

JUDGEMENTS AS SOCIAL NARRATIVE:
AN EMPIRICAL INVESTIGATION OF APPEAL JUDGEMENTS IN
CLOSELY CONTESTED PARENTING DISPUTES
IN THE FAMILY COURT OF AUSTRALIA 1988 – 1999

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A Thesis submitted in total fulfilment
of the requirements for the
Degree of Doctor of Philosophy

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February, 2002

For Jack & Kath

CONTENTS

SUMMARY	x
STATEMENT OF AUTHORSHIP	xi
ACKNOWLEDGEMENTS	xii
SECTION 1: SHIFTING VISIONS OF CHILDREN AND FAMILY	1
CHAPTER 1	1
Post-separation parenting decisions in Australia:	
Issues of Process and Outcome	1
Decisions about children in family law: setting the scene for the research	1
Presumptive decision-making: an overview	4
Non-presumptive principles	6
Studies of non-presumptive judicial process in parenting cases	10
<i>Family law texts</i>	10
<i>Formal qualitative inquiries</i>	13
<i>Quantitative studies</i>	18
Current knowledge of processes and outcomes	22
Formal rationale for the current research	24
Conducting the empirical research	26
CHAPTER 2	28
Responding to the social stigma of divorce:	
Presumptive decision-making principles of patriarchy, motherhood & blame	28
Background	28
The patriarchal solution	29
Motherhood and the emergence of domesticity	34
Reward and blame	44
Thematic summary	47
The Unclear Ingredients of the Maternal Revolution	49
CHAPTER 3	55
Divorce and the “Silent” Revolution”	55
The Formal Abandoning of Presumptive Principles	55
The legacy of fault and what to do about children	59
“Abandoning” maternal preference	65
Thematic summary	75
CHAPTER 4	77
Multiple Narratives of Children and Families	77
Children as individuals. The Challenge of the Single Instance	77
Deconstructing the Nuclear Family	82
Continuing Modernist and Postmodernist Tensions in Family Law	87
Continuing socio-legal narratives “in the best interests of the child”	96

SECTION 2: ANALYSING CLOSELY-CONTESTED CASES

CHAPTER 5

Methodology	108
Introduction	108
Sampling	109
Methodological strengths and limitations	120

CHAPTER 6

Results: First-level analysis	126
Content analysis of appeal judgements: the cases	128
Case 01: <i>A & J</i>	128
Type of case	128
Legal details and outcomes	128
Selection criteria	129
Core socio-legal issues supporting the judgement	130
The judgement as narrative	131
Initial hypotheses	134
Case 02: Christianos	135
Type of case	135
Legal details and outcomes	135
Summary	135
Selection criteria	136
Core socio-legal issues supporting the judgement	136
The judgement as narrative	137
Initial hypotheses	139
Case 03: Doyle	139
Type of case	139
Legal details and outcomes	139
Summary	140
Selection criteria	140
Core socio-legal issues supporting the judgement	141
The judgement as narrative	141
Initial hypotheses	143
Case 04: Drenovac	143
Type of case	143
Legal details and outcomes	143
Summary	143
Selection criteria	144
Core socio-legal issues supporting the judgement	144
The judgement as narrative	146
Initial hypotheses	148
Case 05: Duck	148
Type of case	148

Legal details and outcomes	148
Summary	149
Selection criteria	149
Core socio-legal issues supporting the judgement	149
The judgement as narrative	150
Initial hypotheses	151
Case 06: Firth	152
Type of case	152
Legal details and outcomes	152
Summary	153
Selection criteria	153
Core socio-legal issues supporting the judgement	154
The judgement as narrative	154
Initial hypotheses	156
Case 07: Fisk	156
Type of case	156
Legal details and outcomes	157
Summary	157
Selection criteria	157
Core socio-legal issues supporting the judgement	158
The judgement as narrative	158
Initial hypotheses	160
Case 08: Hong	160
Type of case	160
Legal details and outcomes	160
Summary	161
Selection criteria	162
Core socio-legal issues supporting the judgement	162
The judgement as narrative	163
Initial hypotheses	165
Case 09: <i>K & Z</i>	165
Type of case	165
Legal details and outcomes	165
Summary	165
Selection criteria	166
Core socio-legal issues supporting the judgement	167
The judgement as narrative	167
Initial hypotheses	169
Case 10: Kneller	169
Type of case	169
Legal details and outcomes	169
Summary	170
Selection criteria	170
Core socio-legal issues supporting the judgement	171
The judgement as narrative	171
Initial hypotheses	173
Case 11: Lalor	173

