



THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

Research Commons

<http://researchcommons.waikato.ac.nz/>

Research Commons at the University of Waikato

Copyright Statement:

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

The thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognise the author's right to be identified as the author of the thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from the thesis.

**An Autopoietic Approach to Child Custody and Contact
Decisions and the Welfare and Best Interests of the Child**

A thesis
submitted in fulfilment
of the requirements for the degree

of

Master of Laws

at

The University of Waikato

by

Amelda Schrenk

2012

Abstract

All over the common law world complaints are heard about the manner in which the courts decide the living arrangements for children when their parents separate. A large body of contributions from scholars and commentators from various disciplines exist, and are still being contributed, that highlights problems, critique outcomes, and make recommendations relating to these types of legal decisions. Will their work make a difference to legal outcomes and, if so, why?

This thesis uses the socio-legal theory of Niklas Luhmann to show that it is because of *how* the legal system operates that the expectations of parents, scholars and interest groups, will invariably be disappointment and that ultimately what is required for these types of decisions, cannot be achieved by the legal system. Luhmann argued that the legal system operates in a closed, self-referential manner to produce its own messages as regards the values of legal and illegal. This manner of functioning is called autopoiesis. By its operations the system self-selects and simplifies information generated outside of the system in a manner that will stabilise normative expectations, which is all that the law does. Normative expectations are created with society in mind and not individuals. This challenges the individualistic approach that is required custody and contact decisions after parental separation. The research starts at the historical point when the common law legal system gained jurisdiction over children. The research follows the development of the ‘welfare principle’ upon which custody decisions are based and illustrates the relevance and application of Luhmann’s theory. This study investigates the limitations of the legal system to make decisions about children’s welfare and best interests in the context of custody and contact decisions.

Table of Contents

Chapter 1	Introduction	1
Chapter 2	Law as an autopoietic social system.....	6
2.1	Introduction	6
2.2	Law as an autopoietic social system.....	7
2.3	The elements and function of law	8
2.4	Law's operative closure.....	11
2.5	Courts as central to the legal system	18
2.6	Cognitive openness.....	21
2.7	Structural coupling	22
Chapter 3	Jurisdiction for the development of the welfare principle.....	27
3.1	Introduction	27
3.2	Establishing law's jurisdiction: <i>parens patriae</i>	27
3.3	Probable and possible irritants	32
Chapter 4	The English legal system and the custody of privileged children.....	37
4.1	Introduction	37
4.2	Establishing the patriarchal family.....	37
4.3	Custody of children post-divorce	40
4.4	Children's welfare as education and wealth.....	41
4.5	Custody disputes and children's best interests in the 19th century.....	47
4.6	The thirty-five years after <i>De Manneville</i>	53
4.7	The Tender Years Doctrine	55
Chapter 5	The rise of shared parenting – irritations and responses	66
5.1	Introduction	66
5.2	A problem with child support.....	66
5.3	Maternal preference meets child support	68
5.4	The fathers' rights movement.....	75
(a)	United Kingdom.....	77
(b)	Canada.....	79
(c)	Australia	81
(d)	New Zealand.....	86
5.6	The re-attached family.....	91
5.7	The UN Convention on the Rights of the Child – an irritant?	97
5.8	The new normative expectation?.....	101
Chapter 6	The structural coupling between law and social science.....	105

6.1	Introduction.....	105
6.2	Social science research within the legal system.....	107
6.3	The ‘psy’ experts	125
6.4	The inevitable results?.....	135
Chapter 7	Concluding discussion.....	137
Bibliography	148

Chapter 1 Introduction

Niklas Luhmann's work is not well known throughout the professional Anglo-Saxon world¹ whereas, after his death in November 1998, some of the multiple, extensive obituaries that were published in the European press, described him as "the most important social theorist of the 20th century".² His theory is abstract and radical. This thesis attempts to illustrate its relevance and application by applying it to actual events and developments as can be identified over a time period within the legal system.

Within the context of custody³ and contact decisions, this research investigates and applies his proposition that the legal system, as one of society's functionally differentiated social systems, operates autopoietically. This means that the law⁴ is closed in its operations and relies on its own 'knowledge' and programmes when it makes decisions about children's lives. Developments and messages from the Autopoiesis is a theoretical approach to how society's social systems operate and relate to their environments which comprise society and other social systems.⁵ Luhmann was first in theorising this proposition.⁶ Gunther Teubner is another protagonist of the theory⁷ but he later changed his paradigm. I will mainly focus on Luhmann's work. His work was aimed at explaining society's functional systems' composition. The law was not the only social system

¹ Gotthard Bechmann and Nico Stehr "The legacy of Niklas Luhmann" (2002) Jan-Feb Society 67.

² Gotthard Bechmann and Nico Stehr "The legacy of Niklas Luhmann" above n 1 at 67. More works are steadily being produced in English to explain and elevate his contribution in English speaking society. Most recently see Hans-Georg Moeller *Luhmann Explained: From souls to systems* (Carus Publishing, Peru (IL), 2006); Andreas Philippopoulos-Mihalopoulos *Niklas Luhmann: Law, justice, society* (Routledge, 2009).

³ Custody is currently referred to as 'day-to-day' care in New Zealand under the Care of Children Act 2004, which came into force on 1 July 2005. This thesis is not exclusively focussed on New Zealand developments but includes other common law jurisdictions that decided on different semantics as regards 'custody' of children post parental separation. For the sake of simplicity 'custody' will be used throughout this thesis and refers to where children will live and settle after their parents had separated.

⁴ Luhmann used 'the law' and 'legal system' synonymously and it will be used the same in this thesis.

⁵ Michael King "The 'truth' about autopoiesis" (1993) 20 (2) J.L. Soc'y 218 at 219.

⁶ For his most comprehensive work aimed at the law, see Niklas Luhmann *A Sociological Theory of Law* Martin Albrow (ed) Elizabeth King and Martin Albrow (trans) (Routledge & Kegan Paul, London, 1985); *Law as A Social System* Klaus A Ziegert (trans) Fatima Kastner, Richard Nobles and others (eds) (Oxford University Press, Oxford (UK), 2004) originally published in German as *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1993).

⁷ Gunther Teubner *Law as an Autopoietic System* Zenon Bankowski (ed) Anne Bankowska and Ruth Adler (trans) (Blackwell, Oxford (UK), 1993).

of society that he explored.⁸ This thesis focuses on his work that was devoted to the legal system.

Autopoietic theory is useful in that it raises awareness of *how* the law operates, and as such can highlight why the determination by law of CCDs causes so much frustration and disillusionment. Rather than submitting more suggestions or arguments about what the welfare and best interests of the child (the paramountcy principle) should consider, this thesis suggests that it is how the law operates, and the fact that the law has jurisdiction over these matters, that leads to the perceived and experienced problems.

An autopoietic approach is also beneficial to explain why communications between the legal system and the other subsystems such as the social sciences, are so problematic and that messages from other systems are often distorted and misapplied. This research draws attention to the difficulties of maintaining the notion that the legal system is capable of meticulously deciding CCDs as it claims to do under an ‘individualistic’ approach. It is beyond the scope of this thesis to suggest or explore refutations of Luhmann’s theory. The intention is rather to attempt to show how this theory may apply to and explain actualities as they developed and are developing in the legal system.

The focus is on CCDs in the absence of allegations of, or actual, abuse and/or violence. This does *not* exclude cases where high conflict and animosity between the parents exist. Because this thesis is specifically about CCDs and the operations of the legal system in this regard, the legal developments as regards divorce will not be discussed in detail.

An autopoietic system is not closed off from its environment. It is only closed in its operations i.e. in how it will incorporate external ideas (if at all) into the law. Some environmental ‘irritations’⁹ (events, developments, and messages) that the legal system reacted to will be suggested in this thesis. However, it is much harder to *prove* connections – in particular if a system is closed – than to suggest them and therefore the environmental ‘irritants’ that I identify are not conclusive.

⁸ Niklas Luhmann *Social Systems* John Bednarz Jr. (trans) (Stanford University Press, Stanford (CA), 1995).

⁹ These need *not* always be negative; they can also be positive from the system’s perspective in that they confirm to the system that its choice of response is ‘right’.

The focus is not exclusively on New Zealand's law in relation to CCDs. This is because the 'legal system' in this thesis refers to the common law legal system¹⁰ that was established in England and that transferred to the English colonies. The New Zealand approach to CCDs is not unique but has predominantly followed the approach in other common law countries. The lay-out of the thesis will be as follows.

In Chapter 2 I will set out and explain the elements of Luhmann's theory that will apply to this thesis. His theory is post-modern and positivist in its description of the legal system's nature and operations. Thereafter, Chapters 3 – 7 approach the developments in law from an autopoietic perspective only.

Chapter 3 is a short chapter that determines the historical starting point of the Welfare and Best Interests of the Child (W&BIC) doctrine and applies the theory to this development. This starting point was the doctrine that provided that the courts act as *parens patriae* on behalf of the State. Thereafter the W&BIC doctrine developed from the courts' exercising its *parens patriae* jurisdiction. I will highlight some of the developments in law's environment that the legal system most likely elected to respond to.

As a British colony New Zealand had a policy of adhering to the laws of England.¹¹ The English law regarding divorce and custody of children was copied in New Zealand legislation and English case law was followed. Chapter 4 will discuss how the English legal system went to work to establish the patriarchal 'rule of the father' that was applied by law to uphold and protect a father's custody of children. The law equated father custody to children's best interests. Thereafter the impact of the first child custody legislation will be discussed up to the establishment of the Tender Years Doctrine from which a maternal preference by the courts evolved. Legislation in common law countries did not¹² specify that mothers must be the preferred custodial parent after parental separation. It only ever suggested equal

¹⁰ This is *not* to be taken as meaning that the common law legal system was/is unique or alone in its selection of certain ideas such as patriarchy and the political institution of the heterosexual family. It is merely beyond the scope of this thesis to include the legal developments of all western countries i.e. to include the civil law countries. Luhmann himself wrote and theorised about modern society as a world society and social systems as world systems.

¹¹ English Laws Act 1858.

¹² A few American states' legislatures actually went so far as to codify the judicial maternal preference (after it had been produced by the courts). However for the great majority of states, it was only ever judicially imposed.

consideration of both parents. This preference was how the legal system elected to eventually interpret the legislation. Again, developments outside of law that were elected for response will be suggested.

The legal emergence of shared parenting in CCDs will be explained from an autopoietic perspective in Chapter 5. Two events ('irritations') are particularly identifiable. One was the legislative introduction of child support legislation by the political system and second, the irritation caused by the fathers' rights movement subsequently. I will identify the different ways in which the courts and the political system reacted to these events albeit that they may share the same ideology regarding the outcome of CCDs. From these two events/developments a new post-separation family¹³ ideal has emerged that is attempting to impose shared care post-separation as being in children's best interests.

In Chapter 6 I will discuss how the legal system structurally coupled/couples with social sciences in the twentieth century to decide what is best for children. This happened when the law needed to be seen to be more 'open' in its operations and as 'responsive' to developments and research in social sciences. The latter subsystem of science caused intense perturbation/irritation for the legal system regarding children's mental health and well-being after no-fault divorce was introduced. This 'irritation' could not be ignored. Some social science messages are selected and adapted within the legal system, which then renders them as being legally approved while other messages within these selected research studies are minimised or ignored. The law also maintains control over how social science evidence enters the system and over what a social scientist may or may not contribute.

I conclude in Chapter 7 that the 'shared care' agenda currently offers a solution to both the political system and the legal system. The individualistic approach that the law claims to follow contradicts the reality that CCDs have over their history largely been decided based on the norms that the legal system decided to follow. First, the near absolute paternal custody, then an overwhelming maternal preference and currently the shared care norm that is

¹³ Bren Neale and Carol Smart "In whose best interests? Theorising family life following parental separation or divorce" in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Dartmouth, Aldershot, 1999) 33 (discussing, in the UK context, the attempts that had started in the 1990s to introduce the ideals of the lasting, permanent original nuclear family after separation).

still being stabilised. The law operates by elected a norm, stabilising that norm and then follows that norm until it decides that a new norm must be established. In the process, complexities and realities must be ignored in order for the law to be predictable. A genuine individualistic approach may be beyond the scope of the legal system's operations. This is however the only approach that can come close to best serving children's welfare and interests in custody and contact decisions.

Chapter 2 Law as an autopoietic social system

2.1 Introduction

‘Autopoiesis’ is taken from Greek and means self-creation. In developing his theory on the autopoiesis of social systems, Luhmann was inspired by the work of Chilean biologists Humberto Maturana and Francesco Varela.¹⁴ They describe biological (living) systems/units that self-create (autopoiesis) and reproduced themselves from their own elements, that is, they are closed in their self-creation. Such systems’ dependence upon other systems outside of itself only apply in so far as those other systems constitute an environment in which the biological system is able to exist and self-create. All processes of/within biological autopoietic systems are produced by the system itself though, and the environment cannot directly determine these processes. Therefore autopoietic systems are operatively closed meaning that there are no *operations* entering the system from outside. This however does not mean that the system is oblivious to and unaffected by its environment, since it does require interaction with its environment to exchange energy, but the contact with the environment is regulated by the system, that is, the *system* determines, when, what and via which channels energy or matter is exchanged with its environment.

Luhmann’s account of society was that it is a large, primary system that comprises several closed, self-referring and functionally specialised subsystems that each function in accordance with their own codes and own produced communications which make it difficult for systems to communicate across their boundaries. Autopoiesis rejects the premise that modern society revolves around the individual and his/her ‘free will but instead postulates that individuals are reconstructed within different social systems as epistemic subjects.¹⁵ This would apply to those acting with a given system, for example judges in the legal system (who must act as the system requires them to) or the parties to a legal dispute,

¹⁴ Humberto R Maturana and Francisco J Varela *Autopoiesis and Cognition: the realization of the living* (Reidel, Dordrecht, 1980); Humberto R Maturana “The organization of the living: a theory of the living organization” (1975) 7 *International Journal of Man-Machine Studies* 313; Humberto R Maturana and Francisco J Varela *The Tree of Knowledge: The biological roots of human understanding* (Shambhala, Boston, 1987) 75-82.

¹⁵ Michael King “The ‘truth’ about autopoiesis” above n 5 at 228.

whose actions are given meaning in relation to the code and programmes of the system.

2.2 Law as an autopoietic social system

The theory of the autopoiesis of social systems sees functionally differentiation and closed systems formation as the basic characteristics of modern society. Law¹⁶, politics, science etc. are therefore differentiated social systems, which basically consist of closed communication networks within which meaning is assigned and its own operations determined.¹⁷ Each system functions autonomously in accordance with its own internal operations and codes.

Autopoiesis, or self-reproduction in Luhmann's theory, is a theoretical approach to explain *how* social systems operate and relate with their environment, the latter comprising other social systems and society at large.¹⁸ Law – like other autopoietic social systems – makes its own meaning by referring to its own produced network of communications. The most obvious is law's operation of referring to precedent.

While an autopoietic social system is closed in its operations it is cognitively open to its environment and is therefore aware of developments outside of itself.¹⁹ An autopoietic system therefore does not stand in isolation to other social systems and it will structurally couple, as it deems necessary, with other social systems but will always protect its own function and identity in relation to other social systems and society.²⁰ Law, for example, needs the political system to produce legislation but how it applies legislation will be subject to the system's meaning-making (statutory interpretation) and own decisions involving children. Because of the evolution of the W&BIC doctrine law eventually also coupled with the system of social science so as to extract

¹⁶ In this thesis, as in the theory of Luhmann, 'law', 'the law' and 'legal system' are synonymous and refers to the system comprised of all legal communications. See Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* (Palgrave, Basingstoke, 2003) at 36.

¹⁷ Gunther Teubner "How the law thinks: toward a constructivist epistemology of law" (1989) 23 *Law & Soc'y Rev* 727 at 738.

¹⁸ Michael King "The 'truth' about autopoiesis" above n 5 at 218.

¹⁹ Niklas Luhmann "Closure and openness: on reality in the world of law" in Gunther Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, Berlin, 1988) 335.

²⁰ Niklas Luhmann "The unity of the legal system" in Gunther Teubner (ed) *Autopoietic Law: A new Approach to Law and Society* (Walter de Gruyter, Berlin, 1988) 12; "Operational closure and structural coupling the differentiation of the legal system" (1991-1992) 13 *Cardozo L. Rev.* 1419.

information from that system on child welfare/development and *reproduced* it in a simplified (legal) form to rely on in CCDs. Where needed, the law could/can use this selected, re-produced information similar to how it uses precedent to confirm the *legal* correctness of decisions.²¹ The only threat to law's efficacy, says Luhmann, is de-differentiation, meaning that law's boundaries dissolve and its communications lose their unique legal quality.²² This corruption of law will occur when the legal system adopts alternative ways of making and providing meaning such as the application of codes or programmes from the systems of science, politics, or medicine/therapy.²³ For this reason, the law must re-produce all information from its environment into *legal* communications signifying its legal status. The legal system, as all autopoietic social systems, is in this way highly reliant on its environment²⁴ for stimulation (irritations or perturbations) in its own internal process of producing and adding to its communications network. The environment provides an array of options from which the law can select those to respond to. However, law remains autonomous and closed in performing and determining its own operations and only the system of law can determine what is or is not lawful or unlawful and what is law and what is not.

2.3 The elements and function of law

Within the theory of autopoietic social systems, law consists of any and all *legal* communications/messages, that is, it is a system that consists entirely of legal communications as its elements. All communications that relate to the binary code legal/illegal, law/non-law and/or lawful/unlawful comprise the legal system.²⁵ The legal system however decides when an event in the environment can be given a value of the binary code. For example, controversially (see Chapter 3) the legal system declared children's welfare and best interests to be a legal issue, that is, a matter that the legal system must decide. This happened when it developed and declared the doctrine (and legal fiction) of *parens patriae* based entirely on its own communications. Once this happened, the law had no

²¹ Michael King and Christine Piper *How the Law Thinks About Children* (2nded, Ashgate Publishing Ltd, Aldershot, 1995) at 52.

²² Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 40-41.

²³ Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 41.

²⁴ Niklas Luhmann "Law as a social system" (1989) 83 *Nw. U.L. Rev.* 136 at 139.

²⁵ Gunther Teubner *Law as an Autopoietic System*, above n 7 at 88.

escape but to decide cases that involve children's futures, such as the custody of children, if parents cannot reach their own agreement.

The vital function that Luhmann maintains law fulfils in society is that of stabilising normative expectations over time thereby providing stability and certainty, which consequently avoids the need for people to learn from experience.²⁶ These expectations must be capable of being maintained even in cases of dispute. Law exploits conflicting perspectives so as to form and reproduce generalised behavioural *expectations*.²⁷ This is made possible by, and is dependent on, the operational closure and cognitive openness of law. These expectations are given their meaning temporally (as relevant at certain time periods) through law's communications.²⁸ This happens when the law takes some information from its environment and re-produces it inside the legal system to ultimately provide normative expectations that will stand for as long as the law deems it to be fixed and despite them being disappointed.²⁹ For example a normative expectation once was that a father's absolute custody of his children was best for children despite the reality that in many cases this was bad for children (disappointment of the expectation). Yet, for a long period the law upheld this norm despite activity in the political system that entered the world of law as legislation and that provided for a mother's right to apply for custody of young children. Currently the shift is toward the norm that continued involvement of both parents is best for children despite the reality that mothers still do the brunt of child care and rearing post separation and that many fathers withdraw from their children's lives (disappointment of expectation).

Realities do not necessarily affect the norms of law. Indeed, the reality that the law itself cannot truly know what is best for children and that it ultimately can only be concerned with making procedurally *correct* legal decisions does not affect the normative expectation that these type of decisions are capable of being made by the legal system. Establishing normative expectations therefore do not require learning from experience such as cognitive expectations do. Cognitive

²⁶ Niklas Luhmann "The unity of the legal system" above n 20 at 27; Niklas Luhmann "Law as a social system" above n 24.

²⁷ Niklas Luhmann "The coding of the legal system" in Gunther Teubner and Alberto Febbrajo *State, Law, and Economy as Autopoietic Systems: Regulation and autonomy in a new perspective* (Guiffre, Milan 1992) 145 at 147. Emphasis added.

²⁸ Niklas Luhmann *Law as A Social System* above n 6 at 143.

²⁹ Niklas Luhmann "The unity of the legal system" above n 20 at 19.

expectations amount to learning and accepting realities. However the law must provide society with relatively certain expectations and it must therefore simplify and ignore some realities so as to stand by its norms and retain stability – until it decides to change its norms.

For Luhmann, law's operative closure means that there can be no option of partial openness whatsoever³⁰ and he therefore rebuts the idea that the legal system could *effectively* implement social engineering/change,³¹ which is not to say that such attempts, often by the political system, are not made. Law can merely create (normative) expectations but it is not very effective in producing behavioural changes or regulating conduct that is not open to the determination of legal/illegal.³² Thus for example law's current attempt at creating the norm that parents should separate amicably can be created but whether parents do that is another matter. The rising litigation regarding custody is evidence of this. Equally, the expectation of regular contact with a non-resident parent can be established but whether this will turn out to be the case or indeed, whether the best interests of the child, will be well served is something that the law will not know and does not need to know. This is because legal decisions do not depend for their legality upon the future correctness of the decision.³³ If it was made in accordance with the proper procedure and in reference to the relevant legislation, then the judge is lawfully entitled to use her/his discretion and whatever is decided is – if not appealed – legally correct.

As one of various social systems the legal system also participates in society's construction of reality³⁴ yet without overtly communicating about or acknowledging this.³⁵ Yet it creates and stabilises normative expectations about how things *ought* to be. In order to offer stability, legal norms often must stand despite being counter-factual because actual experience “may negate normative learning by demonstrating that the norms have little ... validity as reliable

³⁰Niklas Luhmann “Coding of the legal system” above n 27.

³¹ Niklas Luhmann “Problems with reflexive law” in Gunther Teubner and Alberto Febbrajo *State, Law, and Economy as Autopoietic Systems* above n 31 at 389.

³² Niklas Luhmann “Closure and openness” above n 19 at 347; Niklas Luhmann “Limits of steering” (1997) 14 *Theory Culture Society* 41 generally.

³³ Niklas Luhmann *Law as A Social System* above n 6 at 199.

³⁴ Niklas Luhmann “Law as a social system” above n 24 at 138; “Closure and openness” above n 19 at 340.

³⁵ Niklas Luhmann “Operational closure and structural coupling” above n 20 at 1434.

indicators of future events.”³⁶ Only the law itself can bring about changes to legal norms by replacing ‘stable’ expectations with other expectations to be temporarily stabilised again.³⁷ Luhmann remarks.³⁸

If, ... in order to stabilize these temporal connections it becomes necessary to sustain expectations which do not in any way correspond to reality, but which are supposed to resist eventual disappointments, the social problematic grows radically.

In current times law can rely on environmental activity such as by the fathers’ rights movement, liberal feminists, and social science research that encourage shared parenting but time will tell if how much this will correspond to reality.

The problem of disappointments may be averted by law providing acceptable sounding reasons for its determination to uphold normative expectations such as its ability to promote children’s W&BIC, thereby avoiding damage to its various norms³⁹ as they stand in various epochs. The rise of social science research made it possible for law to cite from it and to allow for those schooled in that system to provide ‘specialist reports’/expert evidence to the legal system. The law lends a normative quality to events and decides its legal relevance, exclusively relevant for law that is, but given the special status of legal ‘normative quality’ it enables the system to form even “counterfactually stabilised expectations.”⁴⁰ For society this means that it is possible to determine, in advance, whether an event is lawful or unlawful regardless of whether the norm itself is accurate in the environment.

2.4 Law’s operative closure

Law is normatively (operationally) closed meaning; “only the legal system can bestow normative quality on its elements and thereby constitute them as elements.”⁴¹ The quality of legal claims and subsequent decisions are derived from operations of the system and not from external sources unless such external

³⁶ Michael King and Chris Thornhill *Luhmann’s Theory of Politics and Law* above n 16 at 53.

³⁷ *Ibid* at 54.

³⁸ Niklas Luhmann *Das Recht der Gesellschaft* (SuhrkampVerlag, Frankfurt am Main, 1993) at 129 cited in Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 55.

³⁹ *Ibid*.

⁴⁰ Niklas Luhmann *A Sociological theory of law* above n 6 at 283.

⁴¹ Niklas Luhmann “The unity of the legal system” above n 20 at 20.

sources have become *legal* norms, meaning internal “block acceptance” of a given external ‘truth’.⁴² This is similar to legislative facts i.e. when law accepts a communication in its environment as representing the ‘truth’ or as ‘general knowledge’. One example is when the legal system accepted the ‘psychological parent’ notion as espoused by Goldstein, Freud, and Solnit⁴³ in the 1970s.⁴⁴ Law’s environment can thus contribute to change within the system but it does not determine the nature of the changes, given that the legal system itself processes information from its environment and then reproduces it to suit the system.

Luhmann proposes that the relationship between law’s operative closure (or normative closure because law’s operations involve the creation of normative expectations) and its cognitive openness is hierarchical in that its normative closure trumps its cognitive openness.⁴⁵ It is precisely in its constitution as a network of self-reproducing communications about the meaning of law where the legal system’s autonomy lays.⁴⁶ This also ensures the system’s structural stability or unity thus making law autonomous i.e. it ensures the system’s ‘closedness’. Law can therefore “reach forwards or backwards” to its *own* operations in the process of producing its own operations⁴⁷ and it keeps an eye on the future so to speak. It is therefore careful to set or change precedent. As will be evident, law can therefore change the meaning and norms underlying the W&BIC programme – as long the system itself makes those adjustments – and adapt its programmes to be able to signify what will be legally correct without recourse to the actual outcomes of its decisions.

Operational closure has the effect that regardless of what outsiders to the legal system argue, for example that the system unjustly favours women for child custody after separation;⁴⁸ that it harms mothers and children by responding to social science research;⁴⁹ that it is anti-mothers and children’s rights;⁵⁰ or that

⁴² Ibid.

⁴³ Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York, (NY), Free Press, 1973).

⁴⁴ See Peggy C Davis “ ‘There is a book out’: an analysis of judicial absorption of legislative facts” (1987) 100 (May) Harv. L. Rev. 1539.

⁴⁵ Niklas Luhmann “Closure and openness” above n 19 at 341.

⁴⁶ Niklas Luhmann “Closure and openness” above n 19 at 340.

⁴⁷ Niklas Luhmann “Closure and openness: on reality in the world of law” above n 19 at 345.

⁴⁸ E.g. Cynthia McNeely “Lagging behind the times: parenthood, custody, and gender bias in the family court” (1998) 25 Fla. St. U.L. Rev. 891 at 896ff.

⁴⁹ E.g. Mary Ann Mason *From Fathers’ Property to Children’s Rights: The history of child custody in the United States* (Columbia University Press, New York (NY), 1996).

children need fathers and fatherless children lead to great social problems and damaged children,⁵¹ the legal system will decide when, what to and how to react.

a) The binary code of law

What organises the autopoiesis of the legal system, as an inevitable outcome of its own operations, is its binary code that brings the continuous need to decide between legal rights and wrongs.⁵² The system verifies the consistency of its own operations by way of its binary scheme i.e. whether its operations can agree or not agree with its code.⁵³

As already mentioned, law's binary code, which ensures its closure, is legal/illegal or lawful/unlawful.⁵⁴ In most of the translated works of Luhmann the binary code of law is translated as legal/illegal and sometimes as lawful/unlawful. In the original German Luhmann uses Recht/Unrecht. This needs some further clarification. King and Thornhill explain⁵⁵ that legal/illegal refers to law's routine when information obtained from its environment is transformed or coded to have meaning as legal communications, positioning it on either the positive or the negative side of the code. Recht/Unrecht in German also includes what these scholars formulate as law/non-law.⁵⁶ This refers to when the legal system determines and recognises communications as being legal issues or not. This latter formulation also refers to how law protects its unity as the social system called 'law', thus it refers "to communications which are recognized by the law as legal communications, that is, as *relevant for law*."⁵⁷ Once the legal system had determined that the courts, as representative of the State, had jurisdiction over children's welfare, the path was set for the legal system to decide matters relating to children's welfare: first via the notion of *parens patriae* and later, as divorce became legal, in custody cases. Children's W&BIC thus became relevant for law.

⁵⁰ E.g. Martha Fineman *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge, New York (NY), 1995).

⁵¹ David G Blackenhorn Jr. *Fatherless America: Confronting our most urgent social problem* (HaperCollins, New York (NY), 1995).

⁵² Niklas Luhmann "Operational closure and structural coupling" above n 20 generally.

⁵³ Niklas Luhmann "Closure and openness: on reality in the world of law" above n 19 at 337.

⁵⁴ Niklas Luhmann "The coding of the legal system" above n 27 at 145.

⁵⁵ Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 55.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* (Emphasis in original); Niklas Luhmann "The unity of the legal system" above n 20 generally.

The legal system's code therefore also "enable[s] us to distinguish between belonging to the system and not belonging to the system..."⁵⁸ and thus, whether we should turn to the law for a solution of a problem. The code must not be inflated with any moral valuations but should only be seen as the distinction between the ends of the code much like true/not true in the system of science does not denote any moral value either.⁵⁹ The code is not a norm but a structure whereby recognition of whether the communication belongs to the system or not, and value attribution of legal/illegal is made possible.⁶⁰

As a closed system, only law can decide how an event should be coded in accordance with its binary code, and it must do so by always referring back to the results of its *own* operations as well as the consequences for its future operations.⁶¹ Examples include the practice of citing previous court decisions in court submissions and the practice of stare decisis followed by the courts. It recursively applies its operations to the results of its own operations and according to its own code. This has been the way in which the legal system protects its unity and consistency.

Luhmann explains that the code is "invariant" and accordingly it does not itself offer any way for the system to adapt to its changing environment.⁶² While the code does enable us to distinguish whether a communication belongs to the system, it does not provide criteria, the 'how', by which the determination of legal and illegal come about.⁶³ The code by itself is a tautology (legal is not illegal, and illegal is not legal) and if applied to itself, it is a paradox:⁶⁴ legal is what the law says it is but there is no way to determine whether this is actually correct. For the law to be reflexive it has to confront the paradox by which it exists – that it is the system that 'gives' us legal/illegal values without any recourse to a higher system that can confirm its determinations and this includes legislation.⁶⁵

⁵⁸ Niklas Luhmann *Law as A Social System* above n 6 at 209.

⁵⁹ Niklas Luhmann "The coding of the legal system" above n 27 at 146-47.

⁶⁰ Niklas Luhmann *Law as A Social System* above n 6 at 101.

⁶¹ Niklas Luhmann "Law a social system" above n 24 at 139.

⁶² Niklas Luhmann "The coding of the legal system" above n 27 at 174; Niklas Luhmann *Law as A Social System* above n 6 at 190.

⁶³ Niklas Luhmann *Law as A Social System* above n 6 at 192.

⁶⁴ Niklas Luhmann "The coding of the legal system" above n 27 at 172-73; Niklas Luhmann *Law as A Social System* above n 6 at 191.

⁶⁵ Niklas Luhmann "Some problems with reflexive law" above n 31 at 411.

That only the legal system can decide if something is, or is not law or is legal/illegal, and in doing so relies on, and refers only to, its own self-reproduced communications is something that law needs to cover up from itself.⁶⁶

Through its operations the system repeatedly and continuously reaffirms its vision of the external world and its own situation within that constructed world, and so forever conceals the paradox of its own existence.⁶⁷

The courts' responsibility to interpret legislation forces them to confront the primary paradox of the legal system namely that there is no intrinsic value that determines legal or illegal.⁶⁸ A problem that the W&BIC doctrine poses – as regards its impact on children – is that the law itself is unable to determine children's best interests. It can only declare the process (of a court hearing/court counselling/court mediation) and the actual decision that emerge from that as being legally correct. All that is left for law is to mystify itself by way of "[a]uthority, decorum, limitation of access to the mystery of law, texts to which one can refer, [and] the pomp of entries and exits of judges"⁶⁹ in order to prevent the paradox from becoming obvious. It is also by way of conditional programmes that law obscures its paradox.

b) Law's programmes

The law needs to immunise itself against risk in the sense that its decisions will stand despite the future turning out to be different from the future anticipated at the time of a legal decision i.e. it immunises itself against disappointed expectations.⁷⁰ The normative structure of law is not well adapted to risk since it stipulates how people ought to behave in an unknown future.⁷¹ For this, law develops programmes that can deal with the system's vulnerability. Therefore:

The typical form in which normative closure and cognitive openness are combined is that of a conditional programme. This form requires that normative rules for decision-

⁶⁶Michael Kind and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* n 16 at 19-20, 60.

⁶⁷Niklas Luhmann *Niklas Luhmann's Theory of Politics and Law* n 16 at 20.

⁶⁸Niklas Luhmann *Law as A Social System* above n 6 at 282-83.

⁶⁹Niklas Luhmann *Law as A Social System* above n 6 at 284.

⁷⁰John Paterson "Reflecting on reflexive law" in Michael King and Chris Thornhill *Niklas Luhmann on Law and Politics: Critical appraisals and applications* (Hart Publishing, Portland (OR), 2006) 13 at 19.

⁷¹Ibid.

making (which can be sustained only *within the system*) are phrased in such a way that a deduction of the decision from the facts (which have to be established cognitively) is possible: if fact *a* is given, decision *x* is legal.⁷²

Contrary to the move towards social engineering and the development of purposive/purpose specific programmes since the start of the twentieth century, law's programmes are always reduced to conditional programmes.⁷³ It is inherent to how the law operates. It adheres to the "if – then"⁷⁴ formula, that is, the programme identifies the criteria (e.g. what must be taken into account/what will be relevant) necessary for the application of the binary code. Differently phrased; 'if [something] has occurred... then the law states that...' As a closed system, the code therefore generates programmes that will support the legal system's identity i.e. its code.⁷⁵ Through its programmes, law can for example selectively reconstruct science, into universal knowledge, provider to the court of 'truth', in order to bring information from that social system into the legal system⁷⁶ which is possible because an autopoietic social system is also cognitively open. This extends to "such imprecise and contested sciences as ... psychiatry"⁷⁷ and social science which, based on who the court deems to be reliable experts (lawful) or not (unlawful), and distinguishing between reliable (lawful) and unreliable (unlawful) information, which then allows for the application of the code. The legal system decides what will suffice/be relevant and what will not. Even where the binary code of law is not immediately evident for an outside observer in, for example, a court decision, it remains the code that generates the programme by which the legal system determines the criteria for coming to a decision of what will be lawful/unlawful and/or law/non-law.⁷⁸

Finally, conditional programmes prevent future facts – unknown at the time of making a decision – from having relevance as to what is 'legal' and/or 'illegal'. It is protective of the legal system in that future breakdown of the anticipated benefits of the legal decision at the time of its delivery, will not

⁷² Niklas Luhmann *Law as A Social System* above n 6 at 111. Emphases in original.

⁷³ Niklas Luhmann *Law as A Social System* above n 6 at 196.

⁷⁴ Niklas Luhmann *Law as A Social System* above n 6 at 197.

⁷⁵ Niklas Luhmann *Law as A Social System* above n 6 at 193.

⁷⁶ Michael King and Chris Luhmann *Niklas Luhmann's Theory of Politics and Law* above n 16 at 60.

⁷⁷ Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 60-61.

⁷⁸ Niklas Luhmann *Law as A Social System* above n 6 at 193.

threaten law's function of stabilising normative expectations.⁷⁹ The 'if – then' formula of conditional programmes stands at the time of making the decision and therefore is deemed a valid decision regardless of whether the decision truly will turn out to be in the best interests of the child(ren) involved.

The alternative form of programmes is what Luhmann calls purpose-specific programmes.⁸⁰ Purpose-specific programmes are based on present intentions that are projected onto the future and its success will be judged in the future based on its achievement (or not) of its purpose.⁸¹ Accordingly, the W&BIC doctrine is actually a purpose-specific programme. It is stating what the intention/outcome of the decision is, what it will achieve. This form of programme obviously runs the risk that the future will not turn out to be the way it is projected in the present. Luhmann acknowledges that there are purpose-specific or purpose-oriented programmes in law but he maintains that they are still "nested"⁸² in conditional programmes where the system reduces complexities to the 'if-then' formula in order to reach decisions. Legal decisions cannot hinge on a future determination of what will be legally right or wrong. Judges are required to apply the code *at the time* of their decisions, and indeed *they* must make a decision. Judges "make their decisions according to the law, exclusively on the basis of what they see as the future at the moment of their decision."⁸³

It is my contention that in western jurisdictions, W&BIC is now a purpose-specific programme introduced by the political system via legislation. However, as will be discussed in chapter 4, the legal system via the courts had already started to move towards the norm that greater shared parenting will be good for children without legislative instruction. Ever since the introduction of the United Nations Convention on the Rights of the Child, legislatures⁸⁴ have been adapting or introducing legislation that structured what the outcome of W&BIC should be. What this political impact means for children is that decisions about their lives after their parents' separation are now made in accordance with political ideals and pressures which may have little to do with their actual day-to-

⁷⁹Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 61.

⁸⁰ Niklas Luhmann *Law as A Social System* above n 6 at 200.

⁸¹ Niklas Luhmann *Law as A Social System* above n 6 at 199.

⁸² Niklas Luhmann *Law as A Social System* above n 6 at 196.

⁸³ Niklas Luhmann *Law as A Social System* above n 6 at 200.

⁸⁴ The outcomes envisioned by the Convention in relation to custody of children after separation, had already been legally introduced by legislatures in some countries and in states of the USA.

day welfare and best interests but much to do with the political system's agenda in accordance with gaining or losing (political) power. The political system is governed by its code: government/opposition and its programmes are designed to either gain power or stay in power. Saving public money is one result that invariably increases governments' esteem with the middle and upper classes. By still delegating CCDs to the legal system, but now with purpose-specific programmes/instruction, the political system protects itself against societal backlash, because the legal system is immune from potentially negative consequences and because decisions made in the legal system will remain legally correct regardless of the decision's actual impact on children's lives. The only risk for the political system is that the outcomes in the legal system are not necessarily in accordance with political ideals either, but then it remains free to amend the legislation in future and again will be seen as 'doing something' about perceived problems.

Law is not very capable of steering human behaviour and it can merely set normative *expectations* despite people's behaviour and preferences. It can legalise notions of shared parenting and co-parenting and provide opportunity for the contact parent to parent, but it can do nothing about *how* parents parent. And it is how parents parent that ultimately impacts on W&BIC. Not whether parents are legally acknowledged to have a 'right' to parent. Family law is infamous for not having much power to enforce its decisions upon the parties in CCDs. It is therefore very questionable whether the operations of the legal system can offer the change that the political system seeks, such as continued support (especially financially) and involvement from both parents post-separation in their children's lives or that parents will co-operate and collaborate in accordance with the ideals of the new post-separation family.

2.5 Courts as central to the legal system

Luhmann argues courts occupy the centre position in the legal system with the other structures of law (such as legal practice and the legislature) occupying the periphery.⁸⁵ Importantly he stresses that is not a hierarchical situation. He explains that courts' position is justified due to the evolution of the legal system,

⁸⁵ Richard Nobles and David Schiff "Introduction" in Niklas Luhmann *Law as A Social System* above n 6 at 30-31.

which came to demand that courts must actually decide all cases brought before them in line with the prohibition of the denial of justice.⁸⁶ Constitutional law requires the *courts* to take responsibility for interpreting legislation and it is courts that then ultimately decide what is legal and illegal⁸⁷ or, put differently, why and how something will be legal/illegal.

Luhmann is of the view that the rules of organisation also apply to the courts.⁸⁸ Within this particular arena of the legal system, judges have to adhere to the substantive standards of the organisation, its over-arching direction and beliefs within given epochs. Membership of an organisation such as the court system, which also functions bureaucratically due its hierarchical structure, provides incentives and deterrents for its members to make decisions in specified ways.⁸⁹ Organisations have their own routines and discretion is often exercised in routine and repetitive ways.⁹⁰ People who work in an organisation, experience the weight of established expectations from others in the organisation as to how they will make decisions and this contributes significantly to the uniformity of decisions.⁹¹ It is part of the desire for acceptance and peer esteem within the courts' organisation. In the common law system judges are former barristers, and it is in the pursuit of their profession that they "acquire a strikingly homogeneous collection of attitudes, beliefs, and principles, which to them represents the public interest."⁹²

Legislation belongs to both the social systems of politics (as Luhmann generally refers to the political system) and law. Luhmann argues that political trends towards and within the welfare state have had the effect of courts being challenged with purpose-specific conceptualisations in legislation⁹³ and this is particularly true of the current state of the W&BIC doctrine where legislation has identified the elements that will be important in establishing W&BIC. However

⁸⁶ Niklas Luhmann *Law as A Social System* above n 6 at 279.

⁸⁷ Richard Nobles and David Schiff "Introduction" above n 85 at 31.

⁸⁸ Niklas Luhmann *Law as A Social System* above n 6 at 293.

⁸⁹ "Introduction" in Keith Hawkins (ed) *The Uses of Discretion* (Oxford University Press, Oxford (UK), 1992) at 6.

⁹⁰ See e.g. Martha Feldman "Social limits to discretion: an organizational perspective" in Keith Hawkins (ed) *The Uses of Discretion* above n 88 at 163.

⁹¹ *Ibid.*

⁹² John Aneurin Grey Griffith *The Politics of the Judiciary* (3rd ed, Fontana Books, London, 1985) at 198. Griffiths view has been supported from within the legal system by Canadian Chief Justice Nemetz: Nathaniel Nemetz "The concept of an independent judiciary" (1986) 20 U C B Law rev. 286 at 290.

⁹³ Niklas Luhmann *Law as A Social System* above n 6 at 201.

the courts find a solution in the introduced principles of the legislation because it is helpful to again simplify complexity and complements the norms that the legal system were already visualising – shared parenting as equality. In reality, for a judge, an established purpose is merely a guideline for finding conditions that can support a decision in accordance with law’s code i.e. legal or illegal.⁹⁴ Legislation can be purpose-specific in its formulation but still is subjected to law’s conditional programmes. Court decisions are, in the end, therefore never based on purpose-specific programmes.⁹⁵ Of course judges are subject to strict *procedural* rules such as statutory interpretation but:

[T]here can be no guarantee, ... that law will put into effect the policy agenda in the precise way that government intended, as this will always be contingent upon how judges choose to interpret legislation.⁹⁶

As will be seen, in the next chapter, when the political system introduced equal consideration of the parents in CCDs via legislation the courts did not overnight start to award some mothers custody of children (and bearing in mind that CCDs were far and few between and reserved for the wealthy). But once it did, instead of moving towards equality between the parents or more shared care it established the TYD doctrine that lead to mothers being overwhelmingly favoured in CCDs.

Ultimately the meaning given/interpretation by the last judge, judges or majority of the last round of judges to have dealt with the specific litigants’ legal issues will be what the law/the court says it is. When it comes to legislation, the issue for the legal system is different than for the political system. Politics and law have different aims where the former needs to be perceived as having *achieved* its purpose, while the legal system is not subjected to determinations of the success of its decisions.⁹⁷ Even if statutory interpretation may be relevant to determine parliament’s intentions (e.g. the “mischief rule”) in making legal decisions, this only applies to the resolution of ambiguities in the wording of the

⁹⁴ Niklas Luhmann *Law as A Social System* above n 6 at 202.

⁹⁵ *Ibid.*

⁹⁶ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 32. For a practical example of this happening in New Zealand, see Neville Robertson, Ruth Busch, Radha D’Souza and others *Living at the Cutting Edge: Women’s experiences of protection orders Vol 2 What’s to be done? A critical analysis of statutory and practice approaches to domestic violence* (New Zealand Ministry of Women’s Affairs, 2007).

<http://research.waikato.ac.nz/CuttingEdge/>

⁹⁷ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 62.

legislation. Still the ‘if – then’ formula applies in that *if* there is an ambiguity, *then* the courts may have recourse to parliamentary debates to clarify the mischief but it is not suggested that courts then take over responsibility for removing or decreasing the ‘mischief’.⁹⁸

Conditional programmes then include modes of interpretation such as the intentions of the legislature, but where the court is confronted with issues or recourse that have not been pre-determined, decisions still have to be made. Courts must transform indeterminacy into determinacy when needed and it is courts that have to “construct fictitiously the availability or unavailability of principles, where necessary.”⁹⁹ Law’s conditional programmes extract information from the environment and reformulate it (programmes it) so as to convert it into legal communications¹⁰⁰ to which the binary code can ultimately be applied. This is possible because the legal system is cognitively open to its environment.

2.6 Cognitive openness

As an autopoietic system, the legal system must be able to determine whether certain conditions have been met or not¹⁰¹ in relation to its constant production and reproduction of legal communications. Cognitive openness helps the law to co-ordinate its own continued operations with the actual differences in its environment.¹⁰² Lest one thinks that a sophisticated and omnipotent system such as the legal system is thankfully ‘open-minded’ it must be remembered that in autopoietic theory law’s openness is a condition of its closure and as Teubner¹⁰³ reminds us:

Any cognitive activity – be it theory or empirical research – is nothing but an internal construction by the cognizing unit; and every testing procedure that pretends to examine the validity of internal constructions against outside reality is only an internal comparison of different world constructions.

⁹⁸ Ibid.

⁹⁹ Niklas Luhmann *Law as A Social System* above n 6 at 292.

¹⁰⁰ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 60.

¹⁰¹ Niklas Luhmann “Unity of the legal system” above n 35 at 20.

¹⁰² Ibid.

¹⁰³ Gunther Teubner “How the law thinks: toward a constructivist epistemology of law” above n 17 at 737.

Because of its function and status of being the creator of normative expectations, the law especially can hide its self-production and closure by way of its cognitive openness¹⁰⁴ and in the form of its conditional programmes. Law too needs to stay in touch with its environment's production of the legal system's communications and it therefore uses language that is more or less consistent with its usage in the environment.¹⁰⁵ Law could choose to evolve its understanding of 'childhood' (as socially constructed since the seventeenth century¹⁰⁶ with most historians agreeing that this process held pride of place in the eighteenth century¹⁰⁷), 'motherhood' (e.g. by way of the Tender Years Doctrine) and the patriarchal father (making inroads into his once absolute right to custody). Cognitive awareness of its environment is crucial for the legal system's evolution because it cannot apply its operations to its environment if it has no idea of events and developments within the environment – to which it may, or may not, have to apply its code and develop programmes that ultimately determine whether the law will allocate the value legal or illegal to an event or action.

2.7 Structural coupling

Luhmann applies the concept of structural coupling to social systems and sees it as explaining the system's relationship with its environment.¹⁰⁸ Autopoietic theory of social systems retains the idea of "highly selective connections between systems and [their] environments".¹⁰⁹ This does not mean that the coupling systems then contribute to each other's operations in reproducing each system's elements (communications) and networks¹¹⁰ but systems can cause perturbations/irritations/stimulation for each other. Rather than input-output between social systems structural coupling occurs where different systems *repeatedly* exchange communications.¹¹¹ This occurs when a system experiences a perturbation/irritation in its environment (i.e. from another system) that enters the

¹⁰⁴ Niklas Luhmann *A Sociological theory of law* above n 6 at 283.

¹⁰⁵ Niklas Luhmann "Closure and openness" above n 19 at 340.

¹⁰⁶ See e.g. Philippe Ariès *Centuries of Childhood* (Penguin Books, Harmondsworth, England, 1973).

¹⁰⁷ See e.g. Hugh Cunningham *Children & Childhood in Western Society since 1500* (Longman Group Ltd, New York (NY), 1995) at 61ff.

¹⁰⁸ Niklas Luhmann *Law as A Social System* above n 6 at 381.

¹⁰⁹ Niklas Luhmann "Operational closure and structural coupling" above n 20 at 1432.

¹¹⁰ *Ibid.*

¹¹¹ Niklas Luhmann "Operational closure and structural coupling" above n 20 at 1432-33.

‘perturbed’ system’s meaning-making operations, but only once the receiving system has determined how to and whether to produce its own communication in relation to the information received. It must be remembered that information in the environment is received and reproduced by autopoietic social systems wholly internally and therefore the same event will not necessarily be received by different systems in the same way.¹¹² Once structural coupling occurs, developments within the system that causes/caused the perturbation are coupled to parallel but independent developments in the ‘perturbed’ system.¹¹³

The legal system’s coupling with social science – specifically its work on children’s needs and parental relationships – is a prime example. Law could no longer claim its ability to decide what is best for children in CCDs without seemingly ‘co-operating’ with the new system that had emerged as ‘experts’ in precisely the area where law had been making decisions: children’s welfare. The rise in social science data/research findings had become an irritant in law’s environment that required coupling. What happens however is that the legal system extracts and selects *some* of the ideas from social science (for example that children suffer because of divorce since they see one parent less) that will suit law’s function of creating and stabilising normative expectations, (shared parenting or the legality of ongoing relationships with both parents).

All the environment/another social system does is trigger perturbations/irritations within the system. However, where different systems select the same event for response, structural coupling can occur which means there is a “twofold membership of events”.¹¹⁴ Both systems seemingly have children’s W&BIC in mind but may have different ideas of how that should be achieved. (E.g. conflict – litigation – is harmful for children, ongoing relationships with both parents is good for children).

Structural coupling between social systems indicates a particular relationship between them and systems structurally couple if they presuppose specific qualities in another system and rely on these as available for use.¹¹⁵ For example, the legal system may view political communications in the form of legislation as an instrument that will allow and support the court to make better or

¹¹² Niklas Luhmann “Closure and openness: on reality in the world of law” above n 19 at 343.

¹¹³ Michael King “The ‘truth’ about autopoiesis” above n 5 at 225.

¹¹⁴ Niklas Luhmann “Closure and openness: on reality in the world of law ” above n 19 at 342.

¹¹⁵ Niklas Luhmann *Law as A Social System* above n 6 at 382.

more decisions about when arrangements will be legally right or wrong, while the political system may view the legislation as a means to improve political problems (for example reduce social support spending) which will ensure greater political support from the voting public. With legislation being the point of structurally coupling between the legal and political systems,¹¹⁶ these two systems are mutually dependent and co-evolve.¹¹⁷ Increased complexities in the political system can have the effect of increased complexity in the legal system because these two systems are closely linked. This implies co-evolution but not synchronisation between the systems since they both remain autopoietic¹¹⁸ each operating with their own code and programmes.

