

Raising Questions About the Importance of Father Contact Within Current Family Law Practices

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Twenty-one women who had disputes over care arrangements with the fathers of their children and were involved in New Zealand family law processes to resolve those disputes were interviewed about their experiences. This article compares their experiences of the importance attached to sustained and frequent face-to-face contact with fathers by some New Zealand family law professionals with what the research literature says about the parenting arrangements that best serve children post-separation. It notes a discrepancy between those two positions, with women perceiving that some professionals prioritize certain forms of father contact over other competing considerations that may be of more importance to the wellbeing of children. Those professionals appear to work on the assumption, not supported by the research literature, that contact, and a substantial amount of it, is always good for children no matter what the circumstances. Such attitudes on the part of family law professionals were reported to be commonplace, although not universal. This article also briefly describes some of the pressures on family law professionals in the current New Zealand context to

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emphasise the benefit of frequent father contact over other concerns that might affect children's post-separation wellbeing.

Introduction

In this article we question the priority reportedly given by some New Zealand family law professionals¹ to certain forms and amounts of child/father contact in the aftermath of family separation. To discuss this issue we review the relevant literature and draw on accounts provided by women who have been in dispute over day-to-day care and contact arrangements with the father of their children and who, as a consequence, have used family law dispute resolution processes.²

In raising questions about the uncritical importance reportedly placed by some New Zealand family law professionals on the quantity, and certain forms, of contact with fathers post-separation we are not suggesting that father contact is not both beneficial to, and/or desired by, many children who are the subject of disputes within the New Zealand family law system.³ Rather we are suggesting that in some cases there are other competing considerations of greater significance, depending on the facts, and that it is more likely to be the *quality* of the relationship with the so-called "contact parent" that is of significance to the wellbeing of the children concerned than the *quantity* of contact they experience. When deciding what contact arrangements will benefit the children it is therefore important to examine a number of issues, including the nature of the care provided by the contact parent, before deciding that large amounts of frequent contact with fathers will automatically be of benefit to children.⁴ In some cases, particularly where the father has a history of violence and abuse towards the child and/

1 We use this term to include lawyers, lawyers for the child, court-appointed psychologists, counsellors, mediators and judges.

2 We use this term to refer to both formal and informal components of the family law process: negotiation using family lawyers, counselling, mediation, and, finally, Family Court adjudication.

3 Smith & Gollop, "Children's Perspectives on Access Visits" (2001) 3 Butterworths Family Law Journal 259.

4 Note that in this article we are adopting the framework set out in the Care of Children Act 2004, which prioritizes the welfare of the individual child in question above that of the collective family group to which the child belongs. Furthermore, the Care of Children Act 2004 focuses primarily on the child's relationship to her or his parents, rather than the child's relationship to extended family members (for example, grandparents, aunts and uncles) or whanau/hapu. The individualized and nuclearized focus of the Care of Children Act 2004 is at odds with traditional Maori and Pasifika perspectives on kinship relationships, and the priority given to the broader collective. However, it is beyond the

or the child's mother, it may be relevant to carefully consider the value of *any* contact with that parent. However, the primary focus of this article goes beyond a consideration of contact versus the absence of contact, to question assumptions about the nature and amount of contact from which children will benefit.⁵

Obviously not all contact parents are fathers,⁶ although fathers make up the majority of contact parents (in most instances by agreement between the parties).⁷ Because of this fact and the fact that the practice of parenting is still overwhelmingly gendered⁸ (both before and after separation), the

scope of this particular article to articulate a critique of the Care of Children Act 2004 from either a Maori or a Pasifika point of view.

- 5 "Contact" is the term used in the Care of Children Act 2004 to refer to the time that a child spends with the parent that they do not primarily live with (in what is referred to as "day-to-day care"). "Contact" covers a wide range of possibilities, from substantial blocks of time living with the "contact parent" in arrangements that approximate "shared care", to overnight visits or brief meetings (either with or without someone else present to monitor the interaction between the parent and child).
- 6 Indeed in our sample of 21 interviews with mothers, one woman was a contact parent and the father had the day-to-day care of the children. See also Kielty, "Mothers are Non-Resident Parents Too: A Consideration of Mother's Perspectives on Non-Residential Parenthood" (2005) 27 *Journal of Social Welfare and Family Law* 1.
- 7 In 2007, of those cases which ended up being processed in the New Zealand Family Court, 58 per cent of day-to-day care orders were awarded to mothers, 12 per cent to fathers, 9 per cent to other parties, whilst 21 per cent were shared care orders. Of shared care orders, 11 per cent were shared between mother and father, 2 per cent with either mother or father and another party, and 8 per cent were shared among other parties. These figures come from Wyatt (with Ong), *Family Court Statistics in New Zealand in 2006 and 2007*, April 2009, Ministry of Justice, at 31. Most of these arrangements (68 per cent) were arrived at by agreement between the parties, with only 8 per cent being made at a defended hearing, and 23 per cent at a formal proof hearing where only one parent attends, usually because the other parent chooses not to participate: *ibid* at 30. One can speculate that the percentage of cases where mothers are the primary caregivers and fathers are contact parents is likely to be higher in respect of those separating couples who do not apply for Family Court orders but come to their own private arrangements.
- 8 For some of the international research on the issue see: Craig, "Does Father Care Mean Fathers Share? A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children" (2006) 20 *Gender & Society* 259; Henwood & Procter, "The 'Good Father': Reading Men's Accounts of Paternal Involvement During the Transition to First Time Fatherhood" (2003) 42 *British Journal of Social Psychology* 337 at 339-340; Milkie, Bianchi, Mattingly & Robinson, "Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being" (2002) 57 *Sex Roles* 21 at 21-22; Reay, "A Silent Majority? Mothers in Parental Involvement" (1995) 18 *Women's Studies International Forum* 337; Gable, Belsky & Crnic, "Coparenting During the Child's 2nd Year: A Descriptive Account" (1995) 57 *Journal of Marriage and the Family* 609; Lacroix, "Freedom, Desire and Power: Gender Processes and Presumptions of Shared Care and

debates surrounding contact and day-to-day care have tended to be discussed in gendered terms. Hence, the issue of contact is frequently framed as an issue of father contact. We have chosen to reflect the gendered realities of parenting in our choice of language and characterization of the issues throughout this article.

In this article we review the research literature on how the best interests of children might be served in the parenting allocations that take place post-separation. We then contrast a best practice approach with what some women have said about their experiences of dealing with professionals in the New Zealand family law system. There is a disparity between a best practice approach and what these women perceived to be the approach of some of the family law professionals they encountered. In the final section of this article we briefly examine the relevant legislation that governs, and the prevailing political climate that surrounds, the negotiation of post-separation parenting arrangements in New Zealand, in order to describe some of the pressures that *could* produce a discrepancy between a best practice approach and the approach of some family law professionals. Before we do any of this, however, in the next part of this article we provide some context for our discussion by describing why and how we interviewed the women in this study, as well as briefly describing the salient features of our participants.

Description of the Study Participants and Interview Process

We were motivated to undertake this research because of the suggestion that women's voices have become increasingly muted in the family law context in recent times; that it is fathers' experiences and claims that have been in the spotlight and influencing the politico-legal system for some time now.⁹ In

Responsibility After Parental Separation" (2006) 29 *Women's Studies International Forum* 184; Sanchez & Thomson, "Becoming Mothers and Fathers: Parenthood, Gender and the Division of Labour" (1997) 11 *Gender and Society* 747 at 763 & 766; Gjerdingen & Center, "First-Time Parents Postpartum Changes in Employment, Childcare, and Housework Responsibilities" (2005) 34 *Social Science Research* 103; Walzer, "Thinking About the Baby: Gender and Divisions of Infant Care" (1996) 43 *Social Problems* 219; Aldous, Mulligan & Bjarnason, "Fathering Over Time: What Makes the Difference?" (1998) 60 *Journal of Marriage and the Family* 809 at 818; James, "Winners and Losers: The Father Factor in Australian Child Custody Law in the 20th Century" (2006) 10 *Legal History* 207 at 228; Yeung, Sandberg, Davis-Kean & Hofferth, "Children's Time with Fathers in Intact Families" (2001) 63 *Journal of Marriage and Family* 136.

9 "Concerns have recently been expressed that ... [public] debate is now so firmly centred on fathers' relationships with their children that the voices of women are no longer being heard, and that women are losing confidence in the legal system": Perry, "Safety First? Contact and Family Violence in New Zealand: An Evaluation of the Presumption

this study we therefore sought to document the experiences of women who have encountered difficulties in negotiating care and contact arrangements within the New Zealand family law system. Although it is not possible to generalize from these accounts, they are useful in generating a fuller picture of the complex challenges that at least some mothers and their children are currently facing.

Between late 2006 and early 2008 we carried out in-depth semi-structured interviews with 21 separated mothers living in the upper North Island, New Zealand.¹⁰ The interviews invited women to narrate their experiences of post-separation parenting, particularly, although not exclusively, in relation to legal or quasi-legal processes. Most of the interviews lasted two hours, with some lasting three or more hours. All of the interviews were conducted by one of the three authors, and were recorded and transcribed in full. Subsequently, the transcriptions were read and re-read by the authors to identify the themes contained within the interviews. In this article, we explore the comments made by our participants about the pro-father contact stance taken by some family law professionals. In discussing this issue, we draw on those women's accounts that most clearly illustrate our analytical points. In order to avoid identification of the actual women concerned we have changed their names¹¹ and modified some non-essential details of their stories.

The majority of participants joined the study following the publication of a story on our project in suburban newspapers; several others were recruited through snow-balling.¹² The women ranged in ages from their late 20s to mid-50s. Two were Maori, fourteen were Pakeha and five were migrants from other western countries. Just under half of the group were either in receipt of the Domestic Purposes Benefit ("DPB") or on a low income, another seven were earning moderate incomes, while a few were in high-income employment. The women had been separated from the fathers of

Against Unsupervised Contact" (2006) 18 *Child and Family Law Quarterly* 1 at 19. See also Judge Boshier, "Media — Openness in the Family Courts", speech to Manawatu Family Court's Association, Wharerata, Massey University, Palmerston North, 8 August 2006, www.justice.govt.nz/courts/family-court/ (last accessed 10 January 2010); Davis, "Gender Bias, Fathers Rights, Domestic Violence and the Family Court" (2004) 4 *Butterworths Family Law Journal* 299 at 299 & 309; Smart, "Preface" in Collier & Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (2006) vii at vii–viii. This issue is further discussed under heading B in the final part of this article.

