a clash of rights: Mr T’s right to see and have a relationship with A; and Mrs H’s right to raise A in her family free from the stress of having to deal with Mr T.

[7] My focus, however, is not on the rights of the parents at all. Section 4 of the Care of Children Act says that the Court’s paramount consideration and focus has to be the best interests and welfare of A. I must consider A in her particular circumstances and I must implement decisions which are appropriate given A’s sense of time and her development. I also need, in terms of s 4(5) of the Act, to consider the relevant principles in s 5 of the Act.

[8] The relevant principles that I see as applying to this case are that a child’s parents have the primary responsibility for the child and should be encouraged to agree on their own arrangements. Clearly, on the
evidence, that has been a fraught concept thus far although I am hopeful that in time, once orders are made, the parental relationship will improve and Mr T and Mrs H will be able to make agreements as to their own arrangements for the care of A. Secondly, A's relationships with her family group should be stable and ongoing, and in particular A should have continuing relationships with both parents. Relationships between A and members of her family and family group should be preserved and strengthened and those members should be encouraged to participate in A's care. Lastly, A's identity should be preserved and strengthened.

[9] My view is that there is a clear intention expressed by Parliament that there is more than a mono-cultural view of family contained in s 5 of the Act. That is, A has a family/family group in the H house. She also has a family/family group on her father's side of the family. Thus, in terms of the principles in s 5 of the Act, both those relationships must be preserved and strengthened throughout her life. As I have said in other cases, it is my view that the words "and strengthened" are two of the most important words in the Care of Children Act and should not be overlooked.

[10] Preservation envisages a continuation of relationships whereas "strengthened" envisages a building upon and a growing of relationships. Given that I am required to consider, as part of my overall discretion in deciding upon what is in the best interests and welfare of A, the principles in s 5, it is my view that I must, in exercising the discretion today, have the concepts of preservation and strengthening foremost in my mind.

[11] Additionally, those principles in s 5 are entirely consistent with arts 5, 7(1), 8(1), 14(2), and 18(1) of the United Nations Convention on the Rights of the Child, to which New Zealand is a signatory.

[12] The issue for this Court, therefore, is what contact is appropriate and is in A's best interests and welfare with her father Mr T so as to achieve her ability to preserve and strengthen her relationship with both the H and the T families.

[13] A is nearly five months old and she is currently breastfed by her mother. She is of an age where she is clearly entirely dependent upon the adults around her to meet all her needs and for her support. She is at the genesis of a lifetime of opportunity to develop and strengthen her relationships with her parents. She clearly, throughout her life, is going to have many relationships, some of which will be brief, and some of which will be enduring, but the most important and enduring will be her relationships with Mr and Mrs H, and with Mr T.

[14] Mr T seeks contact from around 8.30 am to around 5.30 pm on Tuesday, Wednesday and Thursday of each week. In cross-examination he acknowledged that that proposal contained in his affidavit was not his last word on the matter. The assessment of what I took from his evidence was that he wanted more than the current arrangement. At present he is seeing A twice a week for an hour to an hour and a half. He had been offered by Mrs H an extension of that to three days a week for an hour and a half but Mr T elected to decline that offer as he did not accept that it was in A's best interests.

[15] I took from his evidence that what he wanted in rejecting that increase in contact was the opportunity to be involved in A's life. His concern was that at the times he had been having A in his care, A would rapidly fall asleep and that he would spend most of the time watching her sleeping. As endearing as that was to Mr T, he
wanted to feed her, to change her, to spend some time playing with her, to bathe her: in short, to be involved in aspects of day-to-day parenting of A.

[16] My assessment of Mr T's evidence and the manner in which he gave his evidence was that he brought to his evidence his previous experience with his son, who was also raised in a home where his mother and father did not live together. He impressed me as being child-focused, thoughtful and considered in the manner and content of his evidence and he repeated in his evidence that, regardless of what arrangements are put in place by the Court, if they were not meeting A's needs then he would do all he could to alleviate any stress for A.

[17] I believe Mr T to be genuine in what he has said and I am comforted in that knowledge as it will mean that whatever orders I put in place, if for whatever reason they cause anxiety to A, Mr T will do all he can to meet A's needs. Clearly Mr T wants to be involved with A more than he is at present and that is entirely understandable.

[18] Mrs H proposes contact on a Monday and Thursday each week and proposes that initially Mr T take A away for one and half hours. In her most recent affidavit she deposed that after two to three visits Mr T's contact could then progress to a third day each week away from her home, again for one and a half hours. However, in cross-examination that period extended to around two months and when cross-examined by Mr Medlicott it became clear that Mrs H could not envisage A spending up to a day, or indeed overnight, with Mr T until she was at least a year old.

[19] Mrs H lives a short distance away from Mr T. The time between the households by car, on the evidence, varied from around five to 10 minutes to between 10 to 15 minutes. Regardless, it is a relatively short distance.

[20] To date A has been breastfed on demand and is fed around every one and half hours. Mrs H wants to continue breastfeeding as she did with her four other daughters.