The political system in modern society has its own unique code by which it operates and its own unique function. The former is a two-level code: firstly its binaries are government/governed, which means that the political system identifies itself in relation to those it can exercise power over.¹¹⁹ With the long history of the nuclear family having been constructed and positioned as the basic organising unit and ‘foundation’ of society in the western paradigm, it needs little clarification as to whether the government sees itself as ‘governing’ families, thus that level of the code, is satisfied.¹²⁰ Secondly the ‘government’ side of this binary then also operates in accordance with the split between government and opposition as expressed by political parties¹²¹ i.e. the second level of the political system’s code by which it operates is government/opposition. The consequence is of course that whenever the government expresses itself by exercising its power, it does so in contrast to its opposition that constantly competes for the power. Holding or gaining power is the code under which the political system operates.

The function of the political system is to make collectively binding decisions (e.g. legislation, regulations and by-laws), which it does through the

¹¹⁶ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 70.

¹¹⁷ Niklas Luhmann *Law as A Social System* above n 6 at 382-383.

¹¹⁸ Niklas Luhmann *Law as A Social System* above n 6 at 383.

¹¹⁹ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 71.

¹²⁰ Parkinson also refers to and discusses the politicization of family law: Patrick Parkinson *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, New York (NY), 2011) chapter 1.

¹²¹ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 72.

medium of power.¹²² It is the system in modern society that holds power and is responsible for making decisions that reaches across the boundaries of other systems thereby stimulating structural coupling between those systems affected. Since the creation of the concept of ‘rule of law’ and the doctrine of ‘the sources of law’ the political system’s power has been legitimised¹²³ and thereafter the law offered an area for political creativity.¹²⁴ Note also that the political system acknowledges the autonomy of the legal system when legislation or changes to legislation is anticipated by often calling for reports from the legal system, but recommendations made in such reports will not necessarily be followed by the political system. While politically desirable consequences may steer courts the autopoietic nature of differentiated functional systems’ operations means that the political system itself cannot pre-empt or determine how issues will be decided or choices made *within* those other social systems. By virtue of their self-reference (closure) they will operate in accordance with their own self-determined communications (for example in the legal system precedents, rules, doctrines, procedures i.e. its own conditional programmes). The legal system at times requires action (change in legislation) from the political system in order to cope with a changing environment and, conversely, the political system requires a forum to pass political problems on to and the legal system can deal with these by way of self-reference, by referring to established or newly introduced legal norms.¹²⁵ The political system does provide broad orientations for the recipient systems on matters that the latter find it cannot adequately resolve without such orientations¹²⁶ and do therefore heavily influence the formation of normative expectations. I suggest that this is what has happened as regard W&BIC.

Importantly, changes in one system will not always result in the same changes in the other. For example, when no-fault divorce was first introduced by the political system via legislation, the aim was to reduce litigation and thus cut costs.¹²⁷ However the legal system found itself with a huge increase in workload

¹²² Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 70.

¹²³ Niklas Luhmann *Law as A Social System* above n 6 at 362ff.

¹²⁴ Niklas Luhmann *Law as A Social System* above n 6 at 363.

¹²⁵ Niklas Luhmann *Law as A Social System* above n 6 at 371.

¹²⁶ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 70.

¹²⁷ See e.g. Lynn D Wardle “No-fault divorce and the divorce conundrum” (1991) *BYU L. Rev.* 79 at 79-80.

and, in addition, with the loss of a primary programme it used to determine child custody, namely the behaviours of the parties that led to the divorce. When W&BIC was introduced by the legal system it was to justify deviation from normative expectation (father's right to custody). However, eventually and over time the political system found itself spending large amounts on social support/benefits under the 'mother principle'.

By performing its function of stabilising normative expectations, the law aids the political system but it must be remembered, in accordance with the legal system's internal determinations of the political system's communications.

Communications come about through a synthesis of selected information, and selective understanding (or misunderstanding).¹²⁸ Luhmann explains that producing and delivering communication "is always a selective occurrence"¹²⁹ where the self-production of communications "grasps *something* out of the actual referential horizon ... and leaves *other things* aside".¹³⁰ The social system views its environment – comprised of other social systems – as a "horizon".¹³¹ For Luhmann, the law must invariably simplify complex material in order to reduce it to norms, over time, which can be relied upon in order for society and its other systems to know what to anticipate as regards legal/illegal.

¹²⁸ Michael King and Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* above n 16 at 9.

¹²⁹ Niklas Luhmann *Social Systems* above n 8 at 140.

¹³⁰ *Ibid.* (Emphases in original.)

¹³¹ Niklas Luhmann "Closure and openness: on reality in the world of law" above n 19 at 337.

Chapter 3 Jurisdiction for the development of the welfare principle

3.1 Introduction

This chapter will explore how the law had initiated and developed the W&BIC doctrine and its first conditional programmes in relation to custody decisions. The starting point will be to determine how the common law legal system had established jurisdiction over children's interests in founding the *parens patriae* doctrine. It is evident that this development had occurred autopoietically. I will then proceed by looking at the English law as inherited by New Zealand at the time of its colonisation by England. Thereafter some explorations as to the New Zealand legal system's communications on the W&BIC principle will be offered. The way in which the legal system created and enabled the W&BIC doctrine to develop from within the legal system offers a fine example of its self-referential operations and closure as is inherent to autopoietic social systems. At the time when the first notions of W&BIC emerged, the law had already differentiated into one of society's autonomous subsystems, which saw as its function the creation, and stabilisation of norms that will stand – over and within various epochs – despite disputes or actual experience.

3.2 Establishing law's jurisdiction: *parens patriae*

The doctrine that the king –via the courts – is 'parent of the country' (*parens patriae*¹³²) and must act as a wise parent in cases involving children, came about because of recursive errors within the legal system but due to law's closure or self-reference it became entrenched as a legal issue to be determined by law regardless of the doctrine's dubious emergence. The supreme duty (today) to uphold the welfare interests of children was first grounded in the private property

¹³²The *parens patriae* jurisdiction in respect of those people of 'unsound mind' is statutorily enshrined in New Zealand in the Judicature Act 1908, s 17. As regards children the jurisdiction was confirmed as a residual sovereign power in *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA) at 272 per Cooke J.

interests of the nobility in feudal England.¹³³ From the reign of Edward I (ending in 1307) the English Crown had claimed a specific wardship over ‘natural fools and idiots’, and minor heirs’ property rights where the father had died. This was codified in statute in 1324¹³⁴ and the jurisdiction was eventually vested in the newly established Court of Wards and Liveries in 1540.¹³⁵ It was the practice of that court to sell the wardship to mothers or equally often to strangers, suggesting that the wardship of minors was legally administered for financial gain to the Crown.¹³⁶ Wardship of mentally disabled people and fatherless children’s land tenures preserved their estates but also advanced the king’s revenues that were collected on those. No mention was made of the Crown’s status as parent or father and Clark observes “English law seems singularly devoid of concern for children until at least 1535.”¹³⁷

The first time that the king was described as acting as a ‘father’ to those who lacked capacity was in 1567 by a law reporter called William Staunford.¹³⁸ Custer, after having done exhaustive research into the origins of the ‘parent’ status of the Crown believed that: “[t]he parenthetical *as a father* mentioned by Staunford may ultimately have given the doctrine of *parens patriae* its name”¹³⁹ and in fact no sources had established a responsibility for the welfare of children to that date. The Court of Wards and Liveries showed very little concern for the welfare of its wards and paid prime attention to the collection of revenues, which made the institution distinctly unpopular.¹⁴⁰ For nearly a hundred years, the legal system could continue its operations regardless of its unpopularity (ignored perturbation) due to its autonomy and the closure of its operations but also because; politically the Crown did not intervene via legislation. Eventually

¹³³ See e.g. Lawrence Custer “The origins of the doctrine of *parens patriae*” (1978) 27 Emory L. J. 195 at 195-96; John Seymour “Parens Patriae and wardship powers: their nature and origin (1994) 14 Oxford J. Legal Stud. 159 at 162-65.

¹³⁴ Statute *Prerogative Regis* 17 Edw. 2, cc. 1-16 (1324). Henry Esmond Bell *An Introduction to the History and Records of the Court of Wards and Liveries* (Cambridge University Press, Cambridge (UK), 1953) at 128 citing W Staunford *An Exposition of the Kinges Prerogatiue* (London, 1567).

¹³⁵ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 195.

¹³⁶ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 199.

¹³⁷ Natalie Loder Clark “Parens patriae: history and present status of state intervention into the parent-child relationship” in *Current Perspectives in Psychological, Legal and Ethical Issues Vol IA* (Jessica Kingsley Publishers Ltd, London, 1991) 109 at 118.

¹³⁸ Neil Howard Cogan “Juvenile law before and after the entrance of ‘parens patriae’” (1970) 22 S.C.L. Rev. 147 at 159.

¹³⁹ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 201. Italics in original.

¹⁴⁰ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 199, 201.

though, growing instability¹⁴¹ and violence about, inter alia, the feudal institutions, saw the Court of Wards and Liveries and the feudal system with its doctrine of tenure abolished in 1660.¹⁴² This did not bring an end to the legal notion/communication that the courts had a parental role in relation to those who lacked capacity although it was some time before the courts had an opportunity to raise it again. Legal principles/programmes and communications (e.g. judgments) stay part of the legal communications network until the system alters, expands or abolishes them. With the legal system's establishment of the doctrine of parliamentary supremacy/legislative supremacy, the political system also has the power to proscribe legal doctrines by way of legislation. Nothing of the sort happened and the Crown must have therefore been content with what subsequently became the establishment of the *parens patriae* notion within the legal system.

In 1696, Lord Somers, in the case of *Falkland v Bertie*¹⁴³ held that infants and “ideots” were among several things that belonged to the Crown as ‘*pater patriae*’ and that they were formerly “to be removed to the Court of Wards by the statute; but upon the dissolution of that court came back again to the Chancery”.¹⁴⁴ The oddity in that legal communication (judgment) is that *general* wardship over minors and the mentally disabled was never transferred to the Court of Wards and Liveries and therefore could not have been transferred to the Chancery Court. Where a father died prior to his heir's majority, or a dispute arose as to the identity of the heir, or the nature of the land tenure, the Crown became interested in the child to ensure proper passage of wealth and, importantly, to collect tax on the property.¹⁴⁵ Thus the Crown formerly had the *feudal* right of wardship under the tenure system over a minor's *property* until the

¹⁴¹ This was a time, in England, of great political instability and growing civil unrest that eventually, lead to The Glorious Revolution of 1688. Conflict arose in the realms of religion, politics, economics and law: political conflict between parliament and the Crown; religious conflict between sectarian dissent (Puritanism) and orthodox establishment (Anglicanism); social and economic conflict between country (landed gentry) and central bureaucracy (the courts). See Harold J Berman *Law and Revolution II: The impact of the protestant reformations on the western legal tradition* (Harvard University Press, Cambridge (MA), 2003) at 201-224. For an account of the same instability in Germany in the previous century see pp 31-70.

¹⁴² Tenures Abolition Act, 12 Car. II, c. 24 (1660).

¹⁴³ (1696) 2 Vern.333 at 342; 23 Eng. Rep. 814 at 818.

¹⁴⁴ Cited by John Seymour “*Parens patriae* and wardship powers: their nature and origin” above n 133 at 167; Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 201-02.

¹⁴⁵ Marvin Ventrell “Evolution of the dependency component of the juvenile court” (1998) 49 Juv. & Fam. Cr. J. 17 at 20.

minor reached majority but that system had been abolished nearly forty years before *Falkland*. Lord Somers cited no authority upon which he based his claim that the king was ‘pater patriae’ to all infants and Seymour observes that the *parens patriae* doctrine could just as well have been “plucked from the air.”¹⁴⁶ As Luhmann says, if the law cannot be found, it must be invented.¹⁴⁷ Custer argues that it is likely that Lord Somers was familiar with the work of Staunford, which was the only source that could be found as regards the Crown’s father status and responsibility.¹⁴⁸ In any event, *Falkland* was the first jurisprudential assertion of the Crown’s parental status.

As Luhmann explains, normative expectations are created and stabilised by the legal system over time. Twenty six years went by before Lord Somers’ communication was invoked by the Chancery court in the 1722 case of *Eyre v Shafsbury*¹⁴⁹ a case which actually did involve the care and custody of minors. The conditional programme of precedent, “the hallmark of the modern English common law”¹⁵⁰ had been established by then and therefore the operation of self-reference; referring back to the system’s own communications as a ‘source’ of law and to establish authority. The court also took the opportunity to reassert its jurisdiction over children. However, this time the authority cited for finding that the Crown has responsibility for the care of infants was *Beverley’s Case*¹⁵¹ decided in 1603. Coke reported that King’s Bench case which involved a claim of lack of capacity as a defence to avoid debt. Custer examined the original transcripts of that case and found that either Coke or his printer had inserted “enfant” instead of “ideot” where the Crown’s jurisdiction over mentally disabled people was stated in the 1610 edition. This error was repeated and even expanded upon in the translated English edition of 1658.¹⁵² Custer also established that the error was not corrected until 1826 where, in that edition of Coke’s *Reports*, only

¹⁴⁶ John Seymour “*Parens patriae* and wardship powers: their nature and origin” above n 133 at 173.

¹⁴⁷ Niklas Luhmann *Law as A Social System* above n 6 at 289.

¹⁴⁸ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 201. The Crown, before the abolishment of tenure, had had the feudal right of wardship over infants which derived from the system of tenure, not from the notion that the king is *pater patriae*. See Lawrence Custer at 202.

¹⁴⁹ 24 Eng. Rep. 659 (Ch. 1722).

¹⁵⁰ See e.g. Harold J Berman *Law and Revolution II: The impact of the protestant reformations on the Western legal tradition* above n 141 at 208; 269.

¹⁵¹ 76 Eng. Rep. 1118 (K.B. 1603).

¹⁵² Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 203. This error was also previously confirmed by Cogen, see Neil Howard Cogan “Juvenile law, before and after the entrance of ‘*parens patriae*’” above n 138 at 160.

the word “idiot” is used throughout. Lord Macclesfield in *Eyre* chose to rely on this precedential ‘authority’ (rather than the non-precedential writing of Staunford) because “[s]omehow the old *Beverley’s Case* had been found, and ... used.”¹⁵³ Thereafter *Eyre* became the precedent to be relied upon for upholding the Crown and the equity courts’ protective authority over minors.¹⁵⁴

Three years later in *Shaftsbury v Shaftsbury*¹⁵⁵ Coke’s report was again invoked by Chancery but expanded upon as having *compared* the king’s protection of infants to the protection of idiots. This was a double error because the court “incorrectly restated even the misprinted report of [*Beverley’s Case*].”¹⁵⁶ As Custer points out, Coke never compared the *parens patriae* authority over children to that over ‘idiots’ but only mistakenly inserted “enfants” among the Crown’s prerogative powers.¹⁵⁷ Moreover the Chancery court in *Shaftsbury* then established that the care of children had *reverted* to that court when the Court of Wards and Liveries had been abolished despite the fact that Chancery never exercised this jurisdiction prior the establishment of the Court of Wards and Liveries.¹⁵⁸ The point here is that had it not been for law’s need to find authority within its own network of communications, (its closure) the error – once it was discovered – could have been rectified but this would probably have caused too much consternation in the environment – for those about whom decisions had already been made, and within the system and therefore the likely explanation is that continued assertion of law’s ability and expertise was preferred.

Thereafter the court’s *parens patriae* authority in relation to minors became entrenched in the legal system. Instead of the doctrine having developed out of necessity and legal reasoning, the English judges, committed to the by then developed conditional programme of *stare decises*, (further adding to and ensuring the closure of the legal system) could find precedent in a printing error¹⁵⁹ and thereby firmly declaring *parens patriae* to be legal/lawful/law. By 1893 Lord

¹⁵³ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 204.

¹⁵⁴ *Ibid.*

¹⁵⁵ 25 Eng. Rep. 121 (Ch. 1725).

¹⁵⁶ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 205.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Lawrence Custer “The origins of the doctrine of *parens patriae*” above n 133 at 195.

Esher in the case of *R v Gyngall*¹⁶⁰ felt confident to claim this usage of *parens patriae* as having been exercised by the court “from time immemorial”.¹⁶¹

This brief overview of the initial establishment of the legal system’s authority to decide what is best for children – and why society and other social systems to this day rely on the legal system to make these decisions after non-legal alternatives prove ineffective – is a noteworthy example of how the legal system operates to produce and re-produce legal communications from within the system. From the (erroneously) induced *parens patriae* the W&BIC doctrine evolved, as law produced ever more communications regarding its scope and the law’s jurisdiction so that the court today apparently represents the wisdom of the legendary king Solomon. For example Cross J’s assertion has been relied upon by both the House of Lords and the English Court of Appeal.¹⁶² His honour said:

[Parents in custody applications] ... are *committing* their child to the protection of the court and *asking the court to make such order as it thinks fit for its benefit*.¹⁶³

From the start of the establishment of the legal system in New Zealand, *parens patriae* was one particular feature of the High Court’s jurisdiction and with the establishment of the Family Court the principles established under that doctrine continue to influence that court’s duty.¹⁶⁴

3.3 Probable and possible irritants

What was going on in society at the time when the courts established its jurisdiction over children’s interests? What could have been the ‘irritations’ in its environment that the legal system chose to react to? No doubt the factors were multiple and open to interpretation¹⁶⁵ (and speculation). Some however can be identified. The (former) Court of Wards and Liveries primarily operated to secure

¹⁶⁰ [1893] 2 Q.B. 232.

¹⁶¹ Ibid at 239 cited by John Seymour “*Parens patriae* and wardship powers: their nature and origin” above n 133 at 173.

¹⁶² B D Inglis *New Zealand Family Law in the 21st Century* (Thomson Brookers, Wellington, 2007) at 231.

¹⁶³ *In re B (an Infant)* [1965] Ch 1112 at 1117. (Own emphases).

¹⁶⁴ B D Inglis *New Zealand Family Law in the 21st Century* above n 162 at 228.

¹⁶⁵ See Neil Howard Cogan “*Juvenile law before and after the entrance of ‘parens patriae’*” above n 138 at 166-181 for a discussion on the case law, some surrounding circumstances and the expansion of the court’s *parens patriae* jurisdiction since *Falkland* up to 1828.

revenue for the government.¹⁶⁶ It is not the purpose here to delve into the corrupt and shameful practices that went on in the court which also added to its unpopularity and the eventual abolition¹⁶⁷ under the Tenures Abolition Act 1660. Of relevance is that a major source of government revenue was under threat. Ways had to be found to protect that government interest.

The Act explicitly gave fathers the power to appoint a guardian for an infant heir, who would act on behalf of the infant after the father's death or even during his lifetime if the father made such a specification.¹⁶⁸ Courts subsequently interpreted that statute as having displaced the mother's guardianship by nurture.¹⁶⁹ By involving courts in child custody – even as enforcers of fathers' rights – the Act provided for judicial intervention which created a legal shift that would eventually undermine those rights.¹⁷⁰ Fathers wanted to appoint guardians, not because they did not want their wives to have guardianship, but because the law had given a wife no legal power by which she could manage the 'family' estate after her husband's death or while he was still alive but for example needed to travel and have someone oversee his affairs. She would continue to care for the children while the appointed male guardian managed the children's estates. This was then considered to serve the child's interests. In this way guardianship as a legal issue was introduced. While the father was granted a legal means by which he could utilise his power via a legal instrument, a father's absolute rights became subject to judicial interpretation and discretion and “the all-encompassing right of child custody was no longer the father's, but that of the judge”.¹⁷¹ It is for this reason that the *parens patriae* doctrine was re-invented (reproduced as per Luhmann) in England i.e. to give the legal system wider jurisdiction to regulate guardianships.¹⁷² I say 're-invented' because without insight into every court decision we can only rely on the first *recorded* court decision that actually

¹⁶⁶ See The National Archives (UK) for a concise summary of its history and functions at <http://www.nationalarchives.gov.uk/catalogue/DisplayCatalogueDetails.asp?CATID=258&CATLN=1&FullDetails=True&j=1> Accessed 16 July 2011.

¹⁶⁷ See e.g. Henry Osmond Bell *An Introduction to the History and Records of the Court of Wards and Liveries* (Cambridge University Press, London, 1953).

¹⁶⁸ Tenures Abolition Act 1660, 12 Car.II, c. 24, § 8.

¹⁶⁹ *Eyre v. Shaftesbury* (1722) 24 Eng. Rep. 659, 667.

¹⁷⁰ Sarah Abramowicz “English child custody law, 1660-1839: the origins of judicial intervention in paternal custody” (1999) 90 Colum. L. Rev. 1344 at 1344.

¹⁷¹ Sarah Abramowicz “English child custody law, 1660-1839: the origins of judicial intervention in paternal custody” above n 170 at 1345.

¹⁷² Sarah Abramowicz “English child custody law, 1660-1839: the origins of judicial intervention in paternal custody” above n 170 at 1351.

survived but it seems plausible that *parens patriae* had been espoused by the law before *Bertie v Falkland*.¹⁷³ Abramowicz also states that the court in *Falkland* “summoned up the doctrine of *parens patriae*, and in doing so described the doctrine as it had never been described before.”¹⁷⁴ But the upshot was that *parens patriae* then became relevant to child custody primarily for the purpose of regulating testamentary guardianship at the time and not to other matters relating to children’s welfare and best interests. However, when mothers and their supporters began to agitate for *maternal rights*, the legal system fell back on the notion that a father’s rights were absolute despite the ability of judicial interference that *parens patriae* had established.

Historians generally agree that profound changes occurred from the sixteenth century onwards that impacted upon the ideals and behaviour of families, family life and childhood.¹⁷⁵ The social background of the time was first the growing intellectual re-emergence of humanism which started during the Renaissance and that proclaimed, inter alia, that children held the key to the future of the State, and thus that their upbringing needed to be shaped accordingly. The family came to be seen as (potentially) a model of the State and because the State was dominated by men, fathers again had to be the crucial figures to govern and organise the family in a manner that would produce good citizens: obedient, religious, and upholding harmonious relationships.¹⁷⁶ This led to a break with medieval practice where mothers were viewed as primary in the child’s life for especially the first seven years. In the religious system— arising during the Reformation that followed the re-emergence of humanism – both Protestantism and Catholicism supported the notion that the family is a where children should be raised for the good of the State and the church, and both movements supported the education of children to fulfil their role as good citizens of the State and members of the church.¹⁷⁷ This was possibly a welcome stimulant in the legal system’s environment. Fathers, under the legal adoption of the Roman notions of *patria potestas* and *pater familias*, had to rule their families as the King did his subjects.

¹⁷³ Above n 150.

¹⁷⁴ Sarah Abromowicz “English child custody law, 1660-1839: the origins of judicial intervention in paternal custody” above n 170 at 1532.

¹⁷⁵ See e.g. Philippe Ariès *Centuries of Childhood* above n 106; Edward Shorter *The Making of the Modern Family* (Collins, London, 1975); Lawrence Stone *The Family, Sex and Marriage in England 1500-1800* (Weidenfeld & Nicolson, London, 1977).

¹⁷⁶ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 42.

¹⁷⁷ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 46-61.

A father's responsibility and authority was unlimited and the advice books on parenting that appeared – and which the upper classes and merchant families read – were aimed at fathers, advising them on child rearing practices.¹⁷⁸ Desiderius Erasmus produced numerous works on the importance of early childhood education and stressed the crucial role of the father in shaping his son's character¹⁷⁹ while the mother had the role of nurturing. The Protestant Justus Menius wrote that “[t]he diligent rearing of children is the greatest service to the world, both in spiritual and temporal affairs, both for the present life and for posterity.”¹⁸⁰

It can be speculated, in light of the fact that the law is cognitively open to and aware of developments in its environment, that this movement in social thought and systems affected the legal system also. As will be discussed below, it most definitely did as regards a father's absolute right to custody of his children. Judges may have also seen the law as playing an important role, where it could and via the doctrine of *parens patriae*, in ensuring that children receive proper education in addition to the established legal protection for the preservation of a child's estate. Expanding the application of *parens patriae* to beyond the protection of just the child's property could, in cases of guardianship after a testator's (father) death, serve to protect and ensure children's education. For example, where a will made no provision for the expense of the children's education the court ordered such provision to be made from the deceased's estate.¹⁸¹ In *Barwick v Barwick*¹⁸² the executors of a will were ordered to put aside a specified amount of money for the children's education and where a husband died making no provision for his (legitimate) unborn child, the court ordered that

¹⁷⁸ Philip Gavitt *Charity and Children in Renaissance Florence: The Ospedale Degli Innocenti, 1410-1536 (Studies in Medieval & Early Modern Civilization)* (Ann Arbor, Northumberland, 1990) at 275-279.

¹⁷⁹ It is unclear how much Erasmus thought daughters should partake in this education but some commentators felt it likely that he was primarily concerned with boys: see e.g. Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 44. This would make sense in accordance with the belief that the boy child had such an important role to play as a father in the future i.e. that more attention had to be given to him during upbringing and education.

¹⁸⁰ Quoted in Steven E Ozment *When Fathers Rules: Family life in Reformation Europe* (Harvard University Press, Cambridge (MA), 1983) at 132.

¹⁸¹ *Bright v Chappell*, Tothill 6, 21 Eng. Rep. 106 (Ch. 1629-1630) Cited in Neil Howard Cogan “Juvenile law before and after the entrance of ‘parens patriae’” above n 138 at 152, n 25.

¹⁸² Tothill, 52, 21 Eng. Rep. 121 (Ch. 1601-1602). Cited in Neil Howard Cogan “Juvenile law before and after the entrance of ‘parens patriae’” above n 138 at 152, n 26.

the executors make provision for a sufficient allowance from the deceased's estate.¹⁸³

This of course would have only had application for those who stood to inherit, thus as was the case for most of the law's history, the operations of the legal system in settling disputes were only accessible to those with wealth and assets. Nonetheless, the law started to show concern for children's education at least before *Falkland*¹⁸⁴ in 1696. Due to the emergence of the thoughts on childhood education and its justification as being in the best interests of the State, the political system also moved to make schools more widely available to the laity¹⁸⁵ in order to allow for greater education of children. Therefore the importance and proposed benefits of educating children took hold and moved the religious system, the political system, and the legal system to choose to lend their weight in support.

For the most part however, the court at that time, acting as 'parent' saw its role only in relation to issues surrounding children's property and the protection thereof. Establishing and stabilising normative expectations take time and the legal system's autonomy to expand on its own communications as to what will be legal/illegal is protected by its autopoiesis. It was however not until *In re Spence*¹⁸⁶ that a court held that intervention to protect a child's person from its parent or guardian, i.e. in the absence of property, was legal.

¹⁸³*Pope v Moore*, Tothill 93, 21 Eng. Rep. 133 (Ch. 1627-1628) Cited in Neil Howard Cogan "Juvenile law before and after the entrance of 'parens patriae'" above n 138 at 152, n 27.

¹⁸⁴Above n 152.

¹⁸⁵Harold J Berman *Law and Revolution II: The impact of the protestant reformations on the Western legal tradition* above n 141 at 350.

¹⁸⁶41 Eng. Rep. 937, 938-939 (1847).

Chapter 4 The English legal system and the custody of privileged¹⁸⁷ children

4.1 Introduction

New Zealand was colonised by England during the first half of the nineteenth century, and legal practice was at first and for some time, taken from English practice.¹⁸⁸ In fact New Zealand's first statutes on matrimony and guardianship of children were near carbon copies of the English Acts.¹⁸⁹ English law in this area retained its ecclesiastical character for centuries until the early years of the nineteenth-century.¹⁹⁰ I will therefore start by looking at the developments in the English legal system that New Zealand inherited. The starting point is to look at how the law operated to legalise the 'rule of the father' which led to his unequivocal custody of children that was accepted as being in children's best interests. This was done by legally controlling marriage and the position of husbands and wives.

4.2 Establishing the patriarchal family

A closer look at family relations in England under Anglo-Saxon law, prior to the Norman Conquest reveals that a wife and mother once had the right to leave a marriage, to take the children with her and to claim half of the marital property.¹⁹¹ Indeed marriage was a private agreement between a man and a woman with hardly any link with the church or the law.¹⁹² This is not to say that

¹⁸⁷ It is beyond the scope of this thesis to include discussion of the treatment of the poor in any of the common law jurisdictions. However it is fully recognised that the English political system dealt very differently with poor children and their parents under the English Poor Laws. See e.g. Jacobus tenBroek "California's dual system of family law: it's origins, development and present status" (1964) 16 Stan. L. Rev. 257; Ivy Pinchbeck and Margaret Hewitt *Children in English Society: Vol II* (Routledge & Kegan Paul, London, 1973); R Dingwall, J M Eekelaar and T Murray "Childhood as a social problem: a survey of the history of legal regulation" (1984) 11 (2) J. Law & Soc'y 207; James J Fishman "The political use of private benevolence: the statute of charitable uses" (2008) Pace Law Faculty Publications, Paper 487. Available at <http://digitalcommons.pace.edu/lawfaculty/487/>;

¹⁸⁸ B D Inglis *Sim and Inglis Family Court Code* (Butterworths, Wellington, 1983) xx-xxi.

¹⁸⁹ B D Inglis *Sim and Inglis Family Court Code* above n 188 at xxii – xxiv.

¹⁹⁰ Harold J Berman *Law and Revolution II: The impact of the Protestant reformations on the Western legal tradition* above n 141 at 352-53.

¹⁹¹ Henry Foster and Doris Jonas Freed "Life with father" (1978) 11 Fam.L.Q. 321 at 321; Christine Fell *Women in Anglo-Saxon England* (British Museum Publications, London, 1984) at 42; 89-90; For a wife and mother's property rights see Florence Griswold Buckstaff "Married women's property in Anglo-Saxon and Anglo-Norman law and the origin of the common-law dower" (1893) 4 Annals of the American Academy of Political and Social Science 33. <http://www.jstor.org/stable/10.2307/1009013>

¹⁹² Alison Diduck and Katherine O'Donovan *Feminist Perspectives on Family Law* (Routledge-Cavendish, Abingdon (UK), 2006) at 20. See also Doris Mary Parsons Stenton *The English Woman in History* (Allen & Unwin, London, 1957) chapter 1.

husbands and wives were considered equals in all respects but customary practice offered significantly more protection and rights for married women than what the common law imposed on them.

At the start of establishing the common law system, the English royal courts did not reveal the sources of the principles they applied as they started to re-shape local custom.¹⁹³ It is accepted however that with the establishment of common law the English legal system also took principles and rules from the Roman legal system¹⁹⁴ because, inter alia, many of the English judges and lawyers at the time were educated in *Corpus Iuris Civilis* in Europe.¹⁹⁵ Pater Patriae was one principle taken from Roman law in order to establish the normative expectation of a father's power over his children and their mother.¹⁹⁶ It can be argued that the English legal system was in need of established conditional programmes or legal communications so as to provide established ideas as to what is legal/illegal or matters of law/non-law. Perhaps if, as Luhmann says, legal communications can only be produced by the/a legal system, then adopting them from another jurisdiction is acceptable just so long as they are *legal* communications. Subsequently the legal conditional programmes of precedent, stare decisis and the legally created fiction that judges simply declare the law guaranteed that judicial decisions would be presented as the product of reason.¹⁹⁷ Normative expectations do not reflect reality but merely state what ought to be with the joint sanction of 'law'.

Later, the so-called general immemorial custom of the realm, of which judges were the oracles, ... was pure fiction; ... It was in order to provide the Common law with a foundation in agreement with the traditional, canonical and Roman theories of the sources of law that this concept of general immemorial custom was ... invented. It was not based on any reality.¹⁹⁸

These conditional programmes (doctrines and rules) would protect the unity and closure of the system. The legal system had already differentiated into a

¹⁹³ René David and John E C Brierley *Major Legal Systems in the World Today* (3rded, Stevens & Sons, London, 1985) at 323.

¹⁹⁴F Pringsheim "The inner relationship between English and Roman law" (1933-1935) 5 Cambridge Law Journal 347-65; C K Allen *Law in the Making* (Oxford University Press, London, 1961) at 262-264.

¹⁹⁵ William Holdsworth *Some Makers of English Law: the lectures 1937-1938* (Heinonline<http://heinonline.org>) at 2. Downloaded on 11 July 2011.

¹⁹⁶ Stephen M Cretney "What will the women want next"? The struggle for power within the family" 1925-75 (1996) L. Q. Rev. 110 at 112-13.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

closed, autonomous system and society had no choice but to accept its autonomy. In other words, that only the legal system can decide if something is or is not legal/illegal had been accepted. It also confirms the paradox of law's code, that is, that the code cannot be applied to itself. It thus cannot be determined whether the law's application of its code as to what is legal or illegal or law/non-law is in fact ultimately right or an 'über-truth' at all. The law is what the law says it is.

In addition, the growing power of the Christian Roman Catholic Church and the establishment of feudal law¹⁹⁹ after the Norman Conquest changed women's legal status for centuries to come. Roman Catholic canonists gradually incorporated the Christian theory of 'unity' into marriage and this became an available irritant in the legal system's environment. The legal system ultimately chose to embrace this concept of unity between husband and wife thereby adding the value 'legal' to its institution²⁰⁰ and this was still underpinned even at the separation of canon and common law.²⁰¹

The law 'structurally coupled' with religion and reproduced the religious invention of husbands' and wives' unity as a legal conditional programme namely 'coverture'. Blackstone defined coverture as follows:

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 ... a *feme-covert*... under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture* ...²⁰²

As said, this changed the legal position of English women with men and fathers placed in a superior and hierarchical position and women as basically mothers to legitimate (born within a legal marriage) heirs, submissive to their husbands and in need of men's care – all made legal by and in accordance with 'coverture'.²⁰³

The 'unity' of English husband and wives as proclaimed by the Roman Catholic

¹⁹⁹ Feudalism revolved around hierarchical ownership of land and loyalty as inter alia related to state military service which therefore prioritised men. See e.g. Susan Atkins and Brenda Hoggett *Women and the Law* (Basil Blackwell Ltd, Oxford (UK), 1984) at 10.

²⁰⁰ "Therefore shall a man leave his father and his mother, and shall join to his wife: and they shall be one flesh." *The Bible: King James Version*, Genesis Chapter 2 verse 24.

²⁰¹ Frederick Pollock and Frederic William Maitland *The History of English Law before the Time of Edward I* (Cambridge University Press, London, 1968) at 364-365.

²⁰² William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford (UK), 1765-1769) Vol. 1, Chap. II at 442 cited in Claudia Zaher "When a woman's marital status determined her legal status: a research guide on the common law doctrine of coverture" (2002) 93 (3) *Law Library Journal* 459 at 460.

²⁰³ Susan Atkins and Brenda Hoggett *Women and the Law* above n 199 at 9-10.

church was what Luhmann called a block acceptance,²⁰⁴ reproduced as the legal rule of coverture.

4.3 Custody of children post-divorce

Judges in England up to the second half of the nineteenth century readily enforced a father's unlimited right to custody of his children where he had not forfeited his paternal rights through some legally accepted misconduct, such as cruelty, lack education or financial support of the child.²⁰⁵ Cruelty had to be directed at the child, not the mother, and be shown to be a danger to life and limb. The law on custody of children used as its starting point again, the Roman legal doctrine of paternal power (*patria potestas*) which was widely accepted and applied as giving a father absolute rights to his children as his chattels.²⁰⁶ When the courts were eventually faced with disputes about the custody of children in inter-spousal disputes, the father was lawfully deemed to be the primary right-holder – both economically and as to his right to benefit from his children's services.²⁰⁷ This was upheld without mention of what will be best for the child(ren) at the time because questioning a father's 'natural' right and position was unacceptable, thus legally wrong, according to law's binary code, while upholding his position was legally right.²⁰⁸ Not even after his death could the mother or the children legally expect that she will be allowed custody of her children for if the father appointed a testamentary guardian, the father's will would override her position,²⁰⁹ such as it was, and that appointed guardian would be responsible for the children. For all the criticism that can and has been evoked about this programme of law, one thing remains indisputable: the law on custody of children was very clear in terms of what was legal/illegal and society knew what to expect i.e. the normative expectation that was created by the law was

²⁰⁴Niklas Luhmann "The unity of the legal system" above n 20 at 20.

²⁰⁵ See e.g. *Blisset's Case* 98 Eng. Rep. 899 (K.B. 1774).

²⁰⁶ James Hadley *Introduction to Roman Law in Twelve Lectures* (D Appleton & Company, 1873) 104-153; Frederick Pollock and Frederic William Maitland *The History of English Law before the Time of Edward I* above n 201 at 364-65.

²⁰⁷ P H Petit "Parental control and guardianship" in R H Graveson and F R Crane (eds) *1857 A Century of Family Law 1957* (Sweet & Maxwell Ltd, London, 1957) 56 at 56; Maurice Wilcox "Note: A child's due process right to counsel in divorce custody proceedings (1976) 27 *Hastings L.J.* 917 at 920.

²⁰⁸P H Petit "Parental control and guardianship" above n 207 at 59.

²⁰⁹P H Petit "Parental control and guardianship" above n 207 at 59-60.

patent. Because coverture was so strict,²¹⁰ and legal remedies rare, mothers and fathers very rarely turned to the courts for custody of their children before the nineteenth century.²¹¹ It was not until the late nineteenth century that mothers actually began to achieve custody in more sufficient numbers and the law began to express something akin to maternal rights to custody of children.²¹² As far as the law was concerned, because a father was deemed to be so superior and he held all the legal rights in the marriage under coverture his custody and guardianship would by default best serve the children's interest.

4.4 Children's welfare as education and wealth

The law of guardianship originally evolved so as to protect a parent's (father's) interests in the marriage of his heir because legal protection was afforded to the father's proprietary interests in his child's marriage.²¹³ This was later extended to any economic interest in the child.²¹⁴ Children's economic interests were protected by law so as to ensure legal transference of family wealth to them and thereby the protection of the family fortune.²¹⁵ The law is keenly focussed on ensuring children's private maintenance and in that way it shares at least some values with the political system that appears to have a history of avoiding State relief to the poor or needy. In cases of wealth or property the organisation of the family often controls the distribution and transference of economic power in society.²¹⁶

During the eighteenth century there emerged a trend to interfere with the superior right of the father.²¹⁷ Conditional programmes were created by the courts that legalised some grounds upon which the court could interfere with the father's

²¹⁰ Husbands and wives could not bring action against each other since law deemed them to be a single entity 'having become one'.

²¹¹ Danaya C Wright "The crisis of child custody: a history of the birth of family law in England" (2002) 11 Colum. J. Gender & L 175 n 24.

²¹² Susan Maidment *Child Custody and Divorce: The law in social context* (Croom Helm, London, 1985) at 116-26.

²¹³ Frederick Pollock and Frederic William Maitland *The History of English Law* above n 201 at 444.

²¹⁴ *Hall v Hollaender* (1825) 4 B and C 660.

²¹⁵ John Eekelaar "Family law and social control" in John Eekelaar and John Bell (eds) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford (UK), 1987) 125 at 128.

²¹⁶ John Eekelaar "Family law and social control" above n 215 at 125.

²¹⁷ See Sarah Abramowicz "English child custody law, 1660-1839: the origins of judicial intervention in parental custody" above n 170 at 1381-1391 for a discussion of cases where the court interfered with a father's rights.

rights. From the available case reports there appears to have arisen some judicial reasoning that did consider children's interests to be more important than those of their parents.²¹⁸ The basis of these decisions was never that the mother had a right to the custody of her child that displaced the father's right, but rather that the father had lost his own rights to custody.²¹⁹ Later (in the early nineteenth century) when custody became an issue of competing *maternal and paternal* rights judges ruled in favour of fathers, holding that paternal custody rights are superior to maternal rights. Petit identified the following grounds upon which the court could interfere with paternal custody.²²⁰

First was the 'unfitness in character or conduct' of the father. This required extreme immorality, cruelty, or bad character on the part of the father before the court would interfere. Reported cases include a father of bad character who, in addition, was incarcerated for the level of abuse he perpetrated on his wife; a father who was immoral and adulterous and deliberately taught his children to use obscene language; a father who was an outspoken atheist and who the court considered would lead his children to be immoral.

Second there was distinct indication that the court would protect the children's economic interests. Examples include a father who did not provide for his children's support and thus was treated as if he had abandoned his lawful right to their custody; intervention to keep a child in the home of a wealthy relative if removing it would be detrimental to its social and economic position; refusal to grant a father custody after he had given it to another and the children were beneficiaries of a substantial inheritance. The courts also repeatedly interfered with parents or guardians who wanted their children to marry a person that was their social or economic inferiors.²²¹

Clearly material well-being was of consideration to the court which relates to the third ground. Lack of means played a contributory role i.e. alone it would not be sufficient for the court to interfere with the father's rights but together with

²¹⁸ Danaya C Wright "De Manneville v. De Manneville: rethinking the birth of custody law under patriarchy" (1999) 17 Law & Hist. Rev. 247 at 281; "The crisis of child custody: a history of the birth of family law in England" above n 211 at 182-190 and cases cited.

²¹⁹ Sarah Abramowicz "English child custody law, 1660-1839: the origins of judicial intervention in parental custody" above n 170 at 1356.

²²⁰ P H Petit "Parental control and guardianship" above n 207 at 64-65.

²²¹ For example *Roach v Garva* 27 Eng. Rep. 954 (Ch. 1748); *Eyre v Countess of Shaftesbury*, 24 Eng. Rep. at 659; *Lord Shipbrook v Lord Hinchinbrook* 21 Eng. Rep. 383 (Ch. 1778) all cited in Danaya Wright "The crisis of child custody: a history of the birth of family law in England" above n 211 at n 61.

concurring grounds such as desertion or poor character it would be considered. The fourth ground was where a father entered an agreement with a third party to take over his parental duties. These agreements would be treated as binding *if* the father acted upon it. The fifth ground was where a father had intention to leave the jurisdiction and the child was a ward of court.

The court's concern for the welfare and best interests of children regarding interference with the father's custody still revolved to a significant extent around the child's possession of property, its financial support and its education.²²² Prevention of the loss of financial interests and assets was an event that the law would not hesitate to protect. Where a child had no property or land rights to protect, the court would not generally interfere.²²³ Eldon LC explained:

It is not, however, from any want of jurisdiction that [the court] does not act, ...when there is not property, but from a want of means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the Kingdom.²²⁴

As discussed above, prior to the Tenures Abolition Act 1660 child custody law in England was primarily a spin-off of the laws of inheritance and land ownership. The law regarding the custody of children who did not stand to inherit a landed estate was negligible and hardly ever invoked guardianship matters.²²⁵ Such children's guardianship was known as guardianship by nurture and fell to both parents, lasting until the children reached the age of fourteen.²²⁶ For children who stood to inherit, the guardianship 'by nature' was that of the father, who could legally delegate his guardianship, also to the mother by his will and

²²² See e.g. *Blisset's Case*, above n 214 at 900 citing *Giffard v Giffard*, unreported case (granting custody to a mother, where the father was a Catholic and **bankrupt**); *Creuze v. Hunter*, 30 Eng. Rep. 113 (Ch. 1790) (prevented a **bankrupt** father from interfering with the mother's arrangements for custody and education of the children); *Skinner v. Warner*, 21 Eng. Rep. 473 (Ch. 1792) (ordering a **bankrupt** father not to remove his children from the schools at which their mother had placed them). In *Powel v. Cleaver*²⁹ (1789) Eng. Rep. 274 (Ch.) the court was willing to find against a father's right to guardianship where the father had been absent from the child's life and allowed the testator to care for and financially support the child until the testator's death. The court denied the father guardianship in the interest of **protecting the child's inheritance**.

²²³ P H Petit "Parental control and guardianship" above n 207 at 67.

²²⁴ *Wellesley v Duke of Beaufort* (1827) 2 Russ I cited in P H Petit "Parental control and guardianship" above n 207 at 67.

²²⁵ Sarah Abramowicz "English child custody law, 1660-1839: the origins of judicial intervention in parental custody" above n 170 at 1366 citing various prominent sources as regards the vagueness of law such as Peregrine Bingham *The Law of Infancy and Coverture* (George Lamson, 1824, America) at 159; Edward Coke *The First Part of the Institutes of the Laws of England: A Commentary upon Littleton* (London, W. Clarke 17th ed. 1817) (1628); Francis Hargrave *Notes to Coke's Commentary upon Littleton* (London, W. Clarke 1817) (1787).

²²⁶ *Ibid.*

testament.²²⁷ It lasted until the child turned twenty-one. The message from law was arguably that the law's protection of children's interests was largely based on their material resources i.e. to protect those (taxable) resources.

The courts interpreted the Tenures Abolition Act 1660 to have given it jurisdiction over the appointed guardian in matters of education, religion, domicile, marriage of the minor until the age of twenty-one, dispensation of the child's property and access of the mother to the child where a guardian had the child in his possession.²²⁸ However the Act itself did not provide express guidance in this regard. The source of the court's jurisdiction remained only the invented *parens patriae* doctrine. As Luhmann argues, the courts are central to the legal system. Also, from Luhmann's perspective, it can be argued that legislature preferred to avoid providing guidance. He reasoned that this is because the political system benefits from the fact that the determination of what will be legally wrong and legally right happens in the legal system.²²⁹ The courts must transform indeterminacy into determinacy.²³⁰ The political system prefers to avoid the risk of its binding decisions via legislation turning out to be either impractical or a failure because programmes/decisions by the political systems are purpose specific and their success (or not) can be determined in the future and could, if unpopular, risk a loss of power. Courts *must* decide and they do not have the option of resorting to a declaration that the law could not be found within the system – a consequence of the operative closure of the legal system, i.e. that the law cannot turn to its environment for help in making a legal decision.²³¹

From the very first cases heard in relation to the actions of a testamentary guardian, the court stated that it had authority to regulate fathers as well,²³² not only the appointed guardian, while the Act itself had no wording to this effect. I suggest the courts wanted, at least *inter alia*, to establish a legal means to coerce fathers into their responsibilities as parents/bread earners to ensure for the

²²⁷ *Ward v St. Paul* 29 Eng. Rep. 320 (Ch. 1789); *Mellish v De Costa* 26 Eng. Rep. 405 (Ch. 1737); *Dillon v Mount-Cashell* 2 Eng. Rep. 207 (H.L. 1727) cited in Danaya Wright "The crisis of child custody: a history of the birth of family law in England" above n 211 at n 53.

²²⁸ Sarah Abramowicz "English child custody law, 1660-1839: the origins of judicial intervention in parental custody" above n 170 at 1373-1379.

²²⁹ Niklas Luhmann *Law as A Social System* above n 6 at 371.

²³⁰ Niklas Luhmann *Law as A Social System* above n 6 at 292.

²³¹ Niklas Luhmann *Law as A Social System* above n 6 at 281. In turn the legal system benefits by the political system ensuring peace, respect for legal authority as well as the enforceability of court decisions.

²³² E.g. *Beaufort v. Berty* 24 Eng. Rep. 579, 579-80 (Ch. 1721).

financial provision for children and so avoid State expense (if children become destitute) and to guarantee revenue (in the form of estate and land taxes). Financial provision extended also to children's education, which had become highly valued in upper-class society by then as discussed above. Education was the means by which to mould and create future good citizens. Judges were necessarily influenced by their own education and would therefore have taken on board the necessity of education for a future 'civil' society. But it would seem that fathers did not always act the way the legal system and the upper classes wanted them to.

Indeed the first cases in which the court found it be justified to *terminate* a fathers' parental rights involved situations where the father was seen by the court to have waived or sold his legal rights over his children in exchange for a legacy of property to himself or to his children via whom he would still have access to the legacy.²³³ In *Ex parte Hopkins*²³⁴ the court was forced by its own established rules (self-reference) regarding a father's protected guardianship to uphold the father's guardianship because, on the facts, the father had not waived or sold his legal rights relating to the children. The father had taken money from the legacy provided by the affluent deceased sponsors of his children while they (the testators) had appointed a guardian to care for the three children and to manage the legacy. The guardianship of the children was then disputed and the father wanted to take 'possession of' the children. While compelled to uphold his guardianship, the court refused that the father take possession of the children on the ground that he had not applied for a writ of habeas corpus and then also prohibited the father from attempting to take possession of his children by force. The court subsequently made a new rule in *Butler v. Freeman*²³⁵ deciding that a father was as equally subject to the law's regulation as a testamentary guardian was. Literally two days later, the court held that a father is deemed to have waived his guardianship if he agreed to a testator's appointment of a guardian to manage a legacy on behalf of a beneficiary under the testator's will.²³⁶ In *Lyons v Blenkin*²³⁷

²³³ Sarah Abramowicz "English child custody law, 1660-1839: the origins of judicial intervention in parental custody" above n 170 at 1383.

²³⁴ 24 Eng. Rep. 1009 (Ch. 1732) cited and discussed in Sarah Abramowicz above n 216 at 1383.

²³⁵ 27 Eng. Rep. 204 (Ch. 1756) cited in Sarah Abramowicz above n 216 at 1382

²³⁶ *Blake v. Leigh* 27 Eng. Rep. 207 (Ch. 1756) cited in Sarah Abramowicz above n 216 at 1383. See also *Colston v. Morris* 37 Eng. Rep. 849 (Ch. 1820) ("enforcing as binding a condition attached to a legacy by which the father, in accepting the legacy, agreed not to interfere

the court went so far as to find an *implied* waiver of the father's rights where he had not entered into any express agreement of an appointed guardian but acquiesced to a legacy – a hefty fortune – for his children.

The emotional, behavioural, and psychological well-being of the child played no part in determining children's welfare because, arguably, the social sciences had not yet been established. In sync with coverture, a father's right to custody and guardianship *in relation to the mother* during his lifetime remained near absolute except where he was very abusive, immoral or grossly irresponsible, as interpreted by the law. The Romantic poet Percy Bysshe Shelley was removed from custody because of his atheism.²³⁸ However in *Blisset's Case*²³⁹ the mother was awarded custody despite the father's objection, in order to further the child's education and, indeed her *welfare*. Note however that the father was in financial distress and was considered to be improper. Lord Mansfield based the award of custody to the mother on, inter alia, the right of the public to oversee the education of its citizens, and accordingly to do what was best for the child.²⁴⁰ Education as significant for the determination of welfare and best interests had, by then, become an important factor to the courts. The father had obtained a writ of habeas corpus (the correct legal procedure) to recover his child from the mother's care. Lord Mansfield said:

The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper, for such conduct as was suggested at the Judge's Chambers, the court will not think it right that the child should be with him.²⁴¹

Nonetheless, in addition to patriarchal values and principles, the law usually followed and protected the financial and property interests of the children and in most disputes between spouses, men generally had more resources at their disposal since they were the bread earners and had proper work experience to secure better incomes with which to support and educate the children. The rules of

in his daughter's education, and rejecting the father's claim that such a condition was void" Sarah Abramowicz above n 216 n 236).