10 The project was granted ethics approval by the University of Auckland Human Participants Ethics Committee.

11 Please note that, in order to avoid identification of the women concerned, the names we have assigned to our interview participants may not be consistent across all of the published articles which elaborate on different aspects of this study.

12 Word of mouth from existing interviewees.

their children for one to twelve years, and their children ranged in ages from 15 months to 14 years. In seven cases there had been a history of physical violence (male on female) prior to separation, and in two additional instances there had been non-physical abuse (for example, threats of violence and destruction of property).

An interesting (and perhaps unusual) feature of our study is that 13 of the women separated when their youngest child was 12 months or less, and in three of these cases prior to giving birth. All 13 women were full-time mothers (supported by the fathers or on the DPB) during the first 12 months of their child's life, although many are now combining paid employment with childcare responsibilities or are in new partnerships where they are primary caregivers. What this means is that, for more than half of the women in our study, father contact after separation primarily involved *creating* a relationship rather than *preserving* one that already existed between the children and their father. Another six women separated when their youngest child was less than five. Of these six women, only two were in paid work at the time of the separation and both of these women were not only the "breadwinners" for their families, they were also the primary parents for their children.

Of the 21 women we interviewed, only one was a contact parent and she was having supervised contact with her children (who resided with their father). Of the 20 resident parents in our study, two had 50:50 shared care arrangements with the father of the children. Of the remaining 18 resident parents, the following divisions occurred (with the women having the majority of the parenting time in each division): 60:40 for three; 70:30 for six, 80:20 for two, and 85:15 for two. Of the remaining five mothers who were resident parents, two described their children having erratic and infrequent contact with their father (in both instances they said that this was because the father did not want regular or frequent contact due to his other commitments), one described the father having one supervised contact visit per week, and two said that the father did not have contact (in both instances because he had abandoned supervised contact arrangements).

The women had been through different combinations of family law dispute resolution processes, although the nature of being involved in legal processes as a lay person (in many instances without being able to afford adequate legal representation), and the fact that some of the disputes in question were protracted (spanning many years and involving repeated family law processes), meant that not all interviewees were always clear about the precise nature of the dispute resolution processes that they had been through. Nonetheless, 14 women said that they had taken part in Family Court-appointed counselling; 11 said that they had undertaken mediation either with a judge or, in two instances, with a lawyer in the Family Court pilot of counsel-led mediation; and 10 women claimed to have been to court

at least once with the father of their children in order to resolve issues relating to the care arrangements for their children. Three women talked about having engaged in three different types of family law dispute resolution processes (counselling, mediation, and court), nine talked about being involved in two, and nine women spoke of only one type of process — although some had multiple sessions involving that type of process.

What the Research Says About the Value of Father Contact for Children

Carol Bruch, reviewing the research in the area, concludes that sound empirical research, as opposed to that founded on political rhetoric, suggests that the two most important things for children's psychological wellbeing after divorce are, first, to maintain and strengthen their relationship with their primary caregiver and, second, to minimize their exposure to inter-parental conflict.¹³ Thus, the most significant relationship for children post-separation is the one that they have with their residential parent because that parent has the potential to shield the children from many of the negative effects of separation and/or divorce.¹⁴ In the words of Robert Emery, Randy Otto and William O'Donohue, "[i]n most studies of children from divorced families the quality of the relationship between a child and his or her primary residential parent is the strongest predictor of that child's psychological well being".¹⁵ Given the centrality of the parent with day-to-day care of the child to the child's post-separation wellbeing, it is vital that this relationship is

13 Bruch, "Sound Research or Wishful Thinking in Child Custody Cases: Lessons from Relocation Law" (2006) 40 Family Law Quarterly 281.

14 Johnston, "High Conflict Divorce" (1994) 4 Children and Divorce 165 at 174; Simons, Whitbeck, Beaman & Conger, "The Impact of Mothers' Parenting, Involvement by Nonresidential Fathers, and Parental Conflict on the Adjustment of Adolescent Children" (1994) 56 Journal of Marriage and the Family 356; Arditti & Bickley, "Fathers' Involvement and Mothers' Parenting Stress Postdivorce" (1996) 26 Journal of Divorce and Remarriage 1; Radovanovic, "Parental Conflict and Children's Coping Styles in Litigating Separated Families: Relationships with Children's Adjustment" (1993) 21 Journal of Abnormal Child Psychology 697; Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (1999) at 4.10; McIntosh & Chisholm, "Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation" (2008) 14 Journal of Family Studies 37 at 41–42; McIntosh & Long, *Children Beyond Dispute: A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution, Final Report*, Attorney-General's Department, Australia (2006) at 70.

15 Emery, Otto & O'Donohue, "A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System" (2005) 6 American Psychological Society 1 at 14.

strengthened and that the primary caregiver is well-resourced so that they can parent at their optimal capacity.¹⁶ For very young children the relationship with their residential parent is potentially even more crucial because they typically need a secure attachment with *at least* one consistent parental figure to develop emotionally.¹⁷

What is also uncontroversial in the research literature is that continued exposure to inter-parental conflict runs the risk of harming children.¹⁸ As Janet Johnson noted:¹⁹

Interparental conflict after divorce (for example, verbal and physical aggression, overt hostility, distrust) and the custodial parent's emotional distress are jointly predictive of more problematic parent-child relationships and greater child maladjustment.

Helen Radovanovic concluded that children who are exposed to inter-parental conflict are three times more likely to have problems than children who are not.²⁰ Conflict that is intense, enduring, occurs in front of children, and which

¹⁶ Bruch, above note 13 at 289.

¹⁷ Silverstein & Auerbach, "Deconstructing the Essential Father" (1999) 54 *American Psychologist* 397 at 397–398; Bruch, above note 13.

¹⁸ Bruch, above note 13 at 291; Emery, Otto & O'Donohue, above note 15 at 2 & 16; Shelton & Harold, "Marital Conflict and Children's Adjustment: The Mediating and Moderating Role of Children's Coping Strategies" (2007) 16 *Social Development* 497; Brown, "The Impact of Divorce on Families: The Australian Experience" (1994) 32 *Family and Conciliation Courts Review* 149; Buehler & Gerard, "Marital Conflict, Ineffective Parenting, and Children's and Adolescents' Maladjustment" (2002) 64 *Journal of Marriage and the Family* 78; Amato & Rejac, "Contact with Non-Resident Parents, Inter-Parental Conflict, and Children's Behaviour" (1994) 15 *Journal of Family Issues* 191; Marsiglio, Amato, Day & Lamb, "Scholarship on Fatherhood in the 1990s and Beyond" (2000) 62 *Journal of Marriage and the Family* 1173 at 1184; Amato & Gilbreth, "Non-Resident Fathers and Children's Well-being: A Meta-Analysis" (1999) 61 *Journal of Marriage and the Family* 557 at 560; Davidson, "Custody and Access — A Brief Overview of Psychological Research on Custody and Access in the Separating Family" [1984] *New Zealand Law Journal* 61; Simons, Whitbeck, Beaman & Conger, above note 14; Stewart, "Non-Resident Parenting and Adolescent Adjustment: The Quality of Non-Resident Father-Child Interaction" (2003) 24 *Journal of Family Issues* 217 at 222; Emery, "Inter-Parental Conflict and the Children of Discord and Divorce" (1982) 92 *Psychological Bulletin* 310; El-Sheikh, Buckhalt, Mize & Acebo, "Marital Conflict and Disruption of Children's Sleep" (2006) 77 *Child Development* 31; Lye, above note 14 at 4.9.

¹⁹ Johnston, above note 14 at 176.

²⁰ Radovanovic, above note 14.

actually revolves around the children may be particularly harmful.²¹ Conflict can negatively affect children both directly (because they witness it and can be involved in it)²² and indirectly (because parents' capacities to care for their children can be compromised due to the emotional strain brought about by the conflict).²³ Inter-parental conflict has been associated with an increased risk that a child will develop internalizing and externalizing problems, as well as a range of other negative outcomes such as academic underachievement, low self-esteem, social incompetence, and health problems.²⁴

In contrast to the lack of controversy about the findings discussed above, Emery, Otto and O'Donohue comment that "[t]he extent to which children's relationships with their 'other' parent predicts their psychological wellbeing, particularly when there is parental conflict, is one of the most controversial issues in custody law".²⁵ Indeed, the research has consistently failed to demonstrate that a high level of contact with the non-residential parent is necessarily in the best interests of children.²⁶

In a ... review of research regarding this issue, Amato (1993) identified 16 studies that supported the hypothesis that frequency of contact with the noncustodial father is positively related to child adjustment. However, an equal number of studies failed to support the hypothesis. Indeed seven of the studies in the latter group found frequency of visitation with the

21 Emery, above note 18; Wild & Richards, "Exploring Parent and Child Perceptions of Inter-Parental Conflict" (2003) 17 *International Journal of Law, Policy and the Family* 366; Fincham & Osborne, "Marital Conflict and Children: Retrospect and Prospect" (1993) 13 *Clinical Psychology Review* 75 at 80–82; Grych & Fincham, "Children's Appraisals of Marital Conflict: Initial Investigations of the Cognitive-Contextual Framework" (1993) 64 *Child Development* 215.

22 Emery, above note 18; Forehand, Wierson, McCombs, Brody & Fauber, "Inter-Parental Conflict and Adolescent Problem Behaviour: An Examination of Mechanisms" (1989) 27 *Behaviour Research and Therapy* 365.

23 Fauber, Forehand, Thomas & Wierson, "A Mediational Model of the Impact of Marital Conflict on Adolescent Adjustment in Intact and Divorced Families: The Role of Disrupted Parenting" (1990) 61 *Child Development* 1112; Schoppe-Sullivan, Schermerhorn & Cummings, "Marital Conflict and Children's Adjustment: Evaluation of the Parenting Process Model" (2007) 69 *Journal of Marriage and the Family* 1118.