[21] Before moving on to the issues that I need to consider, I also want to record that in the background there is a realisation by Mr and Mrs H that Mr T is a guardian of A. They wish, it would appear, to relocate as Mr H's job may dictate and to have the ability to do so at whim. However, it is clear they now realise they cannot move A without there being consultation with Mr T as a joint and equal guardian. I want to express my disquiet that, on the evidence to date, there has been only a cursory effort to involve Mr T in guardianship issues affecting A. I was concerned, for instance, to hear that Mr T does not know the basics such as A's routine or her stages of development. In part, I acknowledge that that is symptomatic of the difficulties in the relationship between Mr T and Mrs H in that it appears that their communication is non-existent, this despite the fact that Mr T to date has been having contact with A at Mrs H's home. However, it seems he is left alone and there is very little, if any, communication between A's parents at present.

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[22] The dysfunction in the guardianship issue can be illustrated by the fact that there is now before the Court an application revolving around a dispute about A's name. That application is not the focus of this hearing due to a direction made by the registry to that effect. I simply record that I struggle with the logic of that decision by the registry as it seems to me that there is no logical reason why that issue could not have formed part of this hearing. I had invited the parties to deal with the matter pragmatically and for that issue to be incorporated into this hearing but that course of action was opposed by Mrs H. Accordingly, that matter will need to be allocated a fixture by the registry so that that issue can be resolved.
[23] In support of Mrs H's position, her midwife Ms Ladell gave evidence. She had sworn an affidavit, large portions of which were struck from the Court record by me following a pretrial application by Ms Stewart on Mr T's behalf. Ms Ladell, therefore, gave evidence in relation to the remaining portions of her affidavit that I had found to be within the area of her experience and expertise. I have to say, however, having heard her evidence, that she could not be classed as an expert on the issues to which she deposed evidence. She has only been a midwife for a very short period of time and my assessment of her evidence is that she was driven by a pro-breastfeeding agenda, which seems to have formed part of her psyche for the last 10 years. I did not find her evidence particularly helpful or objective. She did give evidence as to what she saw as risks associated with A not continuing to be breastfed and risks in relation to her being bottle-fed. In particular she talked of risks to A's health in terms of illness, greater propensity for hospital admissions, gastrointestinal infections, risk of asthma, eczema and obesity. However, she was unable to give any evidence as to the reality of those risks. Accordingly, her evidence is of little assistance as I do not know whether that risk is a one chance in two of A developing those symptoms or one chance in 10 billion. It simply was not helpful to the Court at all.

[24] What she was able to give evidence on was that breastfeeding is optimal in her opinion for the first two years of a child's life and for the first six months she believed a child should be fed exclusively with breast milk. That is consistent with the view expressed by the World Health Organisation in information provided to me by Ms Brown on behalf of Mrs H. In addition, art 24 of UNCRC provides at 24(2)(d) that:

State parties shall take appropriate measures to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.

That is, UNCRC supports the State ensuring caregivers of children have access to education as to the advantages of breastfeeding, but to argue, as Ms Brown did, that art 24 supports the use of breastfeeding, in my view elevates that article to a level which is not consistent with what is in fact stated in art 24(2)(d).

[25] Ms Ladell's evidence, therefore, was of some limited assistance to me but my view is that I really cannot put any weight on it over and above it being her personal opinion in the absence of any clear empirical evidence to back up the position she took in her oral evidence.

[26] Central to this case is the issue of breastfeeding. The fact that A is breastfed is a relevant matter which I need to consider as well as the s 5 principles to which I have already referred. A being breastfed is extremely important from Mrs H's perspective. I record that in her evidence she has refused to express breast milk for the purpose of facilitating Mr T's care of A but instead indicated a willingness to breastfeed A while she is in her father's care.

[27] My assessment of the evidence is that Mrs H is using the breastfeeding issue to keep Mr T at arm's length and that that view suits her and Mr H as they attempt to rebuild their marriage. They do not want to be reminded of the fact that their family has a child in it who has a different father. But
this case is not about Mr and Mrs H and their need to try and keep their family as normal as they would like, and to attempt to address the issues surrounding their marriage.

[28] I found Mrs H on her evidence to be judgemental of Mr T and to be obsessed with her position. My assessment of her evidence was that she said what she thought I would want to hear but comments in her evidence indicated to me that she would simply prefer that Mr T play as little role as possible in A's life. For instance, she made a comment, when asked about Mr T's role as a father, that "it is his biological role". I queried Mrs H as to what she meant by that and her evidence on that issue was, in my view, equivocal. I can understand the difficulties that Mr and Mrs H face. Life for them must at times be difficult as they work through circumstances surrounding why their marriage was in difficulty, and the choices that they both made as a consequence of those difficulties. There is a sense in which I suspect Mr T's ongoing involvement in their lives on a practical and real level constantly reminds them both of a period of difficulty in their marriage and in their lives.

[29] A should grow up knowing she has two fathers and her reality is the normal reality for many children in New Zealand society. The circumstances in which A came into this world should not be a source of shame or difference for her, certainly to the extent that Mr and Mrs H appear to believe that it is for them.

[30] Mr T's proposal for contact with A is, in my view, unrealistic given her age and her stage of development in life. She needs stability and security and her contact with her father should increase as she gets older and as she develops cognitively. The reality is, regardless of the morality of how it came to be, that Mrs H is A's primary attachment figure. However, A does also need to develop a secure attachment to her father and the issue I need to decide is how that is going to occur so as to meet A's needs. I am having to make that decision in the clear absence of any ability of A's parents to make that decision themselves.