²³⁷ 37 Eng. Rep. 842 (Ch. 1821) cited in Sarah Abramowicz above n 216 at 1384.

²³⁸ *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817).

²³⁹ 98 Eng. Rep. 899 (K.B. 1774).

²⁴⁰ Donna Schuele "Origins and development of the law of parental support" (1988-89) 27 (4) Univ of Louisville School of Law 807 at 816 citing *Blisset's Case* above n 214.

²⁴¹ Quoted in William Forsyth *A Treatise on the Law Relating to the Custody of Infants in Cases of Difference between Parents or Guardians* (1850) at 64. <<http://heinonline.org>> Downloaded 27 August 2011.(Own emphasis).

coverture also prevented a married woman from independently disposing of her property and therefore undermined her ability to use her capital for the benefit of her children.

However social perturbation was on the way to which law eventually had to respond to, despite the fact that “in English law, practices quickly become rigid – as the twig is bent, so the tree doth grow.”²⁴² The legal norm of coverture was never fully realised, as is true of normative expectations, regarding the patriarch’s protective and provisional duties because in reality there were substantial divergence in the actual practices of society and for England this included its colonies.²⁴³ Husbands and fathers were often found to be abusive and/or avoiding family responsibility, behaviour that the rule of coverture desperately attempted to deny. And the value of children and childhood had changed and they were less seen by society as the father’s property. Their emotional well-being had become increasingly important. But the social and legal consequences of the doctrine of coverture were invasive and have carried over into the present because law, for so long, clung to its patriarchal norms, refusing to, or unable to ‘learn’ from experience i.e. from what realities in its environment had come to show.

4.5 Custody disputes and children’s best interests in the 19th century

The case of the De Manneville couple in the first decade of the nineteenth century resulted in two court hearings: *Rex v De Manneville*²⁴⁴ and *De Manneville v De Manneville*.²⁴⁵ They were the first in a series of cases that led to the enactment of the Custody and Infants Act 1839. The case involved a wife’s application for a writ of habeas corpus against her husband for snatching their eight-month-old child from her after she had left her husband. The case did not involve physical abuse, gross impropriety (as defined by the courts), or serious financial inability on the part of the father. When faced with this inter-spousal dispute about the custody of a child both the King’s Bench and Chancery refused

²⁴²Allen Hortsman *Victorian Divorce* (Croom Helm, London, 1985) at 3.

²⁴³ See e.g. Linda K Kerber “From the declaration of independence to the declaration of sentiments: the legal status of women in the early Republic 1776-1848” (1977) 6 *Hum. Rts.* 115 at 118–19; Norma Basch “Invisible women: the legal fiction of marital unity in nineteenth century America” (1979) 5 *Feminist Studies* 346 at 347.

²⁴⁴ Eng. Rep. 1054 (K.B. 1804).

²⁴⁵ Eng. Rep. 762 (Ch 1804).

the mother's application for custody and would not interfere with the father's right even though the child was still breastfeeding. The mother's legal representatives raised arguments as to the child's age and it being in need of its mother's nurture, that the father was in a much less favourable financial position than the mother, and that the court had jurisdiction to disturb the father's power and rights if the child's interests demanded that²⁴⁶ yet all without legal acceptance. This legal affirmation was made despite changing social attitudes in law's environment about childhood and what is deemed to be good for children²⁴⁷ as well as the importance of the maternal role. Other irritations/stimulants in the social environment were, briefly, as follows.

Swiss philosopher Jean Jacques Rousseau, whose political philosophy, as is well known, would eventually play a motivating factor in the French Revolution,²⁴⁸ published the book *Émile* in 1762.²⁴⁹ While a fictional work, this book was a treatise on the nature of education while he acknowledged and referenced John Locke in this work as his predecessor.²⁵⁰ As such Rousseau also echoed the ideas about children (that they can/must be shaped and that they are 'naturally' innocent) that had already formed in the previous century and that they needed to be directed by appropriate care and education to become good citizens. But Rousseau was also determined to change society's knowledge of childhood and his approach was radical at the time.²⁵¹ He attacked the tradition that fathers are the guardians of child-rearing and wrote:

You say mothers spoil their children, and no doubt that is wrong, but it is worse to deprave them as you do. The mother wants her child to be happy now ... if her method is wrong, she must be taught better. Ambition, avarice, tyranny, the mistaken foresight of fathers, their neglect, their harshness, are a hundredfold more harmful to the child than the blind affection of the mother.²⁵²

Rousseau's work (including his political writing) was anxiously banned from

²⁴⁶ *De Manneville v De Manneville* above n 245 at 763.

²⁴⁷ See e.g. Claire Breen *The Standard of the Best Interests of the Child: A Western tradition in international and comparative law* (Martinus Nijhoff Publishers, The Hague, 2002) at 29-43.

²⁴⁸ See e.g. Gordon H McNeil "The cult of Rousseau and the French Revolution" (1945) 6 (2) *Journal of the History of Ideas* 197;

²⁴⁹ For the spread and impact of Rousseau's work to and in England see e.g. Edward Duffy *Rousseau in England: The context for Shelley's Critique of Enlightenment* (University California Press, Berkeley, 1979).

²⁵⁰ Edward Shorter *The Making of the Modern Family* above n 175 at 183; Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 65.

²⁵¹ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 65-66.

²⁵² Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 66 quoting Jean Jacques Rousseau *Émile* P D Jimack (ed) (London, 1974) at 5.

publication in France by the political system. This did not mean that the social agitation died down or disappeared because of it, as the French Revolution eventually showed. His work was published in Holland and made its way into France and Great Britain – the latter where he fled to and settled for some time.

Émile's (and his other work) popularity has been explained as having provided a “romantic, emotional, and unorthodox approach to life – an escape for which that generation was searching.”²⁵³ Rousseau's ideas were widely supported among the literate and upper classes but, as always, there was a contradiction between a romantic idealised view of childhood embedded in eighteenth-century Enlightenment and the brutal reality of most children's lives endured as a result of, inter alia, the English Poor Laws. Moving forward to the nineteenth century, when the plight of the poor had not improved, we only need to think of the works of popular authors such as Charles Dickens' *Oliver Twist* (1838) with its child protagonist born into poverty and subjected to the brutalities of the Workhouse system, and Charles Kingsley's *The Water Babies* (1862-1863) about small boys working as chimney sweeps and dying as a result, to see this contradiction dealt with by novelists.²⁵⁴

It would be the affluent and powerful middle class that emerged due to the Industrial Revolution who would sway (eventually) the political system and it

²⁵³ Gordon H McNeil “The cult of Rousseau and the French Revolution” above n 248 at 211.

²⁵⁴ Dickens' *Oliver Twist* (1837) and Kingsley's *The Water Babies* (1863) – both re-published by, inter alia Penguin Books, in 1971 and 1981 respectively. For research on Victorian childhood see Thomas E Jordan *Victorian Childhood: Themes and variations* (State University of New York Press, Albany (NY), 1987) chapter 1 (providing insight into definite awareness and focus of the political system about children's health and nourishment during the 1800s and reports of the Commission on the Employment of Children). The poor state of working children's health and stature as a consequence of child labour (inter alia in mines) was not inevitable but was kept afloat by the structural coupling between the economic and political systems – while the latter offered piecemeal reforms which were largely ignored by the former with convenient loopholes in legislation. See Michael Lavalette “Theorizing children at work: family, state and relations of production in historical context” in *A Thing of the Past? Child labour in Britain in the nineteenth and twentieth centuries* (Liverpool University Press, Liverpool, 1999) 44. Supposedly following a laissez faire approach to economics since the 18th century, the political system selected from the environment the work of Adam Smith and Thomas Malthus (irritations as per Luhmann) but simultaneously also selected Bentham's work on governing via legislation and certainly did not hesitate to pass more Acts than ever before during both the 18th and 19th centuries. A primary objective was to break the landed oligarchy of the aristocracy so as to gain power and this was achieved through the influence of the rising middle class in the wake of the Industrial Revolution. See e.g. J Bartlet Brebner “Laissez faire and state intervention in nineteenth-century Britain” (1948) 8 *The Journal of Economic History* 59; David Lieberman *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge University Press, Cambridge (UK), 1989).

became this class that would set societal trends.²⁵⁵ There are commentators who have described Rousseau's influence on the notion of childhood and parental practices as the invention of modern motherhood²⁵⁶ i.e. the all sacrificing, fully devoted and gracious mother, who lives and dies for her children and who makes a loving home for them (and by default the father also) because before his influence mothers (including privileged ones) behaved somewhat differently.²⁵⁷ Historians have raised doubts about the 'truths' of inherent 'maternal instinct' in light of historical common behaviour among European women which points to women having been far less sentimental or devoted to their children as subsequently became the accepted norm.

What we now know is that, for several centuries in Europe, mothers like everybody else frequently saw children as, at best, amusing but more likely as enervating and time-consuming and, at worst, unwanted. What is particularly hard to comprehend is that these attitudes, although generally held, were not fostered or forced on women by men. Among the very poor and those unwed mothers who left their children to die, perhaps the instinct to survive outweighed maternal instincts, but there is no such rationale for the attitudes of middle-class and upper-class women.²⁵⁸

It is also interesting to note that the brothers Grimm, who collected and then captured traditional folklore in their fairytales over the first half of the nineteenth century, originally had both Snow White and the siblings Hansel and Gretel as abused and abandoned (respectively) by their biological mothers but later edited the stories to turn them into a stepmothers and conciliate their fairytales with the changing social values about biological motherhood as well as Christian beliefs at

²⁵⁵ For example, French historian Elisabeth Badinter recounted maternal practice in France between 1700 and 1900 and found that the common practice of sending children off to wet-nurses soon after their birth was first practiced among the aristocracy but steadily (over two centuries) made its way down to anyone who could afford the services including the working classes. See Elisabeth Badinter *The Myth of Motherhood: An historical view of the maternal instinct* Francine du Plessix Gray (trans) (Souvenir Press, London, 1981). Cf. Stephen Wilson "The myth of motherhood a myth: the historical view of European child rearing" (1984) 9 (2) *Social History* 181. For an account of the same developments in England see Christopher Hibbert *The English: A social history 1066-1945* (Norton Publishing, New York (NY) 1986).

²⁵⁶ See e.g. Aminatta Forna *Mother of All Myths: How society moulds and constrains mothers* (Harper Collins, London, 1999) chapter 2.

²⁵⁷ See e.g. Elisabeth Badinter *The Myth of Motherhood: An historical view of the maternal instinct* above n 255 ; Edward Shorter *The Making of the Modern Family* above n 175 at 204ff; Ruth S Bloch "American feminine ideals in transition: the rise of the moral mother" (1978) 4 (2) *Feminist Studies* 101-126 (tracing the changing, societal views of the importance of motherhood from the late eighteenth century using literature that originated in England and suggests that the change in the definition of motherhood was a result of the disappearance of the extended household (which included servants), the removal of men's work and production from the home, and the increasing focus on women's superior morality vis-à-vis men.

²⁵⁸ Aminatta Forna *Mother of All Myths: How society moulds and constrains mothers* above n 256 at 32.

the time.²⁵⁹ Rousseau's ideas were – albeit in a less romantic form – also supported by religion yet without favouring mothers as much for their primary virtues vis-à-vis the father but it was apparently Rousseau's ideas that finally romanticised childhood, child-education and, importantly, motherhood, or at least escorted in that school of thought among many members of literate society.

In England, before the end of the eighteenth century at least two hundred treatises on education had been published, all influenced by *Émile*.²⁶⁰ Rousseau's book had the most immediate and noticeable impact on the practices of breast-feeding (encouraging it) and swaddling (discouraging it) albeit that these ideas were not novel to him.²⁶¹ He also strongly encouraged domestic life – filled with mother love – as salvation, as the means by which morals will be restored, as natural, and by which the nation will grow.²⁶² Women responded, (young) children's mortality dropped by nearly a third – most significantly amongst the aristocracy – childrearing became a female occupation and fathers took a subordinate position.²⁶³ Clearly, children also benefited from mothers increased nurturing and withdrawal from practices such as wet nursing and swaddling. Divorce was however still a remedy for the privileged only, therefore custody disputes between parents were minimal while the rules regarding children's interests were still rigid. Women knew that the patriarchal norm was near impossible to circumvent.

Despite these events and changes in society, both the legal and political system still resisted acknowledging mothers as having rights²⁶⁴ in spousal disputes and ignored these developments in the environment preferring to uphold

²⁵⁹ Terri Windling "Snow, glass and apples – the story of Snow White" The Endicott Studio Journal of Mythic Arts (2007) (Spring) <http://www.endicott-studio.com/> Accessed 23 May 2012.

²⁶⁰ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 68 citing Peter Coveney *The Image of Childhood* (1957) at 46.

²⁶¹ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 68.

²⁶² Jean Jacques Rousseau *Émile* at 46, quoted in Aminatta Forna *Mother of All Myths: How society moulds and constrains mothers* above n 256 at 35. These ideas about women's moral worth and input dominated for a long time (while women themselves supported them, and would be used (selected from the environment) by New Zealand's political system for granting women suffrage in New Zealand in 1893. Women were granted the right to vote because of the political system's expectation that women, as the bearers of domestic and moral qualities, will positively influence the family – deemed women's natural domain – as well as New Zealand political life in general. See Raewyn Dalziel "The colonial helpmeet. Women's role and the vote in nineteenth century New Zealand" (1977) 9 (2) *New Zealand Journal of History* 112; Roderick Phillips *Divorce in New Zealand: A social history* (Oxford University Press, Auckland (NZ), 1981) at 26-27.

²⁶³ Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 69.

²⁶⁴ Danaya C Wright "De Manneville v. De Manneville: rethinking the birth of custody law under patriarchy" above n 218 at 249.

the father's superiority. This resonates with Luhmann since it indicates the level of unresponsiveness of closed systems and that environmental shifts will only be accepted into law's operations when the law elects to respond to them. The law does not necessarily reflect society's values.

Only in 1839 did the political system respond with the Care of Infants Act 1839 that provided that a mother could seek custody of her children below the age of seven and access to older children unless she had committed adultery. But it would take about another thirty-five years before the concept of a woman being legally allowed to have custody of her children, would be *applied* within the legal system. The apparent complexity of reconciling paternal and maternal rights prevented substantial reform for many years and as far as the W&BIC standard went, this was only codified into statute in the 1920s.²⁶⁵ The willingness to interfere with the father's rights shown in the eighteenth century was rejected in inter-spousal custody cases so as to uphold the established paternal rights at an apparent higher level than ever before.²⁶⁶

Wright argues convincingly that it is because the legal system, controlled by men, protected and upheld patriarchy²⁶⁷ and this is most likely true, given the very nature and ideology embedded in coverture. Luhmann argued strongly that norm setting derives its preconditions from *selectively* constructed ideas of humanity,²⁶⁸ here the inferiority of women and the superiority of men. In deciding its operations the law alone chooses and this may amount to rejecting earlier legal communications. The court's jurisdiction to interfere with the paternal right was rejected when the dispute was *between the two parents* as regards a child's custody after divorce. As for the law's 'wise parent' role, in the nineteenth century cases it continued to pay lip service to children's welfare.²⁶⁹

²⁶⁵Guardianship of Infants Act 1925 (U.K.); Guardianship of Infants Act 1926 (NZ).

²⁶⁶Jamil S Zainaldin "The emergence of a modern American family law: child custody, adoption, and the courts 1796-1851" (1979) 73 Nw. U. L. Rev. 1038 at 1063.

²⁶⁷Danaya C Wright "The crisis of child custody: a history of the birth of family law in England" above 211.

²⁶⁸Chris Thornhill "Niklas Luhmann. A sociological transformation of political legitimacy" (2006) 7 (2) Distinktion: Scandinavian Journal of Social Theory 33 at 49.

²⁶⁹Lynne Marie Kohm ""Tracing the foundations of the best interests of the child standard in American jurisprudence" (2008) 10 J. L. Fam. Stud. 337 at n 124; Danaya C Wright "De Manneville v. De Manneville: rethinking the birth of custody law under patriarchy" above n 218 at 248.

4.6 The thirty-five years after De Manneville

The De Manneville's cases set a trend within the legal system to apply different standards in analysing the facts in custody disputes. This depended on who sought custody i.e. the mother or a third party.²⁷⁰ The modest approach to the welfare of the child in disputes primarily *not* involving the mother that had emerged in the years prior to *De Manneville* did not apply when the mother was the petitioner regardless of whether she could satisfy the welfare of the child better. However third parties, such as grandparents or other relatives, were still awarded custody if the court considered them to be able to serve the best interests of the child – bearing in mind the importance of financial means and commitment to the child's education. The doctrine of coverture would also be applied to override private agreements between the spouses that involved custody of the children post-separation regardless of how well such arrangements would serve the best interests of children.²⁷¹

Precedent was set in the 1824 case of *Skinner*²⁷² to the effect that *if* a child was in a third party's custody *then* the court could use its jurisdiction and give the child to the mother (should the court find this the right order to make). However *if* the father had already taken the child into his physical care and was not a threat to the life and limb of the child *then* the child would not be removed from the father to give to the mother. Once a child was in the physical 'possession' of the father – irrespective of how he came to have the child in his care– only extreme ill treatment would justify removal, not mere unfitness.²⁷³ By 1827 the courts clearly distinguished between their ability to give the child to its father (when it was improperly restrained by someone else including the mother) and their ability to take it from the father, regardless of how he obtained possession. In *Ball v. Ball*²⁷⁴ the father hid the child, who had primarily been living with the mother, away and when the mother brought a case to court she only sought access because she was aware of the normative expectation that she, as the mother, had no right to

²⁷⁰Danaya C Wright "The crisis of child custody: a history of the birth of family law in England" above n 211 at 193.

²⁷¹*Earl of Westmeath v. Countess of Westmeath* 162 Eng. Rep. 992 (1826).

²⁷²27 Eng. Rep 710 (C.P. 1824). The child in that case had been placed in the care of a third party after the mother and father had been legally separated. The mother sought to gain custody of the child.

²⁷³This was confirmed in *Ball v. Ball* 2 Sim. 35; 57 ER (1827).

²⁷⁴(1827) 2 Sim 35; 57 ER 703.

custody. The judge lamented that if only an authority could be found to make it possible for him to decide differently he would not deny her custody.²⁷⁵ The judge stated that his limited discretion was ‘a case for the authorities’ meaning he – in the spirit of *stare decisis* – was constrained by the law as it had been laid down by other judges. *Parens patriae* could apparently not help nor empower him to decide what was in the best interests of the child until the system changed its conditional (patriarchal) programmes.

Custody cases between a mother and a father, (particularly where there was no adultery, abuse or financial incapacity) were potentially unsettling for the courts, because it challenged the very core of the coverture programme.²⁷⁶ It threatened to challenge the long determined legal programme of husband and wife’s legal ‘unity’ and the wife’s submission to the husband under coverture. Conditionally it provided in this context that: *if* a woman is married *then* she loses her independent status and stands under her husband’s authority; *if* a couple with children is granted a divorce, *then* the father has a near unchallenged right to custody of his children vis-à-vis the mother. Applying Luhmann’s theory; normative expectations (the wife’s inferiority to her husband and the father’s superior right to custody) must be capable of being maintained even in cases of dispute.²⁷⁷ These norms will stand despite them being disappointed.²⁷⁸ For example, despite the disappointments (and reality) that a father may not best serve his child’s interests or provide for and respect his wife, as is his depicted role under coverture, normative expectations do not ‘learn’ from experience/this observation i.e. that all fathers do not necessarily behave that way.²⁷⁹ Once an event or situation has been coded as legal, it cannot become illegal despite people’s contrary actions.²⁸⁰ From an autopoietic perspective law can merely create normative expectations but it is not very effective in producing behavioural

²⁷⁵ *Ball v. Ball* above n 273 at 704.

²⁷⁶ Danaya C Wright “The crisis of child custody: a history of the birth of family law in England” above n 211 at 180.

²⁷⁷ Niklas Luhmann “The coding of the legal system” above n 27 at 147.

²⁷⁸ Niklas Luhmann “The unity of the legal system” above n 20 at 19.

²⁷⁹ See note 313 above – assuming that Rousseau based his writing on actual observation.

Cunningham also observes as regards the parenting guides that were written for fathers: “Historians are rightly wary of assuming that advice was put into practice; we might do better to assume that the advice was necessary only because practice was to the contrary.” Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 43. The same can be said for the encouragement of mothers to breastfeed and nurture their children more and indeed the later ideas about ‘maternal instinct’.

²⁸⁰ Michael King and Anton Schütz “The ambitious modesty of Niklas Luhmann” (1994) 21(3) *J.L. Soc’y* 260 at 275.

changes or regulating conduct that is not open to the determination of legal/illegal.²⁸¹ In constructing and maintaining its self-identity, the law cannot use communications other than those derived from its *own* structures, meaning structures (legislation, as interpreted, and conditional programmes/rules/precedent) derived from and in support of the coding legal/illegal.²⁸² The code of law is what gives the system its identity: “[O]nly the legal system can bestow legal normative quality on its elements [i.e. legal communications] and thereby constitute them as elements.”²⁸³ Therefore, if problems arise and the law needs new programmes that can declare actions and events as lawful/unlawful it will self-produce such communications as far as can be done and as far as constitutions allow it to, to bring matters within law’s code but importantly, only if the system decides to do so. Again, to be able to establish what exactly goes on inside the legal system is hard for an observer.

4.7 The Tender Years Doctrine

The idea that mothers may be given access to their children post separation if the children were very young was first produced as a *legal* communication by way of legislation. The Custody of Infants Act 1839 declared as lawful that a mother may, upon her petition, have custody of her children up the age of seven and be given access to older children. Apart from the apparent distress that the courts experienced²⁸⁴ politically and socially, the decisions of the courts evoked dissatisfaction due to, inter alia, Caroline Norton’s campaigning²⁸⁵ for mothers’ rights to have access to their children post separation. Norton relentlessly wrote and published (under pseudonyms – sometimes using male names) to create public awareness of court decisions.²⁸⁶

²⁸¹ Niklas Luhmann “Closure and openness: on reality in the world of law” above n 19 at 347; Niklas Luhmann “Limits of steering” above n 32.

²⁸² Michael King and Anton Schütz “The ambitious modesty of Niklas Luhmann” above n 280 at 279.

²⁸³ Niklas Luhmann “The unity of the legal system” above n 20 at 20.

²⁸⁴ Danaya C Wright “Crisis of child custody” above n 211.

²⁸⁵ Martha J Bailey “England’s first *Custody of Infants Act*” (1994-1995)” 20 *Queen’s L J.* 391 at 402-412.

²⁸⁶ Caroline Norton did not apply for custody of her children after her husband removed them and allowed her limited access. She was aware of how hard it would be for her to get a favourable decision from the legal system and rather used her writing skills and political connections to agitate for legal change. She had well positioned male friends who assisted her in her mission. See Martha J Bailey “England’s first *Custody of Infants Act*” (1994-1995)” above n 285; Elizabeth Ann Sinclair “Timeless considerations; an historical analysis of the development of residence and

*R v Greenhill*²⁸⁷ just prior to Norton's campaign caused much public outcry.²⁸⁸ That was a case where the father's behaviour again was dismissed as not relevant if it didn't directly poison the children's minds and it confirmed that children lawfully belonged in the custody of the father. From Lord Denman's words quoted below it seems that there was, in part, some concern from within the legal system that the courts may be flooded by custody cases if the door was opened too wide regarding mothers' position and that the law needed to be confirmed in the mind of potential litigants.

But I think that the case ought to be decided on more general grounds; because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age. [T]he proper custody ... [is] undoubtedly ... the custody of the father.²⁸⁹

Yet, illustrating the autonomy of the legal system as perceived by its primary actors, (judges as per Luhmann) confirmed their belief that they merely apply the law and are effectively helpless to make decisions contrary to what is deemed to be the law as it had developed over time. Lord Denman (then the Chief Justice) stated two years after *Greenhill* that "I believe that there was not one judge who had not felt ashamed of the state of the law and that it was such as to render it odious in the eyes of the country."²⁹⁰ This completely denies the fact that 'the state of the law' was wholly created by judges. But it does confirm that judges are bound by self-reference or, the closure of the system i.e. that former legal decisions must be followed and adhered to.²⁹¹ The legal rule of stare decisis, had also become more elevated at that time,²⁹² But the statement also flies in the face of the system's *own* declared role of *parens patriae* because Lord Denman is effectively saying that children's interests, or at least their need to have regular contact with or be cared for by their mothers, is subject to former legal decisions

contact law, gender and parenting" Phd Thesis (March 2010) Newcastle Law School, University of Newcastle, UK at 77-87. <https://theses.ncl.ac.uk/dspace/handle/10443/1041> Downloaded 08 April 2011.

²⁸⁷ (1836) 4 A. & E. 624.

²⁸⁸ Elizabeth Ann Sinclair "Timeless considerations; an historical analysis of the development of residence and contact law, gender and parenting" above n 286 at 76.

²⁸⁹ *R v. Greenhill* above n 287 at 639-40.

²⁹⁰ Elizabeth Ann Sinclair "Timeless considerations; an historical analysis of the development of residence and contact law, gender and parenting" above n 286 at 76 citing J Wroath *Until They Are Seven* (Waterside Press, Winchester, 1998) at 50.

²⁹¹ Above n 297

²⁹² C K Allen *Law in the Making* above n 194 at 225; J H Baker *An Introduction to English Legal History* (3rd ed, Butterworths, London, 1990) at 228.

and that nothing can be done about that. Alternatively, Lord Denman's can be interpreted as an acknowledgment that custody decisions were about parental rights entirely (and divorced mothers did not have any as regards custody) and that the children's interests may not be that important at all.

Another possibility is that they truly believed that fathers could better provide for children given women's legal and social standing. For example they were still barred from the professions, most commonly had limited education and were not even trusted yet to have acceptable political opinions, hence could not vote. Married women's property, inheritance and earnings belonged to her husband under coverture.²⁹³ Judging by the courts' application of the subsequent legislation (see below), the judiciary did not feel that strongly about a mother's right to custody regardless of Lord Denman's assertion that all the judges were so deeply ashamed²⁹⁴. This does not mean that individual judges all felt the same, but clearly they felt bound to act in accordance with the rules of the system and it is apparent that no judge had the courage to set new precedent which indicates that among the judiciary there was either pressure or agreement not to unsettle established precedent.

Nonetheless, the political system responded to this perturbation by passing Talfourd's Act. This provided the legal system with a new and additional conditional programme in that *if* children were below the age of seven *then* the court might consider giving the mother custody. Maternal custody of young children became legal in the face of a tyrannical father – the latter then being coded illegal i.e. abusive behaviour, or so it may be assumed. Note though that the maternal custody would only be legally right if the father was found to be awfully abusive or grossly inappropriate – according to the court's discretion because the Act provided no guidance and judicial precedent would then usually apply. As already stated, the Act would only apply if the parents had legally separated and the mother was not guilty of adultery. Other than that, a father's right to custody was still deemed to be legally right.

Notably the promoters of the Act did not argue for a change in the law as to the father's 'natural' right to custody but merely for relief in cases where the father's right led to 'grievous wrong' and that judges should in such cases be

²⁹³ This would only change in England in 1870 (Married Women's Property Act 1870) and in New Zealand in 1880 with the Married Women's Property Act passed there.

²⁹⁴

granted discretion to infringe on the father's right.²⁹⁵ Bailey points out that the Act was not passed to correct 'ancient and entrenched' law but to manage the developments in case law discussed above i.e. the case law as it had developed since *De Manneville*. Notwithstanding that the Act provided legal communication in the form of recognition of the rights of mothers to apply for custody and access, the Act did not have a significant impact on judicial practice of maintaining paternal custody rights.²⁹⁶

Even though the tender years doctrine in theory presumed that mothers were the most suitable caretakers of children in their "tender years" and that it was thus in such children's interests to be in their mothers' care, this 'best interests standard' as applied by the courts was extremely limited. In the case of *Re Fynn*²⁹⁷ the father retained custody of his sons, despite the court's comments that he was an unsuitable parent but because the judge deemed it beyond his discretion to interfere with the father's power.

In *Warde v Warde*²⁹⁸ the court was reluctant to make a custody order that would favour one parent over the other and Cottenham LC stated that "[c]hildren are by nature entitled to the care of both their parents" and went on to describe the court's duty as "painful" when one parent's conduct would not allow for this 'natural' entitlement, and that "all [the court] can do is to adopt that course which seems best for the interest of the children."²⁹⁹ This was in 1849 but resonates well with the current approach in custody decisions. It would therefore appear that the current approach is not novel at all but that the law could reach backwards to its own legal communication³⁰⁰ when it decided to follow the contemporary approach. In *Warde* the mother was awarded custody on the grounds of the father's adultery and recklessness. Then in *Re Halliday*³⁰¹ three matters were said to be of permanent importance namely the paternal right to custody, the marital duty (owed by the husband and wife to each other but also their responsibilities towards their children to provide them with care) and the children's interests. The

²⁹⁵Mr Serjeant Talfourd, House of Commons Debate 9 May 1838 at 1054 quoted in Martha J Bailey "England's first *Custody of Infants Act*" above n 285 at 405-406.

²⁹⁶Martha J Bailey "England's first *Custody of Infants Act*" above n 285 at 406.

²⁹⁷(1848) 2 De G. & Sm. 457. Cited in P H Petit "Parental control and guardianship" above n 207 at 64.

²⁹⁸(1849) 2 Phillips 786.

²⁹⁹*Warde v Warde* above n 298 at 789.

³⁰⁰Niklas Luhmann "Closure and Openness: on reality in the world of law" above n 19 at 345.

³⁰¹(1853) 17 Jur. 56. Cited in P H Petit "Parental control and guardianship" above n 207 at 59.

judge then said that the court should decide, if possible, in favour of the paternal right rather than against it. Moving thirty years ahead to 1883 Bowen LJ³⁰² put the matter concisely:

It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children that [sic] a court of justice can.

On the one hand it can be argued that this interpretation and application of the Custody of Infants Act is not surprising because the wording of the Act allowed for a wide scope of discretion³⁰³ as the Acts relevant to CCDs across the world still do to this day. On the other hand it also illustrates the closure of the legal system. While, according to Luhmann, legislation first enters the legal system as a communication from the political system,³⁰⁴ the legal system will itself decide how to adapt its operations to the received communication and then re-produce its own communications or conditional programmes in order to either shift or re-affirm normative expectations. Looking at the impact of that Act in England from the limited reported case law, there are apparent indications that the courts were reluctant to apply it and when they did it was seen as an Act not providing for the consideration of the best interests of the child after all, but an Act to protect mothers from tyrannical husbands.³⁰⁵ Again, the best interests of the child were mere lip-service.

The Custody of Infants Act 1873 repealed the 1839 Act and declared as legal that any children under sixteen years of age may qualify to have access to their mothers or that the mother may have custody over them. New Zealand enacted similar provisions in its Law Amendment Act 1882.³⁰⁶ Thereafter the English and New Zealand legislation “on the subject of the custody of infants was

³⁰²*Agar Ellis v. Lascelles* (1883) 24 Ch D 317, 334.

³⁰³ The Act provided that it shall be lawful for the judge “upon hearing the petition of the mother of any infant or infants ... *if he shall see fit*, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulation *as he shall deem convenient and just*; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations *as he shall deem convenient and just*.” Quoted in William Forsyth *A Treatise on the Law Relating to Custody of Infants in Cases of Difference between Guardians* above n 241 at 139. (Own emphases).

³⁰⁴ Michael King and Chris Thornhill *Niklas Luhmann’s Theory of Politics and Law* above n 16 at 44.

³⁰⁵ In *Warde v Warde* above n 298 at 1148 the court stated that “[t]he object of the Act, and the promoters of it, ... was to protect mothers from the tyranny of those husbands who ill-used them.”

³⁰⁶ *Re JH and LJ Thomson (Infants)* (1910) 30 NZLR 168 (SC) at 170 as per Williams J.

the same.”³⁰⁷ According to at least one New Zealand reported judgement, “[w]hen New Zealand became a [British] colony Talfourd’s Act came into force [in New Zealand].”³⁰⁸ Reported cases on custody decisions post New Zealand’s colonisation³⁰⁹ until the early 20th century are practically non-existent. Given that New Zealand was still a very young colony, it is reasonable to accept that it lacked the resources and structures for proper case reporting and it is worth noting that procedural case reporting was not common practice in England until 1865 either.³¹⁰ Given how closely the English legislation was followed in New Zealand’s legislation at that time³¹¹ one may be forgiven for accepting that English common law was followed as well – at least where possible and that Talfourd’s Act was hardly ever applied.

However despite the 1873 Act, in England judges were still not considering mothers for custody. Parliament then passed the Custody of Infants Act 1886. Eventually New Zealand enacted the Infants Act 1908 which still followed the English legislation practically word for word.³¹² Interestingly, the relevant section of the Infants Act³¹³ provided as follows:

The Court may, on the application of the mother of any infant ... make such an order as it thinks fit regarding the custody of such infant and the *right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father*; and may alter, vary, or discharge such order on the application of either parent, ... as it thinks just. (Own emphases).

Nowhere does the section – exactly the same as the relevant section in the English Act³¹⁴ – expressly state that the mother’s application is first priority, but rather that both parents’ views and wishes should be considered in relation to a decision that must regard the welfare of the child. Yet, for example in *In re A and B (Infants)*³¹⁵ the English Court of Appeal read a prioritisation of the mother into that section of the English Act. Lindley LJ said “[n]obody can read the various

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ In the interest of anchoring the time line I deem this to be 1840 when the Treaty of Waitangi between indigenous Maori and the English crown was signed.

³¹⁰ J H Baker *An Introduction to English Legal History* above n 292 at 208-11.

³¹¹ See notes 146 and 147 above.

³¹² *Re RJ and LJ Thomson (Infants)* above n 361 at 171.

³¹³ Infants Act 1908, s 6.

³¹⁴ Guardianship of Infants Act 1886, s 5.

³¹⁵ [1897] 1 Ch. 786.

sections in the Act without seeing that it is essentially a mother's Act."³¹⁶ While Rigby LJ acknowledged the equality of the mother and father under the Act he found the words 'the wishes as well of the mother as of the father' "very remarkable"³¹⁷ and as the ultimate signification of the intention of the legislature to interfere with the rights of the father. He was quite fascinated by the fact that 'mother' preceded 'father' in the wording of the section which to him indicated that the mother must be more important. He went on to say that "as a general rule you are to consult the wishes of one as well the other" but then expressed his belief that the Act cannot be properly construed if "you are to read into that section 'without prejudice to the rights of the father at common law, and as they stand by the decisions down to this time.'"³¹⁸

Despite the quite similar provision in the 1839³¹⁹ and 1873³²⁰ legislation that also provided that the court – in exercising its discretion – may consider a mother to be the custodial parent of children, it was the 1886 Act that apparently bolstered this idea in the legal system, or as Luhmann would view it, because the legal system had finally *decided* to apply the idea of mother-custody from time to time. Not even the Matrimonial Causes Act 1857 that allowed the courts to make custody orders 'as it may deem just with respect to the custody of children'³²¹ had a greater impact on the court.³²² Notably however, married women had, five years earlier, been granted property rights with the passing of the Married Women's Property Act 1880 and perhaps this was the reason for the courts' readiness to follow the legislation. Lindley LJ actually spelled out that the legislature felt it necessary to enact the 1886 Act because what it wanted to accomplish was to increase the mother's rights "because Talfourd's Act and the Act of 1873 *as construed by the Courts* had not gone far enough in favour of the mother."³²³ Where it was once in the best interests of children to be in the custody of their father, mothers would now be considered to be the parent that would serve the best interests of young children better. Yet, the actual wording of the section

³¹⁶ *In re A and B (Infants)* above n 240 at 790.

³¹⁷ *In re A and B (Infants)* above n 240 at 795.

³¹⁸ *Ibid.*

³¹⁹ Custody of Infants 1839.

³²⁰ Custody of Infants Act 1873. The Act removed the bar to any adulterous mothers to petition for custody of their children.

³²¹ Matrimonial Causes Act 1857, s 35.

³²² Stephen Cretney *Family Law in the Twentieth Century: A history* (Oxford University Press, Oxford (UK), 2003) at 576.

³²³ *In re A and B (Infants)* above n 240 at 795 (Own emphasis).

in the Act does not provide for such a preference, only that the wishes of both parents should be considered alongside the welfare of the child.

The reasons for the judiciary's responses to maternal custody is open to speculation but what this discussion attempts to show is that the political system and the legal system do operate as two separate systems that act in accordance with their own operations and perceived environmental irritations that it deems necessary to respond to.

As said, parliament responded, albeit at first reluctantly, to agitation in its environment led by Caroline Norton.³²⁴ However, three decades later, the outcome of custody decisions had not changed significantly and in the meantime influential leaders and thinkers such as political and social theorist, John Stuart Mill, written about the incapacity of women.³²⁵ By the mid-nineteenth century, feminism and an organised feminist movement emerged with the objective of achieving equality for women via legal rights to education, entry to the professions, equality in marriage, divorce and child custody and the right to vote and some men gave their support. Indeed, Caroline Norton was greatly aided by men in her campaign for some maternal custody rights – if only in relation to men's tyranny or cruelty in marriage – and that men of influence were becoming willing to support women's views. In addition there was still the influence of Rousseau's ideas of the importance of the mother in children's lives and how that linked to morality as re-interpreted by the political system. These ideas could have and probably would have been exploited by the opposition of the day had the government not decided to act upon them.³²⁶

³²⁴ Note that Norton did not agree with feminists on women's equality to men. In fact she argued that it was because of women's weakness that they needed the protection of the law. See Martha J Bailey "England's first *Custody of Infants Act*" above n 284 at 405-406. Bailey argues that it was precisely because the campaign had not been seen as a threat to patriarchy by the male political system that it was passed and that Norton knew that if she wanted the Act to succeed in parliament she had to distance herself from any feminist views. She therefore used men's view of women to further her cause.

³²⁵ John Mills wrote *On The Subjection of Women* in 1861, which was published in 1869. Another 19th century example is the writing of Samuel Smiles, see Alex Tyrrell "Samuel Smiles and the women question in early Victorian Britain" (2000) 39 (2) *The Journal of British Studies* 185. Feminist writers of that time period include Harriet Martineau and from late in the 18th century Mary Wollstonecraft who's *Vindication of the Rights of Women* was published in 1792. Jeremy Bentham, more than a decade before Wollstonecraft, had pointed out the virtual slavery of women and argued for women's political freedom – to be able to vote and participate in parliament – as well as personal freedom for women in allowing them to obtain a divorce. See Miriam Williford "Bentham and the rights of women" (1975) 36 (1) *Journal of the History of Ideas* 167.

³²⁶ Governments react to events that are perceived as threats to holding power in accordance with the code of the political system (government/opposition as per Luhmann).

That most male politicians were still deeply patriarchal and paternalistic in their views of women should not however be doubted. Perhaps the political system also felt assured by the developments in the environment (irritation) that women had devoted their energy to the institution of domesticity. Reliance on this discourse could protect the family as an institution with subsequent benefits for the State. The family was a place where financial, educational and moral responsibility for raising the State's citizens could be ensured (or this was the ideology) and the hope was that this 'cult of domesticity'/'cult of true womanhood'³²⁷ that had emerged would ward off the perceived threats of divorce. Mothers were responsible for upholding moral values and raising their children as loyal citizens.³²⁸ Rousseau's ideas were neatly selected to re-enforce the private sphere of the home where women were supposed to find a haven, protection from the 'harshness' of men's world: business, politics and law. Domesticity came into vogue over the Victorian period – and not only because the notion re-enforced the nuclear family. Indeed, most women claimed and reinforced the ideas of domesticity and 'guidance manuals' now focused on women, purporting to teach them how to do the very important job of running the household (without expecting remuneration, of course, but because this was her 'god given' place in the world) and care for and raise their children so that they would become upstanding citizens for the State. But let us not forget that middle and upper class families employed servants to get the job done.

Nonetheless, gradually working class women were striving to achieve the same and live up to these expectations of motherhood. Alternatives to married life were extremely limited for women since they were less educated (if at all) and legally and economically hampered. These developments/irritations in the political system's environment (the cult of domesticity/true womanhood) suited the political agenda perfectly and so ignoring feminist agitations was preferred. Keeping women in the home was a much-preferred option and therefore legal restrictions were supported by the political system by not interfering with the legal system i.e. not enforcing more legislation that may emancipate women.

³²⁷Barbara Welter "The cult of true womanhood, 1820-1860" (1966) 18 (2) *American Quarterly* 151. For a New Zealand account see Bev James and Kay Saville-Smith *Gender, Culture & Power* (Oxford University Press, Auckland (NZ), 1994) at 32-47.

³²⁸Mary Lyndon Shanley *Feminism, Marriage, and the Law in Victorian England 1895* (Princeton University Press, Princeton (NJ), 1989) at 5-6.

Politically the message was that the husband's authority and the wife's gracious influence constituted the two domestic pillars of civil society.³²⁹

Once the legal system had to interpret and apply the first custody Acts, that system referred only to its own previous rules and decisions as regards legally wrong and legally right. The principal legal norm was that a father is the custodian of his children. Eventually the system accepted that a mother could have custody of her young children (if she was not guilty of adultery).³³⁰ The legal system's developed concern for children's education was possibly perceived to be addressed by the passing of the Elementary Education Act in 1880³³¹ that extended compulsory schooling to children aged five to ten. Perhaps, if there were doubts about the mothers' ability not to 'spoil' the child then this new politically introduced programme would alleviate the 'damage'. This is suggested as another event in the legal system's environment that *could* shed some light on why the system considered the 1886 custody Act to be 'the one' that would 'allow' it to give custody to mothers on a more regular basis while the wording of the Act cannot be said to be all that 'remarkable' at all.³³² A final suggestion is that the move towards a maternal preference in child custody that evolved from here on in, was because the law operated by simplifying complexity, as Luhmann suggests. It was perhaps considered an easier solution to switch from a paternal preference to a maternal preference because dealing with the complexities of human relationships and attempting to allocate 'legally right' and 'legally wrong' values to people's behaviour in individual cases renders the law too unpredictable and inconsistent.

³²⁹ As per Lord Shaftesbury cited in Anthony S Wohl "Introduction" in Anthony S Wohl (ed) *The Victorian Family: Structures and stresses* (Croom Helm, London, 1978) 1 at 9-10.

³³⁰ Commentators have pointed out that when the legal system finally responded by legalising women's care for young children (the tender years doctrine) it practically guaranteed lower economic status and financial dependence for women and children in the future and it also legalised the 'cult of domesticity' i.e. the notion that a woman's place is in the home caring for young children. See e.g. Laura Sack "Women and children first: a feminist analysis of the primary caretaker standard in child custody cases" (1992) 4 Yale J. L. & Feminism 291 at 296.

³³¹ Note that the political system, for a long time, ignored/resisted the irritation/development of childhood education as a possibility for extending its power but, in order to preserve its position, i.e. acting in accordance with its code (government/opposition), the government of the day decided to react to the middle classes who had developed a concern for poor children and child labour, the latter having become increasingly visible due to the Industrial Revolution albeit that poor children had always worked to help sustain the family. See e.g. Sara Horrell and Jane Humphries "Child labour and British industrialisation" in Michael Lavalette (ed) *A Thing of the Past? Child labour in Britain in the nineteenth and twentieth centuries* above n 254 at 44 Hugh Cunningham *Children & Childhood in Western Society since 1500* above n 107 at 79-89 (discussing children's work and the effect of compulsory schooling e.g. extending childhood).

³³² See the discussion at 3.3.5

But the legal system's response – the Tender Years Doctrine (TYD) to the Act was also an 'irritation' that the political system could choose to reconcile itself with. The virtues of motherhood would still benefit future citizens because a mother would play the designated role of raising the young and extremely dependent children, while fathers were thus free to contribute to the economy and to 'earn the bread' which would further institute the patriarchy of the nuclear family.³³³ The message of the TYD was perceived to be that a mother's place is at home with her children. In turn, the legal system could satisfy itself that it was still acting in accordance with its programmes. A father's legal rights to determine a child's education, religion and medical treatment but, importantly, also his duty to maintain his children were still upheld, i.e. the primary functions of patriarchy as regards children.

³³³ See e.g. Wally Secombe "Patriarchy stabilized: the construction of the male breadwinner wage norm in nineteenth-century Britain" (1986) 11 (1) *Social History* 53; Edward Shorter "Women's work: what difference did capitalism make?" (1976) 3 (4) *Theory and Society* 513. For a thorough account of the same developments (State institution of the male breadwinner for families) repeating themselves in New Zealand, see Melanie Nolan *Breadwinning: New Zealand women and the state* (Canterbury University Press, Christchurch (NZ), 2000).

Chapter 5 The rise of shared parenting – irritations and responses

5.1 Introduction

This chapter surveys two events and their consequences for CCDs. First the introduction of child support payment/collection schemes across the common law countries. Second, the reaction from fathers and the subsequent responses by the political system via legislation and the courts once the legislation came into force and were incorporated into its operations. Smart and Neale suggest³³⁴ that what has occurred constitutes a determined attempt to socially engineer the family, to change the nature of the post-divorce family.³³⁵ But this re-visioning of post-separation family life also rests upon a political consideration of fathers' financial responsibilities.³³⁶ The prevalence of children living in low income households is of concern in common law countries.³³⁷ This means that support for single mothers forms a significant portion of social support budgets and the State would stand to gain if such households' incomes could be supplemented by other means.

5.2 A problem with child support

The apparent fiscal emergency in many countries of the 1980s raised political concern regarding the public costs of supporting the economically weaker members of separated families, and sought to transfer the burden of support back to the family itself. The political system introduced child support schemes, which either eliminated or severely curtailed judicial discretion in child support matters.³³⁸ Current child support policy in common law countries was

³³⁴Carol Smart and BrenNeale "Good enough morality? Divorce and postmodernity" (1997) 1 *Critical Soc. Pol'y* 17.

³³⁵Carol Smart "Wishful thinking and harmful tinkering? Sociological reflections on family policy" (1997) 1 *J. Soc.Pol'y* 26.

³³⁶Richard S Collier "The fathers' rights movement, law reform and the new politics of fatherhood: some reflections in the UK experience" (2009) 20 *Fla. J.L. Pub. Pol'y* 65 at 75.

³³⁷ See e.g. Charles Waldegrave, Robert Stephens and others "Assessing the progress on poverty reduction (2003) 20 *Social Policy Journal of New Zealand* 197 at 200; Roderic Beaujot and Jianye Liu "Children, social assistance and outcomes: cross-national comparisons" PSC Discussion Papers Series (2002) 15 (18) article 1.

³³⁸John Dewar "Family law and its discontents" (2000) 14 (1) *Int J Law Policy Family* 59 at 67.

thus a political initiative to curb state expenditure in support of single parents.³³⁹ The environmental irritation of the massive increase in single parents since the 1970s led to a dramatic increase in States' expenditure to support single parents. The child support orders made by the courts were proving hard to enforce and mothers found the operations of the system so unhelpful and complicated that they rather opted to struggle on their own.³⁴⁰ This left many single parent households (predominantly mother-headed) in financial difficulty.

As a consequence of the subsequent agitation by fathers for legal presumptions of shared parenting post separation (that escalated after the introductions of child support schemes) it was hoped that by allowing for more equal and inclusive language in the legislation that acknowledged the merit of both parents, fathers (the predominant non-resident parents) would feel recognised and spend more time with their children, but most importantly, comply with their child support payments. Some studies were published (irritation) that showed that fathers pay their child support more and show more interest in their children when they are awarded joint legal (not necessarily physical) custody.³⁴¹ While none of the legislatures in this discussion enacted a regime that provided for 50/50 shared parenting time or even specified any amount of time, it has been the courts that have interpreted the legislations as the need to order substantial contact and shared care arrangements.

In Australia the legislature enacted a presumption of equal, shared parenting

³³⁹ See Richard Collier and Sally Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Portland (OR), 2006) generally. While the various contributors discuss multiple factors in the different jurisdictions that relate to the topic, they all mention or discuss the effect of child support on fathers' rights groups; Maureen Baker and David John Tippen *Poverty, Social Assistance, and the Employability of Mothers: Restructuring welfare states* (University of Toronto Press, Toronto, 1999) at 157-190.

³⁴⁰ Maureen Baker "Lingering concerns about child custody and support" (2008) 4 (1) Policy Quarterly 10 at 12.

³⁴¹ See e.g. Judith A Seltzer *Father by Law: Effects of joint legal custody on nonresident fathers' involvement with children* Working Paper No. 75 (Center for Demography and Ecology, NSFH, U.S. 1997) Finding that joint legal custody increased adherence to child support payments and contact with children, and concluding that "[a]t least on the dimension of increased contact between nonresident fathers and children, joint legal custody may, as advocates claim, make the lives of children after divorce more similar to their lives before divorce or to the lives of their peers in two-parent households"); Judith A Seltzer, Nora Schaeffer and others "Family ties after divorce: the relationship between visiting and paying child support" (1989) 51 (4) J. Marriage & Fam. 1013; Stephen J Bahr, Jerry D Howe and others "Trends in child custody awards: has the removal of maternal preference made a difference?" (1994) 28 Fam. L. Q 247.

responsibility in CCDs but not a presumption of shared equal time.³⁴² Studies that disproved the benefits of such arrangements were ignored.³⁴³ Findings of a subsequent 2010 research report demonstrate however that even shared care arrangements made by mutual agreement between the two parents often revert to a pattern of one parent providing primary care (the mother) within a few years of the initiation of shared care.³⁴⁴ Thus it would seem that the purpose-specific programme of achieving greater shared care generally for children is not as ‘successful’ as the legislature had hoped. This should make political systems in other jurisdictions cautious since it does not reflect very positively on a government that enacts new legislation which programmes are not being achieved. This applies especially when the experiment involves children’s well-being and it must at the very least be a disruptive experience for children if the parenting arrangements turn out not to be sustainable but much worse if they are destructive. As one commentator notes “despite the fact that real world practices have yet to catch up to the new cultural ideal of fatherhood, fathers’ rights groups have seized upon this compelling imagery in making their political claims.” First I will look at what prompted the fathers’ rights movement (FRM) to drastically elevate their agitation for equal shared parenting.