24 Shelton & Harold, above note 18 at 487.

25 Emery, Otto & O'Donohue, above note 15 at 15.

26 Simons, Whitbeck, Beaman & Conger, above note 14 at 357. See also Marsiglio, Amato, Day & Lamb, above note 18 at 1184; Bruch, above note 13; Amato & Gilbreth, above note 18; Whiteside & Becker, "Parental Factors and the Young Child's Post-Divorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements" (2000) 14 *Journal of Family Psychology* 5; Smith & Gollop, above note 3; Lye, above note 14 at 4.14–4.16; Smyth, "A 5-Year Retrospective of Post-Separation Shared Care Research in Australia" (2009) 15 *Journal of Family Studies* 36.

noncustodial father to be negatively related to child adjustment. Thus, overall the evidence suggests that frequency of visitation by fathers is not related to child adjustment.

Other research has focused on examining “the quality, rather than simply quantity, of interaction with this parent ... [as] the key to understanding ... [the contact father’s] impact on child adjustment”.²⁷ This research suggests that the benefits of contact with fathers following separation is dependent on the style of parenting provided. For instance, some studies suggest that if fathers engage in an authoritative style of parenting²⁸ and remain in a parental rather than a companion role²⁹ then contact with fathers is likely to be good for children’s development. However, this finding is subject to the proviso that contact does not expose the child to increased inter-parental conflict³⁰ or undermine the primary parent’s relationship with the child.³¹ Amato and Gilbreth therefore agree that:³²

[T]o be competent fathers, men must have a strong commitment to the role of parent, as well as appropriate parenting skills. Non-resident fathers who are not highly motivated to enact the parental role or who lack the skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation.

Furthermore, if a parent cannot be relied upon to show up when children expect them, then a frequent visitation schedule is likely to exacerbate the child’s exposure to feelings of abandonment.³³ It follows from this that it

27 Simons, Whitbeck, Beaman & Conger, above note 14 at 357; Lamb, “Non-Custodial Fathers and their Impact on the Children of Divorce”, in Thompson & Amato (eds), *The Post-Divorce Family: Children, Parenting and Society* (1999) 105 at 105–125; Solomon & Biringen, “Another Look at the Developmental Research: Commentary on Kelly and Lamb’s ‘Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children’” (2001) 39 *Family Court Review* 355 at 360.

28 Authoritative parenting practices are defined as combining warmth, demandingness and psychological autonomy: Amato & Gilbreth, above note 18.

29 Simons, Whitbeck, Beaman & Conger, above note 14.

30 Smith & Gollop, above note 3; Amato & Rejac, above note 18; Marsiglio, Amato, Day & Lamb, above note 18 at 1184 (“Because conflict is harmful to children, conflict between parents may cancel, or even reverse, any benefits associated with frequent visitation.”); Bruch, above note 13 at 305–306; Amato & Gilbreth, above note 18 at 560; Davidson, above note 18; Simons, Whitbeck, Beaman & Conger, above note 14; Emery, Otto & O’Donohue, above note 15 at 16; Stewart, above note 18 at 222.

31 Amato & Gilbreth, above note 18 at 570.

32 Ibid at 569.

33 Bruch, above note 13.

is not the *amount* of time that contact fathers spend with their children but *how they interact* with their children that is important.³⁴ Nonetheless, some research suggests that “even nonresident fathers who engage in high quality parenting practices may not significantly improve their children’s well being”.³⁵

Interestingly, the one thing that has been shown to be incontrovertibly related to good outcomes for children is the payment by the contact parent of child support, because payment leads to an improved standard of living, educational attainments, and a general sense of wellbeing.³⁶ Of course this finding must be qualified in the New Zealand context when the parent with day-to-day care is in receipt of the Domestic Purposes Benefit. In such cases child support collected from the contact parent will, in the first instance, go to offset the Domestic Purposes Benefit payments.

Based on an extensive review of the literature, Emery, Otto and O’Donohue therefore conclude that “the most consistent predictors of children’s positive psychological adjustment following separation and divorce” were, ranked in order of importance:³⁷

- A good relationship with an authoritative residential parent;
- Minimal or controlled parental conflict that does not involve the children;
- Economic security; and
- A good relationship with an authoritative non-residential parent.

34 Ibid at 293; Emery, Otto & O’Donohue, above note 15 at 16; Marsiglio, Amato, Day & Lamb, above note 18 at 1184; Stewart, above note 18 at 218; Smith & Gollop, above note 3.

35 Stewart, above note 18 at 239 & 241.

36 Amato & Gilbreth, above note 18; Marsiglio, Amato, Day & Lamb, above note 18 at 1182; Emery, Otto & O’Donohue, above note 15 at 16; Stewart, above note 18 at 217–218 (“Studies based on large national samples consistently find that whereas fathers’ payment of child support is associated with positive child outcomes, frequency of visitation is not.”); Lye, above note 14 at 4.19.

37 Emery, Otto & Donohue, above note 15 at 18. Similarly, Bruch, above note 13 at 291 notes that Furstenberg & Cherlin have also distilled two principles to guide public policy, again ranked in order of importance:

- The more effectively the parent with day-to-day care can function, the better will be their children’s adjustment; and
- The less parental conflict children are exposed to the better will be their adjustment.

A third principle, which is not as well supported by the research, is that the more regularly children visit their contact parent the better will be their adjustment. However, the first two principles are the most important and may, according to Furstenberg & Cherlin, necessitate reducing contact with the contact parent in particular circumstances.

Clearly in the ideal situation a child will be able to maintain strong relationships with both parents, not be exposed to parental conflict, and be well supported financially. However, not all post-separation situations are ideal. For example, in a situation of high parental conflict of a nature that is harmful to children (that directly involves the children or concerns issues related to childrearing), Emery and colleagues recommended that:³⁸

frequent contact with both parents is likely to be more harmful than beneficial to children. In the face of high conflict then, children would do better living primarily in one household with an authoritative mother or father and having more limited contact with the other parent.

As noted above, research suggests that particular care is needed in preserving the relationship that very young children have with their residential parent because optimal emotional development for children under three depends upon having at least one secure attachment with a "continuous, emotionally available" caregiver.³⁹ Based on what is currently known, scholars like Judith Solomon and Zeynep Biringen caution against overnight contact visits for children under three because overnight separations run the risk of damaging the attachment a child has to their residential parent,⁴⁰ without having any positive effect on the attachment they have to their contact parent.⁴¹

38 Emery, Otto & O'Donohue, above note 15 at 18.

39 McIntosh & Chisholm, "Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research" (2007–2008) 20 *Australian Family Lawyer* 1 at 4. See also Parkinson, "Child Custody Arrangements After Family Separation" (2004) 17 *Australian Family Lawyer* 30 at 32.

40 "The data currently available suggest that repeated overnight separations present a greater challenge to the development of organised primary attachments than do daytime separations": Solomon & Biringen, above note 27 at 361. See Solomon & George, "The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables" (1999) 1 *Attachment and Human Development* 2 at 22, who studied 145 infants (aged 12 to 20 months) and found that "infants who had experienced regular overnight visiting with the father were less likely to be classified as secure and more likely to be judged disorganised or unclassifiable in attachment to mother than infants who did not have overnights or who were being raised in intact families. This effect was moderated, however, by the psychological context of overnight visitation: mothers of securely attached infants in the overnight group described themselves as active and effective in providing psychological protection to the infant in the context of visitation and reported lower conflict with the child's father."

41 Neither overnight access nor frequent transitions have yet to be proved to have a positive effect on father-infant attachment: Solomon & Biringen, above note 27 at 361. On the other hand, "mothers' reports regarding the level of communication about the child with the father were strongly and positively related to organized infant-father attachment organization in all family groups, including the maritally intact ones": Solomon &

What Mothers Say About the Stance Taken by Family Law Professionals on Father Contact

It is worth noting at the outset that most of the women we interviewed supported their children having contact with their fathers, some very strongly. Nevertheless, of the 20 women we interviewed who recorded their levels of satisfaction with their contact arrangements, only five rated themselves as satisfied with their contact arrangements (one as “very satisfied” and four as “satisfied”). Of the other 15 women, six rated themselves as “moderately dissatisfied” and nine as “very dissatisfied”. These women wanted contact to be arranged in ways that maintained stability in their children’s lives, worked for the children concerned, and addressed safety issues; and they did not feel that that had been achieved with the arrangements that they had in place. For example, some women wanted contact supervised or limited to daytime contact to accommodate their concerns about the safety and wellbeing of their children whilst in their father’s care. Others wanted the contact arrangements to reflect the different relationship that the child had with each of their parents prior to separation and thus to provide stability or continuity of care for the child. Others wanted contact to increase only as the child became increasingly independent from his or her mother, and therefore as/when contact was emotionally comfortable for the child and/or developmentally appropriate. Some were concerned about how contact changeovers took place and about the frequency of those changeovers, particularly because of the need to shield the child from witnessing conflict between his or her mother and father. Several women wanted contact arrangements to be regular and consistently exercised. And some of the women had arrived at the point where they questioned the value of father/child contact in their particular case because they had developed grave concerns about the safety and wellbeing of their children whilst in the father’s care. In fact, the only woman who was “very satisfied” with the contact arrangements that were in place had been extremely worried about her child’s safety and was relieved that the father of her child had abandoned contact years ago.