[31] Conversely, it is my view that the contact proposed by Mrs H is not enough. Her desire to maintain breastfeeding is laudable but must be subservient to the welfare and best interests of A. In the absence of evidence of clear risk to A, breastfeeding should not operate as a barrier to contact between A and her father. However, I hope that once orders are made, Mrs H and Mr T will work together to discuss A and her needs and how she can continue to be breastfed while in her father's care. That may involve Mrs H going to Mr T's home or vice versa, but I want to record that if there is not a willingness by Mrs H to work with Mr T to ensure that A is able to be breastfed when she is in her father's care, then bottle-feeding will be the only option and if Mrs H continues with her view that she refuses to express breast milk then Mr T has no option but to use formula.

[32] Any orders I make also need to recognise that A is young and her needs and her ability to cope with longer periods away from her mother will increase as she develops. Her Honour Judge Smith, in her Minute of 11 August this year, indicated that any orders should deal with the period between the decision of the Court and when A is nine months old. Whilst not bound by her Honour's view, upon reflection there seems to be some merit in fixing a point in time as, clearly, the care arrangements for A are going to need to be reviewed from time to time as her development and her needs change. There is, therefore, in my view, some sense in roughly adhering to the constraints put in place by her Honour Judge Smith.
Central to these arrangements succeeding, in my view, is Mr and Mrs H appreciating that A is in a sense different from their other daughters. For a start, she is not their daughter. She is Mr H's stepdaughter. She has two fathers and she needs to be shared with Mr T and his family.

Having weighed all the evidence and taking into account the principles in ss 4 and 5 of the Act, I have reached the view that the best interests of A are going to be served by her having contact with her father on three days each week. I also record that A is too young to express any views in terms of s 6 of the Act. Accordingly, I make the following interim parenting orders.

Orders and directions

(a) A is in the day-to-day care of Mr T:
   (i) every Tuesday, Wednesday and Thursday from 10.30 am until 2.00 pm; and
   (ii) such other additional time as can be agreed between Mr T and Mrs H.

(b) A is in the day-to-day care of her mother at all other times.

(c) Mr T's contact with A is to commence on Tuesday 6 October 2009, being the second week of the upcoming school holiday period. Mrs H indicated that there are plans to visit her mother's farm in Kurow during the school holidays but I did not take from her evidence that she would be away for the full two weeks.

(d) The matter is to be reviewed at a mediation conference at the first available date in February 2010. Clearly if matters cannot be resolved at a mediation conference then the Court will need to convene another hearing.

(e) Leave is reserved for Mr Medlicott as A’s lawyer to bring the matter back before the Court on three days' notice if any significant welfare issues arise for A between now and the review in February.

(f) A’s place of residence is not to be outside the Dunedin-Mosgiel area until further order of the Court. In making a parenting order, I can attach any conditions I think fit and given the acknowledgement by Mrs H that she understands the guardianship obligations, I do not see any difficulty in attaching that as a condition at this point.

Finally, I just want to say to you both as A’s parents that I hope that now these orders are made you can both put aside the stress which a hearing inevitably causes and you can begin working together. My hope would be that in time, and hopefully by the mediation in February, you both and together come to an agreed arrangement for Mr T’s ongoing contact with A, whether that is a continuation of the orders I have made today or whether it is more. If not, the Court will continue to make orders, if asked, for A’s care arrangements if you both continue to abrogate your responsibility to make decisions for A.

Reported by: Rachel Marr, Barrister and Solicitor
Appendix II

B v C [Interim parenting orders]
Remodelled [Fictional] Judgment Based on MT v AK

This is a fictional judgment based on the decision of MT v AK [2010] NZFLR 613. It has been rewritten from the perspective of a fictional judge who is able to take into account the differences of each of motherhood and fatherhood, in circumstances where, at the time it is written, a fictional legislative circumstance is presumed to exist; that is, there has been a fictional repeal of s4(3) of COCA. Its purpose is to explore whether some of the issues highlighted in this thesis could be incorporated and addressed in an alternative manner, using a set of similar, real-life circumstances.

A was born in February 2016. Her mother is Mrs C and her biological father is Mr B. Mr and Mrs C had had some difficulties in their marriage. While on a break in 2015, Mrs C had a sexual relationship with Mr B and fell pregnant with A.

During her pregnancy, Mr and Mrs C received therapeutic counselling assistance and as a consequence they are continuing their marriage relationship. A has been embraced by Mr C as his own and is an integral part of the C family. Mr and Mrs C have four other daughters in their family and A has now become their fifth child.

Prior to A's birth, Mr B decided that he wanted to be an involved father and to be an active participant in A's life. He considered this to be his right. Mrs C does not agree with the level of contact Mr B is seeking, and considers that it risks destabilising the intimacy of the mother-child relationship with A, who is still a fully breast-fed baby. Mrs C perceives Mr B's actions in his vigorous pursuit through the Family Court of recognition and implementation of his parental rights through contact designed to introduce equal time shared care as soon as possible as "bullying behaviour," and seeks the Court’s protection during this time of particular vulnerability for her.