5.3 Maternal preference meets child support

One justification from a political perspective has made legislative *promotion* of shared parenting (but not presumption of) effectively inevitable and that is the financial desirability of limiting and reducing public support of children via social support programmes given the growth in the number of one-parent

³⁴² Family Law Act 1975 (Cth) ss 61 DA, 65DAA (2006) (presumption of “equal shared parental responsibility” except where there is violence or abuse; if the court orders equal shared parental responsibility, then shared time must be **considered**).

³⁴³ Conversely, but controlling for observed characteristics and heterogeneity, Veum found no causal link between paying child support and contact see Jonathan R Veum “The relationship between child support and visitation: evidence from longitudinal data” (1993) 22 Soc. Science Research 229 at 242-243.

³⁴⁴ Cashmore, Judy, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General’s Department* (Social Policy Research Centre Sydney, University of New South Wales 2010) <http://www.adfvc.unsw.edu.au/specialcollectionfamilylaw.htm> Accessed 22 February 2012.

families.³⁴⁵ By the 1970s single parent (mother headed) households, whether due to divorce, de facto partnerships breaking up, or women left/choosing to be on their own and coping with unplanned pregnancies had risen dramatically.³⁴⁶ It is a questionable supposition that generally held societal values are preserved in legal enactments. Even before the introduction of no-fault divorce, the English Law Commission assessed that, per annum, about 20 000 children were born to parents who had separated from former spouses, not bothering to legalise the separation due to the complicated process of obtaining a divorce, and simply co-habited.³⁴⁷ When such parents separated they could not involve the law in CCDs because they were still legally married to another, and ‘arrangements’ were necessarily made between the parents – which most often left the mother caring for the children on her own and without commitment of financial support by the father.

The most important question for the political system was how to support such children financially and physically.³⁴⁸ It was evident that the infatuation with the nuclear, father-breadwinner family that should provide the resources for raising children, was failing on some levels and that this irritation could not be ignored much longer. It was also evident the court orders for maintenance and child support were not being adhered to. Long before no-fault divorce was instituted in New Zealand³⁴⁹ the political system – due to social pressure – introduced the Domestic Purposes Benefit in 1973 to support sole parents (primarily mothers) but sentiments included that this encouraged women to leave their husbands rather than that it supported women who had to raise children on their own with no support from the father.

[Support for the one-parent family] challenged two fundamental beliefs about the [European] New Zealand family: the ideal of the nuclear family as the only type of acceptable family unit and the ideal of the married woman at home caring for children.³⁵⁰

³⁴⁵ Patrick Parkinson “Family law and the indissolubility of parenthood” (2006) Sydney Law School Research Paper No. 06/31. Available at SSRN: <http://ssrn.com/abstract=938020> at 57. Downloaded 14 January 2012.

³⁴⁶ See e.g. Cynthia R Daniels “Introduction” in Cynthia R Daniels (ed) *Lost Fathers: the politics of fatherlessness in America* (Palgrave Macmillan, Basingstoke, 1998) 1.

³⁴⁷ Lynn D Wardle “No-fault divorce and the divorce conundrum” above n 127 at 94-95 and sources citing.

³⁴⁸ Jocelyn Elise Crowley “Adopting ‘equality tools’ from the toolboxes of their predecessors: the fathers’ rights movement in the United States” in Richard Collier and Sally Sheldon *Fathers’ Rights Activism and Law Reform in Comparative Perspective* above n 339, 79 at 79.

³⁴⁹ Family Proceedings Act 1980, s 10 (as amended in 1981).

³⁵⁰ Kay Morris Matthews and Richard Matthews “Paradigms of family, welfare and schooling in New Zealand” in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Addison Wesley Longman, Auckland, 1998) 57 at 78.

Before the Children Act 1989 in the U.K. research showed that it was primarily mothers who claimed and obtained custody of children in divorce and that it was evident that in the vast majority of cases, the courts were not actually determining which parent was the more suitable but basically making orders that confirmed the existing trend.³⁵¹ In New Zealand (as in other common law countries) the legal system predominantly upheld the ‘mother principle’³⁵² (programme) in CCDs and even when couples came to their own agreements, the socially accepted values were that women continue to raise the children and that men went their own way. Undoubtedly there were fathers who ‘accepted’ this type of arrangement also ‘in the shadow of the law’, and not because they only had their own comfort in mind. However the law always had the legally established programme of the ‘individual approach’ to apply when a judge saw the need to veer off from the predominant programme, for reasons of evidence or perhaps his own values or subjective perception of a particular parent. But these cases do not create any other normative expectation than that a person may just stand a chance of ‘winning’ in court. If all cases were decided the same then the legal system would not only be unjust but it will also have no business and work.³⁵³ It is however debatable how concerned the legal system was with ‘justness’ while it upheld the ‘father principle’ for hundreds of years but at the same time it also avoided litigation over child custody. How well this turned out for children we will never really know. The point for my purposes is that the legal system operates best (for its own purposes) when there are clear self-determined programmes to follow. The approach to CCDs swung – over time – from a once unbendable rule that fathers owned their children, to the ‘rule’ that of a maternal

³⁵¹ J Eekalaar, E Clive and S Raikes *Custody after Divorce* (Centre for Socio-Legal Studies, Wolfson College, Oxford (UK), 1977 cited in Richard Collier *Masculinity, Law and the Family* (Routledge, London, 1994) at 178.

³⁵² *Re J H and L J Thomson (Infants)* above n 361; *In re Winter* [1930] GLR 637; *Norton v Norton* [1951] NZLR 678; *G v G* [1978] 2 NZLR 444 (CA); Georgie Hall *Family Court Custody and Access: The welfare of the child – a literature review* above n 352 at 15 citing L S Sealy “Parental custody under the law of New Zealand” in Joseph Unger (ed) *Parental Custody and Matrimonial Maintenance – a Symposium* (The British Institute of International and Comparative Law, London, 1960) at 49.

³⁵³ It is interesting to note that in the same year (1981) that no-fault divorce was introduced in New Zealand (meaning many couples no longer needed a lawyer to obtain/defend a divorce), the amendment to the Guardianship Act (s23A) was made which provided that a parent’s sex must no longer be considered in CCDs. Thus, at least in terms of the legislation, there was now hope for those parents who wanted to contest custody in the face of the ‘mother principle’. Perhaps when one door closes (for lawyers) another opens.

preference. as evidenced in outcomes. As Henaghan says,³⁵⁴ it is what is ultimately decided by the courts, the outcomes of contested cases, rather than the obiter dictum of judges about values and justice, that determines legal normative expectations.

The legal system was basically confirming to men (and society) that they do not have the skill or dedication to be involved or to be sole parents post-separation. This was the new legally produced normative expectation that followed after the rule of the father and even though change was slow, which is typical of the operations of the legal system, eventually the system succeeded in stabilising a new legal norm. It was accepted because of the realities of child rearing and nurturing i.e. that it was women's work and specialty and in addition a lot of resources and dedication went into driving this practice home to women especially around the end of the nineteenth century and over the first few decades of the twentieth.³⁵⁵ As said, in accordance with autopoiesis, the legal system is cognitively open to its environment and it decides what to react to and when and if the environment is offering overwhelming evidence of a 'truth' then it is relatively simple to confirm such behaviour as legally correct. Over this time period medical practitioners provided 'scientific proof' to justify the dogma of the polarised roles for men and women and for the policy that saw women and girls being socially and emotionally programmed via training and education to have and to raise (healthy) children and manage households.³⁵⁶ This was possibly a

³⁵⁴ Mark Henaghan "Above and beyond the best interests of the child" in Stuart Birks and Paul Callister (eds) *Perspectives on Fathering* Issue Paper No 4 (Centre for Public Policy Evaluation, Massey University (NZ), Palmerston North, 1999) 110 at 118.

³⁵⁵ See Anna Davin "Imperialism and motherhood" (1978) 5 (9) *History Workshop Journal* 9 for her fascinating contention that the rise of imperialism, the arms race between empires (Japan, Germany, Britain and America), and the competition relating to industrialisation, turned motherhood – particularly the health of mothers - into a focal point in order to produce healthy boys that could serve as soldiers and workers and healthy girls that could produce more healthy babies. Indeed the colonies – including New Zealand despite its remote location – enthusiastically offered (and lost) many its male citizens to Britain in both world wars in the twentieth century. Motherhood (and the rise of eugenics) came under the scrutiny of the medical sciences and the political system supported and responded to that system's recommendations. In New Zealand, this task was primarily undertaken by Truby King and his wife: see Sue Kedgeley *Mum's the Word: The untold story of motherhood in New Zealand* (Random House, Auckland (NZ), 1996) at 43-58; Erik Olssen "Truby King and the Plunket Society: an analysis of a prescriptive ideology" (1981) 15 (1) *New Zealand Journal of History* 3; Erik Olssen and Andree Levesque "Towards a history of the European family in New Zealand" in Peggy G Koopman-Boyden (ed) *Families in New Zealand Society* (Methuen Ltd, Wellington, 1978) 1 at 8-9.

³⁵⁶ Carol Dyhouse "Social Darwinistic ideas and the development of women's education in England 1880-1920" (1976) 5 (1) *History of Education* 41; "Good wives and little mothers: social anxieties and schoolgirls' curriculum 1890-1920" (1977) 3 (1) *Oxford Review of Education* 21. In New Zealand George Hogben (a prominent educationalist) for example introduced cooking,

perturbation that the legal system could use to justify its solidified maternal preference in the face of more CCDs entering the legal system.³⁵⁷ In addition, the State provision of social benefits to single parents was possibly another ‘irritation’ that strengthened the legal system in its maternal preference.

Conversely, women felt compelled to ‘fight’ for custody where a father decided to challenge the norm because not only had motherhood – due to over a hundred-and-fifty years of social engineering – become an inherent part of most mothers’ identity and sense of self-worth, but society also generally expected women to have custody of their children and it was heavily frowned upon and harshly judged if a mother did not automatically want (or lost) custody of her children.³⁵⁸ Social attitudes towards noncustodial mothers are much more negative than attitudes toward noncustodial fathers³⁵⁹ since the stabilisation of the TYD. And yet, over the past few decades, in the context of marriage breakdown and sole parenthood, there is far more public concern for ‘fatherless’ families than for families without mothers regardless of the strong traditional approaches to women as nurturers.³⁶⁰

The ‘mother principle’ dominated within the New Zealand legal system in CCDs throughout the 1980s³⁶¹ and by 1988 for example, despite the legislative amendment in 1981 to the relevant legislation that stipulated that a parent’s sex

sewing and household management into schools as instructions for girls: Herbert Otto Roth *George Hogben: a biography* (New Zealand Council for Educational Research, Wellington (NZ), 1952) at 92-93. This then spilled over into tertiary education so that by 1912 a degree was offered, let alone just subjects: J C Beaglehole *The University of New Zealand: An historical study* (New Zealand Council for Educational Research, Wellington (NZ), 1937) at 260.

³⁵⁷ Legal aid for family matters has been available since 1969 in New Zealand. See Ian Shirley and Susan St John “Family policy and the decline of the welfare state in New Zealand” (1997) 10 *British Review of New Zealand Studies* 39 at 42.

³⁵⁸ See e.g. Ann Dally *Inventing Motherhood: The consequences of an ideal* (Burnett Books, London, 1982); Aminatta Forna *Mother of all Myths: How society moulds and constraints mothers* above n 256.

³⁵⁹ See e.g. Joyce A Arditti and Debra A Madden-Derdich “Noncustodial mothers – developing strategies of support” (1993) 42 (3) *Family Relations* 305; Phyllis Chesler *Mothers on Trial: The battle for children and custody* (Revised and updated 2nd ed, Lawrence Hill Books, 2011); Catalina Herrerias “Noncustodial mothers following divorce” (1994) 20 (1-2) *Marriage & Family Review* 233 (finding inter alia that an overall theme from the literature was a general societal disapproval regarding maternal custody relinquishment).

³⁶⁰ Judith A Davey “Children living in sole father homes in New Zealand” in Stuart Birks and Paul Callister (eds) *Perspectives on Fatherhood II* Issue Paper No 6 (Massey University, Centre for Public Policy Evaluation, Palmerston North, 1999) 105 at 106. <http://cppe.massey.ac.nz/> Downloaded on 29 August 2011.

³⁶¹ See e.g. Mark Henaghan “Shared parenting: where from? Where to?” in Stuart Birks (ed) *Children’s Rights and Families: Proceedings of social policy forum 2000* Issue Paper No. 10 (Centre for Public Policy Evaluation, Massey University (NZ), 2001) 50 at 50. <http://cppe.massey.ac.nz/> Downloaded 30 August 2011.

should not be a consideration in CCDs³⁶² only 5% of fully defended CCDs were for joint custody.³⁶³ It is not evident that this is what the political system intended because certainly the relevant legislation instructed gender-neutrality. However, there were no further changes (relevant to CCDs) made to the legislation until the enactment of the Care of Children Act 2004 (COCA). And certainly no concerted effort over this period can be identified to indicate the same level of investment in fatherhood as a ‘science’ or to ‘educate’ them in social expectations regarding household management matters. When sociologists first started to study New Zealand families in the late 1960s they found that mothers were more actively involved in more activities within the household management than was the case in America.³⁶⁴ New Zealand wives were, for example, more involved in managing the family’s finances which was traditionally the husband’s domain, yet husbands hardly participated in the traditional wife’s ‘domain’ at all, a father’s role was seen as doing his job outside the family. There is a great benefit in entrusting women with raising children. As Fuchs pointed out:

Suppose women were better than men at producing and caring for children but had no particular desire to do so, while it was men who wanted the children and cared more about their welfare. We would probably still see the same division of labor, ... but men would have to pay dearly for women’s services. The present hierarchy of power would be reversed.³⁶⁵

Nonetheless, these questions and concerns were probably not on the mind of the politicians but what did prompt the political system to respond to outcomes of CCDs were primarily the financial concerns over public support to sole mothers and the reality that the courts’ child support determinations and orders were not effective, leaving women and children in dire financial positions. These irritations were considered urgent for response by the 1980s and the political system elected to remove child support decisions from the courts.

The increase in sole parenting thus became one targeted public expense in common law countries where a strategy of controlling social expenses in liberal

³⁶²Guardianship Act 1968, s 23A (as amended in 1981).

³⁶³Georgie Hall *Family Court Custody and Access Research Report: The Welfare of the Child – a Literature Review* above n 352 chapter 2.

³⁶⁴A C Webster and L Y Williams “Family and community: social welfare cults” in Trlin A D (ed) *Social Welfare and New Zealand Society* (Methuen Publications, Wellington (NZ), 1977) 78 at 82.

³⁶⁵Victor R Fuchs *Women’s Quest for Economic Equality* (Harvard University Press, Cambridge (MA), 1988) at 68.

welfare states started in the 1980s.³⁶⁶ Diminishing the public cost of income support (one selected irritation) generally has been a driving force in western countries' social policy reform since the 1980s.³⁶⁷ Sharpening policy and method around collecting child support was seen in the State of Wisconsin (spreading subsequently to other states) and Australia in the 1980s that amounted to removing child support assessment from the courts. New Zealand followed the Australian model in 1991³⁶⁸ when the Child Support Act 1991 was enacted. In most countries, the person with primary care of a child who is in receipt of social assistance is compelled to pursue child maintenance irrespective of whether it is a court or agency based system.³⁶⁹ Recouping State expense is therefore a prime priority and not the W&BIC of the children involved, at least not when it comes to state revenue.³⁷⁰ However, the new structure of child support became one of two major reasons for the uprising of the father's rights movement, the other being child custody policy – albeit that for the activists of this movement the two are interlinked.³⁷¹

In the effort to transfer the financial burden of supporting children in single-parent families (predominantly headed by mothers) from society to parents (fathers), governments have been enacting and strengthening legislation to improve States' ability for identifying, locating, and collecting child support from

³⁶⁶ For an American perspective see Michael B Katz *The Price of Citizenship: Redefining the American welfare state* (Metropolitan Books, Philadelphia, 2008) at 26; John Myles and Jill Quadagno "Political theories of the welfare state" (2002) 76 (1) *Social Service Review* 34; For a New Zealand reflection see e.g. Christine Dunn and Rosemary du Plessis *After the Cuts: Surviving on the domestic purposes benefit* Working Paper No. 12 (University of Canterbury, Christchurch (NZ), Dept of Sociology, 1992).

³⁶⁷ See e.g. Frank Bates "Australia: towards the familialization of the family" (1988-1989) 27 *J. Fam. L.* 7; Maureen Baker and David John Tippen *Poverty, Social Assistance, and the Employability of Mothers: Restructuring welfare states* above n 339 at 157-190; Mark Henaghan "Fatherhood and family law" in Stuart Birks and Paul Callister (eds) *Perspectives on Fatherhood II* Issue Paper No 6 (Massey University, Centre for Public Policy Evaluation, Massey University, Palmerston North, 1999) 51 at 60. <http://cppe.massey.ac.nz/> Downloaded on 29 August 2011.

³⁶⁸ Bill Atkin "Financial support – who supports whom?" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (LexisNexis, Wellington, 2007) 167 at 167.

³⁶⁹ Christine Skinner, Jonathan Bradshaw and Jacqueline Davidson *Child Support Policy: An international perspective* Research Report No 405 (Dept for Work and Pensions, UK, 2007) at 2.

³⁷⁰ See Oscar Casswell-Laird "Child support: a summary and comparison of legislation in New Zealand and Australia" (Child Poverty Action Group, 2010). The New Zealand Child Support Act 1991 makes not mention of the welfare or best interests of the child.

<http://www.cpag.org.nz/assets/CPAG%20Submission%20on%20child%20support.pdf> Downloaded 12 November 2012.

³⁷¹ Jocelyn Elise Crowley "Taking custody of motherhood: fathers' rights activists and the politics of parenting" (2009) 37 (3 & 4) *Women's Studies Quarterly* 223 at 224.

non-resident fathers.³⁷² Whilst divorce was once restricted in an effort to procure financial support of children (and women) within the patriarchal family, the attention has now shifted towards keeping the separated family connected financially through the introduction of ‘family responsibility’.

5.4 The fathers’ rights movement

It must first be noted that the FRM (comprising of various groups and the ones that usually get the most media coverage) is not representative of all fathers, who are calling for change, at all.³⁷³

The [FRM] are mainly concerned with the *legal* rights of *divorced* upper and middle-class fathers. They constitute a response to family law and child support policy and mostly work in the legislative/judicial arena and offer legal advice and support to individual fathers involved in divorce and custody cases. These organizations have a very ambiguous relation to [the] Fatherhood Responsibility Movement; there is both (limited) cooperation and tension.³⁷⁴

Thus there are initiatives among men that also focus on reconstructing ideas of masculinity and what it means to be a good husband and father. However here, where I refer to the ‘FRM’ I am referring to those groups that fit the description above: the groups that have targeted the law in aggressive and highly vocal ways, that first targeted mothers and motherhood and then shifted to ‘responsibility’ to and ‘rights’ discourses to match the language that would trigger response from the legal system (both the courts and the political system with the latter’s legislative

³⁷²Lenna Nepomnyaschy “Child support and father-child contact: testing reciprocal pathways” (2007) 44 (1) *Demography* 93 at 93.

³⁷³ See Anna Gavanas “The fatherhood responsibility movement: the centrality of marriage, work, and male sexuality in reconstructions of masculinity and fatherhood” in Barbara Hobson (ed) *Making Men into Fathers: Men, masculinity and the social politics of fatherhood* (Cambridge University Press, Cambridge (UK), 2002) at 213 (discussing the importance of distinguishing between the espoused views of the various groups that comprise the FRM and the views of fathers in a general sense).

³⁷⁴ Anna Gavanas “The fatherhood responsibility movement: the centrality of marriage, work, and male sexuality in reconstructions of masculinity and fatherhood” above n 372 at 220. (Own emphases).

function).³⁷⁵

The rhetoric that the FRM across the western world employ, poses contradictions and a lack of correspondence with actual realities in the social realm such as for example the harm suffered if children don't have their fathers regularly present in their lives.³⁷⁶ Nonetheless, they are generally 'pro-family', against divorce and in general argue that mothers should continue do most of the parenting but that fathers must still have control over how mothers parent.³⁷⁷ They blame mothers for blocking access to the children, argue that children face awful consequences due to father-absence, state that child support orders are excessive or unfair, accuse the legal system of bias against fathers, demand equal treatment, and want shared parenting or joint custody orders as a remedy for these perceived ills.³⁷⁸ They reason that child support payments would not be necessary at all if the child custody system could be reformed in a way that gives fathers equal child caring time.³⁷⁹ What fathers' rights groups seem to feel most threatened by is single mothers' ability to raise children on their own and to be able to demand child support because this dilutes the ideals of the nuclear, heterosexual family.³⁸⁰ In a UK study based on personal narratives shared by disputing parents, it was found that a gendered pattern emerged in the use of the W&BIC discourse, with mothers at pains to emphasise 'welfare' and fathers invoking 'rights' talk'.³⁸¹ It

³⁷⁵ See Richard Collier and Sally Sheldon "Fathers' rights, fatherhood and law reform – international perspectives" in Richard Collier and Sally Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* above n 383 at 1.

³⁷⁶ See e.g. Miranda Kaye and Julia Tolmie "Fathers' rights groups in Australia and their engagement with issues is family law" (1998) 12 (1) *Australian Journal of Family Law* 19; Susan B Boyd "Backlash and the construction of legal knowledge: the case of child custody law" (2001) *Windsor Yearbook of Access to Justice* 141; Carl Bertoia and Janice Drakich "The fathers' rights movement: contradictions in rhetoric and practice" (1993) 14 (4) *Journal of Family Issues* 592.

³⁷⁷ Miranda Kaye and Julia Tolmie "Fathers' rights groups in Australia and their engagement with issues is family law" above n 376 and Carl Bertoia and Janice Drakich "The fathers' rights movement: contradictions in rhetoric and practice" above n 376.

³⁷⁸ Susan B Boyd "Robbed of their families? Fathers' rights discourses in Canadian parenting law reform processes" in Richard Collier and Sally Sheldon (eds) *Fathers Rights Activism and Law Reform in Comparative Perspective* (Hart, Portland (OR), 2006) 27 at 32-40.

³⁷⁹ In New Zealand parents have automatic joint legal custody – called guardianship – over their child (unless the court decides otherwise and if the father's name is on the birth certificate: Care of Children Act, ss 17-20) which amounts to parents having to consult on important decisions involving the child: Guardianship Act 1968, s 6, re-enacted in the Care of Children Act 2004 s 17. Thus in that jurisdiction the FRM agitates for joint physical custody.

³⁸⁰ Judith Stacey "Dada-ism in the 1990s: getting past baby talk about fatherlessness" in Cynthia R Daniels (ed) *Lost Fathers: The politics of fatherlessness in America* (St Martin's Griffin, New York (NY), 1998) 51 at 55ff.

³⁸¹ Shelley Day Sclater and Felicity Kaganas "Contact: mothers, welfare and rights" in Andrew Bainham, Bridget Lindley and others (eds), *Children and Their Families: Contact, rights and welfare* (Hart Publishing, Oxford (OR) 2003) 156 at 168.

was this demand of a father's right to share in the custody of the child and that this right was ignored by the legal system that drew attention from the legal system and the political system. The same factors that affected the Australian and U.K. legislators have also stimulated debates in Canada including complaints by non-custodial fathers that the legal system inappropriately limits paternal participation in children's lives.³⁸² However, political systems were careful not to respond to the FRM directly since there was reluctance to be seen as favouring one gender over another and its interests lies predominantly in maintaining votes i.e. always operating with the code of the system in mind.

(a) United Kingdom

In the U.K. there is one focal point, regardless of the agitation by father's rights groups, which the government has persistently refused to be move on and that is the call by such groups for legislative *presumption* of greater contact and shared equal parenting that will give non-resident parents a legal right to see their children.³⁸³ The Children Act 1989 does state that the welfare of the child is best served by sustaining relationships with both parents as far as is possible, but no 'right' to contact/access is provided for. The government selected to respond to and act in accordance with a body of research that has directly contradicted the key claims of fathers' rights activists such as that the overwhelming majority of men are equal caregivers to their children and the contention that fifty-fifty care arrangements are largely viable and practical.³⁸⁴

Yet, since the coming into force of the Children Act 1989 in the UK, scholars have commented on how the claims of fathers' rights groups have impacted on the operations of the courts (including family welfare professionals)

³⁸² Helen Rhoades "The rise and rise of shared parenting laws: a critical reflection" (2002) 19 Can. J. Fam. L. 75 at 112; Nicholas Bala "A report from Canada's 'gender war zone': reforming the child related provisions of the *Divorce Act*" (1999) 16 Can. J. Fam. L. 163. For the role of the fathers' rights movement in Canada see Susan Boyd "'Robbed of their families'? The fathers' rights discourses in Canadian parenting law reform processes" above n 378.

³⁸³ Richard Collier "The outlaw fathers fight back: fathers' rights groups, Fathers 4 Justice and the politics of family law reform – reflections on the UK experience" in Richard Collier and Sally Sheldon *Fathers' Rights Activism and Law Reform in Comparative Perspective* above n 339, 54 at 60.

³⁸⁴ See Richard Collier "The outlaw fathers fight back: fathers' rights groups, Fathers 4 Justice and the politics of family law reform – reflections on the UK experience" above n 383 and sources citing.

and indeed on parents themselves. In court cases, new terminology (or ‘semantic artefacts’ as per Teubner³⁸⁵) had emerged such as ‘implacably hostile parent’ to describe what is perceived to be an obstructive, selfish mother, the ‘alienating parent’ that damages the child and blocks contact with the non-resident parent, and consequently the ‘alienated child’ to refer to the child who resists contact.³⁸⁶ In this way the legal system reduces a myriad of complexities to ‘identified’ problem behaviour that is basically deemed ‘illegal’ or legally wrong. In her analysis of emerging case law in England and Wales, Kaganas has argued that in pursuit of the notion of ‘parental responsibility’ it is near “impossible to conceive of a father who is harmful to children unless he inflicts direct violence on them.”³⁸⁷ The courts now start from a presumption that contact with the non-resident parent is good for children³⁸⁸ and thus legally right. It has thus become a programme that can be utilised to simplify CCDs and so a new ‘rule’ has been found by which courts can operate.

In April 2004, the U.K. government announced its commitment to “new laws to end the child custody wars.”³⁸⁹ The Green Paper *Parental Separation: Children’s Needs and Parents’ Responsibilities (2004)* outlined a range of proposals aimed at diverting as many divorcing parents as possible from the courts and promoting “generous parenting” for both parents.³⁹⁰ However, as for the claim by the FRM that the law was biased against fathers the government did

³⁸⁵ Gunther Teubner “How the law thinks: toward a constructivist epistemology of law” above n 17.

³⁸⁶ See e.g. Carol Bruch “Parental alienation syndrome and the alienated child – getting it wrong in child custody cases” (2002) 14 (4) CFLQ 381; Carol Smart and Bren Neale “Arguments against virtue – must contact be enforced?” (1997) Fam. Law 332. For the same in New Zealand see for example *C v C* [2003] NZFLR 689 in which Judge Mather, concluded that the alienation between the father and the children, was attributable to the mother’s actions for which there was no proper or reasonable justification, and was “moderately severe”, thus called for “firm court intervention” (at para [62]); John Caldwell “The dilemma of parental alienation” (2005) 5 NZFLJ 29 stating “The recent New Zealand case law suggested that the Courts, when dealing with this sort of dilemma under [the Guardianship Act 1968], were leaning quite strongly in favour of promotion of a relationship with the ‘alienated’ contact parent.” See also the cases cited by Caldwell. Note that both *C v C* (above) and this article were reported and published prior COCA coming in to force but that New Zealand judges (and lawyers) had started to refer to case law in other common law jurisdictions. COCA with its W&BIC principle of continued relationships with both parents itself had no impact in this regard.

³⁸⁷ Felicity Kaganas “Contact, conflict, and risk” in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Aldershot. Ashgate, 1999) 99 at 104.

³⁸⁸ See e.g. Brian Cantwell “Presumption of contact in private law – an interdisciplinary issue” (1999) Fam Law 226.

³⁸⁹ Clare Dyer “New laws to end child custody wars” *The Guardian* (3 April 2004) <http://www.guardian.co.uk/society/2004/apr/03/childrenservices.politics>

³⁹⁰ Cited in Richard Collier “The fathers’ rights movement, law reform, and the new politics of fatherhood: some reflections on the UK experience” (2009) 20 U. Fla. J.L. & Pub. Pol’y 65 at 89.

not accept this perception and countered that under the law both parents are equal and that no change was needed to the core principles set out in the Children Act 1989.

In order to deal with the claim that there are shortcomings as regards enforcing contact the government enacted the Children and Adoption Act 2006.³⁹¹ This Act introduced, inter alia, punitive measures that can be employed against a parent that is found to block contact by the non-resident parent. These measures apply to the residential parent (usually the mother) who resists contact as opposed to the non-residential parent who refuses to maintain contact (usually the father). In this respect, “fathers’ rights campaigns [do] appear to have had the effect of galvanising the government and the courts into action against mothers whom they see as obstructive”.³⁹² In 2010 MP Brian Binley entered the Shared Parenting Orders Bill (Bill 56 2010-2012) into parliament. The bill proposed that in CCDs the court order must include that “the child must spend a substantial and significant amount of time with both parents”.³⁹³ Its first reading was in July 2011 but it was defeated at the second.³⁹⁴

As for the courts, long before the Children Act 1989 came into force in October 1991 it was found that the courts were more willing to make joint custody orders (not physical joint custody) in contested cases – most likely the highest conflict cases – than uncontested cases which, so the researchers suggested, may indicate that the courts used such orders as a compromise to a complex problem rather than as a creative attempt to involve the both parents in the child’s future.³⁹⁵ This indicates a very limited understanding and empathy for the complexities and dynamics that may underlie divorce and separation matters and rather judges using their power to achieve a solution to clear the desk.

(b) Canada

³⁹¹ Amended the Children Act 1989.

³⁹² Allison Diduck and Felicity Kaganas *Family, Law, Gender and the State: Text, Cases and Materials* (2nded, Hart Publishing, Oxford (UK), 2006) at 561, quoted in Richard Collier *Men, Law and Gender: Essays on the ‘man’ of law* (Routledge, Abingdon, 2010) at 194 n 4.

³⁹³ Shared Parenting Orders Bill (HC Bill 56, cl 2 (1)(a) available at <http://services.parliament.uk/bills/2010-12/sharedparentingorders.html> Accessed 1 February 2012.

³⁹⁴ Ibid.

³⁹⁵ John Eekelaar and Eric M Clive *Custody After Divorce: The disposition of custody in divorce cases in Great Britain* (1977) cited and quoted in Bruce Smyth “A 5-year retrospective of post-separation shared care research in Australia” (2009) 15 *Journal of Family Studies* 36 at 39-40.

In Canada the fathers' rights discourse and the movement's political agitation increasingly permeated the law reform process (political system) but it did not entirely determine its outcome. The Canadian Divorce Act 1985 contains a friendly parent and maximum contact principle that applies to CCDs.³⁹⁶ However in 1996 the government in Canada responded largely to claims of bias (by the FRM) in the legal system and created a Special Joint Committee (SJC) to research the allegations. However, the courts there chose to respond to this irritation (agitation by the FRM) as evidenced in the continuing rise in joint custody orders even before (and after) the SJC delivered its report.³⁹⁷ Neilson's research conducted before the reform process began in Canada found that many Canadian judges already took as their starting point that contact is in a child's best interests, including sometimes where abusive behaviour is an issue.³⁹⁸

While the SJC report³⁹⁹ noted fathers' issues and referred to research that could support their grievances (such as the harm of divorce for children, loss of contact with fathers and its negative effects for children, and the benefits for children of having both their parents involved in their lives) it also pointed to research that refuted the claims that the law is biased against fathers, for example, that despite the legislative provisions (which should motivate fathers to negotiate for more shared care) the vast majority of post-separation agreements made between the parties themselves amount to the parties agreeing that the mother should have primary care.⁴⁰⁰

Once the SJC submitted its report, the government repeated the report's recommendation that there should be no presumptions about post-separation parenting arrangements or level of contact. This was arguably a careful move not to appear to favour either mother-custody or father-custody or even joint custody. The government focussed on the need to change the language of the relevant

³⁹⁶Canadian Divorce Act 1985, ss 16(10), c 3.

³⁹⁷ Susan B Boyd "Robbed of their families? Fathers' rights discourses in Canadian parenting law reform processes" above n 378 at 50-51.

³⁹⁸ Linda C Nielson *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association Law for the Futures Fund*, (University of Brunswick, Muriel McQueen Ferguson Centre for Family Violence Research (March, 2001).
http://www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/team2001.pdf Accessed 3 March 2012.

³⁹⁹ Canada, Special Joint Committee on Child Custody and Access *For the Sake of the Children* (Ottawa, Parliament of Canada, 1998).
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1> Accessed 2 February 2012.

⁴⁰⁰ Canada, Special Joint Committee on Child Custody and Access *For the Sake of the Children* above n 399 at 4.

legislation to counter-act the win/lose message – as espoused by the FRMs spokesmen – that ‘custody/access’ sent as well as concerns about access to children. An Act to Amend the Divorce Act (Bill C-22) was introduced to parliament on 10 December 2002 but it has not yet been passed. It proposes reduction of conflict, promotion of co-operation between parents, enhancement of parental responsibilities and removal of the terms ‘custody’ and ‘access’.⁴⁰¹ It proposes to introduce parenting orders that would allocate parenting responsibilities to each parent (as per their agreement or as decided by the court) rather than adopt the terms ‘residence’ and ‘contact’ as in Australia and England.⁴⁰² Notably a right to contact or parenting time was absent from the bill. The FRM recommendation for a presumption favouring shared parenting was not included.

Despite this middle-ground-approach by the government many of the same challenging results that are seen in Australia (where law reform responded directly to the FRM) are seen in Canada also because lawyers, judges and family court service providers are choosing to respond to the FRM despite the fact that the legislation has not yet changed.⁴⁰³

(c) Australia

In Australia, since the 1995 reforms to the Family Law Act 1975, the lower courts were choosing to interpret the legislation as providing for the need to maintain contact *regardless* of the Full Court explaining the reforms and holding that the reforms had not created a presumption in favour of contact but that the best interests of the child are the ultimate determining factor and that a assumptions about contact should not be applied as being in the child’s best interests.⁴⁰⁴ In *A v A: Relocation Approach*⁴⁰⁵ the Full Court also explained that no single factor will be decisive. The lower courts, with a much higher workload, that in practice “appears to be approached with the goal of clearing the desk”⁴⁰⁶ do not have the time or perhaps the skill to unpack the complexities of parental

⁴⁰¹ Susan B Boyd “Robbed of their families? Fathers’ rights discourses in Canadian parenting law reform processes” above n 378 at 44.

⁴⁰² New Zealand took this idea and enacted it in the Care of Children Act, 2004.

⁴⁰³ Susan B Boyd “Robbed of their families? Fathers’ rights discourses in Canadian parenting law reform processes” above n 378 at 51.

⁴⁰⁴ *B v B* (1997) 21 Fam LR 676.

⁴⁰⁵ (2000) FLC 93-035.

⁴⁰⁶ Niklas Luhmann *The Law as A Social System* above n 6 at 461.

disputes and children's needs.

The Australian political system definitely opted to respond directly to the agitation of the FRM,⁴⁰⁷ and at the time a conservative government was in power. However, academic researchers have pointed out that the FRM were not that powerful in numbers and often had high member turnovers.⁴⁰⁸ It is therefore hardly evident how strong their voting impact could have been and Rhoades points out that “the question of ultimate responsibility for this shift [in focus on separated fathers] is a story of complex and shifting influences.”⁴⁰⁹ Nonetheless, the different activist groups promoted shared parenting and demanded a legislative presumption for equal time in child care.⁴¹⁰

In June 2003, the then Prime Minister, John Howard established a Parliamentary Committee to explore the option of a rebuttable presumption that children will spend equal time with each parent. He was particularly concerned that too many boys are growing up with their mothers and lack a “proper male role model”.⁴¹¹ This assumes that fathers *are* proper role models. It assumes that they can fulfil a role that many fathers may not consider themselves capable of fulfilling. Much has been written about women's experiences within patriarchal marriage and the pressure on them to live up to constructed ideals. We should perhaps also consider the expectations that the patriarchal, ‘male role model’ notion place on men. Great effort went into ‘teaching’ women and girls how to be good mothers but men's parental skills may have been too readily assumed (under patriarchy) or dismissed (under the cult of motherhood).

Ultimately, though paying much attention to fathers' claims, the Committee recommended against a presumption of equal time in its report. Instead, it recommended in favour of equal parental responsibility. Similar to the Canadian response, the Committee pointed out that there should be no standard

⁴⁰⁷ Patrick Parkinson “Changing policies regarding separated fathers in Australia” in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, John Wiley & Sons, Hoboken (NJ), 2010) 578 at 580.

⁴⁰⁸ Miranda Kaye and Julia Tolmie “Fathers' rights groups in Australia and their engagement with issues in family law” above n 376 at 22.

⁴⁰⁹ Helen Rhoades “Yearning for law: fathers' groups and family law reform in Australia” in Richard Collier and Sally Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* above n 339, 125 at 125.

⁴¹⁰ Helen Rhoades “Yearning for law: fathers' groups and family law reform in Australia” above n 409 at 125-134; Miranda Kaye and Julia Tolmie “Fathers' rights groups in Australia and their engagement with issues in family law” above n 376.

⁴¹¹ John Howard cited in Bruce Smyth “A 5-year retrospective of post-separation shared care research in Australia” above n 395 at 38.

arrangement imposed in CCDs. It did however make it clear that the legal system should move away from the assumption that the normal '80/20' pattern of CCDs (i.e. time spent with the non-resident parent every second weekend and half of the school holidays).⁴¹² After extensive further consideration of the Committee's report, the Federal Parliament enacted the Family Law Amendment (Shared Parental Responsibility) Act 2006. An obligation to *consider* shared parenting was placed on the courts (section 65DAA), legal practitioners, family counsellors, mediators and the courts' own family consultants (section 63DA(2)). Section 61DA⁴¹³ provides for a rebuttable presumption of equal shared parental responsibility when the court makes parenting orders. The Full Court of Australia⁴¹⁴ interpreted the change as follows:

There is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

Chisholm opines that courts sometimes use 'legislative intent' "essentially as a label for the interpretation that they have decided to adopt."⁴¹⁵ Even so, when the prime minister announced his intention he already used the words "equal time" and "presumption" and it is under that prime minister's leadership that the 2006 reforms were enacted.⁴¹⁶ Where father absence was the original apparent

⁴¹² Family and Community Affairs Committee of the House of Representatives *Every Picture Tells a Story: Report on the Inquiry Into Child Custody Arrangements in the Event of Family Separation* (2003) cited in Judy Cashmore, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* above n 344 at 1. For a summary of the report's recommendations see Catherine Caruana "Legislating for shared parenting – the 'joint custody' inquiry makes recommendations for change" (2004) 67 Family Matters 16. Available at <http://aifs.gov.au/institute/pubs/fm2004/fm67/cc.pdf> Accessed 23 February 2012.

⁴¹³ The section provides as follows:

“61DA Presumption of equal shared parental responsibility when making parenting orders

- (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates *solely to the allocation of parental responsibility for a child* as defined in section 61B. *It does not provide for a presumption about the amount of time the child spends with each of the parents* (this issue is dealt with in section 65DAA)". (Own emphases).

⁴¹⁴ *Goode v Goode* (2006) 36 Fam LR 422 at para 72.

⁴¹⁵ Richard Chisholm "The meanings of 'meaningful' within the Family Law Act amendments of 2006: a legal perspective" (2009) 15 Journal of Family Studies 60 at 61.

⁴¹⁶ Bruce Smyth "A 5-year retrospective of post-separation shared care research in Australia" above n 395 at 38 quoting PM John Howard.

motivation for reforms, the focus now has shifted to time sharing – its practicalities, benefits and/or viability, even including cases where conflict between the parents is high.⁴¹⁷

Post reform evaluation and research in 2009⁴¹⁸ indicates that there has been a considerable increase in shared care in *judicially determined* cases. In a 2010 study⁴¹⁹ about parentally agreed shared care and its outcomes since the reforms, the findings were ambiguous and showed that while more parents themselves attempt shared care arrangements these arrangements often did not last and reverted back to the ‘80/20’ model or something close to it.

It is evident that both the political and legal systems in Australia were pushing an agenda that is not reflective of reality. Before the 2006 reforms, Australian Bureau of Statistics data showed that more than a quarter of children with separated parents saw their fathers either once a year or never. That has not changed post the reforms and in 2008 stood at 28%.⁴²⁰ Despite the pertinent drive to send a legal message that shared care is now the normative expectation and in that way looming in the background of negotiations between parents should their communication break down completely and they have to ask a court to decide; in cases where parents come to their own agreements, the great majority of parents do not agree to enter significant shared care. In 2008 research showed that this amounted to 9.5%⁴²¹ of parents and by 2010 research showed that it was just below 8%.⁴²² Shared care had by no means yet become a preferred arrangement, contrary to popular ideals in society and the FRM.⁴²³ There is however an

⁴¹⁷ Bruce Smyth “A 5-year retrospective of post-separation shared care research in Australia” above n 395 at 39.

⁴¹⁸ Rae Kaspiew, Matthew Gray and others “Evaluation of the 2006 family law reforms” (Australian Institute of Family Studies, Melbourne, 2009) at 132-133. <http://www.aifs.gov.au/institute/pubs/fle/> Last accessed 1 November 2011.

⁴¹⁹ Judie Cashmore, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* above n 344.

⁴²⁰ Bruce Smyth “A 5-year retrospective of post-separation shared care research in Australia” above n 395 at 41.

⁴²¹ Jennifer McIntosh and Richard Chisholm “Cautionary notes on the shared care of children in conflicted parental separation” (2008) 14 (1) *Journal of Family Studies* 37.

⁴²² Judie Cashmore, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* above n 344 at ix.

⁴²³ Note however that in the US and the UK the numbers are higher: Marygold S Melli and Patricia R Brown: Exploring a new family form – the shared time family” (2008) 22 *Int J Law Policy Family* 231 (estimating the number of shared care post-separation at approximately 20% in the US; Victoria Peacey and Joan Hunt *I’m not saying it was easy ... Contact problems in separated families* (Ginger Bread and Nuffield Foundation 2009) (surveyed 559 post-separation parents with children in the U.K. and found that 12% of respondents reported a shared care arrangement where

apparent increase.⁴²⁴ In 1997 only 3% of Australian children with separated parents lived in a shared care arrangement in which each parent cared for the child at least 30% of the time.⁴²⁵ The researchers point out that many of the shared parenting arrangements in the 2010 research, were among recently separated parents and since they also found that these arrangements have a high incidence of collapsing after a year or more, the rise can only be seeming and not conclusive.⁴²⁶

As Gilmore points out, research on shared care and its outcomes for children must, crucially, distinguish between court-imposed shared care and arrangements that parties themselves agreed to before generally positive findings are assumed to be the outcome.⁴²⁷ Not surprisingly, where parents had negotiated their own arrangements for shared care (this does not necessarily mean 50/50 arrangements but a minimum of 35% of nights with one parent) and, importantly, were not particularly resentful, hostile or blaming of each other, arrangements that endured, worked relatively well.

In the case of court ordered shared arrangements the picture was more negative but, precisely as the researchers also point out, those cases that are determined by the courts invariably involve highly conflicted parents. And yet, as the 2009 evaluation found, in those cases a significant increase in (imposed) shared care orders are seen.⁴²⁸ Shared care rose from 4% to 33.9% in the cases where contact arrangements were specified by the courts. Prior to the 2006 reforms, 65.2% of mothers had primary care and after the reforms their care time reduced by 26.7%. Fathers in 30.8% of cases had primary care prior to the reforms and their care time decreased by a huge 40.6%! This could possibly be a consequence of either a still harboured maternal preference, or perhaps of the wishes of the child(ren) involved. Nonetheless, the rise in court determined shared

the child(ren) was/were spending about 3 days – with overnight stays – per week with each parent, at 17). <http://gingerbread.org.uk/uploads/media/17/6850.pdf> Accessed 1 February 2012.

⁴²⁴ See also Helen Rhoades “The rise and rise of shared parenting laws: a critical reflection” above n 382.

⁴²⁵ Judie Cashmore, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* above n 344 at 1 citing the Australia Bureau of Statistics, 1997.

⁴²⁶ Judie Cashmore, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* above n 344 at 9.

⁴²⁷ Stephen Gilmore “Shared parenting: the law and the evidence: part 2 (2010) 20 (1) *Seen and Heard* 21 (pointing out that “[m]ost studies rely on samples of dual residence children whose post-separation parenting arrangement was agreed rather than adjudicated, or mixtures of these categories.”)

⁴²⁸ Rae Kaspiew, Matthew Gray and others “Evaluation of the 2006 family law reforms” above n 418.

care indicates that the courts are not capable of, or are ignoring the risks involved for children when their parents are highly conflicted i.e. an ignored perturbation. The legislation only obligates the courts to *consider* equal shared care, not to actually order it.⁴²⁹ Despite a presumption of shared care as a starting point, the primary obligation remains the W&BIC but it appears that, as has been shown in history, W&BIC is – at least in Australia – again on its way to being simplified to a general rule/normative expectation. Notably maternal preference in CCDs also took time to be established within and by the legal system but that it was established is undeniable. And that ‘rule’ developed *without* any express (legislatively) preference except for gender neutrality. While legislation can have an impact, the legal system can and does establish its own rules.

Also not surprisingly, research and academic literature from Australia and elsewhere still advises against presuming that equal shared care after separation is best for children because, depending on the circumstances, it can increase the mental health risks for children particularly when parents are in conflict or when children are very young.⁴³⁰ In the Australian context researchers also found that while children benefit from having good and pleasant relationships with both their parents, there is no empirical evidence showing a clear linear relationship between the *amount* of parenting time and better outcomes for children.⁴³¹

(d) New Zealand

In New Zealand in 2000 MP Muriel Newman put forward a private members’ bill for shared parenting in parliament. It can be assumed that this was, at least in part, prompted by FRM agitation. The bill aimed to introduce a rebuttable presumption of 50/50 shared custody. The government released a press

⁴²⁹ Richard Chisholm “The meanings of ‘meaningful’ within the Family Law Act amendments of 2006: a legal perspective” above n 415.

⁴³⁰ See e.g. Jennifer McIntosh and Richard Chisholm “Cautionary notes on the shared care of children in conflicted parental separation” above n 421; Helen Rhoades “The dangers of shared care legislation: why Australia needs (yet more) family law reform (2008) 36 Fed. L. Rev. 279; Julia Tolmie, Vivienne Elizabeth and Nicola Gavey (2010) “Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand” (2010) 24 New Zealand Universities Law Review 136.

⁴³¹ Belinda Fehlberg, Bruce Smyth and others “Legislating for shared time parenting after separation: a research review” (2011) 25 (3) Int. J Law Policy Family 318.

statement announcing that it would not support the Shared Parenting Bill.⁴³² The bill was defeated on its first reading by seventy-one votes to forty-nine. The Attorney-General responded on behalf of the government:

[S]eparation should not end the parental responsibility. However, we do not believe that that purpose will be achieved by this Bill because it relies on the assumption that separating parents will be able to reach agreements, which is clearly not the case in most instances that go to Court.⁴³³

The government did undertake that it would be giving detailed consideration to a wide range of family matters later that year and this would provide an opportunity to take a considered view of all relevant issues, including the option of providing for equal shared parenting. Like Canada,⁴³⁴ the message was that the government did not believe in a ‘one size fits all’ approach to CCDs as it perceived the bill to do. Eventually COCA was the result. The Ministry of Justice has stated that “[t]he review of the Guardianship Act originated from proposals for shared parenting ...”⁴³⁵ In response the question as to whether the bill favours shared parenting the Ministry stated:

The Bill does not, however, create a presumption of shared parenting or a right to contact. Instead, the Bill focuses on encouraging co-operative parenting by focusing on the best interests and welfare of children and by emphasising the ongoing role both parents have in a child’s upbringing.⁴³⁶

Although COCA does not express a presumption of shared care it is hard to see how else the Ministry’s aim of emphasising both parents’ involvement and ‘co-operative parenting’ can be achieved. What else would be the point of the aforementioned achievements? COCA does signal a greater trend towards shared parental involvement. Most likely the political system would have looked at the research and results of the Canadian process. No doubt, some MPs were also

⁴³² Reproduced in Stuart Birks “The shared parenting bill” in Stuart Birks (ed) *Inclusion or Exclusion: Family strategy and policy* Issue Paper No. 9 (Centre for Public Policy Evaluation, Massey University, Palmerston North (NZ), 2000) 57 at 70. Downloaded 30 August 2011.

⁴³³ (10 May 2000) 583 New Zealand Parliamentary Debates (NZPD) 2151.

⁴³⁴ Susan Boyd “Robbed of their families? Fathers’ rights discourses in Canadian parenting law reform processes” above n 378 at 44. (An Act to Amend the Divorce Act, 2nd Sess 37th Parl 2002 was introduced to the Canadian parliament in December 2002 but it was shelved following a change in government and has not since been passed.)

⁴³⁵ “Briefing on the Care of Children Bill - June 2003” Ministry of Justice, 2003. <http://www.justice.govt.nz/>

⁴³⁶ Ibid.

aware of the mixed results⁴³⁷ that the introduction of ‘right to contact’ and ‘equal responsibility’ in Australia⁴³⁸ already showed. The courts there interpreted ‘equal responsibility’ as translating to ‘equal time’, with the upshot that, in the absence of a proper inquisitorial process, greater scope for an abusive, non-custodial parent to interfere. This also led to more conflict. Yet, all the other western common law countries had already embedded the message of more sharing, co-parenting and equal responsibility and political systems generally follow each other. New Zealand’s family law had been criticised in publications for being outdated⁴³⁹ by then because of its continued usage of ‘custody’ and ‘access’ and so if nothing else, at least semantic changes were perceived to be important.

As in the UK, New Zealand judges had already found ways to use the old Act,⁴⁴⁰ specifically a section that provided for resolution of disputes between guardians, to make orders that basically amounted to shared physical care orders.⁴⁴¹ Decisions made under that section of the Act (s 13) could not be appealed. Since these judgments were reported it can be accepted that the legal system considered them as acceptable use of the law. The New Zealand Court of Appeal also approved this practice in *M v Y*:⁴⁴²

I recognise that there are many valid arguments in favour of joint custody... And it may very well be the proper order in many cases as in *Makiri v Roxburgh* (1988) 4 NZFLR 673 (Judge Inglis QC) and *Franklin v Franklin* (1988) 4 FRNZ 466 (Judge Boshier).