When talking about their experiences of dealing with family law professionals to negotiate father contact, the majority of mothers in our study mentioned the priority family law professionals gave to father contact,

George, above note 40 at 26. Secure father-infant attachments are also strongly associated with “the quality of time together — as influenced both by the father’s sensitivity and by the indirect effects of the interparental relationship”: Solomon & Biringen, above note 27 at 360. Contrast Kelly & Lamb, “Using Child Development Research to Make Appropriate Custody and Access Decisions” (2000) 38 *Family Court Review* 297; Pruett, Ebling & Insabella, “Critical Aspects of Parenting Plans for Young Children: Interjecting Data Into the Debate About Overnights” (2004) 42 *Family Court Review* 39.

and to the need to maximize this contact, even though the mothers believed that other issues were at least, if not more, pivotal to the wellbeing of their children. In total, seventeen interviewees described experiences of this nature and it is these women's accounts that we are drawing on in the analysis that follows. Of the women who had had problematic experiences of professionals, six had had them in respect of at least one Family Court counsellor, two of a child psychologist, nine of the lawyer for the child, seven of at least one judge or lawyer who was acting as a mediator, two of at least one judge in court proceedings and five of the family lawyer whom they had hired to represent them.⁴² Some women recounted only such negative experiences of family law professionals, whilst other women recounted also having worked with professionals whom they felt to be more balanced and child-centred in their approach. In this part of this article we will document these claims, paying particular attention to those issues highlighted in the research literature that raise questions either about the value of father contact per se, or about a drive towards maximizing father contact, when it comes to considering the wellbeing of children post-separation.⁴³

The problematic attitudes that women said they experienced on the part of some New Zealand family law professionals were sometimes overtly articulated by the professionals concerned to the interviewees. For example, although Vicki described compelling reasons for wanting to relocate to her country of origin, a Family Court psychologist told her that research showed that contact with the father was of benefit to the child "regardless of the circumstances" and the courts were taking their lead from this research. Moira — who was one of the women we interviewed who was questioning the value of *any* contact due to her concerns about the father's violence, his drug and alcohol problems, and his repeated cancellations of contact visits, often at the last moment — said that "everyone in the system and in authority", including her lawyer and the Family Court counsellor, told her that contact with the father was necessary for the sake of her child. She remarked that "it's seen that some contact with the father is better than none at all and a father no matter how useless or violent or drug addled is better than none".

In addition to the accounts of some professionals making overt comments about the categorical value of contact with fathers in circumstances where its value might be questionable or diminished, women described less obvious

42 In this article we have not organized our discussion of father contact around the different family law professions with whom women described having these experiences because the issues our participants raised were not specific to any particular professional group. In other words, they transcended differences between the different professional groups.

43 Please note that the legislation governing care and contact is outlined under heading A in the final part of this article.

ways in which the prioritization of father contact over other aspects of children's wellbeing manifested in professional practice.⁴⁴ For example, some women talked about frequent father contact being prioritized by professionals in circumstances where such contact exposed children to high levels of damaging adult conflict. Others described professionals advocating the value of their children having a considerable amount of contact with fathers even when there was no evidence that the father engaged in quality parenting, and, indeed, even when the mothers described a history of violence against themselves and/or their children. Some women pointed to the support provided by some family law professionals for father contact as simply enabling fathers to reduce their child-support payments — an outcome these mothers believed led to an erosion of the financial resources available to their children, without necessarily increasing the quality of the parenting they experienced. Finally, some women described being personally stressed or depleted by the contact arrangements put in place, and the difficulties posed for them in trying to provide their children with quality residential parenting. These women described a perception on the part of some family law professionals that the wellbeing of the residential parent was not relevant to the wellbeing of the child. We will now elaborate on these points in turn.

First, some mothers struggled to get their concerns about children being exposed to inter-parental conflict during the exercise of father contact heard by the professionals with whom they were dealing. For example, Debra was placed under pressure in a number of counselling and mediation sessions to pick up and drop off her child at the father's house, even though this involved repeated exposure to the father's verbal abuse of her in front of their child. The contact arrangements she had with the father necessitated frequent changeovers in care and, as a result of the father's behaviour, changeovers were highly distressing for her and for the child. To protect her child and herself, Debra expressed a strong preference for changeovers in care to take place at school. However, the father was not willing to drop off and collect the child from school, and her concerns about the child's wellbeing were not taken up by the counsellors or mediators she saw. Instead, she was placed under pressure to "get on" with the father for the sake of the child, as if she was somehow responsible for his vituperative tirades. The reported approach of the professionals in this case, who gave Debra the impression that what she was asking for was unreasonable, is contrary to the advice made available to separated parents on the Family Court website, which says: "Plan changeovers carefully. If they tend to create conflict, ask friends to help by doing them at their house so you can avoid seeing your ex-partner.

44 Once again it is important to reiterate that in general these women were not seeking a cessation of father contact altogether; rather they raised questions about certain forms of (sustained and frequent) contact with fathers.

Or ask the Family Court Co-ordinator about supervised contact.”⁴⁵ Debra noted that her child had also been exposed to adult conflict (and what could be regarded as a form of emotional maltreatment) by virtue of his father directly denigrating her when the child was in his care — an issue also not taken up by the professionals who had been involved in the case.

A second way in which women encountered father contact being elevated to a categorical good for children was through some family law professionals minimizing their concerns about the parenting practices of fathers.⁴⁶ Some mothers were upset to find that the father’s negligent or incompetent parenting, or history of not seeing their child at the appointed contact time, was treated as irrelevant in the family law process. Instead, mothers were expected to believe the father’s promises of change, even though he may have reneged on such promises in the past. In addition, some mothers were told that fathers would develop skills, once they were given more responsibility for the children, that until that point in time they had shown no aptitude for or inclination to acquire. The accounts of these women are corroborated by research in the United States where Katherine Bartlett and Carol Stack have remarked:⁴⁷

In making custody decisions and enforcing the rights of fathers courts have tended to be too easily impressed by the good intentions of fathers and have exaggerated the credit due to them for their new-found willingness to assume some active role in parenting.

According to our participants, many of the fathers had very little experience of assuming sole parental responsibility for the child/ren prior to separation, an observation that is in keeping with recent research on parenting practices. For example, Lyn Craig has used diary data from the most recent Australian Bureau of Statistics Time Use Survey (involving 4,000 randomly selected households) to measure the differences between mothers’ and fathers’ commitment to childcare. In Craig’s study women spent a third of their time with children alone, whereas men had sole charge of their children for only eight per cent of the time that they were with them.⁴⁸ This clearly has consequences for the quality and quantity of fathers’ contact with their

45 *Parents’ Guide to Caring for Children after Separation: Putting Your Children First*, pamphlet available at www.justice.govt.nz/courts/family-court/ (last accessed 10 January 2010) at 26.

46 See also Chesler, “Mothers on Trial: The Custodial Vulnerability of Women” (1991) 1 *Feminism & Psychology* 409 at 413 & 414.

47 Bartlett & Stack, “Joint Custody, Feminism, and the Dependency Dilemma”, in Folberg (ed), *Joint Custody and Shared Parenting* (2nd ed, 1991) 63 at 66–67.

48 Craig, above note 8.

children following divorce: "If fathers in intact families are seldom fully responsible for children, they may need to make considerable adjustments in their care patterns if children in separated families are to receive quality care from both parents."⁴⁹

Trish, for instance, described her child (who was seven at the time of interview) being seriously neglected over many years whilst in the care of the father: he failed to properly feed and clean the child (sometimes returning him without cleaning urine and faeces from his body and/or his clothes); he apparently did not interact with the child when he had him; nor did he have a proper bed or bedding for the child (and would take the child's bedding for himself in the middle of the night if it was cold, so that the child had to get up and dress himself); he had lost the child in public places on a number of occasions, and had left him locked in the car while he went shopping for extended periods of time. When the child was with his father he was repeatedly given the responsibility of looking after his half-sister (who was a toddler) without adult supervision. In addition, Trish noted that the father failed to show up for contact (missing 18 of his first 36 scheduled contact visits), showed up late, or dropped the child back early without notice or pre-arrangement. In spite of this the father was given more contact by the Family Court every time he asked for it. His failures in parenting were excused by the judge on the basis that he was inexperienced or had not had the child enough, and he was made to do two parenting courses. When the mother described the father's neglect in court the judge reportedly told her "that's a learning curve for a new parent", and "he'll soon learn what a tired, grumpy child is like and step up to the play", a comment that obscured the likelihood that it would be Trish, not the father, who would be dealing with the "tired and grumpy child".

Vicki was told by a number of professionals that she had to take the father's assurances that he would not smoke marijuana whilst he had their child at face value, even though there had been numerous times in the past when he had lied to her or not followed through on his promises. In this case the father had very little involvement with parenting their child while they were together (the mother stated that he had disappeared on drug and computer game marathons for days at a time during key moments when their child was a baby and she needed the father's support). Post-separation he was reportedly a lackadaisical parent: his house was not safety-proofed, so, for example, the two-year-old child could reach poisons, and his bed was placed against a thin-glassed window on the second storey. The father's car had no

49 Ibid at 275.

warrant, yet he would take the child in the front seat without the use of a car seat. Despite the numerous risks this father was prepared to take with their young son's safety, the mother's concerns were ignored by the Family Court counsellor and she felt pressured into agreeing to overnight contact when the child was only two.

The most extreme examples of the prioritization of father contact over other issues relevant to children's post-separation wellbeing were in those cases where the mothers reported that the fathers were abusive.⁵⁰ For example, Hine described a father who had been institutionalized several times due to severe mental health issues, had a long history of violence towards women (including herself), had shaken their child in a "frenzied attack" when he was a baby, and grabbed their baby when he was going to hurt her because, she said, he knew that he could control her in that way. The father had unsupervised contact for years in respect of his oldest child (with another mother). That child had started to act aggressively and to engage in sexualized behaviours, behaviours that the child's mother and Hine attributed to the father's care. The interesting point for our purposes is that the question, as far as Hine's case was concerned, had never been whether or not the father should be denied contact with her child. The sole issue had been the form of that contact; specifically whether contact between the father and toddler should be supervised or unsupervised. So far, Hine had refused to agree to unsupervised contact (although she had to pay for the supervision herself) because of her concerns about the safety of her still pre-verbal child. She had

50 Rhoades comments that "[t]he high priority to be accorded to the right to contact becomes peculiarly evident in cases where there are allegations that the father has abused the child or the resident parent": Rhoades, "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 *International Journal of Law, Policy and the Family* 71 at 81. See also Chesler, above note 46 at 413. An example of the Care of Children Act 2004 being used to downplay child safety in favour of the importance of father/child contact can also be found in *Flynn v Police* (HC Nelson, CRI-2007-442-24, 20 February 2008, MacKenzie J) where a father who was on bail whilst awaiting trial for five charges of assaulting his 11-year-old son and two charges of leaving him without adult supervision had imposed, as a standard condition of bail in such cases, that he not associate with or contact his son. On appeal the judge overturned this condition, citing the best interests of the child — in this case the child's interest in having contact with his father under s 5 of the Care of Children Act 2004. In other words, the court concluded that a child's interests are weighted in favour of seeing an allegedly violent and neglectful father, without regard for the child's safety, including the potentially fraught psychological impact of contact on the child. Thus the child was not entitled to the automatic protection that other victims of violence would get from their perpetrator. Indeed he, or his mother, was put under the onus of taking private proceedings under the Care of Children Act 2004 in order to get protection. See also Davis, above note 9 at 307.

been told repeatedly by her lawyer, the lawyer for the child, and the judge in judge-led mediation that it would be highly unlikely that an order would be made for permanent supervised contact. Her own lawyer said to her in mediation, "well [your child] might just have to adapt to ... [unsupervised contact] the way [the oldest child] has". The lawyer for the child allegedly told her that the father had a "right" to see his son every 72 hours and so she was "lucky" to have more limited contact than that.