The issues for the Court, therefore, are:

The protection of the dignity of, and ensuring immediate primacy is afforded to, the mother-child breastfeeding relationship between A and Mrs C.

Ensuring that each of A’s relationships and place within the C family are not destabilised by the current proceedings but are preserved and strengthened.

Encouraging the development of parenting relationships recognising and respecting their differing fathering and mothering contributions towards A’s upbringing, as well as developing trust and cooperation between each of Mr and Mrs C, their children (including A) and Mr B, as reflecting A’s long term welfare and best interests.

The introduction of mechanisms, based in such trust and respect, to develop an enduring, healthy relationship between A and Mr B (and her relationships with Mr B’s wider family) without compromise to A’s relationship within the C family and in particular, at the present time, with her mother.

Held (making interim parenting orders):
1. By the repeal of s4(3) of the Care of Children Act 2004 (COCA), I am no longer constrained from taking into account, in determining a child’s welfare and best interests, the reality and importance of the gendered natures of motherhood and fatherhood in determining parenting arrangements for a child. This includes, in particular, the foundational and primary intimacy of the mother-child breastfeeding relationship and in these circumstances, the mother-child breastfeeding relationship between A and her mother.

2. I seek to apply Article 24(2)(d) of the 1989 United Nations Convention on the Rights of the Child, ratified by New Zealand on 6 April 1993, requiring the State to ensure parents and children are educated and supported in the advantages of breastfeeding and I further seek to align my findings and decisions with New Zealand Ministry of Health’s policy that “breast is best.” I therefore find that the welfare and best interests significance of a mother’s provision of breastfeeding to her child and for preservation and strengthening of that relationship to be a first and primary principle, and that such principle is to be applied to the particular relationship between A and her mother.

3. I reject the allegation that Mrs C is seeking to breastfeed or is continuing to breastfeed as a device to prevent Mr B from developing a relationship with A, and I find that such an approach fails to dignify and protect the breastfeeding mother and risks reducing breastfeeding to a utility.

4. Care is required to not destabilise, through these Family Court proceedings and the pressure of Mr B’s demands, the primary attachment between A and Mrs C, but to strengthen the primacy of the mother-child breastfeeding relationship as a welfare and best interests priority to A at this formative time in her life. Mrs C’s introduction and desire to maintain a breastfeeding relationship with C is laudable and must be supported. It is central to A’s welfare and best interests, both short term and long term, and Mr B’s contact with A must be subservient to this reality. Mr B is not excluded; it is his role, along with Mr C, to encourage, support and protect Mrs C in her present provision of breastfeeding to A. It will be Mrs C’s role to engage in facilitative gatekeeping practices, opening up to Mr B opportunities for a relationship by him with A for the future.

6. I find Mr B’s proposal for contact with A to be unrealistic given A’s age, her stage of development in life, and her present dependency on the nurture and secure comfort of her mother. It is also disconnected from the reality of the context of relationships within which a welfare and best interests assessment for A must be made.

7. There is a clear intention expressed by Parliament that there is more than a mono-cultural view of family contained in s 5 of the Care of Children Act, thereby providing for the provision and strengthening to a child of both biological and non-biological mother, father and broader family relationships. A is already a participating member of the C family, headed by Mr and Mrs C and which includes sibling relationships with four sisters. These relationships need to be preserved and strengthened, while at the same time consideration is given to introducing mechanisms that will enable A to develop relationships with Mr B and his family in a safe and appropriate way for A within the context of her existing family.
Application

The applicant Mr B has applied for a parenting order seeking contact with the child A, who is nearly five months of age.

JUDGE X:

[1] A was born on 1 February 2016. She is therefore nearly five months old. Her mother is Mrs C, her step-father and Mrs C’s husband is Mr C, and her biological father is Mr B.

[2] Mr and Mrs C had had some difficulties in their marriage. While on a break, Mrs C had a sexual relationship with Mr B. She fell pregnant, after some thought decided to carry through with the pregnancy and on 1 February this year she gave birth to A.

[3] During her pregnancy, Mr and Mrs C attended relationship counselling and as a consequence they decided to resume their marriage relationship and remain together. A has clearly been embraced by Mr C as his own and she is very much a part of the C family. Mr and Mrs C have four other daughters in their family and A has now become their fifth child.

[4] Prior to A’s birth, Mr B decided that he wanted to be an involved father and to be an active participant in A’s life. Mrs C does not agree with Mr B’s contact proposal, seeking support for modest contact only at this time as A is fully breastfed. She does not wish the value of the breastfeeding relationship to be destabilised. She perceives Mr B’s actions with respect to his pursuing the contact he considers to be his right as “bullying behaviour.” These communications also act as a constant reminder of past mistakes which adds an unspoken pressure to their marriage.

[5] The Court is therefore being asked to determine today what contact Mr T is to have with A.

[6] It is quite clear to me that Mr B sees this case as a clash of rights: Mr B’s right to provide day-to-day to A in the same manner as Mrs C, in tension with Mrs C’s right to raise A in her family free from the stress of having to deal with Mr C.