Even before *M v Y* these cases were included for guidance in leading New Zealand family law texts that targeted practitioners and law students.⁴⁴³ At a Law

⁴³⁷ Helen Rhoades, Regina Graycar, Margaret Harrison *The Family Law Reform Act 1995: The first three years* (Family Court of Australia, December 2000) Available at <http://www.familycourt.gov.au/> Last accessed 15 December 2011.

⁴³⁸ Family Law Reform Act 1995.

⁴³⁹ See e.g. Caroline Bridge “Shared residence in England and New Zealand – a comparative analysis” (1996) 8 Child and Family Law Quarterly 12.

⁴⁴⁰ Guardianship Act 1968.

⁴⁴¹ See e.g. *Makiri v Roxburgh* (1988) 4 NZFLR 673; *Franklin v Franklin* (1988) 4 FRNZ 466; *Jarmai v Graf* Family Court, Levin, 7 September 1988 (FP 031/210/985); *Willoughby v Plane* Family Court, Hastings, 23 July 1990, (FP 020/294/89); *Paress v De Boam* Family Court, Napier, 27 July 1990 (FP 041/259/87). For discussions and criticisms see Caroline Bridge “Shared residence in England and New Zealand – a comparative analysis” above n 439; Graeme W Austin “The Guardianship Act 1968 – a status statute?” (1991) 3 (2) Butterworths Family Law Bulletin 14; Pauline Tapp “Family Law” (1990) New Zealand Recent Law Review 102.

⁴⁴² [1994] 1 NZLR 527 (CA) at 536 as per Hardie Boys J.

⁴⁴³ *Butterworths Family Law in New Zealand* contained such discussion at least until 2001 – the year of its 10th edition. See “Custody and Access” under para 6.115 at 475-476 and cases citing.

Society conference in 2001 family court judge von Dadelszen said⁴⁴⁴ in his address that “[i]t would be fair to say that many Judges, including me, have made some attempt to avoid using the custody/access formula and have begun speaking in terms of the sharing of day to day care.” In research conducted by the New Zealand Department of Justice in 1994, judges indicated that they, from time to time, made joint custody orders as a means to settle difficult cases; as a “sop to a difficult parent to encourage cooperation”.⁴⁴⁵ This indicates that, also in New Zealand, judges were effectively – and long before the enactment of COCA – pointing out that difficult cases frustrated them and that they found ways to use (or misuse) the legislation to avoid protracted litigation by ‘forcing’ conflicted parents to co-operate. This also indicates that they saw (forced) joint custody/shared care as a solution and presumably as being in the W&BIC by default. Therefore the courts did not actually need COCA to move towards shared care albeit that COCA strengthens the courts’ already existent ability to order such an option.

The Supreme Court (SC) recently heard an appeal⁴⁴⁶ in a ‘relocation case’ (the parent with custody/primary care wanting to move to another location – beyond a specified distance – with the children; the other parent opposing the move). Most of the court’s judgments were aimed at providing guidance as to the application and interpretation of the various principles provided for under COCA. The Court of Appeal⁴⁴⁷ had effectively stated that principle 5(b)⁴⁴⁸ (importance of continuing relationships with *both* parents ‘in particular’) was to be accorded greater weighting than the other principles (apart from principle (e) – the protection from violence principle). The three-to-two majority disagreed however with the Court of Appeal’s reading of principle 5(b), saying that there was nothing in the language of the subsection or the section as a whole to indicate that this principle “or any of the other principles there set out should have any presumptive

⁴⁴⁴ Paul von Dadelszen “Rights or obligations? - review of the Guardianship Act 1968” (6 October 2001) Triennial New Zealand Law Society Conference and 4th New Zealand Law Conference, Christchurch (NZ) <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/rights-or-obligations> Accessed 2 January 2012.

⁴⁴⁵ Georgie Hall and Angela Lee *Family Court Custody and Access Research Report No 8* (Crown Copyright, Department of Justice New Zealand, 1994) at 75-77.

⁴⁴⁶ *Kacem v Bashir* [2011] 2 NZLR 1; [2010] NZFLR 884; (2010) 28 FRNZ 483.

⁴⁴⁷ *B v K* [2010] NZCA 96, [2010] NZFLR 865 per Glazebrook, O’Regan and Arnold JJ.

⁴⁴⁸ Subsection 5(b) provides that “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, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents)”.

weighting as against other principles referred to in the section”.⁴⁴⁹ This is peculiar for the reason that parliament had used the words ‘in particular’ as regards the child’s continuing relationship with both parents. It is hard to see how ‘in particular’ could translate to anything else but ‘especially’. It is not surprising that the SC judges were divided on this issue. In particular does not (yet) mean ‘for example’.

However, if the behaviour of the Australian lower courts, as discussed above, is anything to go by, it is probable that New Zealand family court judges will also give greater weight to the continuing relationship with both parents because this is what is happening in other common law countries, i.e. self-referencing to the international common law legal system. The networks of communications created by legal systems in other common law jurisdictions form part of any relevant country’s legal system i.e. in its operations of self-reference and self-production of legal meaning it will also refer to cases from ‘fellow’ jurisdictions, finding its authority there if need be rather than in its direct environment. With the protection of judicial discretion as a legal programme, this is always achievable.

In 2011 the Child Support Amendment Bill was introduced in parliament. This was, in part, due to the FRM’s agitation but also, no research had been done, since the 1991 Act about the actual cost of raising children in New Zealand.⁴⁵⁰ The Minister of Revenue, Peter Dunn who introduced the Bill, explains that the Bill will better reflect the legal changes brought about such as a “greater emphasis placed on separated parents sharing the care of and financial responsibility for their children.”⁴⁵¹ This, he says, will increase parents’ motivation to meet their child support obligations. Yet the bill proposes to enact automatic and compulsory deduction of child support from the responsible parent’s employment income by an employer⁴⁵² which indicates a real doubt that this proposed legislation will be such a great motivator for parental involvement. The bill also proposes a new formula on which to base child support payments which will give a wider

⁴⁴⁹*Kacem v Bashir* [2011] 2 NZLR 1; [2010] NZFLR 884; (2010) 28 FRNZ 483 at [28].

⁴⁵⁰Casswell-Laird, Oscar, Child Poverty Action Group, “Child support: a summary and comparison of legislation in New Zealand and Australia” above n 370 at 6.

⁴⁵¹Hon Peter Dunn “Child Support Amendment Bill; Commentary on the Bill” (Policy Advice Division of Inland Revenue, October 2011) at 3 <http://www.legislation.govt.nz/> Downloaded on 21 November 2011.

⁴⁵²Ibid; Child Support Amendment Bill 2011, cl 27. This will also apply to a person who is in receipt of a benefit under the Social Security Act 1964.

recognition of shared care, based on, for example, there being care of at least 28% of nights in a year that the liable parent has the child in his/her care.⁴⁵³ As part of yet another Family Court review, the government has, in 2011, invited public comment, and on the matter of the proposed changes to child support the discussion document states, as one primary objective that must be taken into account, that:

The child support system should reflect social and legal changes that have occurred since the introduction of the current system in 1992. Social changes in that period mean that there is now a greater emphasis on separated parents sharing the care of their children.⁴⁵⁴

It is hard to understand this statement. The current regime allows for reductions to the established amount of child support if a parent has the child in his/her care for 40% or more of the nights in a given year. The proposed change will allow reduction for 28% of nights. Effectively then, the ‘social changes’ that are being accommodated is that less actual shared care will also be acknowledged as shared care. Moreover, ‘greater emphasis on separated parents sharing the care of their children’ does not mean that this translates into actual shared care.

5.6 The re-attached family

Regardless of the real attitudes of men and women in relation to family and childrearing, family *legislation* has taken very specific steps towards reproducing the normative expectations of post-divorce parenting.⁴⁵⁵ The notion of courts of conciliation with their affiliate counselling and mediation services was born in California⁴⁵⁶ in the early 1960s.⁴⁵⁷ The Commission in New Zealand that also reported in 1978 on the need for a specialised family court with conciliatory services noted that social change created “complex personal and legal

⁴⁵³ Hon Peter Dunn “Child Support Amendment Bill; Commentary on the Bill” above n 451 at 3. This, again, is following common law jurisdictions such as England and Australia.

⁴⁵⁴ New Zealand Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 74. <http://www.justice.govt.nz/>

⁴⁵⁵ Carol Smart “Wishful thinking and harmful tinkering? Sociological reflections on family policy” above n 335 at 314.

⁴⁵⁶ See e.g. Meyer Elkin “Conciliation courts: the reintegration of disintegrating families” (1973) 22 (1) *The Family Coordinator* 63.

⁴⁵⁷ New Zealand’s family court with affiliated services of counselling and (now) mediation was established in 1981 under Family Court Act 1980.

problems”⁴⁵⁸ What is never noted by these official enquiries and reports, whether called for by the political system or the legal system, is that the law, as an autonomous social system, determines which issues and events will *be* legal issues (problems) in the first place i.e. whether it will ‘belong’ to the system. The law invented coverture, controlled divorce to preserve the family and forced unhappy couples to stay together, disempowered women, declared some children to be illegal by their very existence (‘illegitimate’ children), turned children into property that belonged to one spouse (the father), and then legalised the maternal preference when men lost interest in maintaining relationships with their children after separation. The law had historically constructed the relation of fatherhood, paternal authority and male economic power in a way that led to the vast majority of men not wanting to be the primary caregiver for their children.⁴⁵⁹ Yet, despite these truths, a neat reversal takes place by stating that *society*, by changing, is causing problems for the system and then implies that the system must find new ways to solve these problems/come to the rescue – which is another way of maintaining and restating the system’s authority and closure. A new (legal) form of family now had to be invented to ensure for the (legal) care of children and most importantly their *financial* care.

The current relevant legislation in common law countries do provide a vision of the ideal of reduced ‘conflict’ between separated and separating parents and to encourage both parents to remain involved in their children’s lives after separation.⁴⁶⁰ Law has assumed the task of impressing upon parents their responsibility to arrange their post-separation family lives in a way that corresponds to the image of the ‘good’ post-separation family, one in which parents are exclusively concerned with the W&BIC of their children and who cooperate in sharing time with and responsibility for them. The former ideas of the ‘clean break’ that accompanied no-fault divorce were/are being legally reproduced (and substituted) to provide for a new ideal: the post-separation family. Rules that encourage private parental agreement assume that giving responsibility

⁴⁵⁸ D S Beattie, I H Kawharu and others *Report of the Royal Commission on the Courts* (Government Printer, 1978) at 146. Practically all parties are now first sent to the family court’s counsellors which is a government funded service.

⁴⁵⁹ Richard Collier *Masculinity, Law and the Family* above n 351 at 180-181.

⁴⁶⁰ Shelley Day Sclater and Christine Piper “The Family Law Act 1996 in context” in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Dartmouth Ashgate, Aldershot, 1999) 3 at 3.

to parents support them in making better decisions. This has not been seen.⁴⁶¹ This however is ignored so long as parents avoid conflict and avoid litigation.

These ideas of enduring relationships, co-operation and sharing the child, have been entered into the public domain as new dominant legal and normative expectations⁴⁶² with the result that other things have been left aside or unsaid, such as many people's lack of ability to simply 'forgive and forget' or that high conflict is the very reason why many couples separate which, ironically, the law legalised and acknowledge by enacting 'irreconcilable differences' as a ground for divorce. But now, suddenly, these 'irreconcilable differences' had to be ignored and for this the W&BIC programme could yet again be adapted. The image of the post-separation child has become that of being a victim, of suffering harm because of divorce and if parents cannot agree, and of a 'survivor' of divorce.⁴⁶³

Legislation moved away from the language of 'custody' and 'access' toward a language of 'residence' (now 'day-to-day' care in New Zealand) and 'contact' explicitly grounded on the supposition that neither parent should consider her/himself to be 'winners' or 'losers' in separation as regards the care of their children, but that parental responsibility is ongoing for both parents. Studies in Australia show that a 'pro-contact culture'⁴⁶⁴ has taken hold in the courts, and the professional advice given to separated parents⁴⁶⁵ creates new pressures on custodial parents to agree to contact regardless of their concerns or doubts about the other parent. Not surprisingly, this is similar to findings in the UK under less

⁴⁶¹ Katharine Bartlett "US custody law and trends in the context of the ALI principles of the law of family dissolution" (2002) (Fall) Va. J. Soc. Pol'y & L. 5 at 48.

⁴⁶² Ben Neale and Carol Smart "In whose best interests? Theorising family life following parental separation or divorce" above n 13 (noting the shift in the 1980s in legal (and political) discourse from the single/reconstituted family to the "co-parenting, biological family"); Carol Smart and Ben Neale *Family Fragments?* (Polity Press, Cambridge, 1999) 37-39 (discussing the importance of the Children Act 1989 in England, as an experiment to promote "a new style of child-centred post-divorce parenting".)

⁴⁶³ Christine Piper "Divorce reform and the image of the child" (1996) 23 (3) J Law & Soc'y 364; Jan Pryor and Bryan Rodgers *Children in Changing Families: Life after parental separation* (Blackwell, Malden (MA) 2001) generally.

⁴⁶⁴ Kathryn Rendell, Zoe Rathus and others *An Unacceptable Risk: A Report on Child Contact Arrangements Where there is Violence in the Family* (Queensland Women's Legal Service Inc. 2000) at 20; Rae Kaspiew "Empirical insights into parental attitudes and children's interests in family court litigation" (2007) 29 Sydney L Rev 131 at 134.

⁴⁶⁵ Helen Rhoades, Regina Graycar and Margaret Harrison *The Family Law Reform Act 1995: The First Three Years* above n 437 at 5.109

<http://www.familycourt.gov.au/wps/wcm/resources/file/ebab0a49e079ac3/famlaw.pdf>

prescriptive legislation.⁴⁶⁶ Recent research (note that the sample was small) indicates that family court practices (including family court counselling and mediation) in New Zealand are drifting in a direction of encouraging 50/50 shared care.⁴⁶⁷ About 5% of cases that enter the legal system in New Zealand go to a full hearing⁴⁶⁸ meaning that the other processes of the family court were not successful in the parties' coming to an agreement and these are counselling, mediation, judicial conference.

By the 1980s the New Zealand family court with its new affiliate services, mediation and counselling⁴⁶⁹ had, long before the enactment of COCA, taken up the agenda of shared parenting.⁴⁷⁰ "The various arms of the New Zealand Family Court are ready to reach out and prop up shared residence arrangements"⁴⁷¹ wrote one commentator in 1994. All parents, who file an application with the family court, will invariably be sent to family court counsellors as a first step in the process of trying to reach 'mutual' agreement.⁴⁷²

COCA (as under the former Guardianship Act⁴⁷³) specifies in section 17 that in most circumstances both parents will automatically have joint legal

⁴⁶⁶ Carol Smart and Bren Neale "Arguments against virtue: must contact be enforced?" above n 386; Rebecca Bailey-Harris, Jacqueline Barron and others "Settlement culture and the use of the 'no order' principle under the Children Act 1989" (1999) 11 CFLQ 53.

⁴⁶⁷ Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 shared care a desirable norm following family separation?" above n 430.

⁴⁶⁸ New Zealand Ministry of Justice *Reviewing the Family Court: A public consultation paper* above n 454 at 81.

⁴⁶⁹ The Domestic Proceedings Act 1968 already emphasised reconciliation between the parties "to help the parties build back their relationship together": Mark Henaghan "Legally rearranging families: parents and children after break-up" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) 269 at 276. The primary emphasis was on keeping the family together and a duty was placed on lawyers and the court to consider reconciliation: Domestic Proceedings Act 1968, s 13. This shifted to conciliation under the Family Proceedings Act 1980, ss 8, 12, 14.

⁴⁷⁰ See e.g. W R Atkin *Living Together Without Marriage: The law in New Zealand* (Butterworths, Wellington (NZ), 1991) at 44. *Spence v Spence* (1984) 3 NZFLR 347 (CA); *McDougall v Cheyne* (1990) NZFLR 446 (FC); Mark Henaghan "Legally rearranging families: parents and children after breakup" above n 530 at 329;

⁴⁷¹ Caroline Bridge "Shared residence in England and New Zealand – a comparative analysis" above n 439 at 12.

⁴⁷² Family Proceedings Act 1980, s 10. For current practices suggesting coercion see Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 shared care a desirable norm following family separation?" above n 430. This, again, is not limited to New Zealand. The same is happening in, for example, England. Wallbank has argued that mothers, who evidently resist arguments for the father's continued involvement and regular contact as not being in line with W&BIC, are criticised and discouraged from such resistance. See Julie Wallbank "Castigating mothers: the judicial response to 'wilful' women in disputes over paternal contact in English law" (1998) 20 J of Social Welfare and Family Law 357.

⁴⁷³ Guardianship Act 1968, ss 3 and 6.

guardianship of their children⁴⁷⁴ unless a court deems it inappropriate and thus what is decided by the court in CCDs is primarily which parent will have what percentage of the child's physical care. Therefore the concept of 'parental responsibility' did not have to be introduced in COCA. The last available family court statistics⁴⁷⁵ (2008) do not however show an apparent increase in shared 'day-to-day' care orders which stood at about 11% and with 'day-to-day' care being awarded to the father in another 11% of cases. The majority of orders are given 'by consent' of the parties to the proceedings, rather than decided by a judge. Mothers were awarded 'day-to-day' care in about 65% of cases. Without more up-to-date statistics it is not possible to say whether there have been significant increases or decreases over the past three years. In the first year after COCA came into force, the New Zealand Principal Family Court Judge reported that the court made just over 33% of CCDs either for shared care or primary father 'day-to-day' care.⁴⁷⁶ The 2008 statistics would thus reflect a decrease in shared and 'father only' CCD orders. What cannot be gleaned from these statistics is how much contact the court grants the non-resident parent or whether this has increased since COCA came into force. Also bear in mind that pursuant to Child Support Act 'shared care' is only recognised from 40% upwards of nights spent with a parent over a year. As noted above, if the current Child Support bill is enacted, shared care will be 'official' from 28% of nights spent with a parent. This might significantly impact on the statistics. Based on what is being said by at least one government minister, shared care has risen, and therefore child support formulas will be adapted to reflect this. The proposed changes to the current child support scheme and assessment formula will

better reflect many of the social and **legal** changes that have occurred since the introduction of the current [child support] scheme, such as the **greater emphasis placed on separated parents sharing the care** of, and financial responsibility for, their

⁴⁷⁴ In the case of never married parents, the father has guardianship if he lived with the mother at the time of the child's birth.

⁴⁷⁵ Ministry of Justice *Family Court Statistics – An overview of family court statistics in New Zealand 2004 to 2008* (May 2010) Statistical Bulletin at 4. The overview states that "[m]ost of the time, day-to-day care is given to a single party ... Relatively few orders are shared between two or more parties" at 3.

⁴⁷⁶ 14.9% were for shared care and 18.4% for father primary care. Peter Boshier "The family court – 25 years on" Speech given to the New Zealand Law Society, Christchurch, 13 October 2006. <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/the-family-court-25-years-on> Accessed 2 November 2011.

children. This in turn will increase incentives for parents to meet their child support obligations.⁴⁷⁷

The public discussion on the bill invited, inter alia, contribution on the topic ‘greater emphasis on contact and care’ and pointed out that family law now places greater emphasis on shared care and parenting and going on to say that COCA emphasises “that parents’ responsibilities are ongoing, and that both parents should have a significant role in their children’s upbringing.”⁴⁷⁸ Evidence is found of a “substantial ... regular sharing of care” in a Family Commission’s survey in which 36% of respondents (child support paying parents) said that they “look after” their children “at least a few days a fortnight”.⁴⁷⁹

It is unsure how the following comment relates to a parent paying his/her *child’s* support (especially as this can be done via the Inland Revenue Department if one so wishes thus requiring no contact with the other parent whatsoever) but it can be assumed that its inclusion in the public discussion and information document was directed at custodial parents (primarily mothers) entirely.

Even when high levels of care did not occur, comments from parents suggested they would be willing to increase their **levels of care** if other hurdles, such as conflict between the parents, could be overcome or reduced.⁴⁸⁰

This is definitely in line with one objective that the FRM wants to achieve. In other words, by arguing that they will pay more towards their children’s support if they are recognised as joint custodians and preferably with as much shared parenting time as possible, they caused the ‘right’ perturbation for political response.

However whether the mention of shared care in the cited government documents is largely used in the hope of encouraging child support payment

⁴⁷⁷ Peter Dunn “Child Support Amendment Bill, Government Bill 337-1” at 2. (Own emphases). <http://www.legislation.govt.nz/bill/government/2011/0337/latest/DLM4071711.html> Accessed 8 November 2011.

⁴⁷⁸ Peter Dunn “Supporting Children, a government discussion document on updating the child support scheme” at 27. <http://taxpolicy.ird.govt.nz/publications/2010-dd-supporting-children/overview> Accessed 3 January 2012.

⁴⁷⁹ Peter Dunn “Supporting Children, a government discussion document on updating the child support scheme” above n 478_ at 27 para 4.3. The relevant key finding of the survey was, to be precise, as follows: “48.3 percent of parents who pay child support (... through voluntary arrangements as well as through the child support scheme) say their child stays overnight at their house at least a few days per fortnight, compared with 32.0 percent of receiving parents who say their child stays overnight at the paying parent’s home at least a few days a fortnight (an average of 36.4 percent).” See Appendix 4 at 81.

⁴⁸⁰ Peter Dunn “Supporting Children, a government discussion document on updating the child support scheme” above n 478 at 28. Own emphasis.

cannot be ruled out. A bigger irritation, rather than the FRM, that the government was likely responding to could be the massive debt owed by (predominantly) fathers and that this could no longer be ignored, as clearly had been done for many years.⁴⁸¹The 1994 Trapski report⁴⁸² was the first significant analysis of the Child Support Act 1991 (CSA) but many of its recommendations had been ignored by the political system. One of these was that that ‘paramount’ legal programme namely the ‘welfare of the child’ should be included in the child support legislation. It was not, nor is it currently anywhere included in the bill before parliament that will, if passed, amend the Act.

One of the great irregularities of the scheme under the CSA, and an indication of its distance from the ‘welfare of the child’, is the discrepancy between actual cost of raising children in New Zealand and the amounts payable under the CSA, something that the Trapski Report pointed out seventeen years ago. Even subsequent to that report, the actual cost of raising children had not been researched by the government until 2009/2010 when research was published and presented⁴⁸³ and this information will apparently be incorporated under the new scheme proposed in the current bill before parliament.⁴⁸⁴

5.7 The UN Convention on the Rights of the Child – an irritant?

International human rights law – being a legal communication in the Luhmannian sense – belongs, to the legal system and it is thus subject to the operations of national legal systems that involve the systems’ principles, rules, standards, as produced *by* those legal systems. The articles of the UNCRC relevant to this thesis – articles 3, 12 and 18 – did not introduce legal concepts or rules that were not already part of the western common law legal system e.g. the U.K., Canada, Australia, New Zealand and America, albeit that the latter has

⁴⁸¹ Imogen Neal “Parents \$2.3b in debt for support” (Fairfax NZ News) Last updated 23/10/2011 <http://www.stuff.co.nz/national/5835623/Parents-2-3b-in-debt-for-support> Accessed 3 January 2012.

⁴⁸²P Trapski D Halsted and others *Child Support Review 1994* Report of the Working Party (Wellington (NZ), 1994).

⁴⁸³ Iris Claus, Paul Kilford and others “Costs of raising children” Presentation (March 2010) Official Statistics Forum 2010.

⁴⁸⁴Peter Dunn “Child Support Amendment Bill, Commentary on the Bill” (Policy Advice Division of Inland Revenue, Wellington (NZ), October 2011) at 5, 9, 10. <http://www.legislation.govt.nz/> Downloaded on 1 December 2011.

signed the Convention but is yet to ratify it while having been heavily involved in its drafting.

Looking at legislation, article 3 of the UNCRC states that the best interests of the child must be primary in actions that involve the child. This is recognised in the relevant legislation of most countries' of the world. Paragraph 1 of article 12 assures, to every child who is "capable of forming his/her own views [i.e. not all children and depending on the courts' discretion as to the child's capacity] the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity." Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her. New Zealand's Guardianship Act s 23(2) for example provided in 1968 already:

In any proceedings [involving the welfare of the child] the Court **shall** ascertain the wishes of the child, if the child is able to express them, and **shall**, ... take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child." (Own emphases).

"Shall" was apparently not instructive enough – and courts certainly did not always obtain the views of children in CCDs⁴⁸⁵ – and so the importance of article 12 was explained as having been "of considerable influence" in enacting COCA.⁴⁸⁶ Section 6 of COCA now says the court "must" give a child a "reasonable opportunity to express views" in CCDs and any views expressed must "be taken into account". Note, that neither the UNCRC nor COCA instructs that the child's views must be superior. Despite the change in COCA to elevate this

⁴⁸⁵Pauline Tapp and Nicola Taylor "Agents or dependants - children and the family law system" (2001) 3 BFLJ 245; Anne B Smith and Megan M Gallop "What children think about access with their non-resident parent" in Anne B Smith, Megan M Gallop and others (eds) *Children Whose Parents live Apart: Family & legal concepts* (Children's Issues Centre, Dunedin (NZ), April 2001) 1; Pauline Tapp "Parenting, a private responsibility or a collaborative partnership? A perspective based on the United Nations Convention on the Rights of the Child" in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Addison Wesley Longman, Auckland (NZ), 1998) 1.

⁴⁸⁶ Robert Ludbrook and Lex de Jong *Care of Children in New Zealand: Analysis and expert commentary* (Thomson Brookers, Wellington, 2004) at 8; See also Pauline Tapp "Judges are human too: conversations between the judge and a child as a means of giving effect to section 6 of the Care of Children Act 2004" (2006) NZ Law Rev. 35; Peter Boshier "The new era – professionalism in the family court" New Zealand Law Society Family Law Section, Family Law, (October 10, 2005) <http://www.justice.govt.nz/family/publications/> Accessed 12 December 2011. [speeches-papers/archive.asp?inline=nzls-family-law-section-10-10-2005.asp](http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=nzls-family-law-section-10-10-2005.asp)

rule, recent research found that, as happened under the previous legislation, the court still does not consistently hear the child's views.⁴⁸⁷

Ironically, while article 12 implies that the child is an autonomous social actor, article 3 speaks of the child as vulnerable and incompetent; in need of a more powerful or knowledgeable forum, body or actor to decide what will be in her/his best interests.⁴⁸⁸ No instruction or clarification is given by the UNCRC as to the meaning of 'best interests' in article 3, except that it must be 'primary' and therefore the articles' meaning and/or application will, again, be determined on a national level by the courts or, more recently, by legislation.⁴⁸⁹ There is thus a structural coupling between international human rights law and national law, at least of western jurisdictions, while national legislatures will react in ways that they deem applicable and practical within the jurisdiction but also bearing in mind that States parties are actually themselves involved in drafting conventions at the United Nations.⁴⁹⁰ Who is instructing whom? Or, as Luhmann explains, there is circularity in the operations of law. Importantly, as has been pointed out by Freeman, the construction of individual rights in response to perceived social problems allows governments to construct these problems as conflicts that need resolving between the individuals involved and thereby avoids scrutinising their social and economic causes.⁴⁹¹ By having reflected on and researched the history of CCDs and the legal system's operations and constructed normative expectations as the system applied its version of W&BIC, I would add legal causes also.

Kaganas and Diduck point out that two images of children in law and socio-legal communication can be identified.⁴⁹² These are first the image of the

⁴⁸⁷ Antoinette Robinson "Children heard but not listened to? An analysis of children's views under s 6 of the Care of Children Act 2004" (2011) 7 NZFLJ 39 (concluding that the article's analyses of recent court decisions involving the child's views has shown that "a change in law will not deliver a true change, if the change is not the result of a change in attitude" – quoting Dala Huang *Accession Magazine* (New Zealand, August 2010) at 1.

⁴⁸⁸ Scholars have pointed out this contradiction before. See e.g. Carol Smart "Children and the transformation of family law" in John Dewar and Stephen Parker (eds) *Family Law: Processes, practice, pressures* at 231; Rebecca M Stahl "'Don't forget about me': implementing article 12 of the United Nations Convention on the Rights of the Child (2007) 24 (3) *Arizona J of Int. & Comparative Law* 803.

⁴⁸⁹ For example the Care of Children Act 2004, s 5

⁴⁹⁰ Michael King "Children's rights as communication: reflections on autopoietic theory and the United Nations Convention" (1994) 57 (3) *MLR* 385 at 392-401.

⁴⁹¹ Michael Freeman *The State, the Law and the Family: Critical perspectives* (Tavistock, London, 1984) at 55.

⁴⁹² Felicity Kaganas and Alison Diduck "Incomplete citizens: changing images of post-separation children" (2004) 67 (6) *Mod L. Rev.* 959 at 961ff.

child as developing towards agency albeit still dependent – i.e. of yet to become a fully rational subject – and the other the ideas of the romantic realm – i.e. of the child as innocent, developing through socialisation and therefore with a limited competency. They contend that the former view currently dominates particularly when social scientists become involved in law's operations and is also reflected by UNCRC – specifically article 12.

That being said, the notions of children's rights, as espoused by UNCRC, are idealistic communications rather than instruments of power and obligation. National legal systems become important in transforming those concepts of rights from the venerable yet Eurocentric statements⁴⁹³ of the Convention into rules designed to regulate relationships between children and adults. These demands for *legal remedies* to better children's lives elicits little more than formalistic responses from governments⁴⁹⁴ and selective responses within the operations of the legal system. To add to the fluidity of interpretation of the UNCRC the articles of the Convention constantly shifts between discussions of children's particular need for protection,⁴⁹⁵ their developing need for independence,⁴⁹⁶ and the protection and enforcement of parents' rights and duties, respectively.⁴⁹⁷ Its construction appears to want to cover so many possibilities and ideals that in the end, it can contradict itself.

Parents (as adults – and not including under aged parents) vote, or at least are eligible to vote, while children do not. Pleasing parents can therefore be far more important for political purposes and staying in or gaining power than pleasing children. But also, making parents the primary source of support for their children's financial well-being means making rules that can continue to elevate parents' position above that of their child(ren) while then demanding 'responsible' parenting in the form of, inter alia, paying child support and relieving government's from significant expense. For example, Helen Rhoades, suggests that the political system (in Australia) chose to respond to the 'gender

⁴⁹³ See e.g. Allison James "From the child's point of view: issues in the social construction of childhood" in Catherine Panter-Brick (ed) *Biosocial Perspectives on Children* (Cambridge University Press, Cambridge (UK), 1998) 45 at 52-53.

⁴⁹⁴ Michael King "Children's rights as communication: reflections on autopoietic theory and the United Nations Convention" above n 490 at 386.

⁴⁹⁵ Convention on the Rights of the Child, G.A. Res. 44/25, Art.3, U.N. Doc. A/44/49 (Nov. 20, 1989) art 5 (protection from abuse)

⁴⁹⁶ Ibid, art 12 (right to express views in judicial proceedings concerning them); art. 13 (freedom of expression).

⁴⁹⁷ Ibid, art 5 (protection of parental rights and duties); art. 18 (responsibilities of parents).

wars' discourse surrounding post-separation child-rearing and caring by way of instituting 'equality' and thus being seen as responding 'fairly'.⁴⁹⁸ In other words the focus on the child has been displaced by the political system's internally produced solution to 'solve' the 'gender war' surrounding post-separation parenting but with the aim to increase the level of responsibility taken for children, or simply put, to force fathers to be (financially) involved in their children's lives post separation.

5.8 The new normative expectation?

In both law and politics, there has materialised an equality agenda and promotion of gender neutrality while, in reality, child rearing is still overwhelmingly a maternal practice, despite the extremely exaggerated claims by the FRM.⁴⁹⁹ In Australia, after the first round of reforms in 1995 that encouraged greater shared parenting and even after the 2006 reforms, when parents come to their own agreements, the mother predominantly remains the primary caregiver. If most separated fathers were truly as determined to have equal time with their children one could imagine that the new 'shadow' that the law casts would have them push for greater shared care in their negotiations. Because of the social systems' closure there is every possibility that Australia's initiative will be followed.⁵⁰⁰ Political systems of particular realms, such as western common law countries, invariably also follow each other, particularly in family law it seems.

Why are legal and political systems reacting (albeit differently except in Australia) to the FRM? They are not that great in numbers and often do themselves no favours by the way they stage public protest. Their websites and user forums often make for misogynistic and very conservative reading and there is a great hatred of child support enforcement. These are relatively easily

⁴⁹⁸ Helen Rhoades "Children's needs and 'gender wars': the paradox of parenting law reform" (2010) 24 AJFL 1.

⁴⁹⁹ In America, which I have not discussed above, but where the move away from sole parent custody/care has been underway longer than in the countries discussed above; approximately 84% of children are in their mothers' custody/primary care see e.g. Jocelyn Elise Crowley "Taking custody of motherhood: fathers' rights activists and the politics of parenting" above n 371 at 224.

⁵⁰⁰ See Owen Bowcott "Government backs shared parenting legislation after separation" (6 February 2012) *The Guardian* online at <http://www.guardian.co.uk/lifeandstyle/2012/feb/06/government-backs-shared-parenting-legislation> Accessed 28 February 2012: "Fathers and mothers should be entitled to a legally binding 'presumption of shared parenting' after separation, the [U.K.] government has announced, rejecting advice by an independent review on family justice."

accessible on the World Wide Web and academic commentators have studied their content.⁵⁰¹ The FRM's public protests often seem immature and unimpressive.

When a protester dressed as Spiderman climbed a crane on Tower Bridge, London, in November 2004, city Mayor Ken Livingstone said the stunt demonstrated why "some men should not have access to their children".⁵⁰²

Luhmann maintains that all choices and decisions made within autopoietic systems are contingent at any given point in time, meaning that there were, and always will be other options available and that choices are made by the systems about what to respond to or not depending on what the receiving system wants to achieve. Some events will be selected for response and others will be ignored. While political systems need to seem more transparent in their motivations, it is much harder to determine what the legal systems will react to and how. Courts are not compelled to make public statements or to explain themselves. In addition, the legal system reacts slowly and little by little as it did for example to stabilise the TYD. Therefore, if shared care is indeed the system's preferred legal expectation that it wants to stabilise, we are not yet seeing a *dramatic* escalation in court ordered shared parenting, with Australia being an exception.

Coltrane and Hickman have concluded⁵⁰³ that legislative child custody reforms in America were readily adopted in the 1980s because certain developments coincided. For the political system, the rhetoric and goals of joint custody as espoused by the FRM, the agitation by women and mothers for child support enforcement reforms and greater financial support from fathers, and the prevailing political climate coincided. The political climate in the 1980s was conservative, particularly as far as social support and welfare budgets were concerned. The objective for the political system was primarily to save State expenditure by shifting financial support of single-parent-children onto fathers. To compromise, the State had to be seen to 'accommodate' fathers and legislative changes were made that suggested greater equality with seemingly 'share-friendly' provisions. However the courts, even before the reformed legislation

⁵⁰¹ See e.g. Susan S Boyd "Robbed of their families? Fathers' rights discourses in Canadian parenting law reform processes" above n 378.

⁵⁰² BBC NEWS "Profile: Fathers 4 Justice" http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/3653112.stm Last updated 22 April 2008 15:10 UK.

⁵⁰³ Scott Coltrane and Neil Hickman "The rhetoric of rights and needs: moral discourse in the reform of child custody and child support laws" (1992) 39 (4) *Social Problems* 400 at 413.

entered it, started to move toward shared parenting. Possibly because the FRM specifically lashed out at the courts, accusing its practices of gender bias, constantly using legal language such as the ‘rights’ and ‘equality’ thus ‘irritating’ the system to respond (over time) to the agitation by the FRM by enhancing joint physical custody/care. Crowley highlights how the FRM uses the arguments employed by women and minority groups in the past to agitate for ‘equality’ in CCDs.⁵⁰⁴

As for children, the latest research after the 2006 reforms in Australia, confirmed what researchers had found already before the reforms⁵⁰⁵ namely that regardless of the type of care arrangement that children find themselves in, what matters to them the most is the quality of the relationship that they have with their parents and not the amount of time they spend with them per se. Thus, if a parent lacks relational and/or parenting skills, no amount of time spent with her/his child will magically turn the relationship into a constructive, pleasant and reliable relationship. “[T]he better (richer, deeper, and more secure) the parent-child relationships, the better the children’s adjustment, whether or not the parents live together.”⁵⁰⁶ This however appears to be ignored by both legislatures and the legal system.

Shared parenting by mutual agreement is on the (slow) rise and sometimes it works well and children benefit and other times the experiment ends (for whatever reason.⁵⁰⁷ It is unfortunate when parents enter agreements only because they feel pressurised by legal and popular (unrealistic) rhetoric especially when it is too difficult to sustain. The biggest losers in the process are invariably the children because of the discontinuity in arrangements and the disruptions that this may cause and also because of the conflict when parents are simply not suited for shared arrangements. Of greatest concern however is that the courts (and their

⁵⁰⁴ Jocelyn Elise Crowley “Adopting ‘equality tools’ from the toolboxes of their predecessors: the fathers’ rights movement in the United States” above n 348.

⁵⁰⁵ Paul Amato and Joan G Gilbreth “Nonresident fathers and children’s well-being: a meta-analysis” (1999) 61 *Journal of Marriage and the Family* 557; Carol Smart, Bren Neale and Amanda Wade *The Changing Experience of Childhood: Families and divorce* (Polity Press, Cambridge (UK) 2001) chapter 3.

⁵⁰⁶ Michael E Lamb “Improving the quality of parent-child contact in separating families” in Mavis Maclean (ed) *Parenting after Partnering: Containing conflict after separation* (Oñati ISLS, Hart Publishing, Portland (OR), 2007) 11 at 17.

⁵⁰⁷ This may also include a parent having to move away for job purposes or that the arrangement proves too costly for example by having to maintain two materially equal households.

affiliated services such as family court counselling and mediation that also ostensible push the legal agenda) are attempting to create a new normative expectation by imposing shared arrangements on parents that are not able to cope with the demands of such an agreement and worse, that are not able to manage their differences and dislike of each other.

There will be exceptions of course because the legal programmes of judicial discretion and the ‘individualistic approach’ is part and parcel of CCDs in particular. These programmes however only come into play when judges decide CCDs. For the great majority of cases, the legal system’s subsidiary services will basically be responsible for helping the parties decide how care will be divided. These lower order services will, quite likely, increasingly follow the first rule of the system by which they operate: help parties to reach a settlement that includes sharing the care of children.

Given the history of CCDs in the legal system and its application of the W&BIC programme to stabilise the legal preference of CCD outcomes over time, there is a great possibility that the legal system will, and already is, pushing this new ideal of shared parenting towards the next stabilised (at least for the system) legal expectation. Law’s function is not to establish the ‘truth’ of W&BIC, but rather to stabilise the (changing) normative expectations *about* W&BIC, which is achieved by way of law’s own operations i.e. by establishing the legality (or not) of circumstances.⁵⁰⁸ Shared parenting post separation is now legally correct. If there is ‘evidence’ in its environment that at a given time coincides with the legal system’s programmes then such evidence will be utilised by the system in its establishment of normative expectations. The next chapter will briefly look at how the law, in this process, coupled with social science.

⁵⁰⁸ Michael King “The future uncertainty as a challenge to law’s programmes: the dilemma of parental disputes” (2000) 63 (4) MLR 523 at 539.

Chapter 6 The structural coupling between law and social science

6.1 Introduction

The social sciences⁵⁰⁹ produced vast amounts of new and, given human nature and emotion, ambiguous communications⁵¹⁰ about the impact and effect of divorce on children and advice on curtailing its negative consequences. However this eventually provided the legal system with opportunities to select from and use those communications that can justify, stabilise and support its own norms. As King and Trowell explain:

One of the services that the law performs is to transform complex, messy situations involving intricate human relationships and a multiplicity of possible causes and effects into a simple story which makes sense and holds a moral for everyone.⁵¹¹

Put differently, the inherent indeterminable and subjective interpretation⁵¹² of the W&BIC doctrine urged the legal system to “enslave”⁵¹³ some social science discourses in accordance with law’s own norm-establishing purposes. By

⁵⁰⁹ While social sciences are more dependent on interpretative concepts, interpretative elements per se are part and parcel of natural sciences also, and therefore social science does belong to the scientific realm. See e.g. Mary B Hesse *Revolutions and Reconstructions in the Philosophy of Science* (Indiana University Press, Bloomington, 1980); Gary King, Robert O’ Keohane and Sidney Verba in *Designing Social Inquiry: Scientific inference in qualitative research* (Princeton University Press, Princeton (NJ), 1994) chapter 1: “The science in social science”; Michael King “Child welfare within law: the emergence of a hybrid discourse” (1991) 18 (3) *J Law & Soc’y* 303 at 309-311. On the diversity of approaches within social science research, see e.g. Tim May *Social Research: Issues, methods and process* (3rded, Open University Press, Buckingham, 2001) at 7-27.

⁵¹⁰ Notwithstanding a large collection of existing published research on issues such as divorce, child welfare, and fathers’ involvement in their children’s lives, overviews of these works can only reach agreement on the unfeasibility of drawing any clear conclusions. See e.g. Stephen Gilmore “Contact/shared residence and child well-being: research evidence and its implications for legal-decision-making” (2006) 20(3) *IJLPF* 344 at 346; Graeme B Wilson “The non-resident parental role for separated fathers: a review” (2006) 20(3) *IJLPF* 286 at 290.

⁵¹¹ Michael King and Judith Trowell *Children’s Welfare and the Law: The limits of legal intervention* (Sage, London, 1992) at 1.

⁵¹² Robert Mnookin “Child-custody adjudication: judicial functions in the face of indeterminacy” (1975) 39 *L. & Contemp. Prob.* 226 – 293; Jon Elster *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge University Press, Cambridge (UK), 1989); Andrea Charlow “Awarding custody: the best interests of the child and other fictions” (1986-1987) 5 *Yale L. & Pol’y Rev.* 267; Barbara Bennett Woodhouse “Towards a revitalization of family law” (1990) 69 *Tex. L. Rev.* 245 at 289; Lynn M Akre, “Struggling with indeterminacy: a call for interdisciplinary collaboration in redefining the ‘Best Interest of the Child’ standard” (1992) 75 *Marq.L.Rev.* 628; Martin Guggenheim *What’s Wrong with Children’s Rights* (Harvard University Press, Cambridge (MA), 2005) Chapter 5 - arguing that espousing W&BIC is a disguise to obscure that custody decisions are really about the involved adults’ interests.

⁵¹³ Gunther Teubner “How the law thinks: toward a constructivist epistemology of law” above n 17 at 745.

“enslave” Teubner means that the law responds to scientific information that is outside its boundaries by determining the relevance of such information in accordance with the legal system’s operations. In the process much information that an expert in social/behavioural sciences may consider relevant or contingent (the latter being worse for the legal system that seeks certainty) will be discarded or reconstructed by the legal system in accordance with its own pre-determined value allocations. Thus, the legal system absorbs ideas only if these ideas can fit into the system’s operations.

There exists, especially since the 1970s, a wealth of scientific knowledge about a wide range of factors that might harmfully or beneficially affect children’s development post parental separation, yet only a small section of this knowledge enters the legal system.⁵¹⁴ Luhmann explains that synthesising outside information within a social system (such as law) so as to produce a communication “is always a selective occurrence”⁵¹⁵ where the process of self-production of the system’s network of communications “grasps *something* out of the actual referential horizon ... and leaves *other things* aside”.⁵¹⁶ A social system views its environment – comprised of other social systems – as a “horizon”.⁵¹⁷ In this chapter I will highlight and discuss the impact of some of the social science research as it emerged since the first half of the twentieth century in law’s environment (or ‘horizon’) that the legal system reacted to in its unavoidable structural coupling with social sciences as this discipline increasingly focussed on divorce and child rearing practices after the legal event that divorce is.

The focus will primarily be on New Zealand developments however at times developments in other jurisdictions will be relevant. Given the diversity and volume of social science research and outcomes I do not propose to cover the information from that system exhaustively but will focus on what the legal system seemed to have responded to. Thus, I will not offer an array of all the social science propositions or ‘general’ findings that the legal system ignored or could have selected for response due to the sheer volume of contributions.

⁵¹⁴ Michael King *A Better World for Children? Explorations in morality and authority* (Routledge, London, 1997) at 19.

⁵¹⁵ Niklas Luhmann *Social Systems* above n 8 at 140.

⁵¹⁶ *Ibid.* (Emphases in original.)

⁵¹⁷ Niklas Luhmann “Closure and openness: on reality in the world of law” above n 19 at 337.

6.2 Social science research within the legal system

The legal system had, in CCDs, started to react to social science in the first decades of the twentieth century. The maternal preference encapsulated in the TYD was “given a boost” by the development and popularisation of psychoanalysis, and Sigmund Freud’s theory of child development in the latter half of his career (the first four decades of the twentieth century) placed heavy weight upon the mother’s role as primary caretaker in a child’s life.⁵¹⁸ Subsequently theories of attachment between mother and child such as John Bowlby’s⁵¹⁹ added apparent scientific support to the weight placed on infant-mother attachment and implied that infant-father attachment was less important to the child’s development.⁵²⁰ Thus, scientific theories of psychoanalysis and attachment appeared to lend further credibility to the maternal preference. Perhaps for these reasons (or at least in part) the legal system deemed the TYD programme to be justified as being in the W&BIC of children.

By the 1960s fathers had started to agitate for legal recognition of their parental role in divorce proceedings and the political system reacted to this perturbation by starting to consider that a more gender-neutral standard might be legally (legislatively) appropriate but still leaving the discretion of the courts intact. Yet it is hard to see where the legislation, since the introduction of equal consideration of both parents in CCDs, was not gender neutral. It was the outcomes and preferences of the courts that had then tilted heavily in favour of maternal custody that evoked environmental irritation. This was also the time of heightened agitation by the ‘second wave’ feminist movement that questioned the social division of labour in the family and the pressure on women to accept most of the child rearing responsibilities⁵²¹ while the reality was that women had increasingly started to join the work force, including middle class women. Working class women largely had no choice but to work in order to survive

⁵¹⁸ Jonathan W Gould and David A Martindale *The Art and Science of Child Custody Evaluations* (Guilford Press, New York (NY), 2007) at 35.

⁵¹⁹ John Bowlby *Attachment and loss: Vol. 1. Attachment* (Hogarth, London, 1969).

⁵²⁰ Jonathan W Gould and David A Martindale *The Art and Science of Child Custody Evaluations* above n 518 at 35. Attachment theory has not (yet) been rejected by social sciences, see Inge Bretherton “The origins of attachment theory: John Bowlby and Mary Ainsworth” (1992) 28 *Dev. Psychol.* 759 at 770-771.

⁵²¹ Sarah Gamble *The Routledge Companion to Feminism and Postfeminism* (Routledge, London, 2001) 25.

financially. Therefore the ideal of a mother staying at home and largely devoting her time to homemaking and childrearing had become questionable given the realities in the environment. The ideal of the breadwinner husband and father was also not realistic for many working class families, but then normative *expectations* can often not claim workability in practice, an outcome that is often ignored by both the political and the legal systems for as long as possible.

In 1973, Goldstein, Freud and Solnit⁵²² introduced their version of W&BIC that claimed that a child is best off with its 'psychological parent'.⁵²³ This book was selected for response by the legal system.⁵²⁴

Today, more than a decade after the appearance of the first book, it is evident that the authors have had an impact on the law governing child welfare decisions that would exceed any academician's wildest expectations. As one commentator observed, every subsequent proposal for reform of the child welfare system has drawn its vocabulary and central ideas from Goldstein, Freud, and Solnit's conceptual framework.⁵²⁵

Why these authors' work had such an impact on the legal system is not entirely clear but notably the first author was a *law* professor, who teamed up with two social scientists, one being Sigmund Freud's daughter and her father's ideas had already been 'approved', in part, by the legal system. Also, the authors directly address the issue of a child's W&BIC in child placement and CCDs, and the book is directed at the legal system. With W&BIC having been legally constructed in CCDs as being the central legal issue,⁵²⁶ it is perhaps not surprising that the legal system chose to respond to its recommendations, at least in part.⁵²⁷

In CCDs the authors recommended that once a custodian had been selected by the legal system, continuity and stability could only be achieved by confining any change in custody and by giving the custodian full decision-making authority over the child, *including* whether the child would visit the non-custodial

⁵²² *Beyond the Best Interests of the Child* (Free Press, New York, (NY), 1973).

⁵²³ A psychological parent had been defined as one who, "on a continuing day to day basis through interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." See Joseph Goldstein, Anna Freud, and Albert J. Solnit *Before the Best Interests of the Child* above n 43 at 98.

⁵²⁴ Nadine Taub "Assessing the impact of Goldstein, Freud and Solnit's proposals: an introductory overview" (1983-84) xii *Review of Law and Social Change* 485 and cases cited.

⁵²⁵ *Ibid.*

⁵²⁶ Daniel A Krauss and Bruce D Sales "The problem of helpfulness in applying *Daubert* to expert testimony: child custody determination in family law as an exemplar" (1999) 5 (1) *Psychology, Public Policy, and Law* 78.

⁵²⁷ Lynn D Wardle and Laurence C Nolan *Fundamental Principles of Family Law* (William S Hein & Co. Inc., Buffalo (NY), 2002) at 863.

parent.⁵²⁸ A “conversation of sorts” began in response to the authors’ proposals that sought to give further definition to W&BIC.⁵²⁹ Because some of their recommendations, particularly concerning the power of the custodial parent (by and large the mother), were considered too controversial, the legal system largely did not respond to that but it took on board the idea of there being one psychological parent and decided CCDs based on legal assessments of which parent the child was more ‘bonded’ with.⁵³⁰ Thus the notion of the ‘psychological parent’ was accepted by the legal system as matters of evidence and was used as such by lawyers for children and guardians ad litem.⁵³¹ Goldstein et al. also recommended that parents should come to their own agreements and that the legal system should, ideally, stay out of such arrangements. This suggestion most likely contributed to what is now being called the ‘settlement culture’⁵³² by some scholars in the U.K. context where the same development emerged. The New Zealand legal system had also started to pursue ‘alternative’ ways to settle custody disputes since the implementation of its conciliation services in CCDs such as counselling under the Guardianship Amendment Act 1980.