Similarly, Isabelle commented that, in spite of the fact that the father was someone who had threatened to badly hurt the child and had forced the child to watch while the father physically assaulted her, no one within the family law system had ever questioned whether this was a case in which contact with the father might not be in the child's best interests. Instead, the father was initially awarded supervised contact, which rapidly progressed to unsupervised contact. She reported that the lawyer for the child had told her that supervised contact was not effective and that the court was unlikely to recommend it for long, even though this would have been her preference. She described a pattern of abuse and neglect when the pre-school child was in his father's care. This included the father hitting the child, to the point that on one occasion he came home with a bruise so black that it took 28 days to go away. She was also concerned about the small acts of abuse that the father perpetrated against the child, such as tying the child's shoe laces so tight that his toes went blue and tying his pants so tight that he had red welts on his stomach. The adequacy of the father's day-to-day care also troubled Isabelle. Sometimes he would be drunk when he arrived to pick up the child or when he dropped him off. She also cited other problematic behaviours, such as the father having the child sleep on the floor or on two chairs pushed together and, when her son was a baby, the father putting nappies for a three-month-old on him when he was one. More recently, the father had let the six-year-old child watch movies that were too mature and frightening for him. Although all of the above could reasonably be considered indicative of neglectful care, the lawyer for the child had framed them as "issues" the mother had with the father, claiming that it was her responsibility to attempt to address them through her own legal representation. As Isabelle saw it, the Family Court system appeared to be continually making excuses for the father and for forms of parenting that would not usually be tolerated. She noted that if he was not the child's father the court would not have let him "anywhere near [the child]".

According to the mothers in this study, a number of children struggled with contact visits with their father, particularly when there had been histories of abuse or neglect. For example, Isabelle said her son was a secure child until contact started with his father when the child was around two years of age, at which point "the change in him was horrific". In spite of Isabelle's best efforts to manage the child's emotional reaction to changeovers, she

described her son becoming very stressed, screaming and clutching so hard to the mother that his little fingers dug into her skin. The child had manifested distress after contact by defecating on the floor, even though he was toilet trained, and hitting children smaller than himself, even though he was not usually an aggressive child. He had also come back from contact with his father with night terrors and skin reactions that the doctor thought were stress-related, and, at some point, began wetting himself with fear when his mother gave him time out — a reaction his mother later attributed to his father's mode of discipline which involved leaving the child alone in a darkened bedroom before the father came in to hit him. The child was frequently anxious and reluctant to go to his father for contact visits, and the father threatened that if the boy did not go with his father when he was scheduled to be in his care the police would come and take his mother away. He also told him that Isabelle was a bad mother who deserved to die. Sometimes after the child had refused to go with the father and the father had walked off, the child would panic and say that he had made a mistake and should go. Isabelle described the heartbreaking image of her son sometimes running back and forwards between his parents panicking.

A number of children specifically struggled with overnight contact, according to their mothers, particularly when they were very young. For example, Gina described her child becoming exceptionally clingy and needy towards her once overnight contact with his father commenced. She remarked that she thought that overnight contact would have been appropriate once the child was around three and a half, but she was "forced" to allow it a year earlier than that.

According to some interviewees, some family law professionals considered father/child contact to be so self-evidently good for children that mothers who attempted to raise concerns about the father's parenting in counselling, mediation, the court, or with the child's lawyer found themselves being viewed as obstructive, bitter or over-anxious. Instead of having their concerns taken seriously, they were more likely to be put under pressure to increase the father's involvement against their better judgement. For example, Isabelle had concerns for her child's safety with the father because, as noted above, the father had a history of physically assaulting her and physically and psychologically hurting their child. However, the lawyer for the child became annoyed with her for insisting that it was an abusive situation and, instead, positioned her as obstructive and difficult. If she tried to relay the child's distress about having contact with the father, instead of the father's parenting being scrutinized she was accused of "pumping" the child. She remarked that she felt as if she was constantly having to counter the pejorative stereotype that every woman "interferes with" contact for no better reason than to get at their ex-husband. That stereotype put her and her son at risk because it meant that her concerns about the father's parenting were not heard and no

consideration was given to the possibility that she and her child were not totally safe.⁵¹

Thirdly, and ironically given the evidence⁵² that child support enhances children's wellbeing post-separation (except perhaps when the parent with day-to-day care is on the Domestic Purposes Benefit),⁵³ compared to the contradictory evidence on the value of father contact,⁵⁴ a significant number of the women we interviewed believed that the father's motivation in seeking to increase contact (with frequent success) in their case was to reduce his child-support obligations. Their beliefs derived from what they saw as the father's lack of interest in having responsibility for the care of the children prior to separation and/or the fact that he was asking for exactly the amount of contact that would reduce his child-support payments even though he was not exercising all of the contact to which he was entitled. When family law professionals automatically supported fathers' claims to increased contact in these circumstances they often simply supported fathers to reduce their child-support payments, without increasing the quality of the parenting experienced by the children (if the father was not as committed to parenting as he was to reducing his financial responsibilities) and without necessarily increasing the contact children had with their fathers (if the father's formal contact obligations did not match the actual contact he took). For example, Briar said that the father of her child accused her of being vindictive in applying for child support. He had originally offered to contribute financially to the care of his child at a level that amounted to a fraction of what he was formally obliged to pay. When they started mediation he "pushed" for the exact amount of contact that would have met the formal criteria for

51 This is a phenomenon on which Rhoades has commented in the Australian context where she remarks that stock stories of hostile and possessive mothers and frustrated men inform public debate about family law issues. Within these stories "The mother's resistance to contact is invariably unreasonable, a function of her contempt for the father and/or her sense of 'ownership' of the children, rather than an exercise of care": Rhoades, above note 50 at 74. See also Behrens, "Shared Parenting: Possibilities ... and Realities" (1996) 21 *Alternative Law Journal* 213 at 215. Kaspiew, "Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation" (2007) 29 *Sydney Law Review* 131 at 134 found a pro-contact culture in the Family Court in Australia, where "a history of violence became no barrier to male litigants pressing parenthood claims", and "the extent to which women could problematise paternal involvement was very limited except in cases where the evidence of severe violence was clear-cut".

52 See above at note 36.

53 As noted above, research on the benefits to children of child-support payments must be treated with caution in New Zealand in cases where the parent with day-to-day care is in receipt of the Domestic Purposes Benefit and as a result is unlikely to receive any of the child support paid by the contact parent.

54 See above at note 25.

“shared care” under the Child Support Act 1991, hence minimizing his child-support obligations to the maximum extent, even though he was failing to exercise the contact that he was entitled to have (in the eight months prior to the interview with Briar he had missed 19 nights of contact that he was scheduled to have and had not asked to make up that time). Briar agreed to relinquish over \$100 a week in child support in exchange for the father agreeing to relinquish his claim to further increase overnight contact, which she felt would have been disruptive and unsettling for the child as well as detrimental to her own ability to provide a stable, calm family life.

Finally, some women talked about the levels of stress that the contact arrangements that had been put in place had caused them to experience. On their accounts, this stress was considered by the professionals navigating their cases to be irrelevant to the wellbeing of the child even though the women concerned were the child’s residential parent. For example, Trish talked about the stress she had experienced as a consequence of the father’s ongoing personal abuse of her during changeovers, as well as her distress about having to compel a frequently reluctant child to have overnight contact with a neglectful parent who she believed was having a damaging effect on him. In spite of the fact that the third psychologist to assess the child reported that the only reason the child was coping was because of his strong relationship with his mother, the father’s behaviour towards the mother and the impact that that had on her was considered irrelevant to the child’s wellbeing. For example, at one point the parents were passing information about the child back and forth in a book that travelled with the child. The father was not having face-to-face contact with the mother but he used the book to continue his abuse of her, writing comments such as “get a life you bitch, you are mental, you need help”, and referring to her as “Trish head-case”. When the notebook was tendered in court, however, the court said that it documented “the interaction between adults. It’s nothing to do with the child.”

Petra also talked about the level of stress she experienced as a result of the father’s behaviour towards her, which included ongoing harassment and physical assaults, and resulted in her becoming physically ill. She commented that “custodial mothers’ lives are absolutely inextricable from children’s” and yet,

we’ve set up in the law this fantasy that they’re actually separable, and in consequence every decision that’s made around kids impacts hugely on mothers and vice versa. So I think that it’s a very important point to make and it’s odd that fathers can be constructed as great fathers, sort of showing up to their kids, even though they’re actually undermining the primary caregiver.

Aside from the stress involved in sending (often reluctant) children on forms of contact with their fathers that the women did not believe were in their best interests, a number of women spoke about the additional challenges these arrangements created for them as parents because their children often returned from contact visits in various kinds of distressed states. As noted above, Isabelle talked about her son coming back from contact and deliberately defecating in the middle of the lounge, as well as behaving aggressively. She said,

that affects my relationship with him because that makes it really hard. When I say it affects my relationship I mean just in how I deal with him because then I have to deal with that. I can't let all that go.