[7] My focus, however, is not on rights. Section 4 of the Care of Children Act says that the Court’s paramount consideration and focus has to be the best interests and welfare of A. I must consider A in her particular circumstances, within the context of the relationships of which she is a part, and I must implement decisions which centrally recognise the context and importance of these relationships. Such considerations must also appropriately recognise A’s sense of time, her stage of development and the essential contributions to such development by each of mothering and fathering. I also need, in terms of s 4(5) of the Act, to consider the relevant principles in s 5 of the Act.

[8] The relevant principles that I see as applying to this case are, pursuant to s5(a), that a child’s safety, including psychological safety, must be protected. This is the foremost issue. Then, pursuant to s5(b), a child's parents are to have the primary responsibility for the upbringing of the child, s5(c) a child’s upbringing should be facilitated by cooperation and consultation between her parents, guardians and anyone else having a role in the child’s care, s5(d) that a child should have continuity of in his or her care and upbringing and s5(e) that a child should continue to have a relationship with his or her parents, and that a child’s relationship with his or her family group should be preserved and strengthened. Clearly, on the evidence, while Mr and Mrs C are working well together, this latter principle of desirability has been a fraught concept with respect to how to include Mr B as a parent. I am hopeful that, in time, the key relationships will improve and Mr and
Mrs C, with Mr B, will be able to make agreements as to their own arrangements for the care of A. Lastly, pursuant s5(f), A’s identity should be preserved and strengthened.

[9] My view is that there is a clear intention expressed by Parliament that there is more than a mono-cultural view of family contained in s 5 of the Act. That is, A has a family/family group in the C house, and the extended families of each of Mr and Mrs C. She also has a family/family group available to her through Mr B. Thus, in terms of the principles in s 5 of the Act, all these relationships should be preserved and strengthened throughout her life. As I have said in other cases, it is my view that the words “and strengthened” are two of the most important words in the Care of Children Act and should not be overlooked.

[10] Preservation envisages a continuation of relationships whereas “strengthened” envisages a building upon and a growing of relationships. Given that I am required to consider the principles of s5 as part of my overall discretion in deciding upon what is in the best interests and welfare of A, it is my view that I must, in exercising the discretion today, have the concepts of, and tensions created between, preservation and strengthening of relationships foremost in my mind.

[11] Additionally, those principles in s 5 are entirely consistent with arts 5, 7(1), 8(1), 14(2), and 18(1) of the United Nations Convention on the Rights of the Child, to which New Zealand is a signatory.

[12] A is nearly five months old and she is currently fully breastfed by her mother. She is of an age where she is clearly entirely dependent upon the adults around her, particularly her mother, to meet all her needs and for her support. Mrs C too, is in a circumstance as a breastfeeding mother, where she is more vulnerable than during other periods of her life, and therefore also requires the care and support of the adults around her to be able to respond well to the immediacy and intimacy required by A’s present, complete dependency upon her. A is at the genesis of a lifetime of opportunity to develop and strengthen her relationships with her parents, beginning with her relationship with her mother. As her primary relationship, this must be preserved and strengthened. In doing this, A’s psychological safety, both in the short and long term, will also be protected. We are informed in this regard because of the significant social science work with respect to the issue of attachment that has been undertaken over the last seventy-five years, and I am grateful to counsel for drawing my attention to the originating work of Bowlby and more recently of the refinements offered by Trinder, Smyth, McIntosh, Kelly, Lamb, Warshak and others. Whatever school of social science thought is applied, it is now accepted wisdom that a destabilised, disorganised early attachment does not bode well for a child’s later psychological well-being. A clearly, throughout her life, is going to have many relationships, some of which will be brief, and some of which will be enduring, but the most important and enduring will be her relationships with Mr and Mrs C and, hopefully, with Mr B, and with her siblings. It is my view that the quality of these relationships very much depends at this time on the ability of Mr C and Mr B to presently support and protect Mrs C in her development of a secure, nurturing mother-child breastfeeding relationship with A. That Mrs C wishes to continue to offer this to A is commendable and needs protecting to them both.

[13] Mr B seeks contact from around 8.30 am to around 5.30 pm on Tuesday, Wednesday and Thursday of each week. In cross-examination he acknowledged that that proposal contained in his affidavit was not his last word on the matter. The assessment of what I took from his evidence was that he wanted more than the current arrangement and to continue to develop that into equal time shared care. At present he is seeing A twice a week for an hour to an hour and a half. He had been
offered by Mrs C an extension of that to three days a week for an hour and a half but Mr B elected to decline that offer as he did not accept that it was in A’s best interests.

[14] I took from his evidence that what he wanted in rejecting that increase in contact and pressing for more as the opportunity to be involved in A’s life. His concern was that at the times he had been having A in his care, A would rapidly fall asleep and that he would spend most of the time watching her sleeping. As endearing as that was to Mr B, he wanted to exercise his right to feed her, to change her, to spend some time playing with her, to bathe her; in short, to be involved in aspects of day-to-day parenting of A in the same way as Mrs C.