Type of case	173
Legal details and outcomes	173
Summary	174
Selection criteria	174
Core socio-legal issues supporting the judgement	175
The judgement as narrative	175
Initial hypotheses	176
Case 12: Lavette	176
Type of case	176
Legal details and outcomes	176
Summary	177
Selection criteria	178
Core socio-legal issues supporting the judgement	178
The judgement as narrative	179
Initial hypotheses	181
Case 13: Lavrut	181
Type of case	181
Legal details and outcomes	181
Summary	182
Selection criteria	183
Core socio-legal issues supporting the judgement	183
The judgement as narrative	183
Initial hypotheses	184
Case 14: McCall	185
Type of case	185
Legal details and outcomes	185
Summary	185
Selection criteria	186
Core socio-legal issues supporting the judgement	186
The judgement as narrative	187
Initial hypotheses	189
Case 15: McMillan	190
Type of case	190
Legal details and outcomes	190
Summary	190
Selection criteria	191
Core socio-legal issues supporting the judgement	191
The judgement as narrative	192
Initial hypotheses	193
Case 16: Moddel	193
Type of case	193
Legal details and outcomes	194
Summary	194
Selection criteria	194
Core socio-legal issues supporting the judgement	195
The judgement as narrative	195
Initial hypotheses	197

Case 14: Peterson	197
Type of case	197
Legal details and outcomes	197
Summary	197
Selection criteria	198
Core socio-legal issues supporting the judgement	199
The judgement as narrative	199
Initial hypotheses	201
Case 18: Ploetz	201
Type of case	201
Legal details and outcomes	201
Summary	202
Selection criteria	202
Core socio-legal issues supporting the judgement	202
The judgement as narrative	203
Initial hypotheses	204
Case 19: Re Evelyn	204
Type of case	204
Legal details and outcomes	204
Summary	204
Selection criteria	206
Core socio-legal issues supporting the judgement	206
The judgement as narrative	208
Initial hypotheses	210
Case 20: Robbins	210
Type of case	210
Legal details and outcomes	210
Summary	211
Selection criteria	212
Core socio-legal issues supporting the judgement	212
The judgement as narrative	212
Initial hypotheses	215
Case 21: Ross Doyle	215
Type of case	215
Legal details and outcomes	215
Summary	215
Selection criteria	216
Core socio-legal issues supporting the judgement	216
The judgement as narrative	217
Initial hypotheses	218
Case 22: Sheradin	218
Type of case	218
Legal details and outcomes	219
Summary	219
Selection criteria	219
Core socio-legal issues supporting the judgement	220
The judgement as narrative	221

Initial hypotheses	222
Case 23: Smith	222
Type of case	222
Legal details and outcomes	223
Summary	223
Selection criteria	224
Core socio-legal issues supporting the judgement	224
The judgement as narrative	225
Initial hypotheses	227
Case 24: Toon	227
Type of case	227
Legal details and outcomes	228
Summary	228
Selection criteria	229
Core socio-legal issues supporting the judgement	229
The judgement as narrative	229
Initial hypotheses	231
Case 25: Ward	232
Type of case	232
Legal details and outcomes	232
Summary	232
Selection criteria	233
Core socio-legal issues supporting the judgement	233
The judgement as narrative	233
Initial hypotheses	235
Patterns within the judgments	235
 CHAPTER 7	 238
Second level analysis: Do fathers “win” or do mothers “lose”?	238
“Successful fathers” judgements	241
Summary of “successful fathers” cases	255
“Successful mothers” judgements	257
The case of “Re Evelyn”: A surrogacy dispute	265
Summary of “successful mothers” cases	268
 CHAPTER 8	
The persistence of the nurturing/bread-winning dichotomy: contextualising the findings	272
Introduction	272
The legacy of gender-neutral parenting legislation and its “adultist” origins	278
Gender and current Australian family values	282
What do we know now about gender, parenting and child development that we did not know in 1976?	284
Making sense of our current knowledge-base	288
The future of externally-imposed post-separation parenting decisions	291