She said that she had to work "really hard to make sure that he feels secure". She also spoke of having to parent effectively in difficult circumstances in spite of being exhausted and sick, which she said resulted from the father's "insidious, invasive, pervasive, and debilitating" abuse of her, which was unrecognized as such by the mediators and lawyers that she encountered in the family law system. Isabelle talked about the difficulty involved in teaching children safety, and in particular to trust their intuition that if something "feels wrong then it is wrong and to listen to that because it's better to be wrong about that than to be wrong about the situation and get harmed". Having done that, she then had to send her child off to someone "he doesn't feel happy about". In order to try and equip herself to deal appropriately with her son, Isabelle consulted a child psychologist, a step that was also taken by Natalie, Suzie, and Debra.

Several of the women that we interviewed were from overseas and lacked any kind of family support in New Zealand. These women were particularly isolated and financially desperate in their role as single parents. None had tested the attitude of the court to relocation in their particular case, although Vicki was planning to do so. Vicki described how she has been advised by a family lawyer that judges are very reluctant to grant relocation and that she had a less than 45 per cent chance of success. She observed that although there is "a lot of stuff about culture and whanau" in the law and Family Court literature, it somehow does not get applied to her circumstances, in which she is dislocated from her cultural origins and isolated from her family, in particular from her mother, who has a serious illness and lives in her country of origin. Many other mothers, particularly those who were migrants, shared the perception that judges were reluctant to grant relocation, which left them making decisions in the shadow of this understanding. For example, Louise chose not to go to court but to privately negotiate a temporary relocation overseas for several years that would enable her husband to maintain his employment. To do so she had to accept a 50:50 shared care arrangement

for her eldest child, an arrangement that she thought was less than optimal for the child and that also undermined her capacity to parent effectively.

The perception, articulated by these women, that it is hard for residential parents, generally mothers, to persuade the court that relocation is in the child's best interests when this involves moving away from the non-residential parent, generally the father, is not without support.⁵⁵ In the New Zealand context Judge Boshier, for example, suggests that the Care of Children Act 2004 "clearly intends that having a relationship with both parents be considered as generally in the best interests of the children".⁵⁶ He therefore asserts: "In general, where both parents can provide for the welfare of the child, the Act suggests that the court should conclude that this is in the child's best interests, and therefore not allow relocation."⁵⁷ In other words, father contact might now be considered to trump all other concerns that might affect the child's wellbeing, including the financial and social support and resources available to the parent who is providing the day-to-day care for the child.

In conclusion, the interviews conducted in this study show that some women who have used New Zealand family law processes to resolve their parenting disputes do not see the family law professionals as always adopting a balanced and child-centred approach when assisting in the resolution of parenting arrangements. These women believed that some, although not all, of the family law professionals that they had dealings with prioritized father contact, and particular forms of sustained and frequent contact, over other considerations which were of equal or greater importance to the wellbeing of the children in the circumstances of the particular case.

Pressures Supporting the Prioritization of Contact Over Other Concerns That Might Impact on a Child's Welfare and Best Interests

In this section we briefly look at what it is about the current statutory and political context that might militate against an open and informed inquiry by family law professionals (lawyers, counsellors, psychologists, mediators,

55 Several commentators in different jurisdictions have remarked on this phenomenon. Parkinson, "The Realities of Relocation: Messages from Judicial Decisions" (2008) 22 *Australian Journal of Family Law* 35; Henaghan, "Relocation — Taking the Baby With the Bathwater", in New Zealand Law Society, *Raising the Standard: Family Law Conference*, October 2003 (2003) 189; Davis, above note 9 at 308.

56 Boshier, "Relocation Cases: An International View From the Bench" (2005) 5 *New Zealand Family Law Journal* 77.

57 *Ibid.*

and judges) into the post-separation parenting arrangements that best serve particular children in any given case. In other words, we mention some of the factors that might converge to create pressure in favour of an ideology of frequent and sustained father contact in the contemporary family law context.

A Legislative constraints

The Care of Children Act 2004 contains some strong impediments to limiting or managing the contact children have with one of their parents. Some of these are “structural”, in that they are inherent in the nature of the dispute resolution structure that must be followed when negotiating day-to-day care and contact. Others are more “aspirational”, in that they are set out as stated goals and aims of the family law process. In this sense the legislative framework for the resolution of family law disputes involving children could be argued to contain an implicit presumption in favour of children having contact with both of their parents after separation, which may be overridden on the facts of any particular case.

The welfare and best interests of the child are defined in s 5(a) of the Care of Children Act 2004 to include the parents being “encouraged to agree to their own arrangements for the child’s care, development and upbringing”. If either party applies for an order for day-to-day care a Family Court Judge may refer the matter to counselling under s 10(4) of the Family Proceedings Act 1980.⁵⁸ A Family Court Judge, or a party to proceedings for care or contact, is also given the power to call for a mediation conference under s 13 of the Family Proceedings Act 1980. If a party fails to attend counselling or mediation a District Court Judge can issue a summons under s 17 of the Family Proceedings Act 1980 requiring that party to attend. In practice these provisions will generally mean that counselling and mediation will be attempted before a court will determine the care arrangements for children.⁵⁹

58 After 28 days either party may request that the hearing proceed, and it will unless the court otherwise directs: s 10(5) of the Family Proceedings Act 1980.

59 See also ss 39 & 40 of the Care of Children Act 2004 which provide that a party can request counselling to resolve any disputes which arise relating to an agreement for care. Not only are the parents encouraged to come to agreement on arrangements for the child’s care, but the Act makes it clear that the child’s welfare and best interests will be facilitated by “ongoing consultation and co-operation” between their parents, guardians and others who are involved in looking after them (s 5(c)). See also s 16(5), which obliges guardians to act jointly, “in particular, by consulting wherever practicable with the aim of securing agreement”. Under s 65(2) any guardian can request counselling to resolve disputes between them. Finally, it is not just the substance of care arrangements but also their enforcement that has negotiation between the parents as its starting point.

The cooperative dispute resolution process set out in the Care of Children Act 2004 and the Family Proceedings Act 1980, in which parents are encouraged to arrive at their own agreement and required to go through counselling and mediation before they arrive in court,⁶⁰ makes it extremely difficult for one parent to limit the contact the other parent has with the child should that other parent insist on having a great deal of contact. A parent who has grave doubts about the benefit to the child of the other parent's contact with the child (either at all, or, as is more likely, in terms of the particular quantum or form of the contact) must have the emotional tenacity and financial resources to go through several negotiation processes with the other parent until he or she either secures that parent's agreement or, failing this, makes a case for limiting or managing contact in court. Women may experience particular pressure to compromise in cooperative dispute resolution processes. For one thing, they are likely to have limited financial resources relative to their ex-partners and thus to be less able to afford protracted negotiations. Moreover, they are subject to gender norms that emphasise cooperation and readily expose them to being tagged as unreasonable or obstructive should they not demonstrate a willingness to compromise or, in fact, to actually cede to the father's demands.⁶¹ Where there is a history of domestic violence, the pressure experienced to concede is usually far greater.⁶² Although there is controversy about whether counselling or mediation are appropriate in cases where there is a history of domestic violence,⁶³ all of the women we interviewed who had experienced violence

If a parenting agreement, or parenting order, is not working, then the first step, with a few exceptions, is also counselling to try and get the parents to work out the problem themselves (ss 63 & 65(1)).

60 See ss 10–17 of the Family Proceedings Act 1980.

61 From the interviews that were undertaken, the question arises whether professionals involved in the processes of dispute resolution need, and often do not have, a sophisticated understanding and/or ability to take account of how power shapes mediation in ways that favour those who are less compromising and more dominating.

62 Hester & Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996). For example, Debra, who had experienced emotional and physical abuse from the father of her child, commented on counselling and mediation in the following terms: "You're in the playground with the bully again." She described the father using tactics to destabilize her, such as ringing her before mediation and "taunting" her: "you're in trouble, you're in trouble and you've got a shit lawyer".

63 See, for example, Hooper & Busch, "Domestic Violence and Restorative Justice Initiatives: The Risks of a New Panacea" (1996) 4 *Waikato Law Review* 101; Astor, "The Weight of Silence: Talking About Violence in Family Mediation", in Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 174 at 174–175; Astor, "Swimming Against the Tide: Keeping Violent Men out of Mediation", in Stubbs (ed), *Women, Male Violence and the Law* (1994) 147; Cobb, "The Domestication of Violence in Mediation"

from the father of their children had been compelled to participate in these processes.⁶⁴

Yet the source of the pressure on the parent with day-to-day care, as many of the women we interviewed indicated, lies not only in the fact that they must go through the process of attempting to reach agreement with the contact parent, but also with the professionals *facilitating* the counselling and mediation process, who were reported to press women into contact arrangements with which they were not happy. Mediators and counsellors have the professional goal of facilitating agreement between the parties to a dispute. For example, s 12(b) of the Family Proceedings Act 1980 places an obligation on counsellors to “attempt to promote conciliation” between the parties, and under s 14(2) of the Act the objectives of a mediation conference are to identify the matters in issue between the parties and “to try and obtain agreement between the parties on the resolution of these matters”.⁶⁵ It is not clear to what extent the professional culture supporting sustained

(1997) 31 Law and Society Review 397; Sheehan & Smyth, “Spousal Violence and Post-Separation Financial Outcomes” (2000) 14 Australian Journal of Family Law 102.

64 Although a Family Court Judge can refer parties to compulsory counselling where one parent has asked for the day-to-day care of the child under ss 10 & 17 of the Family Proceedings Act 1980, under s 19A(1) of that Act a person is not required, unless he or she agrees, to attend counselling in which the other party is present, where the other party has used violence on that person or his or her child. Violence is defined broadly as having the same meaning as it does under s 3(2) of the Domestic Violence Act 1995 (which includes psychological abuse or allowing children to witness the abuse of their parent), as opposed to the narrow definition contained in s 58 of the Care of Children Act 2004 (which is confined to physical or sexual abuse). Furthermore, under s 65 of the Care of Children Act 2004, parties to a parenting order or agreement, or guardians, can request counselling in respect of disputes arising from a contravention of the order, agreement, or guardianship decisions. However, under s 67, the Family Court Registrar can decline such requests if he or she thinks a referral to counselling is unlikely to resolve the dispute. Violence from one party to the dispute against the other party, the child, or both, must be regarded in exercising this discretion. The new provisions, not yet in force, are contained in ss 46R, 46Q & 46S(1) of the Care of Children Act 2004 and operate in respect of requests for both counselling and mediation in respect of a contravention by one of the parties to a parenting order. Similar provisions do not apply to requests for counselling or mediation under s 46F in respect of disputes between guardians, under ss 46G & 46H for disputes between parties to an agreement or proposing to enter an agreement, or instances where proceedings have been commenced for a court order in respect of a guardianship dispute or parenting order and the court refers the dispute to counselling under s 46I or mediation under s 46J (although such a referral will not be made unless the Family Court Judge thinks it is “expedient”).