Some of these authors’ ideas had therefore been selected by the common law legal system generally, including in New Zealand.⁵³³ Perhaps its attraction for the legal system lay in its seemingly gender neutrality. It may even be plausible to

⁵²⁸ Goldstein et al. above n 43 at 23-25.

⁵²⁹ Jane Spinak “When did lawyers for children stop reading Goldstein, Freud and Solnit? Lessons from the twentieth century on best interests and the role of the child advocate” (2007) 41 FLQ 393 at 398.

⁵³⁰ Mark Henaghan “Legally rearranging families: the family court process, custody, access, adoption, name change, separation and dissolution” in *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 83 at 107.

⁵³¹ Jane Spinak “When did lawyers for children stop reading Goldstein, Freud and Solnit?” above n 529.

⁵³² Rebecca Bailey-Harris, Jacqueline Barron, and Julia Pearce “Settlement culture and the use of the ‘no order’ principle under the under the Children Act 1989” above n 466.

⁵³³ See e.g. *A v A* [1978] 1 NZLR 278 (HC); *B v B* [1978] 1 NZLR 285 (HC). For New Zealand discussions of that theory in the legal context see e.g. Graeme Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington (NZ), 1994) at 27 and for a discussion of related case law see chapter 4; Mark Henaghan, Bill Atkin, Dale Clarkson and others *Butterworths Family Law in New Zealand* (15th ed, LexisNexis, Wellington (NZ), 2011) under “The needs and development of children” at 6.113 citing as regards the “disruption of bonds by separation of a child from his [sic] psychological parent(s)” inter alia Joseph Goldstein, Anna Freud and Albert J Solnit *Beyond the Best Interests of the Child* (1973) for those authors’ contention of the dangers of disrupting children’s bonds with the psychological parent. The “psychological parent” is now mostly referred to in adoption or child placement cases in New Zealand but see e.g. *L v L* FAMC Taupo FAM-2003-069-262, 26 May 2006 Judge Hikaka; *E v E* HC Dunedin CIV-2004-412-923, 20 July 2005 Hansen J; *B v W* FAMC Taupo FAM-2003-069-101, 2 December 2004 Judge Twaddle; *R v R* (1990) 6 FRNZ 232 where judges still refer to or accept evidence that supports the ‘psychological parent’ notion. <http://bookersonline.co.nz>

suggest that these authors' work was interpreted as providing scientific evidence (again) of why the maternal preference should be maintained since mothers were overwhelmingly given physical custody because they were indeed primarily responsible for child rearing and nurturing. Therefore the legal system used this 'irritant' (Goldstein et al.) so as to continue justification for its TYD in the face of (liberal) feminist criticism *and* paternal agitation for parental recognition in CCDs. The maintenance of stabilised norms is usually important for the legal system so as to protect its unity, stability, and authority. For example, the U.S. state of Florida's legislature amended that state's child custody law in 1971 in an effort to remove the TYD and providing for the father to be given equal *consideration* vis-à-vis the mother when custody is determined. However, the Florida Supreme Court reaffirmed the TYD four years later, concluding that the statute did not change the doctrine.⁵³⁴ Whatever the motivation for the legal system's reaction to Goldstein et al., that there was no empirical support for the 'psychological parent' and that it was based on untested assumptions⁵³⁵ was, perhaps conveniently or deliberately, ignored by the legal system that is ostensibly and particularly expected to scrutinise evidence.⁵³⁶ It must also be noted that the psychological parent postulation also challenged the 'blood ties' or biological connection that the courts used to justify the need for contact between the child and the father.

The next social science contribution that had a notable impact⁵³⁷ was that of Judith Wallerstein and Joan Kelly in 1980.⁵³⁸ According to these researchers, the 131 'children of divorce' (this became a social construction in itself) in their research preferred living in a household where the parents were unhappy in the

⁵³⁴ Cynthia A McNeely "Lagging behind the times: parenthood, custody and gender bias in the family court" (1998) 25 Florida State University Law Review 892 at 919.

⁵³⁵ Jonathan W Gould and David A Martindale *The Art and Science of Child Custody Evaluations* above n 518 at 35-36.

⁵³⁶ Judge Davis discusses her experience, observations and analyses as regards judicial acceptance of extra legal material, including the work by Goldstein, Freud and Solnit, as legislative facts: Peggy C Davis "There is a book out': an analysis of judicial absorption of legislative facts" above n 44.

⁵³⁷ See e.g. Carol Smart "Negotiating parenthood: bargaining in the shadow of the law" in Christine R Barker, Elizabeth A Krik and Monica Sah (eds) *Gender Perceptions and the Law* (Ashgate Dartmouth, Aldershot, 1997) 1 at 3-4.

⁵³⁸ Judith S Wallerstein and Joan B Kelly *Surviving the Breakup: How children actually cope with divorce* (Basic Books, New York (NY), 1980). See Mark Henaghan "Legally rearranging families: the family court process, custody, access, adoption, name change, separation and dissolution" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (Oxford University Press, Auckland (NZ) 1992) 83 at 107.

marriage rather than having their parents' divorce and that both parents are essential for the child's psychological health.⁵³⁹ They therefore recommended that shared parenting should be encouraged and parents be helped to engage in post-separation arrangements that would allow and enhance continuity in the relationships between children and both their parents.⁵⁴⁰ However, their research was criticised for reasons: the participants were not randomly selected nor did they have a control group; the participants were from affluent neighbourhoods (thus limited to a specific socio-economic stratum); the participants were all referred for therapy by local agencies (mostly schools) or practitioners.⁵⁴¹ Nonetheless and regardless of the identified problems with generalising the findings of this research, this work became very influential in the U.K. and the U.S. and the focus was shifted towards a new perceived problem for 'children of divorce' namely the loss of the biological father; whether they had 'bonded' with him or even whether they still needed to bond with him i.e. the father was now being seen as more than just an economic provider.⁵⁴² In the U.K. for example, this research played a part in the enactment of the Children Act 1989 which its primary drafter, Brenda Hoggett, explained as being an 'experiment in joint custody'.⁵⁴³

What appears to have been ignored was that Wallerstein and Kelly also found that the fathers in their sample group who fought for custody were not men who had been nurturing parents. Those men who were nurturing parents during the marriage did either, surprisingly, not want custody or, as perhaps could be expected, obtained it by way of agreement with the mother. The fathers who

⁵³⁹ Mark Henaghan "Legally rearranging families: the family court process, custody, access, adoption, name change, separation and dissolution" above n 530 at 107 quoting Wallerstein and Kelly.

⁵⁴⁰ Bearing in mind that children's needs are also socially constructed *within* the construction of childhood over time. See e.g. Stevi Jackson and Sue Scott "Risk anxiety and the social construction of childhood" in Deborah Lupton (ed) *Risk and Sociocultural Theory: New directions and perspectives* (Cambridge University Press, Cambridge (UK), 1999) at 86ff.

⁵⁴¹ Carol Bruch "Parenting at and after divorce: a search for new models: *Surviving the Breakup: How Children and Parents Cope with Divorce* by Judith S. Wallerstein; Joan Berlin Kelly" (Michigan Law Rev. (1981) 79 (4) 708 at 708-709. For other critiques see e.g. Eleanor Maccoby, Charlene E Depner and Robert Mnookin "Co-parenting in the second year after divorce" (1990) 52 (1) *Journal of Marriage and the Family* 141. For reference to Wallerstein and Kelly in New Zealand legal texts see Mark Henaghan, Bill Atkin, Dale Clarkson and others *Butterworths Family Law in New Zealand* above n 530 at 6.114 and accompanying notes.

⁵⁴² Carol Smart "Negotiating parenthood: bargaining in the shadow of a new law" above n 538 at 4.

⁵⁴³ Brenda Hoggett "Joint parenting systems: the English experiment" (1994) 6 (1) *Tolley's Journal of Child Law* 8.

fought for custody were angry and bitter and tried to find ways to prolong the spousal conflict; the authors considered such men, unlikely to co-operate in cases of joint custody orders. These findings actually confirmed research results that were published the previous year by Weitzman and Dixon.⁵⁴⁴ Wallerstein and Kelly in fact found that for only 25% of the parents in their study would joint custody be a good option. They also found that the mothers in their study, who had primarily been the custodial parents, were battling under the strain of paid work, household work and child care functions but that most fathers refused to help lighten the load by, for example, spending additional time with their children, even where they were able to without dropping other commitments. They perceived such possible involvement not as an opportunity to maintain or increase contact with their children, but rather as acting as a childminder for the mother's convenience.⁵⁴⁵ Thus, the message that seems to have been taken from this research – that joint custody should be a preferred option – sweeps aside some important nuances of the study's findings.

The point here is not to diminish the importance for any children of having regular and reliable contact with their fathers. It is rather to point out that these matters are complex and conveys more than what is selected for response. Simplified conclusions should be avoided since they lead to distortions. Unfortunately, social science research appears often to be subjected to such simplified practices when it enters the legal system, possibly due to the legal system's need to determine 'rights' and 'wrongs' in situations where these are not always determinable and often cannot be known at the time when a decision is made. Indeed, correlation in social science studies does not imply causation and this is self-evident in and for social science methodology.

Moving forward to the current state of affairs, the social science literature and research as it emerged over the past two to three decades *generally* but never conclusively supports the idea that children do best when they can maintain *good* relationships with both parents. This is relied upon to support the current thinking towards an ideal of regular contact and shared care as well as to persuade parents

⁵⁴⁴ Lenore Weitzman and Ruth B Dixon "Child custody awards: legal standards and empirical patterns for child custody, support and visitation after divorce" (1979) 12 U.C.D L. Rev. 471.

⁵⁴⁵ Carol Bruch "Parenting at and after divorce: a search for new models: *Surviving the Breakup: How Children and Parents Cope with Divorce* above n 541.

that conflict between them puts their children at risk of harm.⁵⁴⁶ Therefore parents should maintain an active role in their children's lives and parents should not engage in conflict over their care, an ideal that is clearly unattainable for a substantial minority of parents. It is even questionable that all the parents who do reach private agreements do so because they truly believe in the good of the agreement, or whether they are aware of the law's stance and are apprehensive of what a judge might order, a reality that has been identified in numerous publications.⁵⁴⁷

These general and contingent propositions from the child mental health literature have steadily come to represent the 'truth' despite its acknowledged inconclusiveness. As mentioned above the law operates by way of rules and this involves simplifying and reducing complexity to an applicable programme.

Interference of law and other social discourses does not mean that they merge into a multidimensional super-discourse, nor does it imply that information is "exchanged" among them. Rather, information is constituted anew in each discourse and interference adds nothing but the simultaneity of two communicative events.⁵⁴⁸

While child mental health research involves far more than 'if-then' propositions, it includes findings that contact and shared care is good for *some* children albeit in certain circumstances, but law appears to have re-produced this 'finding' to a legal norm of continuing relationships under the W&BIC in cases where no violence or abuse is found. Again, while the sentiment is not necessarily a harmful one, there is the risk and possibility that the courts, working under time constraints and with loaded court dockets, are unable to identify such complexities. They may dismiss important evidence so as to uphold the possibility of continued relationships with both parents. While the legislation allows for social science experts to be called upon in CCDs, this practice is not a rule in New Zealand, and as will be discussed below, these experts are specifically not meant

⁵⁴⁶ Felicity Kaganas "Contact, conflict and risk" in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Dartmouth Ashgate, Aldershot, 1999) 99 at 99.

⁵⁴⁷ See e.g. Richard Neely "The primary caretaker parent rule: child custody and the dynamics of greed" (1984) 3 Yale L. & Pol'y Rev. 168 at 177-78 (explaining that men often use threats of seeking custody as a bargaining chip to reduce financial settlement and child support); Martha Fineman "Dominant discourse, professional language and legal change in child custody decisionmaking" (1988) 101 Harv. L. Rev. 727; Nancy D Polikoff "Why are mothers losing: a brief analysis of criteria used in child custody determinations" (1981-1982) 7 Women's Rts. L. Rep. 235.

⁵⁴⁸ Gunther Teubner "How the law thinks: toward a constructive epistemology of law" above n 17 at 745.

to answer issues that the court deems to be related to the welfare and best interests of the child.

As regards shared parenting, legal texts and judges in New Zealand seem to select some social science research that is not only vague, but if reduced to a simplified conclusion, supports the ideal of shared/joint parenting. Wallerstein and colleagues' research, as interpreted by the legal system, was influential in New Zealand also, and currently *some* publications by Joan Kelly and colleagues are favoured i.e. cited in legal texts and even quoted in judgments.⁵⁴⁹ In accordance with autopoiesis, such extra-legal messages are thereby brought into the operations of the legal system, that is, are reproduced as legally approved communications, once this happens.

In *M v M*⁵⁵⁰ the New Zealand Court of Appeal reaffirmed that a parent should only be deprived of access in exceptional circumstances. The Family Court necessarily (in line with law's operations) followed the authority of the Court of Appeal in for example *M v H*⁵⁵¹ and added that there is a "presumption" that both parents are entitled to contact. Subsequently the High Court in *L v A*⁵⁵² stated that it is harmful to children's interests to elevate to a legal rule – the idea that only if parents get along well can there be shared parenting. Therefore *if* parents are continuously conflicted, *then* this will not preclude shared parenting. This disregards the child mental health research on the negative impact of parental conflict⁵⁵³ and effectively denies that ongoing conflict is harmful to the W&BIC of children in favour of minority outcomes in social science research that find that **if** parents can or do co-operate, shared care contributes to the W&BIC of

⁵⁴⁹ Pauline Tapp and Nicola Taylor "Relocation: are we trying to do too much, too late, with too few appropriate resources? (2008) NSFLJ 6(4) December 94. These two New Zealand academics concur that the New Zealand courts currently favour social science research/publications of Joan Kelly that promotes the frequent and regular contact between children and both their parents.

⁵⁵⁰ (1981-82) NZFLR131 (CA).

⁵⁵¹ [1999] NZFLR 439 (FC).

⁵⁵² [2004] NZFLR 298 (HC).

⁵⁵³ See e.g. Paul R Amato "Parental divorce and adult well-being: a meta-analysis" (1991a) 53 *Journal of Marriage and the Family* 43; Paul R Amato and Bruce Keith "Parental divorce and the well-being of children: a meta-analysis" (1991b) 110(1) *Psychological Bulletin* 26; Robert E Emery "Parental alienation syndrome: proponents bear the burden of proof" (2005) 43(1) *Fam. Ct. Rev.* 8; John H Grych "Interparental conflict as a risk factor for child maladjustment: implications for the development of prevention programs" (2005) 43(1) *Fam. Ct. Rev.* 97; E Mavis Hetherington and John Kelly *For Better or for Worse: Divorce reconsidered* (W W Norton & Co, New York (NY), 2002) at 137; Joan B Kelly "Children's adjustment in conflicted marriage and divorce: a decade review of research" (2000) 39 *J. of Child and Adolescent Psychiatry* 963; Frank F Furstenberg Jr. and Andrew Cherlin *Divided Families: What happens to children when parents part?* (Harvard University Press, Cambridge (MA), 1994) at 107-108.

children.⁵⁵⁴ Thus, despite the supposed individualistic approach and abandonment of precedent and rules in CCDs, the courts still favoured law's self-referencing operation which led to a stream of judgments where the words (or words akin to) 'shared care' were used.⁵⁵⁵

For example in *K v K*⁵⁵⁶ the Family Court judge said that the perception that joint day-to-day care can only operate in situations where there is a high level of co-operation between parents is not supported by social science opinions. His Honour then went on to selectively quote from an analysis and review⁵⁵⁷ of social science research studies published by Joan Kelly and Robert Emery that is very far from conclusive, as indeed few social scientists would honestly claim their research to be. Terminology such as 'most', 'generally', 'potential benefit' and 'many' is often found. Also, in social science different and concurrent theoretical interpretations of behaviour may be constructed that emphasise different aspects of a particular child's well being for the purpose of therapy and diagnoses but these cannot transfer as guides to make decisions about children's welfare.⁵⁵⁸ The point is however that by citing such research, the judge legally endorsed *those* findings and the message taken from them is that:

more than half of parents engage in ... parenting in which low conflict, low communication, and emotional disengagement are typical features. [C]hildren thrive as well in [such] parenting relationships when parents are providing nurturing care and appropriate discipline in each of their households.⁵⁵⁹

Note the qualifiers included: low conflict and both parents providing care and appropriate discipline. What is also not made clear is whether these parents reached such parenting arrangements of their own accord or whether a court ordered the parenting plans. It seems plausible that if parents are not highly conflicted, albeit that they understandably don't feel particularly warm but rather

⁵⁵⁴ See e.g. Jan Pryor and Bryan Rodgers *Children in Changing Families: Life after parental separation* above n 463.

⁵⁵⁵ Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* (14thed, LexisNexis, Wellington (NZ), 2009) at 228.

⁵⁵⁶ Family Court, Whakatane, FAM-2002-087-200, FAM-2002-087-186, 15 April 2004, Judge Geoghegan. Cited in Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* above n 569 at 201.

⁵⁵⁷ Joan B Kelly and Robert E Emery "Children's adjustment following divorce: risk and resilience perspectives" risk and resilience perspectives" (2003) 52 (4) *Family Relations* 1.

⁵⁵⁸ Michael King and Judith Trowell *Children's Welfare and the Law: the limits of legal intervention* above n 511 at 21.

⁵⁵⁹ Joan B Kelly and Robert E Emery "Children's adjustment following divorce: risk and resilience perspectives" above n 557 at 357 as cited and quoted in *K v K* (FAMC, Whakatane, FAM-2002-087-200, FAM-2002-087-186, 15 April 2004).

aloof towards each other, that they will have reached such styles of post-separation parenting without having to ask a court to decide the matter for them. Whether this is acceptable for the children (their parents' attitudes) is another matter. Serious doubts should remain as to whether this can transfer to highly conflicted parents who strongly disagree on multiple issues and disrespect each other.

Yet in, for example, *Greer v Greer*⁵⁶⁰ where “there was animosity between the parents to the point of ‘hatred’ of the father being felt by the mother”⁵⁶¹ but the judge decided that it is most important to emphasise the significance of putting in place a clear and basically permanent routine whereby the parents shared the care of the children or else there would be, “very serious concerns about the ongoing emotional well-being of these children if they are left in a situation where through the effluxion (sic) of time their mother can pervert their views about their father”.⁵⁶² This is an unreported case and we are told little else about the details in the legal text in which it is cited and the judge is quoted, except that the children were four, two and one years old. One cannot help but wonder what the support for this young family looked like after the judge made such a controversial and decision. We also do not know how these orders turned out for them which is true for all the cases that the court decides and that we get a glimpse of or are able to read reported judgments of.

In *A v G*⁵⁶³ (heard after COCA came into force) the High Court accepted the legal relevance of the contribution by Kelly and Emery⁵⁶⁴ as the court was clearly referred to the judge's assertion in *K v K*.⁵⁶⁵ Thus the door for (legal) reliance on that social science assertion(s) that reviewed and simplified findings from other research findings, was left open by the High Court and that particular research article by Kelly and Emery is now regularly cited by judges in reported cases⁵⁶⁶ as regards ‘proof’ that ongoing conflict is not necessarily detrimental to

⁵⁶⁰ Family Court, Auckland FP 1402/99, 28 June 2000. Cited in Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* above n 569 at 199.

⁵⁶¹ Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* above n 569 at 199.

⁵⁶² *Greer v Greer* above n 560 at para [11] quoted in Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* above n 561.

⁵⁶³ HC Invercargill CIV-2006-425-489, 21 December 2006 <http://brookersonline.co.nz>

⁵⁶⁴ *Ibid* at [70].

⁵⁶⁵ Above n 559.

⁵⁶⁶ See e.g. *P v M* FAMC Auckland FAM-2002-004-2110, 5 May 2009; *T v E* FAMC Auckland FAM-2007-004-2481, 14 October 2008; *CR v JS* FAMC Auckland FAM-2008-004-673, 11 April

making shared care orders. Bruch,⁵⁶⁷ in reference to social science research, asserts:

[T]he interest of a noncustodial parent in maintaining frequent, regular visits does not necessarily guarantee a good outcome for the child. Things work out well if he and the custodial parent are among the 20% to 25% of divorced couples who are able to talk over the children's problems, coordinate household rules and child-rearing practices, and adapt their schedules to fit their children's needs.

Less auspicious are the 50% of cases in which parents go forward while ignoring each other, neither coordinating their parenting nor interfering with each other. It is the final 25% of divorcing couples who pose the greatest danger to their children, and a noncustodial parent's ... interest in maintaining frequent, regular visits in this setting is apt to harm rather than help them. Hetherington explains, '[T]he only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time'.⁵⁶⁸

Although the greater part of the cases decided under this shift toward greater shared parenting since the early 1980s in New Zealand did not involve actual equal time in the care of each parent,⁵⁶⁹ these decisions signified that both parents *ought* to share more in the care of the child post-separation, and thus the move towards a new legal norm had been strengthened.

Priestly J in the High Court has described the principles in section 5 of COCA in *Brown v Argyll*⁵⁷⁰ as desirable social norms but in accordance with autopoiesis they are, in effect, legal and now also political norms of what ought to be best for children. They are both political and legal because they are communicated in legislation but are first approved by parliament. As Luhmann says, the operations of the legal system are circular but the courts remain central to the operations of the system and legislation remains at the periphery. The political system can of course, in theory, alter the normative expectations that the courts have stabilised, or are seeking to stabilise, by changing legislation but it is very careful in that regard and very seldom (but not never) imposes principles via legislation on the legal system that had not already been established, or partially established, within the legal system. As discussed in chapter 3, under the first custody legislation in the common law system, the courts ignored the introduction

2011; *MCP v RC* (Family Court, Levin FAMC 2006-031-000024, 1 December 2006). These judgments reported online at <http://www.brookersonline.co.nz>

⁵⁶⁷ Carol Bruch "Sound research or wishful thinking in child custody cases?" (2006) 40 Fam. L. Q. 281.

⁵⁶⁸ *Ibid* quoting E Mavis Hetherington in E Mavis Hetherington and John Kelly *For Better or for Worse* above n 553 at 136-137.

⁵⁶⁹ Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Family Law in New Zealand* (14th ed, LexisNexis, Wellington (NZ), 2009) at 228.

⁵⁷⁰ [2006] NZFLR 705 (HC).

of the equal consideration of mothers in CCDs for nearly fifty years and simply upheld the law of the father. The courts, for whatever reason, did not consider maternal custody a viable option yet. Therefore, while we are led to believe that legislation is the primary source of law, the unfolding of the courts' determination of CCDs under the legislation tells a different story and judges are 'protected' by the programme of judicial discretion, which is always part of CCD legislation. In turn, the legal system can agitate for legislative changes when it finds a change in legislation will ease decision making but the political system can and does reject requests and recommendations often when what is proposed will be, for example, too costly – in revenue terms. However, as discussed in chapter 4, judges in New Zealand had found ways, and were free to use the Guardianship Act in a way that allowed shared parenting orders without parliament's endorsement in anyway. The "in particular" principle of continued relationships with both parents is now provided for in subsection 5(b) of COCA⁵⁷¹ and is a continuation of the programme that was started under the former Act.

Child mental health science will most often be re-constructed within the legal system to meet the demands of legal discourse.⁵⁷² Because of the inevitable structural coupling between law and social science, selected principles of child well-being and development can and will also be used within the legal system similar to how precedents are used and in accordance with how the system decides to use them.⁵⁷³ In a recent literature review of contact issues⁵⁷⁴ it was established that much of the literature exploring methods for dealing with the matter of child contact in CCDs also actually *questions* this ideal of increased contact and shared custody and the circumstances under which this will be good for children. Yet in New Zealand for example the Principal Family Court Judge has recently reiterated that "[t]he importance for children of having both parents, ... actively involved in their lives is central to the understanding of how the

⁵⁷¹ **Section 5 Principles relevant to child's welfare and best interests**

(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, whanau, hapu, or iwi, should be stable and ongoing (**in particular**, the child should have **continuing relationships with both** of his or her **parents**): (Own emphases).

⁵⁷² Michael King and Christine Piper *How the Law Thinks About Children* above n 21 at 52.

⁵⁷³ Michael King and Christine Piper *How the Law Thinks About Children* above n 21 at 52.

⁵⁷⁴ Fran Wasoff *Dealing with Child Contact Issues: a literature review of mechanisms in different jurisdictions* (Centre for Research on Families and Relationships, University of Edinburgh, Edinburgh, 2007). <http://www.scotland.gov.uk/Publications/2007/10/> Downloaded 5 September 2011.

Family Court approaches care of children cases.”⁵⁷⁵

It appears that the normative expectation of regular contact with both parents weighs so heavily within the courts that in *PN v BN*⁵⁷⁶ the judge went so far as to order a father, who did *not* want to spend more time with his children due to his work commitments and other priorities, to increase his contact time with them.⁵⁷⁷ This jurisdiction of the Family Court to enforce contact on a ‘reluctant’ parent under COCA, which was held not to exist under the Guardianship Act 1968,⁵⁷⁸ was confirmed by the High Court in *B v H*.⁵⁷⁹ This was apparently due to the wider scope of considerations that the court may consider in matters relating to the best interests of children and “the Act in its totality.”⁵⁸⁰ There is however no express provision in COCA that a ‘reluctant parent’ can be forced to have more or specified contact with her or his child(ren). Importantly though, the High Court was not asked to (and did not) decide whether a contact order could be *enforced* against a reluctant (contact) parent. In other words, whether the law has the power to force a parent to have contact, thus the decision in *PN v BN* still stands. However COCA makes it a criminal offence for a person, without reasonable excuse and with intent, to disobey or prevent compliance with a parenting order. Even if the court has the power to make an order against an unwilling parent there are likely to be difficulties in enforcing the order. The power to issue a warrant under COCA s 73 applies only where a person entitled to contact has applied for a warrant to have the child uplifted and delivered to them. Conversely, there is no power for the primary care-giving parent or the child to apply for a warrant to enforce a contact order. Breaching of a parenting order occurs when the parent responsible for providing contact fails to satisfy or breaches his or her obligation according to the order. Thus, it is when the primary care-giving parent prevents contact because it is that parent’s responsibility to present the child to the contact parent. Apparently then the contact parent does not have a responsibility but a right to contact.

⁵⁷⁵ Peter Boshier “What’s gender got to do with it in New Zealand family law” (2011) 7 NZFLJ 61.

⁵⁷⁶ [2007] NZFLR 320; (2006) 25 FRNZ 536 (FC).

⁵⁷⁷ It must be noted that the children wanted to have more contact with their father and the mother accordingly applied to have more contact time enforced on the father than what the father proposed he has.

⁵⁷⁸ *B v VE* (1988) 5 NZFLR 65 (HC); *Cunliffe v Cunliffe* (1992) 9 FRNZ 537 (FC); *Collins v Sawtell* [1995] NZFLR 880 (FC).

⁵⁷⁹ [2008] NZFLR 200 (HC).

⁵⁸⁰ *PN v BN* above n 576 at para [43].

There are commentators who point out that the positive benefits for children of father-involvement essentially exist where both parents are welcoming thereof, but when men are forced into higher levels of involvement, the effects on children tend towards the negative.⁵⁸¹ “A father’s motivation in caring for children may be, ... more important than the amount of time he spends with them.”⁵⁸² Is the ideal of wanting parents/fathers to continue to make meaningful contributions to their children’s lives greater than what will, in the children’s experience, be uncomfortable or unwanted? Perhaps. Only time and the children involved can tell whether their interests were actually served by decisions that strive to encourage fathers to remain or become involved in their children’s lives. In Australia with its legal presumption of equal shared parenting research indicates that more children in shared care arrangements want to change the arrangements than children in primary parent arrangements and a primary reason for them wanting change was their parents’ conflict.⁵⁸³

This expansion of the New Zealand court’s jurisdiction to order more contact time where this is against the wishes of the resident parent offers one of many examples for why Luhmann sees the courts as being central to the legal system.⁵⁸⁴ As stated, this is not provided for in COCA but then, judicial discretion is. Also, courts – not legislatures – alone are expected to make legal decisions, even when there are no profound reasons for doing so because of the norm relating to the prohibition of the denial of justice.⁵⁸⁵ The courts have to interpret legislation and decide what will be legally right or legally wrong which runs into the problem of law’s paradox i.e. that in the end something will be legally correct because the legal system says it is and not because some universal ‘über-truth’ provides us with this knowledge. The reality of having to decide what is undecidable leads to situations that “if [the courts] cannot decide, they must force themselves to be able to decide. If the law cannot be found, it must simply be

⁵⁸¹ See e.g. Jan Pryor and Bryan Rodgers *Children in Changing Families* above n 463 at 202; Paul Amato and Joan G Gilbreth “Nonresident fathers and children’s well-being: a meta-analysis” above n 505; E Mavis Hetherington and John Kelly *For Better or for Worse: Divorce reconsidered* above n 553 at 134.

⁵⁸² Jan Pryor and Bryan Rodgers *Children in Changing Families* above n 463 at 202.

⁵⁸³ Judith McIntosh “Legislating for shared parenting: exploring some underlying assumptions” (2009) 47 (3) Fam. Ct. Rev. 389 at 396.

⁵⁸⁴ Niklas Luhmann *Law as A Social System* above n 6 Chapter 7.

⁵⁸⁵ Niklas Luhmann *Law as A Social System* above n 6 at 279.

invented”.⁵⁸⁶ Lest we forget how much ideas about children’s W&BIC have also changed within the legal system⁵⁸⁷ (while all the while children were and are on the receiving end of these selected norms and programmes in the interests of predictability of the law) despite changes in its environment and even legislative changes as seen by the courts’ response to the first Act that provided for consideration of the mother in CCDs discussed in chapter 3. The nature of the courts’ law-producing activities and the legal rules which constrain them (operations of the legal system) have profound implications for the possible influence of social science as well.⁵⁸⁸

Judges face the pressure of having to decide individual cases and to decide them justly, meaning that they should treat similar cases equally and apply the same rules in accordance with the courts’ ‘just’ interpretation of legislation.⁵⁸⁹ I suggest, that the legal system is uncomfortable with firstly being ‘accused’ of being biased and therefore ‘unjust’ (as by fathers’ rights groups) and secondly with constantly being exposed to the irritation that there is no consistency in its CCDs. The legal system is now moving towards recovering an image of consistency and it has decided on stabilising the norm of shared care as the means to achieve this agenda. To escape some of the paradox (that the law cannot know what is in the W&BIC of any given children) and to support the normative expectation it selects from the social sciences those suggestions that will aide in determining this new normative legal expectation in order for the system to be able to justify its decisions by presenting them as being based on sound research.

[T]he scientific discourse of child welfare in all its richness and complexity is reconstructed as concepts which ‘make sense’ within law – that is, concepts which further the immediate demands of the law to determine guilt and responsibility, resolve disputes and do justice between litigants and at the same time promote the function of law in modern society – distinguishing the lawful from the unlawful.⁵⁹⁰

The diversity of outcomes in child mental health research on the impact of divorce on children is profound.⁵⁹¹ It is evident that this branch of science cannot in truth

⁵⁸⁶ Niklas Luhmann *Law as A Social System* above n 6 at 289.

⁵⁸⁷ See e.g. Carol Smart and Bren Neale “Arguments against virtue – must contact be enforced?” above n 386; Mary Ann Mason *From Father’s Property to Children’s Rights* above n 49.

⁵⁸⁸ Richard Lempert “Between cup and lip!: social science influences on law and policy” (1988) 10 *Law & Pol’y* 167 at 195.

⁵⁸⁹ Niklas Luhmann *Law as A Social System* above n 6 at 279.

⁵⁹⁰ Michael King and Christine Piper *How the Law Thinks About Children* above n 21 at 50.

⁵⁹¹ For an example listing of research in this regard see e.g. Mark Henaghan “Legally rearranging families: parents and children after break-up” above n 469 at 272 n 14.

be said to provide one answer (and it would/should not claim to be able to do so).

That the New Zealand political system did not legislate for equal shared parenting should probably not be seen as inspiring to those who disfavour such an arrangement for children (and/or the custodial parent). The U.K. for example had legislated in the same way but as Harris-Short reports in 2010:

Despite the Labour government's refusal to enshrine a presumption in favour of 50/50 shared residence in the Children Act 1989, there is a very real danger that we are edging closer and closer towards a position in which this will indeed become entrenched as the normative model for organizing post-separation family life.⁵⁹²

Whether this is more 'dangerous' than the previous presumptions of the courts (first that fathers were the automatic custodial parent that 'knew best' and then that mothers are the natural nurturers and therefore better care givers of (young) children remains to be seen. I suggest that *any* 'rule of thumb' can and probably was and will be detrimental to some children. However, the courts have not proven to be very successful at applying and maintaining genuine individuality in their decision-making. The overwhelming trends thus far have been too striking and it would therefore not be surprising if the shared parenting norm will eventually come to dominate CCDs. Nearly two years after Harris-Short's statement above, in February 2012, the British government expressed its intended support⁵⁹³ for a legally binding presumption of shared parenting, thereby rejecting the advice from the independent review⁵⁹⁴ led by David Norgrove and presented in 2011. That Report referred to its Interim Report that had been submitted and stated:

The thorough and detailed evidence from Australia showed the damaging consequences for many children. So we recommended that: no legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents.⁵⁹⁵

From an autopoietic perspective the reaction from the current British government should not be surprising. Australia had already entered this communication (of

⁵⁹² Sonia Harris-Short "Building a house upon sand: post-separation parenting, shared residence and equality – lessons from Sweden (2011) 23 (3) Child and Family Law Quarterly 344.

⁵⁹³ Owen Bowcott "Government backs shared parenting legislation after separation" (*The Guardian*, 6 February 2012) <http://www.guardian.co.uk/lifeandstyle/2012/feb/06/government-backs-shared-parenting-legislation>

⁵⁹⁴ *Family Justice Review, Final Report* (Crown, November 2011) at 4.23: <http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review-final> Accessed 9 January 2012.

⁵⁹⁵ *Ibid* at 4.23.

rebuttable presumption for equal shared care) into the greater political social system of common law countries hence there is a strong possibility that it will be followed. America eventually seems to be settling on an ‘approximation standard’ in CCDs that allocates shared care in accordance with the time spent by each parent prior the separation in caring for the child. True to law’s need for stability in producing its norms the primary reason given for this is the need for predictability.⁵⁹⁶

McKay reports⁵⁹⁷ in 2012 that where children saw their non-resident parent most often their parents were financially comfortable while those who never saw their non-resident parent were poorest. This again confirms that the realisation of shared parenting or ‘regular contact parenting’ involves far more than just the law declaring it to be legally correct and by ordering plenty contact. It also signifies little hope for poor children in terms of improving their financial position⁵⁹⁸ and of having more positive input from their non-resident parent.

I am *not* arguing that fathers do not have an important role to play in their children’s lives and certainly some research outcomes and surveys about children’s experiences of shared parenting when committed fathers have the opportunity to be more involved and take-up the opportunity, have some inspiring messages. What I am questioning though is whether these outcomes are ‘transplanted’ onto CCDs in the hope that parents will overcome their conflict and/or become more involved and pay their child support contribution.

I am also not searching for, or suggesting, the better or worse ‘rule’ by which to determine a child’s living arrangements after parental separation. The point I am making is that the law seeks stability, a *legally* produced rule, a stabilised norm (as Luhmann calls it) as regards behavioural expectation, that reflects its ability to ‘know’ what a good outcome ought to be. Indeed, other social systems and individuals in society also consider, and rely on, the legal system as the one system to provide at least a certain degree of sureness as regards

⁵⁹⁶ Robert F Kelly and Shawn L Ward “Allocating custodial responsibilities at divorce: social science research and the American Law Institute’s approximation rule” (2002) 40 Fam. Ct. Rev. 350 at 350.

⁵⁹⁷ Stephen McKay “Shared parenting: longitudinal and comparative perspectives” Presentation at the 4th meeting of the AHRC Research Network, University of Birmingham, UK, 5 January 2012. <http://www.birmingham.ac.uk/Documents/college-mds/haps/projects/MESH/AHRC-Meetings/Meeting3/StephenMcKay.pdf>

⁵⁹⁸ See Tanya Evans “Is it futile to try to get non-resident fathers to maintain their children?” (2006) October, History & Policy <http://www.historyandpolicy.org/papers/themes.html#families>

legal rights and wrongs. Invariably, over the history of legal decisions the law managed to create rules by the *outcomes* of custody and contact decisions regardless of the ‘indeterminability’ of (or perhaps because of) the W&BIC ‘standard’. This is precisely why I suggest that the legal system has been, or is, so uncomfortable with the claimed, albeit necessary in reality, ‘individualist’ approach. This is possibly also why judges repeatedly referred/refer to the decision being ‘painful’ or ‘the hardest’ to make.

As has been suggested before, the parents who feel it necessary to have a judge decide their child care arrangements are likely to be the parents that struggle the most with co-operation, communication and child rearing practices. How precisely does/can a judge know, often without hearing expert evidence, that a particular pair of parents have the skill and determination to overcome their differences or manage them in a way that will not expose the children to conflict? How precisely do children’s welfare and best interest feature in a decision that is focussed on ‘distributing’ the child between two parents who have no respect for, and practically despise each other? The issues that underlie such parents’ perceived problems are often very complex and hardly be ‘solved’ by way of a forced co-parenting order. I propose that these parents need another forum through which they can be helped to overcome their difficulties, difficulties that can contain subtleties that the legal system is neither capable of identifying, nor equipped to remedy by way of making parenting orders. There are still judges who do not agree shared parenting,⁵⁹⁹ but given the history of the legal system in relation to CCDs there is a very good chance that shared parenting will eventually be stabilised from within the legal system.

⁵⁹⁹ E.g. *B v VE* (1988) 5 NZFLR 65 (HC); *Mills v Mills* (Family Court, Taupo FP 069/115/99, 13 April 2000) cited in *Butterworths Family Law in New Zealand* above n 569 at 6.104; *AJD v KGD* (Family Court, Hamilton FAM 2004-019-1896, 6 October 2005); *AL v TLL* (Family Court, Auckland FAM-2008-004-2588, 6 August 2009).

6.3 The ‘psy’⁶⁰⁰ experts

By the 1970s no-fault divorce had been legally and normatively established and as regards custody decisions, parents’ behaviour would no longer be taken into account if the court deemed it not to affect the welfare of the child. Therefore a conditional programme of law that relied on a parent’s (formerly) ‘illegal’ behaviour (adultery most often and with a harsher attitude towards mothers⁶⁰¹) to determine which parent would have the children in her/his custody became superfluous, no longer considered legally relevant. Arguably it had therefore become challenging to find ways⁶⁰²

to ultimately apply ‘legal’ and ‘illegal’ values in the process of deciding custody while the latter remains a legal issue which means that they would be decided by the legal system. No-fault divorce and the subsequent rise of parental separation created research demands and opportunities for the social sciences as regards children’s needs and behaviour during and after parental separation. Social and behavioural science rely, however, largely upon “unfalsifiable” statements i.e. statements that are reducible to ‘true’ or ‘false’ values – in part due to the relativity, context, dynamics of human life/experience and the variant theories offered within this branch of science – and this presents “a direct challenge to law’s normatively-directed version of reality” because law seeks to offer congruence and predictability.⁶⁰³ Yet, as discussed above, the law chooses to accept some social science research as ‘more true’ and representative than other.

New Zealand judges have, in the past, shown an unwelcoming attitude

⁶⁰⁰ No fault-divorce was introduced in New Zealand by the Family Proceedings Act 1980.

⁶⁰¹ See e.g. *Palmer v Palmer* [1961] NZLR 702 (CA); *Re L (Infants)* [1962] 1 WLR 886 (C.A.); *M v M & L* unreported 7 April 1964, discussed by Rutherford Ward “Parental misconduct and the custody of children” in B D Inglis and A G Mercer (eds) *Family Law Centenary Essays* (Sweet & Maxwell (NZ) Ltd, Wellington, 1967) 57 at 58-59; *Otter v Otter* [1951] NZLR 739; *Cubitt v Cubitt* [1930] NZLR 227; *Van der Veen v Van der Veen* [1923] NZLR 794.

⁶⁰² Referring to psychologists, psychiatrists and the practice of psychoanalysis. See e.g. Carol Smart “Power and the politics of child custody” in Carol Smart and Selma Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (Routledge, London, 1989) at 5-6; Michael King and Christine Piper *How the Law Thinks about Children* above n 21 at 85; Nikolas Rose *Inventing Our Selves: Psychology, power and personhood* (Cambridge University Press, Cambridge (UK), 1996) at 10.

⁶⁰³ Michael King and Christine Piper *How the Law Thinks About Children* above n 21 at 44-45. See also Alan Goodwin and Llewelyn Richards-Ward, New Zealand Law Society Seminar, *Working With Psychologists* (CLE New Zealand Law Society, July 2002) at 29 (describing psychology as a “nervous science when placed in a courtroom which often seems to demand the definite from the nervous about the uncertain.”)

towards welfare officers (before the introduction of the ‘psy’ experts in CCDs⁶⁰⁴) when the judges perceived them to be stepping outside the role that the courts considered they should fulfil. For example in *B v B and S*⁶⁰⁵ Hardie Boys J admonished the fact that a welfare officer’s statement, that he himself would be reluctant to upset the prevailing residence arrangements of the child, was made in the lower court. The statement, said Hardie Boys J, should never have been expressed because it is unacceptable to restrict the view of the court and to assume the latter’s function. Again, this approach was not confined to New Zealand but was in line with judicial expressions in the other common law jurisdictions. For example in the U.K. in *In re C (L)*⁶⁰⁶ the undisputed evidence from a psychiatrist that a change in custody will be damaging to the child was accepted by Pearson LJ but he then called attention to the danger of the legal system allowing its function to be trammelled. In the House of Lords case of *J v C*⁶⁰⁷ Lord Upjohn made it clear that a science opinion can only be a support element to the judge’s general knowledge and experience and also stated that a judge must not hesitate to risk going against scientific evidence if he considers that the W&BIC would be better achieved in the way the judge deems to be proper.

It is evident that at least until the early 1970s judges felt (and expressed) that the courts know best when it comes to W&BIC.⁶⁰⁸ It cannot be said with certainty that the attitude from within the New Zealand legal system, has changed significantly. The current Principal Family Court Judge in New Zealand appears to be, or at least to have been, apprehensive about psychological opinion in the legal operations of family law stating that while psychologists’ reports can be useful for the court’s purposes, “perhaps we overuse psychologists. We may have unwittingly developed a culture wherein we dare not move without asking for a psychological opinion. This is hardly good litigation practice.”⁶⁰⁹ Conversely, judges and lawyers in America currently appear to want specific

⁶⁰⁴ Guardianship Act 1968, s 29A as amended in 1980.

⁶⁰⁵ [1970] NZLJ 367 (HC).

⁶⁰⁶ [1965] 2 Q.B. 449.

⁶⁰⁷ [1970] A.C. 668 (HL).

⁶⁰⁸ Catherine Mallon “A critical examination of judicial interpretation of a child’s best interests in inter-parental custody disputes in New Zealand” (1973-1976) 3 Otago L. Rev 191.

⁶⁰⁹ Peter Boshier “Speech of Principal Family Court Judge Peter Boshier to the Auckland Family Courts Association” (Auckland (NZ), 21 April 2004) available at <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/speech-of-principal-family-court-judge-peter-boshier-to-the-auckland-family-courts-association> Last accessed 4 March December 2011.

recommendations and accept that this is what child custody evaluators (social scientists) provide. One recent study showed that an overwhelming majority of judges (84%) and lawyers (86%) believe that child custody evaluators should directly address the ultimate issues in custody disputes with specific recommendation.⁶¹⁰ Another study showed that evaluators offer specific recommendations in almost every case (94%).⁶¹¹

In New Zealand a 1980 amendment to the Guardianship Act 1968⁶¹² provided for the introduction of expert evidence from social scientists to assist the court in reaching child related decisions. Under COCA these professionals (who are psychologists for the purposes of CCDs) are now called ‘specialist report writers’ in New Zealand⁶¹³ they were allowed into the operations of the legal system but, importantly, in accordance with the law’s operations. As a closed, self-reproducing system, the legal system only draws those outside of the system who are concerned about children’s issues into an understanding that allows and facilitates considerations about the future best interests of children but on the principle that this well-being depends substantially upon adopting the appropriate *legal* solution.⁶¹⁴ The law was increasingly confronted with the incompatible clash between maintaining its autonomy over deciding CCDs in accordance with the W&BIC and its dependence for its authenticity upon an outsider body of knowledge.⁶¹⁵

However to ensure the legal system’s authority and control, the judge has the final discretion as to whether expert evidence will be required⁶¹⁶ and a specialist report asked for, that is, the judge must first be satisfied that a report is necessary “for the proper disposition of the application”⁶¹⁷ and then the judge will call for such a report. In that regard an expert opinion and report remains conditional, in line with the nature of law’s conditional programmes: *if* the judge

⁶¹⁰ James N Bow and Francella A Quinnell “Critique of child custody evaluations by the legal profession” (2004) 42 Fam. Ct. Rev. 115.

⁶¹¹ James N Bow & Francella A Quinnell “A critical review of child custody evaluation reports” (2001) 40 Fam. Ct. Rev. 164. Ibid.

⁶¹² Guardianship Act 1968, s 29A.

⁶¹³ Care of Children Act 2004, s 133.

⁶¹⁴ Michael King “Future uncertainty as a challenge to law’s programmes: the dilemma of parental disputes” above n 508 at 525.

⁶¹⁵ Gunther Teubner “How the law thinks: toward a constructivist epistemology of law” above n 17 at 742.

⁶¹⁶ *P and P v P* (1991) 8 FRNZ 232 at 235; *Burger-Ringer v Burger-Ringer* [1995] 3 NZLR 310 (HC) also reported as *E v C* [1995] NZFLR 895. Codified by Care of Children Act 2004 s 133(2).

⁶¹⁷ Care of Children Act 2004 s 133(2).

considers a psychologist's report to be necessary in the particular case, *then* the court will request such a report. Specialist report writers are also selected and approved by the legal system.⁶¹⁸ The purpose of such a report is to provide the court with an assessment of the present relationships, risks existent within the relevant family plus the impacts thereof on the children, and a determination regarding the potential consequences of these risks and relationships on the children's future care as proposed by the parties.⁶¹⁹ The judge (in consultation with the lawyers involved) however will provide the report writer with a brief as to what he/she must determine and report on.⁶²⁰ For observers outside the legal system such matters may fairly consistently be classed as belonging to the realm of child mental health science yet psychologists called into the legal system are "adjunctory experts" while the legal system "seeks to address [the] core psychological process of child development and attachment disruptions occasioned by parental separation."⁶²¹

Experts must adhere strictly to the legal system's requirements of what may or may not be included in their reports and the legal system is very prescriptive⁶²² as to what a report must, and must not, contain as well as the position that the report writer must be seen to take in recognition of her/his ability to provide the court with the assistance it seeks. The report writer must for example refrain from reporting on the child's views as this is considered to be a task that the lawyer for the child must do or that a judge will determine by interviewing the child.⁶²³ The court effectively said that a judge or a lawyer⁶²⁴ is deemed to be more able to determine the child's views. In depth and large-scale research on children's experiences of their court appointed counsel may shed

⁶¹⁸ Care of Children Act 2004, s 133(2)(b).

⁶¹⁹ Alan Goodwin and Llewelyn Richards-Ward, New Zealand Law Society Seminar, *Working With Psychologists* above n 603 at 1.

⁶²⁰ Practice Note *Specialist Report Writers* (24 March 2011). Available at <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/practice-note-specialist-report-writers-1/?searchterm=%22specialist%20report%20writers%22%20and%20%22practice%20note%22> Last accessed 02 August 2011.

⁶²¹ Alan Goodwin and Llewelyn Richards-Ward, New Zealand Law Society Seminar, *Working With Psychologists* above n 603 at 29.

⁶²² See *Practice Note Specialist Report Writers* (24 March 2011) above n 620 ; Judith Medicott "Psychiatry and psychology in the family court" (2005) 11(1) *Otago L.Rev.* 79 at 79-96.

⁶²³ *K v K* [2005] NZFLR 28 (HC) at paras 89-91.

⁶²⁴ Care of Children Act 2004, s 7 requires that a lawyer for the child be appointed if proceedings go to trial. Subsection 7(2)(b) provides that the court can decline to appoint a lawyer for the child if considers that this will serve no useful purpose. Therefore, there is a general presumption that the appointment of a child's lawyer in CCD proceedings will benefit a child.

more light on children's experiences in this regard. From the small New Zealand studies that have been done, the results are not very inspiring.⁶²⁵

The idea of separate legal representation for children in CCDs in New Zealand was, again, not novel to New Zealand but was taken from the greater common law legal system. This proposition developed without political involvement at first but was campaigned for by judges, long before the invention of the UNCRC⁶²⁶ with its communication of the 'child's rights to express her/his views'⁶²⁷ in judicial proceedings. Perhaps the legal system is relying on children's innate sense of fairness and sharing, that they learn through socialisation and/or are taught from a young age, to help to justify the system's drive towards easier solutions in CCDs that will also reflect 'fairness' and 'balance'. Any irritations can be selected by autonomous social systems for response but without having actual insight into the day-to-day discussions among the legal system's decision-makers (judges, senior lawyers and *selected* senior legal academics) and throughout the hierarchy of the system (first instance courts up to Supreme Court level) we are reduced to looking at the outcomes over time to determine the likely choices that the system makes/made in terms of creating stabilised norms. Nonetheless, of relevance here is that the notion of a lawyer representing a child in CCDs was presented as an *integration* of social science skills and legal skills.⁶²⁸

When the New Zealand High Court in *K v K*⁶²⁹ placed this role limitation on psychologists it relied on a Court of Appeal judgment.⁶³⁰ The Court of Appeal case is cited for two reasons. First, it outlines the proper role of counsel for the

⁶²⁵ Nicola Taylor, Megan Gollop and Anne Smith "The role of counsel for the child - perspectives of children, young people, and their lawyers" (2000) 3 BFLJ 146 – finding that out of 20 children only 5 children stated clearly that they even liked their lawyer; Nicola Taylor, Megan Gollop and Mark Henaghan *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (June 2010) (Centre for Research on Children and Families, Faculty of Law University of Otago, Dunedin, New Zealand) at 130-34.