[15] My assessment of Mr B’s evidence and the manner in which he gave his evidence was that he brought to his evidence his previous experience with his son, who was also raised in a home where his mother and father did not live together. While his evidence appeared to be thoughtful and considered, and he repeated that, regardless of what arrangements are put in place by the Court, if they were not meeting A’s needs then he would do all he could to alleviate any stress for A, I am not satisfied that Mr C appreciates that a determination of A’s welfare and best interests is not based in his rights as her biological father, but in the quality and network of particular relationships that are available and able to be developed in the future for A. I am concerned that there was demonstrated little appreciation for the significance of Mrs C’s present breastfeeding relationship with A and that she is the only person who can provide this essential start to A. Not only must this not be destabilised, but I am also required to look at ways whereby it might be preserved and strengthened. Indeed, Mr B’s approach, from prior to A’s birth, has left me concerned about its stressful effect upon Mrs C at the very time Mr B should desirably be demonstrating respect for, and protection of, Mrs C’s ability to provide and develop a mother-child relationship to A through breastfeeding. This unique, gendered relationship between Mrs C and A requires its dignity to be respected and cannot be allowed to be reduced merely to the provision of a utility. I am also not satisfied that Mr B appreciated that A is being brought up within the C family, and that these relationships should not only not be destabilised by his requirements, but they should also should be preserved and strengthened.

[16] That said, Mr B has a great deal to offer A. While Mr C is also developing a fathering relationship with A, this is not a fatherhood competition. A’s particular circumstances mean that she is fortunate to have available to her the potential for two father relationships. Mr C will be providing those daily aspects of fatherhood to A that will promote in her the development of resilience, discipline and self-reliance in a way that only the father-child relationship can provide. Mr B should look forward to contributing to these developments, along with providing to A those other qualities of a healthy father-child relationship such as a sense of adventure, pushing A beyond her comfort zone to achieve, and providing praise to her when she succeeds. Mr B will also be integral in assisting to secure to A her sense of identity, commencing with her paternal biological connection to Mr B and his wider family. He should therefore be encouraged to consider ways he can develop his particular father-child relationship with A, which I propose commence with a scrapbook for her that chronicles her paternal family history and her place in it. I reiterate, this is not a fatherhood competition. It is also not a competition between fatherhood and motherhood. Mrs C needs to be able to provide those aspects of emotionally attuned, warm, nurturing care to A, commencing with breastfeeding, that only a mother can provide. A needs her to be able to do this without interference or pressure from Mr B on the basis that he wants to provide the same things. The risk would be that Mrs C’s mothering would then be compromised, and this should not be allowed to occur.
[17] I ask Mr B and Mrs C, together with Mr C, to step back and look to the long term goal as being the development of healthy, respectful relationships between them as the significant adults in A’s life, for A’s benefit. I am willing to provide the resources of the Court as far as they are available, to support this process. I also require that the brief include education as to the differing, gender-based roles of motherhood and fatherhood, and how the fatherhood roles of each of Mr B and Mr C may be complementary of each other. I am now able to do this given the repeal of s4(3) of COCA, as I am no longer constrained from considering the gender of the parent in determining A’s welfare and best interests. Such processes may also at appropriate times include Mr and Mrs C’s four daughters, in understanding and developing their relationships with not only A but also their parents, together with Mr B and his place in their family as a result of his relationship with A. I regard this relationship work seriously, and as being central and pivotal to A’s welfare and best interests.

[18] It should therefore come as no surprise that I consider the premise of Mr B’s application for a parenting order as to contact with A to be misconceived if, as I suspect, it is founded on Mr B’s view that this is his right as A’s biological father to expect the Court to make an order today that will ultimately result in an equal time shared care arrangement between himself and Mrs C. This is an incorrect interpretation of the paramountcy of the welfare and best interests principle contained in s4(1) of COCA. I prefer this Court’s approach to be that Mr B, in making this application, is rather offering to A and to those with whom she is in existing relationship, that is, her mother Mrs C, her father Mr C and her four siblings, the opportunity for a further father-relationship with him being developed for A as being in her welfare and best interests.

[19] It is unfortunate that Mrs C has been required to respond within Mr B’s rights-based paradigm, as I suspect this has contributed to her stress at the very time that she ought to have been able to expect the protection and support of Mr B and the Court. Nonetheless, she has helpfully given consideration as to how contact with Mr B may take place within the current context, and I am grateful to her for these considerations. She proposes contact on a Monday and Thursday each week and proposes that initially Mr B take A away for one and half hours. In her most recent affidavit she deposed that after two to three visits Mr B’s contact could then progress to a third day each week away from her home, again for one and a half hours. However, in cross-examination seeking to elicit from her an agreement to such contact be extended in around two months time to include overnights, it was clear that Mrs C was under pressure. She could not envisage A spending up to a day, or indeed overnight, with Mr B until she was older. She suggested this be at least a year old. I regret Mrs C was placed in this position. A’s relationship with her should not be stressed by external demands that are contrary to Mrs C’s views about what A needs, or to A’s needs. At this time, Mrs C is the most emotionally attuned to A and her views and opinions about what might be best for A need to be heard and respected. Mrs C also needs to be reassured that the Court understands that she was under pressure to accede to the agreements being sought from her under cross-examination and that at even one year old, A may not be ready for the level of contact, particularly overnight contact, that was being sought.