65 See, for example, ss 8 & 14(2)(b) of the Family Proceedings Act 1980. The new sections, not yet in force, are contained in 46D(1)(b), 46E, 46L(2)(b), 46U(1) & 46Y(1)(c) of the Care of Children Act 2004.

and frequent father contact that was described in some of the interviews was driven by this agenda.⁶⁶ What receives scant acknowledgement in the literature generated about the family law process in New Zealand is the degree to which the operational agendas of different professional groups within the system (such as counsellors and mediators) — in this case the goal of securing agreement — may actually be at odds with what is the best outcome for the children in the particular cases in question, and how that tension can be resolved.

In addition to these structural issues the Care of Children Act 2004 contains some ideological statements about the importance of the child having a relationship with both of his or her parents after separation.⁶⁷ Section 5(a), elaborating on principles relevant to the child's welfare and best interests, provides that "the child's parents and guardians should have the primary responsibility" for the child's "care, development, and upbringing". Section 5(b) provides that children should have continuity in arrangements for their 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*)" (our emphasis). The mother and father are, in most circumstances, joint guardians of the child,⁶⁸ and guardianship is defined in s 16(1) to include "contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development". In other words, guardianship, even if the responsibility for day-to-day care is vested in someone else,⁶⁹ is no longer simply confined to being involved in

66 For example, Moira described feeling as though the mediators and counsellors involved in her dispute were more interested in "ticking the boxes" and arriving at an agreement, whatever it was, so that the dispute could be kept out of court, rather than dealing with the underlying issues that were directly connected to the child's best interests.

67 Note that the New Zealand provisions do not go as far as those in Australia, where the Family Law Amendment (Shared Parental Responsibility) Act 2006 requires courts with family jurisdiction to consider making orders for the children to spend equal or substantial periods of time with each parent, where such arrangements are in the child's best interest and reasonably practicable: ss 61D & 65DAA of the Family Law Act 1975. See also s 63DA on the obligations of family "advisors". Australian law also has a "friendly parent provision" in which, all other things being equal, the court is required to consider placing the child with the parent who is most likely to encourage the child's relationship with the other parent: ss 60CC(3)(c) & 60CC(4)(b) of the Family Law Act 1975. De Simone, "The Friendly Parent Provisions in Australian Family Law: How Friendly Do You Need to Be?" (2008) 22 Australian Journal of Family Law 3.

68 Care of Children Act 2004, s 17.

69 As under the previous Guardianship Act 1968 (s 3), guardians also have the general role of providing day-to-day care for the child (s 16(1)(c) of the Care of Children Act 2004), although this will be limited, and the exclusive responsibility for the child's "day-to-day

“big picture decisions”.⁷⁰ Section 48 specifically allows for day-to-day care to be shared; however, if one parent is given the role of providing the child with day-to-day care in a court order,⁷¹ then the court is *required* under s 52 to consider “whether and how the order can and should” provide contact with the other parent.

Nonetheless, the notion that children should have an ongoing relationship with both their parents after separation is only one of a number of important considerations set out in the Act. Other principles elaborating on the child’s best interests, such as the need to ensure that “the child’s safety” is “protected”,⁷² might override this principle on any particular set of facts.⁷³ Furthermore, it is always the case that the “welfare and best interests of the child must be the first and paramount consideration” in any proceedings involving a child’s day-to-day care and contact.⁷⁴ Indeed, the first listed purpose of the Care of Children Act 2004 is to promote the child’s welfare and best interests and to facilitate their development. It is clear that the decision as to where the child’s welfare and best interests lie is an individual one unique to the particular child in his or her particular circumstances.⁷⁵

It follows that, although the legislation clearly contemplates that in many cases a child will benefit from having a relationship with both parents after separation, there is space to recognize that this may not be the case for some children. Furthermore, even if it is the case that a child will benefit from having a relationship with both parents the Act does not dictate how much contact that child should have with the contact parent or what form the contact should take. In fact, the range of communication technologies now available creates the possibility of sustaining relationships between a

living arrangements” will be vested in any person who has been specifically assigned responsibility for the child’s day-to-day care by court order (s 16(3)–(6) of the Care of Children Act 2004).

70 Section 16(1)(c) of the Care of Children Act 2004 makes it clear that guardianship includes the responsibility to determine or help the child determine “questions about important matters affecting the child”. Section 16(2) defines these matters to include the child’s name, place of residence, non-routine medical treatment, where and how the child is educated, and the child’s culture, language, and religious denomination and practice.

71 Section 4(4) of the Care of Children Act 2004, which first came into law in 1981 as s 23(1A) of the Guardianship Act 1968, makes it clear that there is no “maternal preference” in day-to-day care decisions.

72 Section 5(e) of the Care of Children Act 2004. The child requires protection from “all forms of violence” under this provision, which is likely to include psychological abuse, in addition to the physical and sexual abuse specifically referred to in ss 58–62 of the Care of Children Act 2004.

73 See s 4(5)(b) of the Care of Children Act 2004.

74 Section 4(1)(b) of the Care of Children Act 2004.

75 Sections 3(1)(a), 4(2), 4(5)(b) & 4(6) of the Care of Children Act 2004.

child and a contact parent without having to rely exclusively on face-to-face contact with that parent. The idea that regular, frequent, and long periods of face-to-face physical contact with fathers is automatically good for children is therefore not a principle that finds expression in the Care of Children Act 2004.

However, having made the point that the Care of Children Act 2004 is not prescriptive about the post-separation relationship that children have with each of their parents and that the best interests of the child on the facts are always left to determine that issue, it is fair to say that the Act does have a different "flavour" on the subject of post-separation parental involvement than was evidenced in the previous Guardianship Act 1968. The Care of Children Act 2004 introduced a number of new provisions that favour the equal involvement of both parents in a child's life, and many of these provisions were introduced at the select committee stage in response to public submissions. For example the non-prescriptive and non-exclusive principles that elaborate on a child's best interests in s 5 of the Care of Children Act 2004 do not have a counterpart in the Guardianship Act 1968, and were inserted by the Justice and Electoral Committee at the select committee stage. Three out of these six principles (s 5(a), (b), and (c)) emphasise the role of the child's parents in the post-separation care of the child. Section 49 requires a parent (or anyone else) who is applying for a parenting order to include a statement detailing whether and how the order should provide for the other parent (or any other relevant person) to have a role in providing day-to-day care for, or contact with, the child. This provision was inserted by the Justice and Electoral Committee and did not have a counterpart in the previous legislation.⁷⁶ And, as noted above, under s 52 of the Care of Children Act 2004 the Court is obliged to consider whether and how contact should be granted to a parent who is not given the day-to-day care of the child. Under the previous s 15 of the Guardianship Act 1968 the court had the power to order access if a parent did not have custody of the child but was not obliged to consider whether access should be ordered in every case in which it ordered custody, as is now the case.⁷⁷ The legislation does, therefore, evidence a greater trend towards shared parental

76 The Committee thought that if an applicant for a parenting order did not have a good reason for being unwilling to allow other relevant parties to be involved in the care of the child, this fact would be relevant to whether their application was addressing the best interests of the child (Care of Children Bill, as reported from the Justice and Electoral Committee, Commentary, at 5–6).

77 As noted above, the responsibilities of guardians are defined broadly (s 16(1) of the Care of Children Act 2004), although they were also defined broadly in s 3 of the Guardianship Act 1968. Guardians are also now specifically directed to act jointly and to consult "wherever practicable with the aim of securing agreement" (s 16(5) of the

involvement post-separation⁷⁸ and this will undoubtedly have an influence on how professionals are interpreting and applying the Act.

Interestingly, the increased emphasis on children's rights in the Care of Children Act 2004 has enabled some children to take matters into their own hands and resist father contact. In October 2007, for example, two brothers aged nine and twelve years old successfully appealed Judge Ryan's decision that it was in their interests to see their father and that any risks to them in having contact with him could be managed.⁷⁹ The Judge had come to this decision despite expert evidence that they had been psychologically damaged by previous contact with their father, and a recommendation that there be no contact. Clearly this opens up a possibility for empowered children who have reached a certain age, but it will not be universally available to all children. It is also a strategy that, in the current legal and political environment, has no guarantee of success.

B *The current political environment*

The suggestion has been made by a number of people that the current strong emphasis on sustained and frequent father contact is more about protecting the feelings or position of contact parents (often fathers) than a genuine concern about the welfare of children.⁸⁰ Elaine articulated this view in commenting that, as she saw it, the current law is not about what is best for children but all about fathers. Thus children are often made to have contact with fathers no matter how the father behaves. Trish similarly remarked that the rights of fathers seem to overshadow the interests of children in the current New Zealand family law system:

they're not interested in what it is doing to the kids, they're not interested from the mother's point of view, all they seem to be interested in is the father's rights at the moment.

Care of Children Act 2004), although this was implicitly the case under the Guardianship Act 1968 as well.

78 Although well short of the presumption of post-separation shared parenting contained in the Shared Parenting Bill put forward by ACT MP Muriel Newman and defeated at its first reading on 10 May 2000.

79 MacIntyre, "Boys Spurn Contact with Father", 21 October 2007, *Sunday Star-Times*. Children can now appeal Family Court and District Court decisions under s 143(2)–(3) of the Care of Children Act 2004. *M and D v S* [2008] NZFLR 120 discusses the issue of appeals by a child.

80 In the words of Rhoades, above note 50 at 73, the approach is a result of "anecdotes about disaffected men rather than evidence of children's welfare". See also Chesler, above note 46 at 418; Davis, above note 9.