⁶²⁶ Robert F Drinan "The rights of children in modern American family law" (1962) 2 J. Fam. Law 101; Henry H Foster and Doris Jonas Freed "A bill of rights for children" (1972) 6 Fam. L. Q. 343; Judge Hansen of the Family Court in Milwaukee, Wisconsin, turned the issue into a campaign in the 1960s: Robert W Hansen "The role and rights of children in divorce actions" (1966) 6 J. Fam. Law 1.

⁶²⁷ United Nations Convention on the Rights of the Child, art 12.

⁶²⁸ See e.g. Olive M Stone *The Child's Voice in the Court of Law: An account of the representation of minors in civil proceedings in Canada and some other (mostly common law) jurisdictions* (Butterworths, Toronto, 1982).

⁶²⁹ Above n 623.

⁶³⁰ *M v Y* [1994] 1 NZLR 527 (CA).

child⁶³¹ which is to interview the parents, to ascertain and investigate all relevant facts, to ascertain the wishes of the child in the most appropriate way and to provide the court with this information, to negotiate or mediate in the most appropriate way the welfare of the child at the earliest possible opportunity. “In most cases the negotiation of a workable compromise or settlement, which minimises the destructive effect of litigation, dispute or uncertainty, will achieve this result”.⁶³² Finally, to protect the child from unnecessary or undesirable examinations, tests and evaluations. The second reason for referring to the Court of Appeal judgment is for authority that a judge is entitled to reach a view that is inconsistent with expert evidence.⁶³³ The High Court states in its judgement that to use specialist reports for the sole purpose of ascertaining the wishes of the child, should cease immediately.⁶³⁴ What is ignored is that in the Court of Appeal judgment, none other than Hardie Boys J stated:

Whether or not the Judge sees the child, the child’s wishes must be ascertained. That may in a proper case be done through the **specialist appointed to report, or through counsel for the child**, or by a combination of one or both of these with an interview by the Judge himself.⁶³⁵

Principal Family Court Judge Peter Boshier also feels strongly that the court is ultimately and primarily responsible for children’s futures when it decides CCDs and asserts:

We are the Court that deals with raw emotion, with conflict and with the lives of children. If we get it wrong or even if we don’t get it right enough, it will in probability be the Youth and District Courts that pick up the pieces and in very costly fashion deal with juvenile and adult crime.⁶³⁶

In dealing with all this emotion and bearing in mind this monumental responsibility of the court as Judge Boshier sees it, how far does the system go to ensure that all available help is utilised?

⁶³¹ *K v K* above n 623 at 47.

⁶³² Rule 5.3(d) (iii) of the Family Court Practice Note, January 1982, published in *Butterworths Family Law Service* as quoted in the judgment and without further explanation or comment on their meaning or application: *M v Y* above n 630 at 538.

⁶³³ *K v K* above n 623 at para [85].

⁶³⁴ *K v K* above n 623 at para [90].

⁶³⁵ *M v Y* above n 630 at 537. (Own emphasis).

⁶³⁶ Peter Boshier “Getting it right in the Family Court” Speech given to Christchurch Family Courts Association, Family Court, Christchurch, 18 November 2010 at 7. Downloaded from <http://www.courts.govt.nz/courts/family-court> Last accessed 17 February 2011.

An authoritative and much used legal database in New Zealand states in its introductory discussion of COCA that in “most disputed proceedings” under the Act, “the court will have obtained a psychological report” under s 133(2) and the report writer will be a registered psychologist with the required experience and expertise.⁶³⁷ According to recent New Zealand research however, in a sample of 120 cases involving children, in those decisions that determined CCD matters, fewer than 50% had the input of a specialist report writer.⁶³⁸ It would therefore appear that judges regularly find it unnecessary to ask for input from such a specialist. The current Principal Family Court Judge is however also of the opinion that “[j]udges become very discerning in knowing before too long, where the welfare interests of children really lie.”⁶³⁹ This perhaps illustrates the prevailing self-identity within the legal system i.e. that the system’s decision makers are best equipped to know what even those with substantial experience and education in child mental health sciences will not readily claim to know for a fact.

If a specialist report is asked for, then according to a leading legal text “[c]ases in which the Court goes against the recommendation of a specialist reporter are relatively rare.”⁶⁴⁰ Without having access to all the CCD judgments that are made on a daily basis this cannot be accepted as a certainty. However if it is the reality then it can be justified by considering that if the court called for such a report because *the court* considered it as ‘necessary’, and so then the time and money spent may urge a judge to trust the psychologist’s input, particularly as the legal system itself selects those experts that will be preferred for providing the court with reports.⁶⁴¹

The Registrar or Family Court Co-ordinator will convene a panel to consider applications for inclusion in the list of report writers available to undertake Family Court appointments. The panel will consist of a Caseflow Manager or Family Court Co-ordinator as chair, two experienced report writers **appointed by the**

⁶³⁷ Brookersonline “Introduction to the Care of Children Act 2004” at para 13A. Available at <http://www.brookersonline.co.nz>. Last accessed 15 March 2011.

⁶³⁸ Antoinette Robinson “Children: heard but not listened to? An analysis of children’s views under s 6 of the Care of Children Act 2004” above n 487.

⁶³⁹ Peter Boshier “Getting it right in the Family Court” above n636.

⁶⁴⁰ Dick Webb, Mark Henaghan, Bill Atkin and others *Butterworths Butterworths Family Law in New Zealand* above n 569 at 381 n 1.

⁶⁴¹ See “Process for selection” in *Practice Note: Specialist Report Writers* (24 March 2011). Available at <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/practice-note-specialist-report-writers-1> Accessed 15 February 2012.

Court, and a Family Court Judge nominated by the Principal Family Court Judge.⁶⁴²

In one ‘relatively rare’ case in 2007, two brothers aged thirteen and nine years old successfully appealed a Family Court decision that held that it was in their best interests to have contact with their father and that any risks to them in having contact with him were manageable. The judge decided on ordering contact *despite* expert evidence that the boys had been psychologically injured by previous contact with their father.⁶⁴³

Thus we see that the legal system does not simply freely and collegially allow those expert professionals from outside the system to enter its operations, and it does at times not follow or act upon the evidence provided by the specialist report writer, *even though* they are selected and ‘evaluated’ for their acceptability by the legal system first. Psychologists themselves have reported to the New Zealand Law Commission during its enquiry into the procedures and practices in the Family Court of New Zealand that they find the adversarial and hostile approach by lawyers and litigants highly unpleasant and removed from the notion of a ‘team approach’. Concluding on these difficulties the Law Commission’s report states.⁶⁴⁴

The Family Court risks losing the expertise of these people. At the same time, newly qualified clinical psychologists are being advised not to enter the field. It is crucial to remedy these problems and support report writers. It is also important to re-state and reinforce the teamwork approach. There are many ways to operate as a team without compromising a properly conducted adversarial hearing.

In a fairly recent custody case the parties jointly applied for an adjournment based on, *inter alia*, the need for a specialist report from a psychologist and Judge Adams (the Administrative Judge for the Family Court for the Northern Region in New Zealand) explained the situation as regards psychologists in CCDs in his judgment as follows:

⁶⁴² Ibid. (Own emphasis). The appointed report writers can be assumed to have extensive experience of providing this service *in accordance with the court’s specifications*, preference and style which, limits the content to what the legal system deems necessary.

⁶⁴³ Fairfax NZ News “Boys spurn contact with father” Last updated 21/10/2007 <http://www.stuff.co.nz/national/38466/Boys-spurn-contact-with-father> Accessed 3 March 2012.

⁶⁴⁴ New Zealand Law Commission Te Aka Matua O Te Ture Report 82 *Dispute Resolution in the Family Court* (NZLC, Wellington (NZ), March 2003) at p 148 para 710. http://www.lawcom.govt.nz/project/family-court-dispute-resolution-0?quicktabs_23=report#node-521 Downloaded 15 March 2011.

[40] The reasons advanced is [sic] broadly that this is a complex situation because there are blended families. C has half siblings with different fathers. There is the question of her attachments and how it will be for her if she were removed from her mother's care and placed with her father.

[41] **In my view these are ordinary bread and butter matters for the Family Court.** I do not see anything particularly unusual in this case. **If that were the threshold, then we would be obtaining psychological reports in at least two thirds of the cases we hear** that cannot possibly have been filed its intention [sic]. I am well aware of the fact that **there are simply not enough specialist report writers to achieve that kind of result.**⁶⁴⁵

Fortunately though, there appears to be enough lawyers for the child to do the job.

Lawyers for the child are governed by the legal professions' code of conduct that limits their discretion from the outset.⁶⁴⁶ There was a question in New Zealand as to whether or not the training received by family lawyers is appropriate or adequate for the multi-disciplinary role that such lawyers for the child are expected to carry out.⁶⁴⁷ A lawyer for the child is appointed by and is firstly accountable to the court.⁶⁴⁸ As with psychologists, the court keeps a list of approved lawyers that it has selected and can select from. *If* such a lawyer does acknowledge her/his lack of skill in a particular case the court will *then* condone reliance on a specialist report writer to aid with ascertaining the child's views.⁶⁴⁹ But the legal system finds it essential to produce a rule that the lawyer for the child is the preferred actor to establish the child's views.⁶⁵⁰ The Principal Family Court Judge explained in a speech he gave a week after COCA came into force

⁶⁴⁵ *R v B-L* FAMC Papakura FAM-2004-039-16628 March 2006 <http://www.brookersonline.co.nz> (Own emphases).

⁶⁴⁶ Katherine Hunt Federle "Children's rights and the need for protection" (2000) 34 Fam. L. Q, 421 at 424.

⁶⁴⁷ Simon Jefferson "Lawyers representing children" in Stuart Birks (ed) *The Child and the Family Court: seeking the best interests of the child Proceedings of Social Policy Forum 2002* Issue Paper No 13 (Centre for Public Policy Evaluation, Massey University, Palmerston North (NZ) 2003) at 33 at 35. <http://cppe.massey.ac.nz/> Downloaded 30 August 2011. Accessed 30 January 2012.

⁶⁴⁸ Care of Children Act 2004, s 7.

⁶⁴⁹ See e.g. *R v B-L* (High Court, Auckland CIV 2006-404-001666, 12 May 2006) at para [85]. <http://www.brookersonline.co.nz>

⁶⁵⁰ In the U.K. Children and Family Court Advisory and Support Service (Cafcass) officers are primarily responsible for informing the court of the child's wishes and feelings: Directgov "Child welfare during court proceedings (Cafcass officers)" [http://www.direct.gov.uk/en/Parents/Lookingafterchildrenifyoudivorceorseparate/Childrendivorce separationandcourts/DG_4002959](http://www.direct.gov.uk/en/Parents/Lookingafterchildrenifyoudivorceorseparate/Childrendivorceseparationandcourts/DG_4002959); Canada is proposing to follow the same route as New Zealand (lawyer for the child in CCDs): Department of Justice "The voice of the child in divorce, custody and access proceedings, 4.0 conclusion and recommendations" http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002_1/p4.html (Recommending inter alia that: "Lawyers must acquire the requisite skills to represent children in custody, access and divorce cases. These include appropriate interview skills, the ability to communicate information in simple and comprehensible language, an understanding of child psychology, and knowledge of community resources for children.")

(2005) that “all those involved in the process must commit themselves to understanding how best to go about this challenging task” of having significant interviews with children.⁶⁵¹ Only since March 2011 does a revised Practice Note now require, in addition to five years of legal practice experience that must include defended cases in court, “an understanding of, and an ability to relate to and listen to, children of all ages” and “relevant qualifications, training and attendance at relevant courses”.⁶⁵² It is not sure how these skills and practical knowledge are assessed since experienced lawyers usually work independently and are unlikely to provide references that can attest to their actual performance in working with children. Possibly the children themselves would be the best point of reference but it is unlikely that ‘hearing the voice of the child’ will ever stretch that far.

A reality, I suggest, is that the courts prefer to work with lawyers rather than psychologists because these lawyers understand the rules and operations of the legal system and, arguably, approach matters from a legal perspective rather than from a child’s perspective, or a mental health perspective, when they talk to children. They are, after all, committed to law’s code and programmes and they act within law’s boundaries, meaning that they are likely to focus on that which the legal system has identified as relevant and ignore what is considered irrelevant. However, appointing a lawyer who will represent the child shows compliance with the UNCRC and seems to be a primary motivating factor for such appointments.⁶⁵³ Research shows that a lawyer for the child is always appointed in matters concerning children in the family court.⁶⁵⁴ I fully agree with Tapp who states that “[t]he complexities of family law make it a discipline that

⁶⁵¹ Peter Boshier Principal New Zealand Family Court Judge “The Care of Children Act 2004 – does it enhance children’s participation and protection rights?” Children’s Issues Centre, 6th Child and Family Policy Conference, Dunedin (NZ) (7 July, 2005)

<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/the-care-of-children-act-2004-does-it-enhance-childrens-participation-and-protection-rights> Accessed 4 November 2011. Cf. an article by a family court judge published towards the end of the year after COCA came into force discussing the difficulties and challenges for counsel for the child and judges to interview children and to ascertain their views: Jan Doogue “A seismic shift or a minor realignment? A view from the bench ascertaining children’s views” (2006) 5 NZFLJ 198.

⁶⁵² *Practice Note: Lawyer for the Child: Selection, appointment and other matters* (24 March 2011) Issued by the Principal Family Court Judge, at 9.5 (f) and (i). <http://www.justice.govt.nz/> Accessed 1 March 2012.

⁶⁵³ *Practice Note, Lawyer for the Child: Code of Conduct* (24 March 2011) at 1.4. Issued by the Principal Family Court Judge <http://www.justice.govt.nz/>. Accessed 1 March 2012.

⁶⁵⁴ Antoinette Robinson “Children: heard but not listened to? An analysis of children’s views under s 6 of the Care of Children Act 2004” above n 487.

cannot be covered by the general legal profession.”⁶⁵⁵ Lawyers for children must be assessed and approved for their specialist skills and not for their years of legal experience. As commented before, these lawyers’ ‘clients’ (children) do not give very positive feedback about their experiences.

The tentativeness and inconclusiveness of statements produced by those who work within the child psychology realm/discourse, indeed inherent to the subject field and the very nature of ‘childhood’ as it has been constructed (i.e. a developmental, progressive, evolving life phase) make content of reports and the ‘expert report writer’ rather defenceless to ‘enslavement’ within the legal system and it is not surprising that the cross examination process leaves social scientists feeling degraded and devalued. The law’s demand for resolve and conclusiveness, for right and wrongs to be identified in order to further its normative objectives, tends to impose legal conclusions upon child mental health professionals.⁶⁵⁶

6.4 The inevitable results?

The legal system takes advantage of conflicting perspectives (of which there are many in social science) so as to form and reproduce generalised behavioural expectations.⁶⁵⁷ If Luhmann is right in saying that the law can merely create normative expectations for society, then it is quite likely that the law will not successfully alter parental behaviour such as, for example, withdrawal from a child’s life post-separation. What seem to be the current legal norms that law is seeking to stabilise in CCDs – co-parenting and joint financial responsibility – will likely only be successful in cases where parents agree and co-operate and in such instances parents are unlikely to ask the legal system to decide the parenting arrangements for them in the first place. To oblige conflicted parents (those who feel compelled to ask the law to decide for them and which is not necessarily a reflection of obstinacy but most often involves real complexities and concerns) into shared parenting in the hope that they will eventually sort out their differences, ignores the child’s well-being and is not conducive to stable environments for children. Also, in accordance with autopoiesis and norm

⁶⁵⁵ Pauline Tapp “Judges are human too: conversation between the judge and a child as a means of giving effect to Section 6 of the Care of Children Act 2004” above n 486 at 36.

⁶⁵⁶ Michael King “Child welfare within law: the emergence of a hybrid discourse” above n 509 at 312.

⁶⁵⁷ Niklas Luhmann “The coding of the legal system” above n 27 at 147. (Emphasis added).

creation, the legal system is not very effective at producing behavioural changes or regulating conduct that are, in particular, not easily or logically subjectable to the values of legal/illegal.⁶⁵⁸ Therefore, to hope that conflicted parents will change their behaviour and act in accordance with how the legal system wants them to behave (i.e. settle their differences and take responsibility for children's upbringing) is unrealistic and often illogical.

Stabilised norms pre-impose a bias. What follows is that freedom of conduct thus becomes restricted in advance at least on the level of expectations (i.e. what to expect from the legal system). People who want to act in a way that is perceived to violate the established expectations are at a disadvantage right from the start. A truly individualist approach is perhaps beyond the scope and ability of the legal system. It seems that, looking at the history of CCDs, as long as we expect the legal system to decide CCDs we must expect to see the system reduce complexity in its norm stabilising function and thus to disregard information that interferes too much with this task while selecting other information that can complement the norms selected for stabilisation. Of course, there will always be odd exceptional cases to keep some debate afoot. The legal system after all needs cases to survive.

⁶⁵⁸ Niklas Luhmann "Closure and openness: on reality in the world of law" above n 19 at 347; Niklas Luhmann "Limits of steering" above n 32.

Chapter 7 Concluding discussion

For an observer from outside of the legal system there may be insight that law, as produced by the legal system, is not synonymous with justice or fairness. Indeed, it may not even be reflective of general social practice but it merely informs of how the law will most likely view a parent's life, expected gendered role (as constructed by law), and responsibilities in terms of raising the State's future citizens. And it presents these legal norms to society as the welfare and best interests of the child. What happens beyond the boundaries of the legal system remains a plane of events that the legal system, as one of society's functional, closed systems, can select from and respond to as the system sees fit.

But the legal system cannot afford to see or consider itself in the face of such possibilities because that will threaten its identity and autonomy. It therefore has to maintain its self-image and believe that *legal* justice is the same as universal rightfulness. If need be, the legal system will engage and utilise knowledge from outside itself to substantiate its universality but because of its closure, such knowledge will be extracted, reshaped and simplified to match the law's operations.

Under the 'welfare and best interests of the child' standard a judge can usually provide a plausible excuse for giving one parent or both physical custody of their child(ren), whatever the judge's reasons might be. The law's programme of judicial discretion protects its decision makers to be able to do this and to present such personal views and values as being based on the welfare and best interests of the child. Because a judge says it, it is legally acceptable. However, the legal system favours consistency and random outcomes threaten law's function of providing norms as regards behaviour. It also threatens law's unity, that is, the law's need to be able to refer to its own communications (precedents, legislative interpretation and application, etc.).⁶⁵⁹ Once an event has been declared

⁶⁵⁹ It also heightens the potential for litigation, which, for lawyers, may be a good thing since it provides a greater source of income. However, lawyers who are trained to 'identify the relevant law' in relation to a client's legal problem, need to be able to inform their client of, inter alia, what the law 'says' and therefore, randomness and inability to 'find the law' threatens their professional image also. Like, for example, medical doctors who act in the closed social system of science, continuous answers to clients that state "I don't know" will quickly undermine the function and unity of the system and of course the reputation of the relevant professional.

to be a legal issue, or legally determinable – as the custody of children post parental separation and the law’s ability to know what is best for children had been declared – the law must bear the burden of seeming to know what is right and what is wrong and deny the paradox that this represents. The fundamental and major assumption the law should remain the system to decide over children’s care, reinforces the illusion that courts are able to reach ‘the right decision’ for the child’s future well-being.

I suggest, based on Luhmann’s theory, that the legal system is profoundly uncomfortable with the ‘no rules’ method that an individual approach in CCDs effectively demands and for this reason it has chosen shared parenting, which seemingly matches other legal notions such as ‘equality’ and ‘non-discrimination’, as a norm to stabilise from here on in.

To be able to seem informed about children’s needs and development in a society that becomes increasingly diverse despite law’s norms, the legal system must find ways to uphold its identity and will couple with other social systems, here the sub to ‘learn’ from their communications. However, ultimately, the law will select and extract some communications from the system it couples with and discard others in order to reduce and simplify complexity into legal norms i.e. those norms that make sense for the system. While it is true that society becomes ever more complex, I suggest that ‘complexity’ itself must also be analysed in relation to legal norms. If same sex couples insist to be acknowledged at the same legal level as heterosexual couples and to have children, or nearly half of all marriages end in divorce, or women choose to keep their babies born outside of law’s norms (which is what ‘illegitimate’ children basically once meant), are these signs of ‘complexity’? I suggest that for family law, ‘complexity’ means nothing more than people acting in accordance with their own meaning and perceived reality rather than in the manner proscribed by law. Perhaps the ‘complexity’ is rather caused by law that assumes that it knows.

Despite the law’s best efforts, for many people, the sanctity of, and *imposed* ideology of sacred, life-long marriage and parental roles based on the patriarchal model, did, and does, not reflect their experienced reality. This includes many men and women. Law’s norms, based on assumptions often cause the very ‘problems’ that it then subsequently attempts to ‘solve’. That being said,

Luhmann does not propose that the legal system solves problems; it only produces normative expectations and stabilises them over time. The law cannot be used to investigate über-truths, or to discover innovative solutions.⁶⁶⁰ By applying its norms, law however can harm and oppress but it is not liable for those consequences.

The political system in turn supports more involved co-parenting and shared parenting at least for the reason of attempting to reduce State aid for single parents and perhaps in the hope that this will reduce social problems that is so often blamed on single parents, while a multitude of potential reasons for social problems is often ignored. As Professor Thane for example points out,⁶⁶¹ single parenthood has been a reality for a long time and is not a recent phenomenon while the notion of legally endorsing on-going relationships with both parents after separation has only recently become an issue. As suggested, if the legal system, the courts specifically, had not already started to move towards more liberal contact and shared parenting orders, it is quite possible that the courts would have found ways to avoid making such orders if history is anything to go by. As discussed in chapter 3, because the legal system had not before considered and made orders that mothers have custody of children, when the political system felt it necessary to respond to women's demands and included mothers for consideration via legislation, the courts continued to apply the norm of paternal custody for nearly fifty years.

Joint custody or shared parenting has been an option available to the courts for a long time and was never prohibited by statute. It was the courts that produced the rule of the father (in the absence of custody legislation) and then *eventually* produced the maternal preference that evolved from the 'tender years doctrine'. Nonetheless, when political systems contemplate making a collectively binding decision (legislation) the lawfulness of the decision can and is tested in advance via its coupling with the legal system.⁶⁶² For this reason, it is suggested that via the close coupling between the political system and the legal system, enhanced co-parenting after separation was produced in law and its relation to

⁶⁶⁰ Niklas Luhmann *Law as A Social System* above n 6 at 366.

⁶⁶¹ Pat Thane "Happy families? History and policy" (2010) *History and Policy* <http://www.historyandpolicy.org/papers/> Accessed 21 November 2011.

⁶⁶² Niklas Luhmann *Law as A Social System* above n 6 at 368.

children's welfare is bolstered by selected (yet still inconclusive) social science research.

Ever since the legal system started to advocate the law's ability and responsibility to make decisions in custody cases based on and in accordance with the best interests/welfare of the child, the notion has been criticised. These perturbations (criticisms) in law's environment, apart from stimulating intellectual, political and academic debate have, to date, made no difference to law's proclaimed ability *per se*. The welfare and best interests of children remain 'the legal standard'. The overriding assumption⁶⁶³ of these observers and commentators lies in their belief that there *are* indeed right answers, or better/worse answers to issues relating to children's welfare in parental separation disputes. Therefore the reasoning is that the court simply lacks all the right information and that this is the reason for its wrong decisions and so if the courts were better informed they would not make such poor decisions.⁶⁶⁴ Autopoiesis suggests however that the problem arises due to how the law operates and not because it lacks information. The legal system is largely concerned with its decisions being legally correct not whether it is metaphysically, morally or philosophically correct. This does not mean that individuals who act within the legal system do not ponder these matters.

Regardless of these criticisms, a judge's decision does not depend for its legality on the actual correctness of their predictions or her/his personal beliefs, but only on how the law operates. Only a higher court's decision can change the outcome but not the consequence of the decision being intolerable for the parties involved. Thus the legal system itself still decides the correctness of the decision and in order for it to do so and to believe in its own ability it/we must accept the paradox of law's code: the code cannot be applied to itself with the result that we can never know if law itself is ultimately correct/legitimate⁶⁶⁵ for those who are affected by it. For Luhmann, legitimacy precedes the law, and law does not represent legitimacy. When we consider how law tends to ignore realities or real experience or customary practice, particularly in family law and the conjugal family as discussed in this thesis, Luhmann's point becomes more evident. The

⁶⁶³ Michael King "Future uncertainty as a challenge to law's programmes: the dilemma of parental disputes" above n 508 at 525.

⁶⁶⁴ Ibid.

⁶⁶⁵ Niklas Luhmann "The third question: the creative use of paradox in law and legal history" (1988) 15 J Law & Soc'y 153 at 153-154.

law however defers to no higher truth. As long as these decisions are made by the legal system, they will be deemed to be *legally* correct and that is all that the legal system can achieve.

Legal decisions are only subject to the norms that the legal system seeks to stabilise and this is achieved in a closed manner. Only the system decides what it responds to and how it responds.

Law is not something that is simply maintained with the help of powerful support and then, more or less, enforced. Law is only law if there is reason [for society and its various social systems] to expect that normative expectations can be expected normatively.⁶⁶⁶

In other words, for as long as society and/or the political system believes that there will be a way to ‘convince’ the legal system of the actual ‘truth’ or the whole truth of children’s welfare and best interests, then we effectively believe that the law is capable of providing us with, and can discover the ‘right’ norms that will support that ‘truth’. Despite the law being incapable of defining children’s welfare in a pre-emptive way it operates circularly by self-reference thus determining welfare based on whatever the law has recognised as favourable for children. And this may include some findings from the social sciences that will be reproduced as legally approved messages.⁶⁶⁷ Luhmann suggests that when judges try to act as therapists they are no longer operating in the legal system because they are attempting to apply a different code to legal operations.⁶⁶⁸ Ultimately judges must therefore behave like judges and act in accordance with the legal system’s identity, meaning they must act as deciders of what will be legally right and legally wrong in terms of the child’s future best interests. A problem that is evident here is how to subject extra-legal communications and human behaviour to law’s code. Consequently the law treats social science as knowledge that can legitimise *law’s* accounts of and decisions about reality and the subsequent decisions of the legal system.⁶⁶⁹

If the legal system did not continue to claim its jurisdiction over and its ability to ‘know’ what is best for children’s living arrangements and, in addition, if the political system did not choose to sit back and support the legal system’s

⁶⁶⁶ Niklas Luhmann *Law as A Social System* above n 6 at 158.

⁶⁶⁷ Michael King “An autopoietic approach to ‘parental alienation syndrome’” (2002) 13 (3) J. Forensic Psychiatry and Psychology” 609 at 623.

⁶⁶⁸ Niklas Luhmann *Law as A Social System* above n 6 at 201.

⁶⁶⁹ Michael King and Christine Piper *How the Law Thinks About Children* above n 21 at 44.

invention of its *parens patriae* role, then parents would not seek decisions from the law. While we may argue that the law must be involved in order to protect children and vulnerable parties, it seems that the law is not proving to be very effective in anyway. The successful outcomes of court decisions depend on the particular people subject to the particular decision.

Throughout the history of the custody and contact decisions, clearly identifiable and overarching beliefs, held within the legal system, can be identified. Quite literally, the system switched from one extreme to the next: first the rule of the father and then the mother as preferred custodian while the latter preference dominated for a much shorter period of time than the former. There were always exceptions and, I suggest, that this is also necessary in law in order to leave room for dispute because without it, the courts and the legal profession as structures of the legal system will cease to exist. It should perhaps not be surprising that the next norm for law would be shared parenting.

However, a reality outside of the legal system as regards children's living arrangements after their parents' separation is that when parties come to their own arrangements, the majority of fathers still prefer that mothers take the primary responsibility. It is therefore doubtful whether the law is truly 'bringing fathers back into their children's lives' as it seems to want to do. It is this desire of both law and politics that led to the response to minority fathers' rights movement. With the shared parenting post-separation norm that I suggest is now being stabilised there remains much room for doubt as to whether this reflects the reality in the legal system's environment. Gendered behaviour (still a definite reality in the environment judging by the outcome of private agreements between parents) may also be ignored by the new insistence on gender-neutral law. Mothers are still, by and large, children's primary caregivers.⁶⁷⁰ Both political and legal systems seem in denial of the reality that most men today either lack the skill to parent *in the way that is expected of, and done by (most) women* or that the benefits of parenting are not as attractive to them as it seems to be for most mothers, although increasingly more women in the western world are choosing to remain childless. History seems to cast doubt upon the 'truth' that women always felt this way about mothering, albeit that they did care for their children; just not

⁶⁷⁰ Julie Wallbank "Parental responsibility and the responsible parent: managing the 'problem' of contact" above n 472 at 300.

in the manner that is expected of them today. Nonetheless, for reasons of its own and about which suggestions have been made, since the turn of the nineteenth century, the law (the courts) chose to view mothers/women as the parent that must raise children after divorce and in that way also 'legalised' the separate spheres for mothers and fathers.

Law tends to focus on the 'ought to be' of outcomes rather than the realities in family life which matches the argument that law is concerned with the function of establishing and stabilising normative expectations. Parents who both want and agree with significant shared care are likely to enter into such agreements of their own accord and they do not need the law to settle on such arrangements. However, coercing conflicted and non-collaborative parents into shared care in the belief that this is good for children reflects a pre-occupation with *some* social science research that found that on a statistical level children as a group do better in shared care. This ignores the proclaimed individualist approach. Perhaps the legal system also believes that it can 'steer' parents towards overcoming their differences. Even if the law could have such a steering effect, which Luhmann is adamant it cannot, shared care or joint physical custody orders cannot teach parents to parent well, and it is plausible that at least some of the conflict is caused by distrusts in that regard. The law may speak of parental responsibility, whether in statute or case law, but it is not able to determine how parents treat their children when they have them in their care.

Social science custody studies do not show indisputable causality and life events such as divorce or separation experienced by parents may be unique thus making behaviour post separation as compared to pre-separation unpredictable.⁶⁷¹ The same is true for how children experience their parents' care or attitudes once they have separated. Much more dedication, attention to detail and an understanding for the complexity of human emotions are required than what the law seems able to provide.

⁶⁷¹ Marjorie Lindner Gunnoe and Sanford L Braver "The effects of joint legal custody on mothers, fathers, and children controlling for factors that predispose a sole maternal versus joint legal award" (2001) 25 (1) Law and Human Behavior 25; E Mavis Hetherington "An overview of the Virginia Longitudinal Study of Divorce and Remarriage with a focus on early adolescence" (1993) 7 J. Fam. Psych. 39.

One solution that the legal system offered was to seemingly place the responsibility on the two disputing parties to find a solution⁶⁷² but simultaneously legalising the concept of permanent parental responsibility post separation and the ‘right’ of the child to have ongoing contact with both parents which serves to counteract the maternal preference and appeases the growing fathers’ rights movements. This has the effect of pressurising parties into agreements that will resemble the norms of law.

This new model of the post-separation family, in reality may not serve any of the ‘family’ members’ interests that well, since it requires emotional, mental, and structural commitments, i.e. more than a court order, to have meaningful results. Smart, for example, in her research conducted after the implementation of the Children Act 1989 in the UK, found that often fathers, while not having been the primary day-to-day caregivers pre-separation, appeared angry about the work load (including emotional demands) that was ‘suddenly’ required of them under greater shared parenting orders.⁶⁷³ Some mothers also find it difficult to surrender their identity of being the primary caregiver,⁶⁷⁴ which indeed had been so adamantly reinforced by law during the during the first half of the 20th century albeit that this had begun during the 19th century, that is the designation of child care to the mother and with the creation of the bread earner father. Fathers seeking revenge, retribution, vindication, or simply the maintenance of power and control constitute a significant part of the group of parents who, under the Australian legislation find the opportunity to realise these negative intentions.⁶⁷⁵ As discussed in chapters 4 and 5, for children whose parents are conflicted these efforts to artificially impose shared care arrangements upon them definitely do not affect their interests and well-being in the most helpful way. Indeed, many of these arrangements collapse over time and actually subject children to drawn out instability. Children do not need to spend more and longer periods with their non-resident parent to be able to have a qualitatively good relationship with such a

⁶⁷² There is a wealth of judgments in which judges urge parents to settle their differences and even reprimand them for their inability to do so while both the Guardianship Act 1968 s ___ and, with more vigour, the Care of Children Act 2004 s 5 (1) instruct parents that this is a ‘principle’ that serves the W&BIC.

⁶⁷³ Carol Smart “The legal and moral ordering of child custody” (1991) 18 J of Law & Soc’y 485 at 496.

⁶⁷⁴ Carol Smart “The ‘new’ parenthood: fathers and mothers after divorce” in Elisabeth B Silva and Carol Smart (eds) *The New Family* (Sage, London, 1999) 108 at 111.

⁶⁷⁵ John Dewar and Stephen Parker *Family Law: Processes, practice, pressures* above n 488 at 108.

parent. It is the very nature, the quality of that relationship (about which the law can make little difference unless we believe that the legal system can teach relationship skills) that adds positive value to children's lives.

Law 'thinks' about the problems that it confronts by producing general categories or ideals and subsequently applying these produced meanings either directly or through interpreting the realities it is presented in the face of those meanings.⁶⁷⁶ Parents are now expected to 'do' their separation in accordance with the new, modern legal norms of conciliation and compromise which the legal system imposes as being in the welfare and best interests of the child. Recognition of the emotional, mental and physical demands this places on parents and children cannot be addressed by the operations of law, or the political system. The stress and stressors that the new norms may bring into family members' lives is beyond the concern or scope of the law in particular, as long as the decisions were made in a legally appropriate manner.

Upholding and retaining the ideological legal standard of 'the welfare of the child', serves to cover up its use to achieve political and legal programmes by which the post divorce family can, at the present time, be legalised⁶⁷⁷ and largely to serve parents interests.⁶⁷⁸ While the courts may declare parents' rights as not being deciding factors, a reality is that parents themselves cannot actually be subjected to the welfare and best interests of the child⁶⁷⁹ because the law can do very little to bring about emotional and cognitive commitment by a 'reluctant' parent except for awarding such a parent liberal contact or even shared parenting and then to hope for the best. Sometimes, such arrangements may work relatively well, but the greater odds are that the children will continue to live a life marred with their parents' conflict or disrespect of each other. A prominent feature of the current welfare and best interests programme is that the children's needs revolve

⁶⁷⁶ Gunther Teubner "How the law thinks: toward a constructivist epistemology" above n 17 .

⁶⁷⁷ This legalisation of the post-divorce family has been pointed out before by, for example, IrèneThéry "The interests of the child' and the regulation of the post-divorce family" (1986) 14 Int'l J. Sociol. L. 341 at 345.

⁶⁷⁸ Gwynn Davis "Love in a cold climate – disputes about children in the aftermath of parental separation" in Stephen Cretney (ed) *Family Law: Essays for the New Millennium* (Jordan Publishing, Bristol, 2000) 127 at 134-135.

⁶⁷⁹ Susan Maidment *Child Custody and Divorce: The law in social context* above n 212 at 149-150; Michael King "Future uncertainty as a challenge to law's programmes: the dilemma of parental disputes" above n 508 at 536-537; Martin Guggenheim, *What's Wrong with Children's Rights?* above n 512 .

around the lack of fathering⁶⁸⁰ and the imperfection of mothering (as custodial parent) which has concluded “in a link between the ‘child of divorce’ and the pervasive but largely undefined notion of harm”.⁶⁸¹ What is now considered as even more harmful for children than divorce is to not have access to their fathers. The idea that contact is essential for children’s well-being seems to have obtained the status of an indisputable truth.⁶⁸² Yet, over the past three centuries, we have not seen much energy invested by the various social systems (social science, education and the political system) in fatherhood. If the desire is to convince fathers of the benefit of good and committed relationships with their children, then working with boys and men may be a good place to start. This is not to deny that there are men who are truly devoted to their children and prioritise their relationships with them thereby, most likely, transferring those values to their children, and most importantly, their sons. However, this is not true for the majority. This also does not deny that there are mothers who also do not prioritise or value their children in their lives. However, this is true for the minority. The meaning, value, skills, and priority of being a father may be a good starting point for men who choose to theatrically target the legal system and stir up the mass media. The law cannot produce good fathers.

Luhmann was a social theorist, not an idealist.⁶⁸³ As far as finding ways to change the functional differentiation and closure of social systems such as law he suggests that “[i]t might be rewarding, however, not to look for better solutions of problems ... but to ask ‘what is the problem?’ in the first place.”⁶⁸⁴ This arguably presents the biggest challenge. Perhaps the *problem* started when the law claimed its own ability to decide over children’s lives, as the law perceived ‘a wise parent’ ought to.⁶⁸⁵ Perhaps the problem is law’s (and politics’) obsession

⁶⁸⁰ See e.g. Robert van Krieken “The socio-legal construction of the ‘best interests of the child’: law’s autonomy, sociology and family law” in Michael Freeman (ed) *Law and Sociology. Current Legal Issues 2005, Vol 8* (Oxford University Press, Oxford (UK), 2006) 437 at 437-438.

⁶⁸¹ Bren Neal and Carol Smart “In whose best interest? Theorising family life following parental separation and divorce” in Shelley Day Sclater and Christine Piper *Undercurrents of Divorce* (Dartmouth Ashgate, Aldershot, 1999) 33 at 37.

⁶⁸² Felicity Kaganas and Shelley Day-Sclater “Contact disputes: narrative constructions of ‘good’ parents” (2004) 12 *Feminist Legal Studies* 1 (examining the ways in which these ideas about children’s interests have become embodied in a dominant W&BIC discourse in the U.K. that is embedded in law and informs policy thinking).

⁶⁸³ Hans-Georg Moeller *Luhmann Explained: From souls to systems* (Open Court, Peru (IL), 2006) at 173.

⁶⁸⁴ Niklas Luhmann “Globalization of world society: how to conceive of modern society?” (1997) 7 (1) *International Review of Sociology* 67 at 77.

⁶⁸⁵ Davis makes the point that while the welfare principle functions as the outward focal point of

with the conjugal, heterosexual, patriarchal family, which had been imposed upon society. Perhaps the problem is that governments want good citizens but are unprepared to adequately assist those who take the most responsibility to raise them. Perhaps the starting point is to accept how the law operates and then to ask if this is the right system to decide matters that hardly fit into law's operations. The apparent problems regarding children's needs and their wellbeing post divorce are so dispersed, and the causes of children's problems and unhappiness in the aftermath of parental separation so diverse, that it is difficult to see how law could and can reconstruct and reproduce these issues in order to make them subject to legal rights and wrongs. In the interim Norgrove Report delivered in the UK, it is stated that [f]amily matters are often more about welfare judgements and people skills than law."⁶⁸⁶ Indeed. Perhaps the problem is that custody and contact decisions, in the absence of behaviour that can be given legal/illegal values such as abuse and violence, no longer 'belong' in the legal system. If Luhmann's theory is accepted then trying harder to adapt the law will make little difference. With every change that has taken place in this legal area, there have been frustration, uneven results and negative consequences for some children because the law functions to create broad normative expectations aimed at society and not at individuals.⁶⁸⁷ As Einhorn accurately states:

[I]f we restrict our focus to Anglo-American history, the most direct source of our legal and psychological tradition, we find sufficient contradictions and conflicts to nullify any prejudice in favor of fathers or mothers, or against them for that matter; and a conspicuous absence of knowledge about what is best for children in all but the most obvious cases...⁶⁸⁸

This is why a genuine individualist approach is the only appropriate one in care and contact decisions. In this thesis, I found this to be beyond the scope of the legal system's operations.

family court jurisprudence, in reality "this is not fundamentally why courts bother" but rather "it is accepted (at the moment) that quarrels about children in the aftermath of separation are the appropriate stuff of adult litigation": Gwynn Davis "Love in a cold climate – disputes about children in the aftermath of parental separation" above n 678 at 135.

⁶⁸⁶ *Family Justice Review. Interim Report* above n 594 at para 3.114.

⁶⁸⁷ Niklas Luhmann *Law as A Social System* above n 6 at 142.

⁶⁸⁸ Jay Einhorn "Child custody in historical perspective: a study of changing social perceptions of divorce and child custody in Anglo-American law" (1986) 4 *Behav. Sci. & Law* 119 at 120.

Bibliography

Primary sources

Legislation

New Zealand

Care of Children Act 2004

Child Support Act 1991

Divorce and Matrimonial Causes Act 1867

Domestic Proceedings Act 1968

English Laws Act 1858

Family Proceedings Act 1980

Guardianship Act 1968

Guardianship of Infants Act 1926

Infants Act 1908

Judicature Act 1908

Law Amendment Act 1882

England

Children Act 1989

Custody of Infants Act 1839

Custody of Infants Act 1873

Guardianship and Infants Act 1886

Marriage Act 1823

Marriage Act 1836

Matrimonial Causes Act 1857

Statute Prerogative Regis 17 Edw. 2, cc. 1-16 (1324)

Tenures Abolition Act 1660

Australia

Family Law Act 1975 (Cth)

International

United Nations Convention on the Rights of the Child 1989.

Cases

A v A [1978] 1 NZLR 278 (HC).

A v A: Relocation Approach (2000) FLC 93-035.

A and B (Infants), In re [1897] 1 Ch. 786.

Agar Ellis v Lascelles [1883] 24 Ch D 317.

AJD v KGD (Family Court, Hamilton FAM 2004-019-1896, 6 October 2005).

AL v TLL (Family Court, Auckland FAM-2008-004-2588, 6 August 2009).

B, In re (an Infant) [1965] Ch 1112.

B v B [1978] 1 NZLR 285 (HC).

B v B (1997) 21 Fam LR 676.

B v B and S [1970] NZLJ 367 (HC).

B v H [2008] NZFLR 200 (HC).

B v K [2010] NZCA 96, [2010] NZFLR 865 (CA) .

B v VE (1988) 5 NZFLR 65 (HC).

B v W FAMC Taupo FAM-2003-069-101, 2 December 2004.
<http://bookersonline.co.nz>

Beaufort v Berty 24 Eng. Rep. 579 (Ch.1721).

Beverley's Case 76 Eng. Rep. 1118 (K.B. 1603).

Blisset, Re 98 Eng. Rep. 899 (K.B. 1767).

Brown v Argyll (2006) 25 FRNZ 383 (HC); [2006] NZFLR 705 (HC).

Burger-Ringer v Burger-Ringer [1995] 3 NZLR 310 (HC) also reported as *E v C* [1995] NZFLR 895.

Butler v Freeman 27 Eng. Rep. 204, (1756).

C v C [2003] NZFLR 689 (DC).

C (L), In re [1965] 2 Q.B. 449.

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

CR v JS FAMC Auckland FAM-2008-004-673, 11 April 2011.
<http://bookersonline.co.nz>

Cubitt v Cubitt [1930] NZLR 227.

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

De Manneville v De Manneville Eng. Rep. 762 (Ch 1804).

E v E HC Dunedin CIV-2004-412-923, 20 July 2005.
<http://bookersonline.co.nz>

Earl of Westmeath v Countess of Westmeath 162 Eng. Rep. 992 (1826).

Eyre v Shafsbury 24 Eng. Rep. 659 (Ch. 1722).

Falkland v Bertie (1696) 2 Vern 333 at 342; 23 ER 814.

Franklin v Franklin (1988) 4 FRNZ 466 (FC).

Fynn, Re (1848) 2 De G. & Sm. 457.

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

Greer v Greer Family Court, Auckland FP 1402/99, 28 June 2000.

Goode v Goode (2006) 36 Fam LR 422.

Halliday, Re (1853) 17 Jur. 56.

J v C [1970] A.C. 668 (HL).

Jarmai v Graf Family Court, Levin, 7 September 1988 (FP 031/210/985).

K v K (FAMC, Whakatane, FAM-2002-087-200, FAM-2002-087-186, 15 April 2004).

K v K [2005] NZFLR 28 (HC).

Kacem v Bashir [2011] 2 NZLR 1 (SC); [2010] NZFLR 884; (2010) 28 FRNZ 483.

L, Re (Infants) [1962] 1 WLR 886 (C.A.).

L v A [2004] NZFLR 298 (HC).

L v L FAMC Taupo FAM-2003-069-262, 26 May 2006
<http://bookersonline.co.nz>

LH v FD [Admonishment order] [2010] NZFLR 926 (HC).

Lyons v Blenkin 37 Eng. Rep. 842 (Ch. 1821).

M v H [1999] NZFLR 439 (FC).

M v M (1981-82) NZFLR 131 (CA).

M v M & L Unreported 7 April 1964, Court of Appeal, NZ.

M v Y [1994] 1 NZLR 527 (CA).

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

McDougall v Cheyne (1990) NZFLR 446 (FC).

MCP v RC (Family Court, Levin FAMC 2006-031-000024, 1 December 2006). <http://brookersonline.co.nz>

Norton v Norton [1951] NZLR 678.

Otter v Otter [1951] NZLR 739.

P and P v P (1991) 8 FRNZ 232 (FC).

P v M FAMC Auckland FAM-2002-004-2110, 5 May 2009.
<http://brookersonline.co.nz>

PN v BN [2007] NZFLR 320; (2006) 25 FRNZ 536 (FC).

Pallin v Department of Social Welfare [1983] NZLR 266 (CA).

Palmer v Palmer [1961] NZLR 702 (CA).

Paress v De Boam Family Court, Napier, 27 July 1990 (FP 041/259/87).

Powel v Cleaver (1789) 29 Eng. Rep. 274 (Ch.).

R v B-L FAMC Papakura FAM-2004-039-166 28 March 2006
<http://brookersonline.co.nz>

R v B-L (High Court, Auckland CIV 2006-404-001666, 12 May 2006)
<http://brookersonline.co.nz>

R v R (1990) 6 FRNZ 232. <http://bookersonline.co.nz>

RJ and LJ Thomson (Infants), Re (1910) NZLR 168.

R v Greenhill (1836) 4 A. & E. 624.

R v Gyngall [1893] 2 QB 232.

Rex v De Manneville Eng. Rep. 1054 (K.B. 1804).

Shaftsbury v Shaftsbury 25 Eng. Rep. 121 (Ch. 1725).

Skinner, Ex parte 27 Eng. Rep 710 (C.P. 1824).

Spence v Spence (1984) 3 NZFLR 347 (CA).

Spence, In re 41 Eng. Rep. 937, 938-939 (1847).

T v E FAMC Auckland FAM-2007-004-2481, 14 October 2008.
<http://bookersonline.co.nz>

Van der Veen v Van der Veen [1923] NZLR 794.

Wellesley v Duke of Beaufort (1827) 2 Russ I.

Willoughby v Plane Family Court, Hastings, 23 July 1990, (FP 020/294/89).

Winter, In re [1930] GLR 637.

Secondary sources

Books

Allen, C K *Law in the Making* (Oxford University Press, London, 1961).

Ariès, Philippe *Centuries of Childhood: A social history of family life* (Penguin Books, Harmondsworth, England, 1973).

Atkin, W R *Living Together Without Marriage: The law in New Zealand* (Butterworths, Wellington (NZ), 1991).

Atkins, Susan and Brenda Hoggett *Women and the Law* (Basil Blackwell Ltd, Oxford (UK), 1984).

Austin, Graeme *Children: Stories the Law Tells* (Victoria University Press, Wellington (NZ), 1994).

Badinter, Elisabeth *The Myth of Motherhood: An historical view of the maternal instinct* Francine du Plessix Gray (trans) (Souvenir Press, London, 1981).

Baker, J H *An Introduction to English Legal History* (3rd ed, Butterworths, London, 1990).

Baker, Maureen and David John Tippen *Poverty, Social Assistance, and the Employability of Mothers: Restructuring welfare states* (University of Toronto Press, Toronto, 1999).

Beaglehole, J C *The University of New Zealand: an historical study* (New Zealand Council for Educational Research, Wellington (NZ), 1937).

Berman, Harold J *Law and Revolution II: The impact of the protestant reformations on the Western legal tradition* (Harvard University Press, Cambridge (MA), 2003).

Bell, Henry Esmond *An Introduction to the History and Records of the Court of Wards and Liveries* (Cambridge University Press, Cambridge (UK), 1953).

Bingham, Peregrine *The Law of Infancy and Coverture* (George Lamson, 1824, America)

Blackstone, William *Commentaries on the Laws of England* (Clarendon Press, Oxford (UK), 1765-1769).

Bowlby, John *Attachment and loss: Vol. 1. Attachment* (Hogarth, London, 1969).

Breen, Claire *The Standard of the Best Interests of the Child: A Western tradition in international and comparative law* (Martinus Nijhoff Publishers, The Hague, 2002).

Chesler, Phyllis *Mothers on Trial: The battle for children and custody* (Revised and updated 2nd ed, Lawrence Hill Books, Chicago (IL), 2011).

Collier, Richard

Masculinity, Law and the Family (Routledge, London, 1994).

& Sally Sheldon (eds) *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Portland (OR), 2006).

Cretney, Stephen *Family Law in the Twentieth Century: A history* (Oxford University Press, Oxford (UK), 2003).

Cunningham, Hugh *Children & Childhood in Western Society since 1500* (Longman Group Ltd, New York (NY), 1995).

Dally, Ann *Inventing Motherhood: The consequences of an ideal* (Burnett Books, London, 1982).

David, René and John E C Brierley *Major Legal Systems in the World Today* (3rd ed, Stevens & Sons, London, 1985).

Dewar, John and Stephen Parker (eds) *Family Law: Processes, practice, pressures* (Proceedings of the Tenth World Conference of the International Society of Family Law, July 2000, Brisbane, Australia) (Oxford University Press, Portland (OR), 2003).

Elster, Jon *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge University Press, Cambridge (UK), 1989).

Fell, Christine *Women in Anglo-Saxon England* (British Museum Publications, London, 1984).

Fineman, Martha *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge, New York (NY), 1995).

Forna, Aminatta *Mother of All Myths: How society moulds and constrains mothers* (Harper Collins, London, 1999).

Forsyth, William *A Treatise on the Law Relating to the Custody of Infants in Cases of Difference between Parents or Guardians* (1850) HeinOnline, <http://heinonline.org>

Freeman, Michael *The State, the Law and the Family: Critical perspectives* (Tavistock, London, 1984).

Fuchs, Victor R *Women's Quest for Economic Equality* (Harvard University Press, Cambridge (MA), 1988).

Furstenberg, Frank F Jr and Andrew Cherlin *Divided Families: What happens to children when parents part?* (Harvard University Press, Cambridge (MA), 1994).

Gamble, Sarah *The Routledge Companion to Feminism and Postfeminism* (Routledge, London, 2001).