[20] Mrs C lives a short distance away from Mr B. The time between the households by car, on the evidence, varied from around five to 10 minutes to between 10 to 15 minutes. Regardless, it is a relatively short distance. To date, A has been breastfed on demand and is fed around every one and half hours. Mrs C wants to continue breastfeeding as she did with her four other daughters.

[21] Before moving on to the matters that I need to consider, I also want to record that in the background are guardianship issues which Mr and Mrs C and Mr B need to consider. The law
provides that Mr B, along with Mrs C, is a guardian to A. This is irrespective of the circumstances surrounding her birth and the role played by Mr C as Mrs C’s husband and father to A. It is unfortunate that the legislation does not provide the Court with a greater discretion to enable it to take a more nuanced approach to guardianship by recognising the range of circumstances within which a child may be raised. I express my disquiet that, for example, Mr B should at the present time have guardianship authority while Mr C has none, and that Mr B’s authority is the same as Mrs C with the attaching power to withhold his agreement to matters that may significantly affect the lives of Mr and Mrs C and their family in circumstances where Mr B presently has only a limited role in A’s life. I would prefer that the Court have the authority pursuant to s29 of COCA to be able to vary Mr B’s guardianship authority for specific purposes and periods that may better reflect the reality and nature of these circumstances. However, this discretion is not available and can only be provided by legislative amendment. At present my hands are tied. Accordingly, if Mr and Mrs C wish to relocate as Mr C’s job may dictate, they cannot presently by law do so without prior consultation with, and agreement from, Mr B as a joint and equal guardian with Mrs C in respect of A. They would otherwise need the assistance of the Court in respect of such matters. It is also not surprising that the communication between Mr B and Mrs C is presently non-existent. It may need to be this way to ensure the recovery of Mr and Mrs C’s relationship, which is a matter of great importance to A’s security and wellbeing, as well as for Mr and Mrs C’s other children. The Court ought not disregard the reality and importance of this boundary by imposing unrealistic requirements upon Mr and Mrs C at this time, with respect to the involvement of Mr B in their lives.

[22] The law may also consider there is dysfunction in the guardianship relationship in circumstances where a realistic consideration of the issue may conclude that the situation is not, in fact, dysfunctional but normative. This is illustrated by the fact that there is now before the Court an application by Mr B revolving around a dispute about A’s name. That application is not the focus of this hearing due to a direction made by the registry to that effect. Accordingly, a further fixture will need to be allocated by the registry so that that issue can be resolved at a later date unless the parties can reach a prior agreement. I encourage the further exploration of agreement as a result of the outcomes from today’s hearing, and take the opportunity to comment that because A is being brought up within the C family by Mr and Mrs C, it would be normal to expect that A carry the C name, in the same manner as her mother, father and siblings. She may not wish to be singled out and made to feel different by imposing a requirement that she carry Mr B’s surname. Accordingly, I urge the parties to reconsider the issue of A’s name in light of these matters. Without predetermining the issue, if agreement is not reached and I am required to hear the matter, I would be interested to hear the position of the parties if A was to remain AC but has B added as an additional middle name. The parties’ position on this, as well as the prospect of agreement by Mr B to Mr C being made an additional guardian for A to recognise the reality of his role and relationship to A, may signal to me the progress being made in centralising, respecting and prioritising to A the significant relationships in her life as the means to determine her welfare and best interests, rather than focussing on rights, as I suspect may presently be the case.

[23] Turning again to Mrs C’s breastfeeding relationship with A, in support of Mrs C’s position, her midwife Ms L gave evidence in relation to matters which I found to be within the area of her experience and expertise, notwithstanding only having been a midwife for a short period of time. She supported breastfeeding as the most desirable way for a mother to feed her baby, consistent with Ministry of Health guidelines and policy. She confirmed that breastfeeding is optimal, in her opinion, for the first two years of a child's life and for the first six months she believed a child
should be fed exclusively with breast milk. This is consistent with the view expressed by the World Health Organisation in information provided to me by Mrs C’s counsel. In addition, art 24 of UNCRC provides at 24(2)(d) that:

State parties shall take appropriate measures to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.

That is, UNCRC supports the State ensuring caregivers of children have access to education as to the advantages of breastfeeding, This extends, in my view, to support for implementing breastfeeding because of such advantages. Ms L also gave evidence as to what she saw as risks associated with A not continuing to be breastfed and risks in relation to her being bottle-fed. In particular, she talked of risks to A's health in terms of illness, greater propensity for hospital admissions, gastrointestinal infections, risk of asthma, eczema and obesity.

[24] Central to this case is the issue of breastfeeding. The fact that A is breastfed is a relevant and weighty matter which I need to consider along with the s 5 principles to which I have already referred. That A is being breastfed is extremely important in enhancing optimal relational, social and health outcomes for A. If breastfeeding is available to A, it is a relationship that should be encouraged and protected, and not put at risk by compromise. It represents a continuation of the mother-child relationship that had already developed as a result of gestation when A was formed and grew within the intimacy and safety of Mrs C’s body. That this is important should not be minimised as being just Mrs C’s perspective. I record that in her evidence she did not agree to express breast milk for the purpose of facilitating Mr B’s care of A but when pressed, indicated a willingness to breastfeed A while she is in her father's care. I again express regret that Mrs B was put in this position as a result of this hearing.