Attitudes about the importance of regular father contact have been formed in a political context that, in recent times, includes a strong fathers' rights movement.⁸¹ The political rhetoric of this movement suggests that children need fathers because father absence is responsible for a range of social ills.⁸² In support of this claim, research demonstrating that good fathering produces benefits for children in intact families is cited, along with those studies showing that father contact is good for children post-separation (without accounting for those studies which do not produce the same findings) and literature documenting the problems arising for children from single-parent families.⁸³ We have canvassed above the research on father contact in separated families, which is clearly more directly relevant to the experiences of children of separation and divorce than the research based on fathers in intact families. As noted above, this research indicates that it is not clear that father contact per se does provide benefits to children in separated families. Just as significantly, this literature also points to the potential for sustained and frequent father contact to have a negative impact on other important dimensions of children's lives (for example, in respect of very young children, by weakening their attachment bonds to their primary caregivers without necessarily strengthening other attachment bonds, or by exposing children to high levels of inter-parental conflict). We also note that the literature suggesting that the single-parent family form is not beneficial to children is controversial. There are studies suggesting that if factors such as poverty are controlled for, then single-parent family structures are as beneficial for children as other family structures.⁸⁴ Furthermore, even if

81 Perry, above note 9; Davis, above note 9 at 308; Flood, "Separated Fathers and the 'Fathers Rights' Movement", paper given at the *Feminism, Law and the Family Workshop*, Law School, University of Melbourne, 24 February 2006; Rosen, Dragiewicz & Gibbs, "Fathers' Rights Groups: Demographic Correlates and Impact on Custody Policy" (2009) 15 *Violence Against Women* 513.

82 See, for example, Baskerville, "Is There Really a Fatherhood Crisis?" (2004) VIII *The Independent Review* 485; Edleson & Williams, "Introduction: Involving Men Who Batter in Their Children's Lives", in Edleson & Williams (eds), *Parenting by Men Who Batter: New Directions for Assessment and Intervention* (2007) 3 at 6–11; Marsiglio, Amato, Day & Lamb, above note 18 at 1174; Families Apart Require Equality (FARE), quoted in Kim, "Fighting a Custodial Sentence", 5 March 2000, *Sunday Star-Times*, Edition A, 2; Newman, "Time to Move Family Law Forward", speech, ACT New Zealand, 22 November 2000; Newman, "Family Law Exacerbates Fatherlessness", press release, ACT New Zealand, 1 June 2001.

83 See Newman, "Family Law Exacerbates Fatherlessness", press release, ACT New Zealand, 1 June 2001.

84 Lang & Zagorsky, "Does Growing up with a Parent Absent Really Hurt?" (2001) 36 *The Journal of Human Resources* 253; Kleist, "Single-Parent Families: A Difference that Makes a Difference?" (1999) 7 *The Family Journal: Counselling and Therapy for*

it were to be the case that single-parent family structures are not ideal for children, it does not follow that increased father contact will automatically avoid the problems associated with such family forms. Finally, it is not clear whether it is "fathering" as a gendered practice, as opposed to having a number of parents to draw upon, who are also able to provide support for each other, that produces benefits for children in intact families. Louise Silverstein and Carl Auerbach argue that "neither the sex of the adult or their biological relationship with the child has emerged as a significant variable in predicting positive development".⁸⁵

Of course the ideological importance of father contact in the current family law context is the result of the complex interaction between a range of factors, in addition to the political efforts of fathers' rights groups.⁸⁶ Other influential factors include therapeutic discourses on family relationships that promulgate a vision of the two-parent family even when parents live apart,⁸⁷ the agendas of some neo-conservative and neo-liberal politicians who want to limit claims on state finances for the costs associated with child-rearing, and the subjectivities of individual family law professionals who may identify personally with some of the fathers with whom they are dealing.

Couples and Families 373; Silverstein & Auerbach, above note 17; Emery, Otto & O'Donohue, above note 15 at 18.

85 Silverstein & Auerbach, above note 17 at 404. Of course, the suggestion that children need fathers is made by fathers' rights advocates as though the only father figures in children's lives are their biological fathers, and yet it is not at all clear that other men cannot, and do not in fact, perform a nurturing role in children's lives when their biological parents have separated. Amato & Rivera, "Paternal Involvement and Children's Behaviour Problems" (1999) 61 *Journal of Marriage and the Family* 375; Coley, "Children's Socialisation Experiences and Functioning in Single-Mother Households: The Importance of Fathers and Other Men" (1998) 69 *Child Development* 219; Haney & March, "Married Fathers and Caring Daddies: Welfare Reform and the Discursive Politics of Paternity" 50 *Social Problems* 461.

86 Fineman, "Dominant Discourse, Professional Language and Legal Change In Child Custody Decision Making" (1988) 101 *Harvard Law Review* 727.

87 The debate surrounding the Care of Children Act 2004 as it progressed through Parliament was characterized by a number of politicians presenting a biologically determined and idealistic vision of the parent/child relationship and of the nuclear family as paramount to a child's wellbeing even post-separation, although many of these politicians were not speaking out in support of the Care of Children Act 2004. For the full debates, see Hansard: first reading (24 June 2003) 609 NZPD 6539; second reading (21 October 2004) 621 NZPD 16415; Committee of the Whole House (4 November 2004) 621 NZPD 16627 & (4 November 2004) 621 NZPD 16675; third reading (9 November 2004) 621 NZPD 16715.

Conclusion

In this article we have compared the practices that mothers interviewed in our study have said they have encountered from some New Zealand family law professionals towards the importance of father contact, with what the research literature says about the parenting arrangements that best serve children post-separation. We have noted a discrepancy between those two positions, with women in our study perceiving that there are professionals who prioritize certain forms of sustained and frequent father contact over other competing considerations that may be of more importance to the wellbeing of children. Those professionals appear to proceed on the assumption, not supported by the research literature, that contact, and a substantial amount of it, is always good for children no matter what the circumstances. On the accounts of women we interviewed some professionals are therefore maximizing father contact even when it exposes children to adult conflict or undermines the parent providing day-to-day care, and without any consideration of whether the particular father reliably cares for the children during agreed periods of contact — including whether he actually shows up and whether or not his attention to the children's safety and wellbeing is assured. Such attitudes on the part of family law professionals were reported to be commonplace, although not universal. Thus, whilst women in our study described experiences of professionals who appear to have a simplistic or incomplete understanding of the research literature, other New Zealand family law professionals that they had contact with demonstrated, on their accounts, a more sophisticated grasp of this material.⁸⁸ A larger-scale study would be useful in ascertaining how widespread the experiences and perceptions of the women that we have documented in this article are amongst separated women who have used the New Zealand family law system to resolve disputes about parenting arrangements.

Although the perspectives of a small number of mothers do not prove that the attitudes and values described herein are widespread amongst family law professionals operating in New Zealand, it is worth noting that the “pro-father contact ideology” adhered to by some professionals, as it was described by some of the interviewees in this study, has been observed in professional practice in other jurisdictions. Bruch, for example, argues that United States family law professionals are running on misinformation at present — what she describes as “profitable, but disingenuous, advocacy that endangers many children”.⁸⁹ Similar observations have been made in the United Kingdom where Kaganas and Piper suggest that judges, solicitors, mediators, and

88 This is borne out in the reported cases. See, for example, *ACCS v AVMB [Parenting Orders]* [2006] NZFLR 986.

89 Bruch, above note 13 at 285.

court welfare officers operate professionally on the assumption that father contact is required. Nevertheless they noted some contradictions behind the implementation of such recommendations:⁹⁰

The court welfare officers ... [were] 'committed to the value of children having contact with both parents but believed that other factors could outweigh that presumption'. However, their reservations did not, it seems, affect their practices; even in cases where they thought contact inappropriate, they recommended it. They did so because they perceived a strong expectation of contact at all costs on the part of the courts. Interviewees thought that the courts put undue emphasis on the advantages of contact and ignored its possible detrimental aspects. But they did not question the appropriateness of operating a general presumption in favour of contact. Where this faith in the advisability of contact in the general run of cases stems from is obscure.

In Australia Kaspiew has suggested that there is "little scope in Family Court proceedings for a substantial inquiry into the question of whether ongoing contact would 'advance and promote the welfare of the child'".⁹¹ In the Australian Family Court cases that she has analysed she says that:⁹²

Attention was focused on preserving the father-child connection, but the possibility that this may have threatened the healthy development of the child or children received little consideration. This trend was concerning given the growing body of research showing that exposure to violence, conflict and poor parenting is detrimental to children.

We have also described in this article some of the pressures on family law professionals in the current New Zealand context to emphasise the benefit of father contact over other concerns that might affect children's post-separation wellbeing. Such pressures can be found in the general thrust of the Care of Children Act 2004 which favours ongoing post-separation parental involvement by both parents, as well as the professional agendas of some groups of family law professionals and the political environment in which debates and understandings about family law currently take place.

These factors, combined with the accounts of the women in this study, do raise the worrying possibility that some well-meaning family law professionals *might* be operating according to assumptions and values that

90 Kaganas & Piper, "Shared Parenting — a 70% Solution?" (2002) 14 *Child and Family Quarterly* 365 at 371.

91 Kaspiew, above note 51 at 149.

92 *Ibid* at 150.

may not always reflect the best interests of the children in the particular cases with which they are dealing. This suggests the need for further research. In particular, research that explores the assumptions, views, and practices of individual family law professionals is obviously vital if we are to gain greater insight into the operation of the family law system in New Zealand.

Finally, it is worth noting that the views expressed by the mothers interviewed in this study challenge the commonly articulated view that the family law system is biased against men.⁹³ As noted in this article, from the point of view of a number of the women we interviewed some family law professionals bend over backwards to accommodate fathers, even at the expense of what is good for the children. Whether or not this perspective is “correct” in any particular case, it does suggest a more complex reality than that which is contained in the accounts by “fathers’ rights” proponents.⁹⁴

93 Judge Boshier, above note 9.

94 Ibid. Powell, “The Men’s Movement”, Monday, 12 May 2008, Salient (www.salient.org.nz; last accessed 10 January 2010); Quaintance, “Court of Injustice”, June 2001, *North & South*; Birks, “Letters to the editor” <http://www.massey.ac.nz/~kbirks/gender/letters1.htm> (last accessed 22 October 2009).