- Gavitt, Philip *Charity and Children in Renaissance Florence: The Ospedale Degli Innocenti, 1410-1536 (Studies in Medieval & Early Modern Civilization)* (Ann Arbor, Northumberland, 1990).
- Goldstein, Joseph, Anna Freud, and Albert J Solnit *Beyond the Best Interests of the Child* (New York, (NY), Free Press, 1973).
- Goodwin, Alan and Llewelyn Richards-Ward *Working with psychologists* (CLE New Zealand Law Society, July 2002).
- Gould, Jonathan W and David A Martindale *The Art and Science of Child Custody Evaluations* (Guilford Press, New York (NY), 2007).
- Griffith, John Aneurin Grey *The Politics of the Judiciary* (3rd ed, Fontana Books, London, 1985).
- Guggenheim, Martin *What's Wrong with Children's Rights?* (Harvard University Press, Cambridge (MA) 2005).
- Hadley, James *Introduction to Roman Law in Twelve Lectures* (D Appleton & Company, 1873).
- Hawkins, Keith (ed) *The Uses of Discretion* (Oxford University Press, Oxford (UK), 1992).
- Hesse, Mary B *Revolutions and Reconstructions in the Philosophy of Science* (Indiana University Press, Bloomington, 1980).
- Hetherington, E Mavis and John Kelly *For Better or for Worse: divorce reconsidered* (W W Norton & Co. Inc., New York (NY), 2002).
- Hibbert, Christopher *The English: A social history 1066-1945* (Norton Publishing, New York (NY) 1986).
- Holdsworth, William
- Some Makers of English Law: The lectures 1937-1938.* Heinonline <<http://heinonline.org>> Downloaded 11 July 2011.
- Hortsman, Allen *Victorian Divorce* (Croom Helm, London, 1985).
- Inglis, B D
- Sim and Inglis Family Court Code* (Butterworths, Wellington, 1983).
- New Zealand Family Law in the 21st Century* (Thomson Brookers, Wellington, 2007).
- James, Bev and Kay Saville-Smith *Gender, Culture, Power* (Oxford University Press, Auckland (NZ), 1994).

Katz, Michael B *The Price of Citizenship: Redefining the American welfare state* (Metropolitan Books, Philadelphia, 2008).

Kedgeley, Sue *Mum's the Word: The untold story of motherhood in New Zealand* (Random House, Auckland (NZ), 1996).

King, Gary, Robert O' Keohane and Sidney Verba in *Designing Social Inquiry: Scientific inference in qualitative research* (Princeton University Press, Princeton (NJ), 1994).

King, Michael

& Judith Trowell *Children's Welfare and the Law: The limits of legal intervention* (Sage, London, 1992).

& Christine Piper *How the Law Thinks About Children* (2nd ed, Ashgate Publishing Ltd, Aldershot, 1995).

A Better World for Children: Explorations in morality and authority (Routledge, London, 1997).

& Chris Thornhill *Niklas Luhmann's Theory of Politics and Law* (Palgrave, Basingstoke, 2003).

Lieberman, David *The Province of Legislation Determined: Legal theory in eighteenth-century Britain* (Cambridge University Press, Cambridge (UK), 1989).

Ludbrook, Robert and Lex de Jong *Care of Children in New Zealand: Analysis and expert commentary* (Thomson Brookers, Wellington, 2004).

Luhmann, Niklas

A Sociological Theory of Law Martin Albrow (ed) Elizabeth King and Martin Albrow (trans) (Routledge & Kegan Paul, London, 1985).

Social Systems John Bednarz Jr. (trans) (Stanford University Press, Stanford (CA), 1995).

Law as A Social System Klaus A Ziegert (trans) Fatima Kastner, Richard Nobles and others (eds) (Oxford University Press, Oxford (UK), 2004).

Maidment, Susan *Child Custody and Divorce: The law in social context* (Croom Helm Ltd, London, 1984).

Mason, Mary Ann *From Fathers' Property to Children's Rights: The history of child custody in the United States* (Columbia Univ. Press, New York (NY) 1994).

Maturana, Humberto R and Francisco J Varela

Autopoiesis and Cognition: the realization of the living (Reidel, Dordrecht, 1980).

The Tree of Knowledge: The biological roots of human understanding (Shambhala, Boston, 1987).

May, Tim *Social Research: Issues, methods and process* (3rd ed, Open University Press, Buckingham, 2001).

Moeller, Hans-Georg *Luhmann Explained: From souls to systems* (Open Court, Peru (IL), 2006).

Ozment, Steven E *When Fathers Ruled: Family life in Reformation Europe* (Harvard University Press, Cambridge (MA), 1983).

Parkinson, Patrick *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, New York (NY), 2011).

Phillips, Roderick *Divorce in New Zealand: A social history* (Oxford University Press, Auckland (NZ), 1981).

Pollock, Frederick and Frederic William Maitland *The History of English Law before the Time of Edward I* (Cambridge University Press, London, 1968).

Pryor, Jan and Bryan Rodgers *Children in Changing Families: Life after parental separation* (Blackwell Publishers, Oxford (MA), 2001).

Rose, Nikolas *Inventing Our Selves: Psychology, power and personhood* (Cambridge University Press, Cambridge (UK), 1996).

Roth, Herbert Otto *George Hogben: a biography* (New Zealand Council for Educational Research, Wellington (NZ), 1952).

Shanley, Mary Lyndon *Feminism, Marriage and the Law in Victorian England 1850-1895* (Princeton University Press, Princeton (NJ), 1989).

Shorter, Edward *The Making of the Modern Family* (Collins, London, 1975).

Smart, Carol

& Bren Neale *Family Fragments?* (Polity Press, Cambridge, 1999).

& Bren Neale and Amanda Wade *The Changing Experience of Childhood: Families and divorce* (Polity Press, Cambridge (UK) 2001).

- Stenton, Doris Mary Parsons *The English Woman in History* (Allen & Unwin, London, 1957).
- Stone, Lawrence *The Family, Sex and Marriage in England 1500-1800* (Weidenfeld & Nicolson, London, 1977).
- Stone, Olive M *The Child's Voice in the Court of Law: An account of the representation of minors in civil proceedings in Canada and some other (mostly common law) jurisdictions* (Butterworths, Toronto, 1982).
- Teubner, Gunther *Law as an Autopoietic System* Zenon Bankowski (ed) Anne Bankowska and Ruth Adler (trans) (Blackwell, Oxford (UK), 1993).
- Wallerstein, Judith S and Joan B Kelly *Surviving the Breakup: How children actually cope with divorce* (Basic Books, New York (NY), 1980).
- Wardle, Lynn D and Laurence C Nolan *Fundamental Principles of Family Law* (William S Hein & Co. Inc., Buffalo (NY), 2002).
- Weitzman, Lenore J *The Divorce Revolution: The unexpected social and economic consequences for women and children in America* (Free Press, New York (NY), 1985).
- Webb, Dick, Bill Atkin and others
- Butterworths Family Law in New Zealand* (10th ed, Butterworths, Wellington (NZ), 2001).
- Butterworths Family Law in New Zealand* (14th ed, LexisNexis, Wellington (NZ), 2009).
- Butterworths Family Law in New Zealand* (15th ed, LexisNexis, Wellington (NZ), 2011).

Chapters

- Atkin, Bill “Financial support – who supports whom?” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (LexisNexis, Wellington, 2007) 167.
- Boyd, Susan B “Robbed of their families? Fathers’ rights discourses in Canadian parenting law reform processes” in Richard Collier and Sally Sheldon (eds) *Fathers Rights Activism and Law Reform in Comparative Perspective* (Hart, Portland (OR), 2006) 27.
- Clark, Natalie Loder “Parens patriae: history and present status of state intervention into the parent-child relationship” in Sandra Anderson Garcia and Robert Batey (eds) *Current Perspectives in Psychological, Legal and*

Ethical Issues Vol 1A (Jessica Kingsley Publishers Ltd, London, 1991) 109.

Collier, Richard

“The outlaw fathers fight back: fathers’ rights groups, Fathers 4 Justice and the politics of family law reform – reflections on the UK experience” in Richard Collier and Sally Sheldon (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hard Publishing, Portland (OR), 2006) 54.

& Sally Sheldon “Fathers’ rights, fatherhood and law reform – international perspectives” in Richard Collier and Sally Sheldon (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Portland (OR), 2006) 1.

Crowley, Jocelyn Elise “Adopting ‘equality tools’ from the toolboxes of their predecessors: the fathers’ rights movement in the United States” in Richard Collier and Sally Sheldon *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Portland (OR), 2006) 79.

Daniels, Cynthia R “Introduction” in Cynthia R Daniels (ed) *Lost Fathers: the politics of fatherlessness in America* (Palgrave Macmillan, Basingstoke, 1998) 1.

Davis, Gwynn “Love in a cold climate – disputes about children in the aftermath of parental separation” in Stephen Cretney (ed) *Family Law: Essays for the New Millennium* (Jordan Publishing, Bristol, 2000) 127.

Day Sclater, Shelley

& Felicity Kaganas “Contact: mothers, welfare and rights” in Andrew Bainham, Bridget Lindley and others (eds), *Children and Their Families: Contact, rights and welfare* (Hart Publishing, Oxford (OR) 2003) 156.

& Christine Piper “The Family Law Act 1996 in context” in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Dartmouth Ashgate, Aldershot, 1999) 3.

Eekelaar, John “Family law and social control” in John Eekelaar and John Bell (eds) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford (UK), 1987) 125.

Feldman, Martha “Social limits to discretion: an organizational perspective” in Keith Hawkins (ed) *The Uses of Discretion* (Oxford University Press, Oxford (UK), 1992) 163.

Gavanas, Anna “The fatherhood responsibility movement: the centrality of marriage, work, and male sexuality in reconstructions of masculinity and

fatherhood” in Barbara Hobson (ed) *Making Men into Fathers: Men, masculinity and the social politics of fatherhood* (Cambridge University Press, Cambridge (UK), 2002) 213.

Henaghan, Mark

Mark Henaghan “Legally rearranging families: the family court process, custody, access, adoption, name change, separation and dissolution” in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (Oxford University Press, Auckland (NZ) 1992) 83

“Legally rearranging families: parents and children after break-up” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) 269.

Horrell, Sara and Jane Humphries “Child labour and British industrialization” in Michael Lavalette (ed) *A Thing of the Past? Child labour in Britain in the nineteenth and twentieth centuries* (Liverpool University Press, Liverpool, 1999) 44.

Jackson, Stevi and Sue Scott “Risk anxiety and the social construction of childhood” in Deborah Lupton (ed) *Risk and Sociocultural Theory: New directions and perspectives* (Cambridge University Press, Cambridge (UK), 1999) at 86.

Kaganas, Felicity “Contact, conflict and risk” in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Ashgate, Aldershot, 1999) 99.

Lavalette, Michael “Theorizing children at work: family, state and relations of production in historical context” in Michael Lavalette (ed) *A Thing of the Past? Child labour in Britain in the nineteenth and twentieth centuries* (Liverpool University Press, Liverpool, 1999) 44.

Luhmann, Niklas:

“The unity of the legal system” in Gunther Teubner (ed) *Autopoietic Law: A new approach to law and society* (Walter de Gruyter, Berlin, 1988) 12.

“Closure and openness: on reality in the world of law” in Gunther Teubner (ed) *Autopoietic Law: A new approach to law and society* (Walter de Gruyter, Berlin, 1988) 335.

“The coding of the legal system” in Gunther Teubner and Alberto Febbrajo (eds) *State, Law, and Economy as Autopoietic Systems: regulation and autonomy in a new perspective* (Guiffré, Milan, 1992) 145.

“Problems with reflexive law” in Gunther Teubner and Alberto Febbrajo (eds) *State, Law, and Economy as Autopoietic Systems: regulation and autonomy in a new perspective* (Guiffré, Milan, 1992) 389.

Morris, Matthews Kay and Richard Matthews “Paradigms of family, welfare and schooling in New Zealand” in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Addison Wesley Longman, Auckland, 1998) 57.

Neale, Bren and Carol Smart “In whose best interests? Theorising family life following parental separation or divorce” in Shelley Day Sclater and Christine Piper (eds) *Undercurrents of Divorce* (Dartmouth, Aldershot, 1999) 33.

Nobles, Richard and David Schiff “Introduction” in Niklas Luhmann *Law as A Social System* Fatima Kastner, Richard Nobles and others (eds) Klaus A Ziegert (trans) (Oxford University Press, Oxford (UK), 2004) 1.

Olssen, Erik and Andréé Levesque “Towards a history of the European family in New Zealand” in Peggy G Koopman-Boyden (ed) *Families in New Zealand Society* (Methuen Ltd, Wellington, 1978) 1.

Parkinson, Patrick “Changing policies regarding separated fathers in Australia” in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, John Wiley & Sons, Hoboken (NJ), 2010) 578.

Paterson, John “Reflecting on reflexive law” in Michael King and Chris Thornhill (eds) *Niklas Luhmann on Law and Politics: Critical appraisals and applications* (Hart Publishing, Portland (OR), 2006) 13.

Petit, P H “Parental control and guardianship” in R H Graveson and F R Crane (eds) *1857 A Century of Family Law 1957* (Sweet & Maxwell Ltd, London, 1957) 56.

Rhoades, Helen “Yearning for law: fathers’ groups and family law reform in Australia” in Richard Collier and Sally Sheldon (eds) *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Portland (OR), 2006) 125.

Smart, Carol

“Power and the politics of child custody” in Carol Smart and Selma Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (Routledge, London, 1989) 1.

“Negotiating parenthood: bargaining in the shadow of the law” in Christine R Barker, Elizabeth A Krik and Monica Sah (eds) *Gender Perceptions and the Law* (Ashgate Dartmouth, Aldershot, 1997) 1.

“The ‘new’ parenthood: fathers and mothers after divorce” in Elisabeth B Silva and Carol Smart (eds) *The New Family* (Sage, London, 1999) 108.

“Children and the transformation of family law” in John Dewar and Stephen Parker (eds) *Family Law: Processes, practice, pressures* (proceedings of the Tenth World Conference of the International Society of Family Law, July 2000, Brisbane, Australia) (Oxford University Press, Portland (OR), 2003) 223.

Smith, Anne B and Megan M Gallop “What children think about access with their non-resident parent” in Anne B Smith, Megan M Gallop and others (eds) *Children Whose Parents live Apart: Family & legal concepts* (Children’s Issues Centre, Dunedin (NZ), April 2001) 1.

Stacey, Judith “Dada-ism in the 1990s: getting past baby talk about fatherlessness” in Cynthia R Daniels (ed) *Lost Fathers: The politics of fatherlessness in America* (St Martin’s Griffin, New York (NY), 1998) 51.

Tapp, Pauline “Parenting, a private responsibility or a collaborative partnership? A perspective based on the United Nations Convention on the Rights of the Child” in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Addison Wesley Longman, Auckland (NZ), 1998) 1.

van Krieken, Robert “The socio-legal construction of the ‘best interests of the child’: law’s autonomy, sociology and family law” in Michael Freeman (ed) *Law and Sociology. Current Legal Issues 2005, Vol 8* (Oxford University Press, Oxford (UK), 2006) 437.

Wallbank, Julie “Parental responsibility and the responsible parent: managing the ‘problem’ of contact” in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds) *Responsible Parents and Parental Responsibility* (Hart Publishing, Oxford, 2009) 295.

Ward, Rutherford “Parental misconduct and the custody of children” in B D Inglis and A G Mercer (eds) *Family Law Centenary Essays* (Sweet & Maxwell (NZ) Ltd, Wellington, 1967) 57.

Webster, A C and L Y Williams “Family and community: social welfare cults” in Trlin A D (ed) *Social Welfare and New Zealand Society* (Methuen Publications, Wellington (NZ), 1977) 78.

Periodicals

Abramowicz, Sarah “English child custody law, 1660-1839: the origins of judicial intervention in parental custody” (1999) 90 Colum. L. Rev. 1344.

Akre, Lynn M “Struggling with indeterminacy: a call for interdisciplinary collaboration in redefining the ‘Best Interest of the Child’ standard” (1992) 75 Marq.L.Rev. 628.

Amato, Paul R

“Parental divorce and adult well-being: a meta-analysis” (1991a) 53 J. Marriage and the Family 43.

& Joan G Gilbreth “Nonresident fathers and children’s well-being: a meta-analysis” (1999) 61 Journal of Marriage and the Family 557.

& Bruce Keith “Parental divorce and the well-being of children: a meta-analysis” (1991b) 110 (1) Psychological Bulletin 26.

Arditti, Joyce A and Debra A Madden-Derdich “Noncustodial mothers – developing strategies of support” (1993) 42 (3) Family Relations 305.

Austin, Graeme W “The Guardianship Act 1968 – a status statute?” (1991) 3 (2) Butterworths Family Law Bulletin 14.

Bahr, Stephen J, Jerry D Howe and others “Trends in child custody awards: has the removal of maternal preference made a difference?” (1994) 28 Fam. L. Q 247.

Bailey, Martha J “England’s first *Custody of Infants Act*” (1994-1995) 20 Queen’s L.J. 391.

Bailey-Harris, Rebecca, Jacqueline Barron, and Julia Pearce “Settlement culture and the use of the ‘no order’ principle under the Children Act 1989” (1999) CFLQ 53.

Baker, Maureen “Lingering concerns about child custody and support” (2008) 4 (1) Policy Quarterly 10.

Bala, Nicholas “A report from Canada’s ‘gender war zone’: reforming the child related provisions of the *Divorce Act*” (1999) 16 Can. J. Fam. L. 163.

Bartlett, Katharine “US custody law and trends in the context of the ALI principles of the law of family dissolution’ (2002) (Fall) Va. J. Soc. Pol’y & L. 5.

Bates, Frank “Australia: towards the familialization of the family” (1988-1989) 27 J. Fam. L. 7.

Beaujot, Roderic and Jianye Liu “Children, social assistance and outcomes: cross-national comparisons” PSC Discussion Papers Series (2002) 15 (18) article 1. <http://ir.lib.uwo.ca/pscpapers/vol15/iss18/1/> Downloaded 2 August 2011.

Bechmann, Gotthard and Nico Stehr "The legacy of Niklas Luhmann" (2002) Jan-Feb, *Society* 67.

Bertoia, Carl and Janice Drakich "The fathers' rights movement: contradictions in rhetoric and practice" (1993) 14 (4) *Journal of Family Issues* 592.

Bloch, Ruth S "American feminine ideals in transition: the rise of the moral mother" (1978) 4 (2) *Feminist Studies* 101.

Boshier, Peter "What's gender got to do with it in New Zealand family law" (2011) 7 *NZFLJ* 61.

Bow, James N and Francella A Quinnell

"Critique of child custody evaluations by the legal profession" (2004) 42 *Fam. Ct. Rev.* 115.

"A critical review of child custody evaluation reports" (2001) 40 *Fam. Ct. Rev.* 164.

Boyd, Susan B "Backlash and the construction of legal knowledge: the case of child custody law" (2001) *Windsor Yearbook of Access to Justice* 141.

Brebner, J Bartlet "Laissez faire and state intervention in nineteenth-century Britain" (1948) 8 *The Journal of Economic History* 59.

Bretherton, Inge "The origins of attachment theory: John Bowlby and Mary Ainsworth" (1992) 28 *Dev. Psychol.* 759.

Bridge, Caroline "Shared residence in England and New Zealand – a comparative analysis" (1996) 8 (1) *CFLQ* 12.

Brown, Anne B "The evolving definition of marriage" (1998) 31 *Suffolk U. L. Review* 917.

Bruch, Carol

"Parenting at and after divorce: a search for new models: *Surviving the Breakup: How Children and Parents Cope with Divorce* by Judith S. Wallerstein; Joan Berlin Kelly" (1981) 79 (4) *Mich. L. Rev.* 708.

"Parental alienation syndrome and the alienated child – getting it wrong in child custody cases" (2002) 14 (4) *CFLQ* 381.

"Sound research or wishful thinking in child custody cases?" (2006) 40 *Fam. L. Q.* 281.

- Buckstaff, Florence Griswold "Married women's property in Anglo-Saxon and Anglo-Norman law and the origin of the common-law dower" (1893) 4 *Annals of the American Academy of Political and Social Science* 33.
- Caldwell, John "The dilemma of parental alienation" (2005) 5 *NZFLJ* 29.
- Cantwell, Brian "Presumption of contact in private law – an interdisciplinary issue" (1999) *Fam. Law* 226.
- Charlow, Andrea "Awarding Custody: the best interests of the child and other fictions" (1987) 5 *Yale L. & Pol'y Rev.* 267.
- Chisholm, Richard "The meanings of 'meaningful' within the Family Law Act amendments of 2006: a legal perspective" (2009) 15 *Journal of Family Studies* 60.
- Collier, Richard S "The fathers' rights movement, law reform and the new politics of fatherhood: some reflections in the UK experience" (2009) 20 *Fla. J.L. Pub. Pol'y* 65.
- Cretney, Stephen M "What will the women want next? The struggle for power within the family" 1925-75 (1996) *L. Q. Rev.* 110.
- Crowley, Jocelyn Elise "Taking custody of motherhood: fathers' rights activists and the politics of parenting (2009) 37 (3 & 4) *Women's Studies Quarterly* 223.
- Cogan, Neil Howard "Juvenile law before and after the entrance of 'parens patriae'" (1970) 22 *S.C.L. Rev.* 147.
- Coltrane, Scott and Neil Hickman "The rhetoric of rights and needs: moral discourse in the reform of child custody and child support laws" (1992) 39 (4) *Social Problems* 400.
- Custer, Lawrence "The origins of the doctrine of *parens patriae*" (1978) 27 *Emory L. J.* 195.
- Dalziel, Raewyn "The colonial helpmeet. Women's role and the vote in nineteenth century New Zealand" (1977) 9 (2) *New Zealand Journal of History* 112.
- Davin, Anna "Imperialism and motherhood" (1978) 5 (9) *History Workshop Journal* 9.
- Davis, Peggy C "There is a book out' ...: an analysis of judicial absorption of legislative facts" (1987) 100 *Harv. L. Rev.* (May) 1539.
- Dewar, John "Family law and its discontents" (2000) 14 (1) *Int J Law Policy Family* 59.

Doogue, Jan “A seismic shift or a minor realignment? A view from the bench ascertaining children’s views” (2006) 5 NZFLJ 198.

Drinan, Robert F “The rights of children in modern American family law” (1962) 2 J. Fam. Law 101.

Dyhouse, Carol

“Social Darwinistic ideas and the development of women’s education in England 1880-1920” (1976) 5 (1) History of Education 41.

“Good wives and little mothers: social anxieties and schoolgirls’ curriculum 1890-1920” (1977) 3 (1) Oxford Review of Education 21.

Einhorn, Jay “Child custody in historical perspective: a study of changing social perceptions of divorce and child custody in Anglo-American law” (1986) 4 Behav. Sci. & Law 119.

Elkin, Meyer “Conciliation courts: the reintegration of disintegrating families” (1973) 22 (1) The Family Coordinator 63.

Emery, Robert E “Parental alienation syndrome: proponents bear the burden of proof” (2005) 43(1) Fam. Ct. Rev. 8.

Federle, Katherine Hunt “Children’s rights and the need for protection” (2000) 34 Fam. L. Q, 421.

Fehlberg, Belinda, Bruce Smyth and others “Legislating for shared time parenting after separation: a research review” (2011) 25 (3) Int. J Law Policy Family 318.

Fineman, Martha “Dominant discourse, professional language, and legal change in child custody decisionmaking” (1988) 101 Harv. L. Rev. 727.

Foster, Henry and Doris Jonas Freed

“A bill of rights for children” (1972) 6 Fam. L. Q. 343.

“Life with father” (1978) 11 Fam. L. Q. 321 at 321.

Gilmore, Stephen

“Contact/shared residence and child well-being: research evidence and its implications for legal-decision-making” (2006) 20(3) IJLPF 344.

“Shared parenting: the law and the evidence: part 2 (2010) 20 (1) Seen and Heard 21.

Grych, John H “Interparental conflict as a risk factor for child maladjustment: implications for the development of prevention programs” (2005) 42 Fam. Ct. Rev. 97.

Gunnoe, Marjorie Lindner and Sanford L Braver “The effects of joint legal custody on mothers, fathers, and children controlling for factors that predispose a sole maternal versus joint legal award” (2001) 25 (1) Law and Hum. Behav. 25.

Hansen, Robert W “The role and rights of children in divorce actions” (1966) 6 J. Fam. Law 1.

Harris-Short, Sonia “Building a house upon sand: post-separation parenting, shared residence and equality – lessons from Sweden (2011) 23 (3) CFLQ 344.

Herrerias, Catalina “Noncustodial mothers following divorce” (1994) 20 (1-2) Marriage & Family Review 233.

Hetherington, E Mavis “An overview of the Virginia Longitudinal Study of Divorce and Remarriage with a focus on early adolescence” (1993) 7 J. Fam. Psych. 39.

Hoggett, Brenda “Joint parenting systems: the English experiment” (1994) 6 (1) Tolley’s Journal of Child Law 8.

Kaganas, Felicity

& Shelley Day-Sclater “Contact disputes: narrative constructions of ‘good’ parents” (2004) 12 Feminist Legal Studies 1.

& Alison Diduck “Incomplete citizens: changing images of post-separation children” (2004) 67 (6) Mod L. Rev. 959.

Kaspiew, Rae “Empirical insights into parental attitudes and children’s interests in family court litigation” (2007) 29 Sydney L. Rev. 131.

Kaye, Miranda and Julia Tolmie “Fathers’ rights groups in Australia and their engagement with issues in family law” (1998) 12 (1) Austl. J. Fam. Law 19.

Kelly, Joan B

and Emery Robert E “Children’s adjustment following divorce: risk and resilience perspectives” (2003) 52(4) Family Relations 1.

“Children’s adjustment in conflicted marriage and divorce: a decade review of research” (2000) 39 J. of Child and Adolescent Psychiatry 963.

Kelly, Robert F and Shawn L Ward “Allocating custodial responsibilities at divorce: social science research and the American Law Institute’s approximation rule” (2002) 40 Fam. Ct. Rev. 350.

King, Michael:

“Child welfare within law: the emergence of a hybrid discourse” (1991) 18 (3) J Law & Soc’y 303.

& Schutz Anton “The ambitious modesty of Niklas Luhmann” (1994) 21(3) J.L.Soc’y 260.

“Children’s rights as communication: reflections on autopoietic theory and the United Nations Convention” (1994) 57 (3) MLR 385.

“The ‘truth’ about autopoiesis” (1993) 20 (2) J.L. Soc’y 218.

“Future uncertainty as a challenge to law’s programmes: the dilemma of parental disputes” (2000) 63(4) MLR 523.

“An autopoietic approach to ‘parental alienation syndrome’” (2002) 13 (3) J. Forensic Psychiatry and Psychology” 609.

Kohm, Lynne Marie ““Tracing the foundations of the best interests of the child standard in American jurisprudence” (2008) 10 J. L. Fam. Stud. 337.

Krauss, Daniel A and Bruce D Sales “The problem of helpfulness in applying *Daubert* to expert testimony: child custody determination in family law as an exemplar” (1999) 5 (1) Psychology, Public Policy, and Law 78.

Luhmann, Niklas:

“The third question: the creative use of paradox in law and legal history” (1988) 15 J. Law & Soc’y 153.

“Law as a social system” (1989) 83 Nw. U.L. Rev. 136.

“Operational closure and structural coupling: the differentiation of the legal system” (1991-1992) 13 Cardozo L. Rev. 1419.

“Limits of steering” (1997) 14 Theory Culture Society 41.

“Globalization of world society: how to conceive of modern society?” (1997) 7 (1) International Review of Sociology 67.

Lempert, Richard ““Between cup and lip!: social science influences on law and policy” (1988) 10 Law & Pol’y 167.

- Maccoby, Eleanor, Charlene E Depner and Robert Mnookin “Co-parenting in the second year after divorce” (1990) 52 (1) *Journal of Marriage and the Family* 141.
- Mallon, Catherine “A critical examination of judicial interpretation of a child’s best interests in inter-parental custody disputes in New Zealand” (1973-1976) 3 *Otago L. Rev* 191.
- Maturana, Humberto R “The organization of the living: A theory of the living organization” (1975) 7 *International Journal of Man-Machine Studies* 313.
- McIntosh, Jennifer and Richard Chisholm “Cautionary notes on the shared care of children in conflicted parental separation” (2008) 14 (1) *Journal of Family Studies* 37.
- McIntosh, Judith “Legislating for shared parenting: exploring some underlying assumptions” (2009) 47 (3) *Fam. Cr. Rev.* 389.
- McNeely, Cynthia A “Lagging behind the times: parenthood, custody and gender bias in the family court” (1998) 25 *Florida State University Law Review* 892.
- McNeil, Gordon H “The cult of Rousseau and the French Revolution” (1945) 6 (2) *Journal of the History of Ideas* 197.
- Medlicott, Judith “Psychiatry and psychology in the family court” (2005) 11(1) *Otago L.Rev.* 79.
- Melli, Marygold S and Patricia R Brown “Exploring a new family form – the shared time family” (2008) 22 *Int. J. Law Policy Family* 231.
- Mnookin, Robert
- “Child-Custody adjudication: judicial functions in the face of indeterminacy” (1975) 39 *L. & Contemp. Prob.* 226.
- “Co-parenting in the second year after divorce” (1990) 52 (1) *Journal of Marriage and the Family* 141.
- Myles, John and Jill Quadagno “Political theories of the welfare state” (2002) 76 (1) *Social Service Review* 34.
- Neely, Richard “The primary caretaker parent rule: child custody and the dynamics of greed” (1984) 3 *Yale L. & Pol’y Rev.* 168.
- Nemetz, Nathaniel “The concept of an independent judiciary” (1986) 20 *U C B Law rev.* 286.
- Nepomnyaschy, Lenna “Child support and father-child contact: testing reciprocal pathways” (2007) 44 (1) *Demography* 93.

Olssen, Erik "Truby King and the Plunket Society: an analysis of a prescriptive ideology" (1981) 15 (1) *New Zealand Journal of History* 3.

Piper, Christine "Divorce reform and the image of the child" (1996) 23 (3) *J Law & Soc'y* 364.

Polikoff, Nancy D "Why are mothers losing: a brief analysis of criteria used in child custody determinations" (1981-1982) 7 *Women's Rts. L. Rep.* 235.

Pringsheim F "The inner relationship between English and Roman law" (1933-1935) 5 *Cambridge Law Journal* 347.

Rhoades, Helen

"The rise and rise of shared parenting laws: a critical reflection" (2002) 19 *Can. J. Fam. L.* 75.

"The dangers of shared care legislation: why Australia needs (yet more) family law reform (2008) 36 *Fed. L. Rev.* 279.

"Children's needs and 'gender wars': the paradox of parenting law reform" (2010) 24 *AJFL* 1.

Robinson, Antoinette "Children: heard but not listened to? An analysis of children's views under s 6 of the Care of Children Act 2004" (2011) 7 *NZFLJ* 39.

Schuele, Donna "Origins and development of the law of parental support" (1988-89) 27 (4) *U Louisville L. Rev.* 807.

Sack, Laura "Women and children first: a feminist analysis of the primary caretaker standard in child custody cases" (1992) 4 *Yale J. L. & Feminism* 291.

Secombe, Wally "Patriarchy stabilized: the construction of the male breadwinner wage norm in nineteenth-century Britain" (1986) 11 (1) *Social History* 53.

Seltzer, Judith A, Nora Schaeffer and others "Family ties after divorce: the relationship between visiting and paying child support" (1989) 51 (4) *Journal of Marriage & Family* 1013

Seymour, John "Parens Patriae and wardship powers: their nature and origin (1994) 14 *Oxford J. Legal Stud.* 159.

Shirley, Ian and Susan St John "Family policy and the decline of the welfare state in New Zealand" (1997) 10 *British Review of New Zealand Studies* 39.

Smart, Carol

“The legal and moral ordering of child custody” (1991) 18 J. Law & Soc’y 485.

& Bren Neale “Good enough morality? Divorce and postmodernity” (1997) 1 Critical Soc. Pol’y 17.

& Bren Neale “Arguments against virtue – must contact be enforced?” (1997) 27 Fam Law 332.

“Wishful thinking and harmful tinkering? Sociological reflections on family policy” (1997) 1 J. Soc. Pol’y 26.

Smyth, Bruce “A 5-year retrospective of post-separation shared care research in Australia” (2009) 15 Journal of Family Studies 36.

Spinak, Jane “When did lawyers for children stop reading Goldstein, Freud and Solnit? Lessons from the twentieth century on best interests and the role of the child advocate” (2007) 41 Fam. L. Q. 393.

Stahl, Rebecca M “‘Don’t forget about me’: implementing article 12 of the United Nations Convention on the Rights of the Child (2007) 24 (3) Ariz J of Int’l. & Comp Law 803.

Tapp, Pauline

“Family Law” (1990) New Zealand Recent Law Review 102.

& Nicola Taylor “Agents or dependants - children and the family law system” (2001) 3 BFLJ 245.

“Judges are human too: conversation between the judge and a child as a means of giving effect to Section 6 of the Care of Children Act 2004 (2006) NZ L. Rev. 35.

& Nicola Taylor “Relocation: are we trying to do too much, too late, with too few appropriate resources? (2008) NSFLJ 6(4) December 94.

Taub, Nadine “Assessing the impact of Goldstein, Freud and Solnit’s proposals: an introductory overview” (1983-84) Review of Law & Social Change 485.

Taylor, Nicola, Megan Gollop and Anne Smith “The role of counsel for the child - perspectives of children, young people, and their lawyers” (2000) 3 BFLJ 146.

Teubner, Gunther “How the law thinks: toward a constructivist epistemology of law” (1989) 23 L. & Soc’y Rev 727.

- Théry, Irène “‘The interests of the child’ and the regulation of the post-divorce family” (1986) 14 *Int J Sociol. Law* 341.
- Thornhill, Chris “Niklas Luhmann. A sociological transformation of political legitimacy” (2006) 7 (2) *Distinktion: Scandinavian Journal of Social Theory* 33.
- Tolmie, Julia, 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) 24 *New Zealand Universities Law Review* 136.
- Tyrrell, Alex “Samuel Smiles and the women question in early Victorian Britain” (2000) 39 (2) *The Journal of British Studies* 185.
- Ventrell, Marvin “Evolution of the dependency component of the juvenile court” (1998) 49 *Juv. & Fam. Ct. J.* 17.
- Veum, Jonathan R “The relationship between child support and visitation: evidence from longitudinal data” (1993) 22 *Soc. Science Research* 229.
- Waldegrave, Charles, Robert Stephens and others “Assessing the progress on poverty reduction (2003) 20 *Social Policy Journal of New Zealand* 197.
- Wallbank, Julie “Castigating mothers: the judicial response to ‘wilful’ women in disputes over paternal contact in English law” (1998) 20 *JSWFL* 357.
- Wardle, Lynn D “No-fault divorce and the divorce conundrum” (1991) *BYU L. Rev.* 79.
- Weitzman, Lenore and Ruth B Dixon “Child custody awards: legal standards and empirical patterns for child custody, support and visitation after divorce” (1979) 12 *U.C.D L. Rev.* 471.
- Welter, Barbara “The cult of true womanhood, 1820-1860” (1966) 18 (2) *American Quarterly* 151.
- Wilcox, Maurice “Note: A child’s due process right to counsel in divorce custody proceedings (1976) 27 *Hastings L.J.* 917.
- Wilson, Graeme B “The non-resident parental role for separated fathers: a review” (2006) 20(3) *IJLPF* 286.
- Williford, Miriam “Bentham and the rights of women” (1975) 36 (1) *Journal of the History of Ideas* 167.
- Winding, Terri “Snow, glass and apples – the story of Snow White” *The Endicott Studio Journal of Mythic Arts* (2007) (Spring)
<http://www.endicott-studio.com/> Accessed 23 May 2012.

Woodhouse, Barbara Bennett "Towards a revitalization of family law" (1990) 69 Tex. L. Rev. 245.

Wright, Danaya C

"De Manneville v. De Manneville: rethinking the birth of custody law under patriarchy" (1999) 17 Law & Hist. Rev. 247.

"The crisis of child custody: a history of the birth of family law in England" (2002) 11 Colum. J. Gender & L 175.

Zainaldin, Jamil S "The emergence of a modern American family law: child custody, adoption, and the courts 1796-1851" (1979) 73 Nw. U. L. Rev. 1038.

Reports

Australia, Commonwealth, House of Representatives, Standing Committee on Family and Community Affairs *Every Picture Tells a Story: Report on the Inquiry Into Child Custody Arrangements in the Event of Family Separation* (Canberra: Australian Government and Publishing Service, December 2003).

Beattie, D S, I H Kawharu and others *Report of the Royal Commission on the Courts* (Government Printer (NZ), 1978).

Canada, Special Joint Committee on Child Custody and Access *For the Sake of the Children* (Ottawa, Parliament of Canada, 1998).
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1> Accessed 2 February 2012.

Cashmore, Judy, Stephen Parkinson and others *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre Sydney, University of New South Wales 2010) at 1.
<http://www.adfvc.unsw.edu.au/specialcollectionfamilylaw.htm> Accessed 22 February 2012. Accessed 9 December 2012.

Dunn, Christine and Rosemary du Plessis *After the Cuts: Surviving on the domestic purposes benefit* Working Paper No. 12 (University of Canterbury, Christchurch (NZ), Dept of Sociology, 1992).

Hall, Georgie *Family Court Custody and Access Research Report 1: The Welfare of the Child – a Literature Review* (Crown Copyright, Department of Justice New Zealand, Wellington, 1989).

Hall, Georgie and Angela Lee *Family Court Custody and Access Research Report No 8* (Crown Copyright, Department of Justice New Zealand, Wellington, 1994).

New Zealand Law Commission Te Aka Matua O Te Ture Report 82 *Dispute Resolution in the Family Court* (NZLC, Wellington (NZ), March 2003).

Nielson, Linda C *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association Law for the Futures Fund*, (University of Brunswick, Muriel McQueen Fergusson Centre for Family Violence Research (March, 2001). http://www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/team2001.pdf Accessed 3 March 2012.

Norgrove, David (chair) *Family Justice Review, Final Report* (Crown (UK), November 2011). <http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf> Downloaded 15 December 2011.

Rendell, Kathryn, Zoe Rathus and others *An Unacceptable Risk: A Report on Child Contact Arrangements Where there is Violence in the Family* (Queensland Women's Legal Service Inc. 2000).

Rhoades, Helen, Regina Graycar, Margaret Harrison *The Family Law Reform Act 1995: The first three years* (Family Court of Australia, December 2000) Available at <http://www.familycourt.gov.au/> Accessed 15 December 2011.

Skinner, Christine, Jonathan Bradshaw and Jacqueline Davidson *Child Support Policy: An international perspective* Research Report No 405 (Dept. for Work and Pensions, UK, 2007). <http://research.dwp.gov.uk/asd/asd5/rports2007-2008/rrep405.pdf>

Taylor, Nicola, Megan Gollop and Mark Henaghan *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (June 2010) (Centre for Research on Children and Families, Faculty of Law University of Otago, Dunedin, New Zealand). <http://www.otago.ac.nz/crcf/pdfs/Relocation%20Research%20Report.pdf> Accessed 2 June 2012.

Trapski, Peter, Diana Halsted and others *Child Support Review 1994, Report of the Working Party* (Report of the Working Party, 8 November 1994).

Seltzer, Judith A *Father by Law: Effects of joint legal custody on nonresident fathers' involvement with children* Working Paper No. 75 (Center for Demography and Ecology, NSFH, U.S. 1997). <http://www.ssc.wisc.edu/cde/nsfhw/nsfh75.pdf> Accessed 15 March 2012.

Wasoff, Fran *Dealing with Child Contact Issues: a literature review of mechanisms in different jurisdictions* (Centre for Research on Families and Relationships, University of Edinburgh, Edinburgh, 2007). Downloaded on 5 September 2011 at <http://www.scotland.gov.uk/Publications/2007/10/>

Presentations

Claus, Iris, Paul Kilford and others “Costs of raising children” Presentation (March 2010) Official Statistics Forum 2010.

http://www.stats.govt.nz/about_us/news_and_events/events_calendar/March%202010/oss-forum.aspx Accessed 6 November 2011.

Henaghan, Mark “The impact of the Care of Children Act 2004 on family practice” in *Family Law: The new era – professionalism in the family court* (New Zealand Law Society Continuing Education, New Zealand, 2005) 229.

McKay, Stephen “Shared parenting: longitudinal and comparative perspectives” Presentation at the 4th meeting of the AHRC Research Network, University of Birmingham, UK, 5 January 2012.

<http://www.birmingham.ac.uk/Documents/college-mds/haps/projects/MESH/AHRC-Meetings/Meeting3/StephenMcKay.pdf>
Accessed 14 February 2012.

Thesis

Sinclair, Elizabeth Ann “Timeless considerations; an historical analysis of the development of residence and contact law, gender and parenting” PhD Thesis (March 2010) Newcastle Law School, University of Newcastle, UK.

<https://theses.ncl.ac.uk/dspace/handle/10443/1041> Downloaded 08 June 2011.

Digital resources

Australian Institute of Family Studies:

Caruana, Catherine “Legislating for shared parenting – the ‘joint custody’ inquiry makes recommendations for change” (2004) 67 *Family Matters* 16. <http://aifs.gov.au/institute/pubs/fm2004/fm67/cc.pdf> Downloaded 17 March 2012.

Kaspiew, Rae, Matthew Gray and others “Evaluation of the 2006 family law reforms” (Australian Institute of Family Studies, Melbourne, 2009) at 132-133. <http://www.aifs.gov.au/institute/pubs/fle/> Accessed 1 November 2011.

Brookersonline, “Introduction to the Care of Children Act 2004”

<http://www.brookersonline.co.nz>. Accessed 15 December 2011.

Casswell-Laird, Oscar, Child Poverty Action Group, “Child support: a summary and comparison of legislation in New Zealand and Australia”

<http://www.cpag.org.nz/>

Downloaded 12 November 2012.

Centre for Public Policy Evaluation, Massey University, Palmerston North (New Zealand):

Birks, Stuart “The shared parenting bill” in Stuart Birks (ed) *Inclusion or Exclusion: Family strategy and policy* Issue Paper No. 9 (2000) 57. <http://cppe.massey.ac.nz/> Downloaded 30 August 2011.

Davey, Judith A “Children living in sole father homes in New Zealand” in Stuart Birks and Paul Callister (eds) *Perspectives on Fatherhood II* Issue Paper No. 6 (1999) 105. <http://cppe.massey.ac.nz/> Downloaded 12 August 2011.

Henaghan, Mark “Above and beyond the best interests of the child” in Stuart Birks and Paul Callister (eds) *Perspectives on Fathering* Issue Paper No. 4 (1999) 108. <http://cppe.massey.ac.nz/> Downloaded 15 August 2011.

Henaghan, Mark “Fatherhood and family law” in Stuart Birks and Paul Callister (eds) *Perspectives on Fatherhood II* Issue Paper No. 6 (1999) 51. <http://cppe.massey.ac.nz/> Downloaded on 29 August 2011.

Henaghan, Mark “Shared parenting: where from? Where to?” in Stuart Birks (ed) *Children’s Rights and Families: Proceedings of social policy forum 2000* Issue Paper No. 10 (2001) 50. <http://cppe.massey.ac.nz/> Downloaded 30 August 2011.

Jefferson, Simon “Lawyers representing children” in Stuart Birks (ed) *The Child and the Family Court: seeking the best interests of the child Proceedings of Social Policy Forum 2002* Issue Paper No 13 (2003) 33. <http://cppe.massey.ac.nz/> Downloaded 30 August 2011.

Department of Justice, Canada “The voice of the child in divorce, custody and access proceedings, 4.0 Conclusion and recommendations” http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002_1/p4.html Accessed 25 December 2011.

Department of Justice, New Zealand:

Practice Note: Specialist Report Writers (24 March 2011), Issued by the Principal Family Court Judge, Peter Boshier <http://www.justice.govt.nz/> Accessed 15 February 2012.

Practice Note, Lawyer for the Child: Code of Conduct (24 March 2011) Issued by the Principal Family Court Judge, Peter Boshier <http://www.justice.govt.nz/> Accessed 1 March 2012.

Practice Note: Lawyer for the Child: Selection, appointment and other matters (24 March 2011), Issued by the Principal Family Court Judge, Peter Boshier <http://www.justice.govt.nz/> Accessed 1 March 2012.

“Briefing on the Care of Children Bill - June 2003” Ministry of Justice, 2003. <http://www.justice.govt.nz/> Accessed 11 December 2011.

New Zealand Ministry of Justice “Reviewing the Family Court: A public consultation paper” (20 September 2011) <http://www.justice.govt.nz/> Accessed 22 March 2011.

“Family Court Statistics – An overview of family court statistics in New Zealand 2004 to 2008” (May 2010) Statistical Bulletin. <http://www.justice.govt.nz/> Accessed 12 January 2012.

Directgov, Website of the UK government “Child welfare during court proceedings (Cafcass officers)” http://www.direct.gov.uk/en/Parents/Lookingafterchildrenifyoudivorceorparate/Childrendivorceeparationandcourts/DG_4002959 Accessed 22 December 2012. Accessed 9 March 2012.

Dunn, Peter

“Child Support Amendment Bill; Commentary on the Bill” (Policy Advice Division of Inland Revenue, October 2011) at 20. <http://www.legislation.govt.nz/> Downloaded 21 November 2011.

“Child Support Amendment Bill, Government Bill 337-1” <http://www.legislation.govt.nz/bill/government/2011/0337/latest/DLM4071711.html> Accessed 8 November 2011.

“Supporting Children, a government discussion document on updating the child support scheme” at 27. <http://taxpolicy.ird.govt.nz/publications/2010-dd-supporting-children/overview> Accessed 3 January 2012.

“Supporting Children, a government discussion document on updating the child support scheme” at 27. <http://taxpolicy.ird.govt.nz/publications/2010-dd-supporting-children/overview> Accessed 3 January 2012.

Gingerbread and Nuffield Foundation, Victoria Peacey and Joan Hunt *I’m not saying it was easy ... Contact problems in separated families* (Ginger Bread and Nuffield Foundation 2009) <http://gingerbread.org.uk/uploads/media/17/6850.pdf> Accessed 1 February 2012.

History and Policy, Pat Thane “Happy families?’ History and policy” (2010) <http://www.historyandpolicy.org/papers/> Accessed 21 November 2011.

Parkinson, Patrick “Family law and the indissolubility of parenthood” (2006) 40 (2) Fam. L. Q. 237 Sydney Law School Research Paper No. 06/31. Available at Social Science Research Network: <http://ssrn.com/abstract=938020> . Downloaded 14 January 2012.

UK, The National Archives

<http://www.nationalarchives.gov.uk/catalogue/DisplayCatalogueDetails.asp?CATID=258&CATLN=1&FullDetails=True&j=1> Accessed 16 July 2011.

Speeches

Boshier, Peter

“The Care of Children Act 2004 – does it enhance children’s participation and protection rights?” Children’s Issues Centre, 6th Child and Family Policy Conference, Dunedin (NZ) (7 July, 2005)

<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/the-care-of-children-act-2004-does-it-enhance-childrens-participation-and-protection-rights> Accessed 4 November 2011.

“The new era – professionalism in the family court” New Zealand Law Society Family Law Section, Family Law, (October 10, 2005)

<http://www.justice.govt.nz/family/publications/> Accessed 12 December 2011.

“The family court – 25 years on” Speech given to the New Zealand Law Society, Christchurch, 13 October 2006.

<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/the-family-court-25-years-on> Accessed 2 November 2012.

“Getting it right in the Family Court” Speech given to Christchurch Family Courts Association, Family Court, Christchurch, 18 November 2010 at 7. Downloaded from <http://www.courts.govt.nz/courts/family-court/publications/speeches-and-papers> Last accessed 17 February 2011.

“Speech of principal family court judge Peter Boshier to the Auckland Family Courts Association” (Auckland (NZ), 21 April 2004) available at <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/speech-of-principal-family-court-judge-peter-boshier-to-the-auckland-family-courts-association> Last accessed 4 March December 2011.

von Dadelszen, Paul “Rights or obligations? - Review of the Guardianship Act 1968” (6 October 2001) Triennial New Zealand Law Society Conference and 4th New Zealand Law Conference, Christchurch (NZ) <http://www.justice.govt.nz/> Accessed 2 January 2012.

Parliamentary Debates

(10 May 2000) 583 New Zealand Parliamentary Debates (NZPD) 2151.

Media

BBC News “Profile: Fathers 4 Justice” http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/3653112.stm Last updated 22 April 2008 15:10 UK. Accessed 7 November 2011.

Bowcott, Owen “Government backs shared parenting legislation after separation” *The Guardian* (6 February 2012) online at <http://www.guardian.co.uk/lifeandstyle/2012/feb/06/government-backs-shared-parenting-legislation> Accessed 19 February 2012.

Cheng, Derek “Family Court ‘shake-up’ frightening” *New Zealand Herald* (New Zealand, 20 April 2011). Online at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10720504 Accessed 10 May 2011.

Dyer, Clare “New laws to end child custody wars” *The Guardian* (3 April 2004) <http://www.guardian.co.uk/society/2004/apr/03/childrenservices.politics> Accessed 4 March 2012.

Fairfax NZ News “Boys spurn contact with father” Last updated 21 October 2007 <http://www.stuff.co.nz/national/38466/Boys-spurn-contact-with-father> Accessed 3 March 2012.

Hayden, Donnell

& Michael Dickison “Thompson apologises for remarks” (*New Zealand Herald*, 24 June 2011) http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10734243 Last accessed 11 December 2011.

“Members quit EMA after CEO saga” (*New Zealand Herald*, 2 August 2011) http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10742434 Last accessed 11 December 2011.

NZHerald Staff “Family Court review to cut ballooning costs” (*New Zealand Herald*, 19 April 2011) Available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10720386 Accessed 20 February 2011.

Neale, Imogen “Parents \$2.3b in debt for support” (Fairfax NZ News) Last updated 23/10/2011 <http://www.stuff.co.nz/national/5835623/Parents-2-3b-in-debt-for-support> Accessed 3 January 2012.

“Alasdair Thompson – full interview with *Campbell Live*” <http://www.3news.co.nz/Alasdair-Thompson---full-interview-with-Campbell-Live/tabid/367/articleID/216251/Default.aspx> Accessed 15 January 2012.