[25] My assessment of the evidence is that, contrary to Mr B’s assertions, Mrs C is not using her breastfeeding relationship to keep Mr B at arm's length. The fact is that the gendered nature of the role and function of a mother towards her child through breastfeeding means that Mr B cannot participate in this. Nor should he. It is a father’s role at this time to protect and enable, not harass, the mother as she undertakes this function on behalf of them both in seeking to give A the very best start in life. I also find that it is not unreasonable that Mr and Mrs C may wish to keep Mr B at arm’s length at this time, as they seek to rebuild their marriage. It is commendable that they are seeking to do so. A needs their relationship to be as strong and secure as possible, with the careful development of Mr B’s relationship with A, supported by Mr and Mrs C, being overlaid on this foundation.

[26] Nonetheless, A should grow up knowing she has two fathers, and that her reality is not uncommon for many children in New Zealand society. There is plenty of time for this. The
circumstances in which A came into this world should not be a source of shame or difference for her, and it is incumbent upon Mr and Mrs C as well as Mr B, to sensitively manage this situation for A. I propose providing the specialist counselling resource available to the Court, to assist the parties in this process.

[27] Mr T’s proposal for contact with A is, in my view, unrealistic given her age and her stage of development in life. She needs stability and security, with contact with her father carefully developed in line with her social, developmental, psychological and cognitive milestones. The reality is that Mrs C is A’s primary attachment figure. However, A does also need to develop a secure attachment to her father and the issue I need to decide is how that is going to occur so as to meet A’s needs. I am having to make that decision in the absence of the ability of A’s parents to make that decision themselves. I am, however, able to draw on social science research which suggests that the development of A’s attachment with Mr B should be safely and optimally developed through short, regular contact of about an hour to an hour and a half several times each week, recognising A’s present age, stage of development and the fact that she is being breastfed. It would then be expected, as the parenting relationship between Mr B and Mrs C develops over time, that contact by A with Mr B would increase; the counselling and FDR mediation processes which I am putting in place are to support and encourage the longer-term ability of A’s parents to reach flexible, child-centred contact arrangements as she grows older.

[28] It is also my view that the contact proposed by Mrs C is more reasonable at the present time, but also reflects the pressure that I detect has been exerted on her. Her desire to maintain a breastfeeding relationship with A is laudable and must be supported. It is central to A’s welfare and best interests, both short term and long term, and Mr B’s contact with A must be subservient to this reality. Mr B is not excluded; it is his role, along with Mr C, to encourage, support and protect Mrs C in her present provision of breastfeeding to A. It will be Mrs C’s role to engage in facilitative gatekeeping practices, opening up to Mr B opportunities for relationship by him with A for the future, as A becomes less dependent on her and is encouraged and able to develop other healthy, secure and significant relationships. I expect and trust her to engage in this process, reflecting her desire to provide to A the opportunity for a healthy, secure relationship with Mr B as well as with Mr C.

[29] Having weighed all the evidence, taking into account the principles in ss 4 and 5 of the Act, and recording that A is too young to express any views in terms of s 6 of the Act, I accordingly make the following interim parenting orders:

Orders and directions

(a) A is to be in the day-to-day care of her mother Mrs C

(b) Mr B shall have contact with A, as facilitated by Mr and Mrs C:
   (i) Every Monday, Thursday and Friday from 10.30 am until 12.00 noon
   (ii) Such other additional times as may be agreed between Mr B and Mrs C.

(c) I ask the Registrar to refer Mr and Mrs C and Mr B to specialist counselling pursuant to s46G of COCA to address strategies to develop healthy, respectful communication between them. I also ask that the brief include education as to the differing, gender-based roles of motherhood and fatherhood, and how the fatherhood roles of each of Mr B and Mr C may be complementary of each other. I expect such processes may
also at appropriate times include Mr and Mrs C’s four daughters, in understanding and developing their relationships with not only A but also their parents, together with Mr B and his place in their family as a result of his relationship with A. I suggest 15 sessions be allocated.

(d) Upon completion of specialist counselling, I refer the parties pursuant to s46F(2) of COCA to FDR mediation to explore finalising these proceedings with a relational focus and by consent. I recommend that in addition to Mrs C and Mr B, Mr C also attend. I also flag now my expectation that any final orders able to be made by consent as a result of agreements reached at mediation, should also include consideration of the issues of A’s name, Mr C being appointed an additional guardian to A and the parenting order as to day-to-day care of A being made in favour of Mr C in addition to Mrs C.

(e) I direct a case management review in February 2017 to consider what further steps may be required in respect of these proceedings, in the event that any matters remain outstanding at that time.

[30] Finally, I just want to say to Mr and Mrs C and Mr B, as A’s parents, that I hope that as a result of these interim orders and the guidance that has been offered as to the way forward, you will now able to put aside the stress which a hearing inevitably causes. I trust that you will continue to develop your complementary mothering and fathering relationships with A and with each other, that you will seek professional assistance when you need it to support your shared parenting responsibilities, and that you will hopefully not require the future involvement of the Family Court again as you engage in the task of raising A between you, mindful and respecting of your respective roles and functions.