References	297
Cases Cited	309
Notes	310

Figure

1. Outline of purposeful sampling: Screening criteria of AustLII cases	110
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Tables

1. Cases by Name, Type, Feature and Judge at First Instance	116
2. Residence Order and Year of Judgement	118
3. Gender and Status of Applicant and Appellant	119
4. Descriptions of mothers and fathers in “successful fathers” and “successful mothers” cases	240

SUMMARY

The thesis is divided into two sections. Section 1 explores the psycho-social and legal constructions of family, parenting and children that have influenced judicial decision-making in parenting disputes following separation and divorce. Particular attention is paid, first, to the circumstances surrounding the shift from paternal to maternally-based presumptions about the parenting of children; and second, to the more recent and somewhat puzzling shift to a presumption of gender neutrality. The extent to which fault has continued as a less overt decision-making criterion is also considered.

In Section 2, judgements in recent closely contested parenting cases in the Family Court of Australia are analysed as contemporary socio-legal narratives. A systematic, in-depth examination of a heterogeneous sample of publicly accessible cases revealed that gender-based assumptions continue to dominate judicial thinking about parenting and family structure. In particular, it was found that outcomes that favoured mothers correlated with perceived evidence of conformity to a maternal stereotype of self-sacrifice on behalf of the child(ren). Outcomes favouring fathers usually resulted from situations in which mothers were judged to fall short of these stereotyped expectations. Fathers' roles, even in cases in which their applications were successful, generally continued to be equated with breadwinning and support. Their capacities as nurturers to their children were either not mentioned or treated with scepticism.

In the light of the findings, tensions between continuing gender-based roles in families, public attitudes to parenting and preferred family structure, and recent changes in our scientific knowledge base regarding gender and parenting are reviewed. Implications of the persistence of the breadwinning/nurturing dichotomy both within the Australian culture and family court judgements are discussed. Particular attention is drawn to the impact of the confused circumstances in which gender-neutral parenting principles came about in the 1970s.

STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma.

No other person's work has been used without due acknowledgement in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Lawrie Moloney
February 18, 2002

ACKNOWLEDGEMENTS

Thanks to those many friends, colleagues, supervisees and students, too numerous to mention, who have shared with me a passionate interest in finding better ways to assist adults and children in the difficult processes associated with family separation and re-formation. Thanks to those who understand that, though not glamorous and not for the feint-hearted, the work has “character building” qualities, interspersed with moments of great reward. Rewards come from the clients themselves, especially the children and from opportunities to work across professional boundaries.

The legal and non-legal professionals who work effectively in what is known as family law are very special people. Perhaps appropriately, their success is rarely recognised or appreciated outside of the families they assist and outside small clusters of other colleagues. Nonetheless, their thoughts and struggles to understand better the complexities of their trade have inspired me to write on child and family issues in the past and to undertake and complete the present project.

Due to a number of contingencies, especially the unfortunate financial cuts to universities in recent times, the present project experienced several false starts. In retrospect, the rather lengthy gestation period was probably no bad thing. Thus with the support of my university’s outside studies program and the opportunity to spend that time at the Australian Institute of Family Studies (AIFS), I found I was able to complete the bulk of the writing in a relatively short space of time.

For this support I am grateful to La Trobe University and to my colleagues in the Counselling and Psychotherapy Unit within the School of Public Health. I am especially thankful to Dr George Wills and Dr Helen Gardner, who told me at the time of my sabbatical leave to go away and not come back until I had finished. At the same time, I am aware that no matter how well one endeavours to plan these things, one’s fellow academics always find themselves shouldering extra responsibilities at such times. I

sincerely thank those who did this on my behalf and I hope to return the favour.

I am most grateful to Elisabeth Zinschitz, who provided a willing and patient ear, usually at the end of long-distance telephone calls, whilst much of the writing took place. I am also extremely grateful to the staff at AIFS. The Director, David Stanton, and the then Deputy Director, Dr Peter Saunders, made me very welcome. I was given an office and complete access to the Institute's wonderful library. I felt like a child in a sweet shop. I was left alone when I needed to read and write – but was always offered assistance when I needed it, whether in the form of help with computers, tracing difficult to find material, or simply a chance to bounce ideas around.

Two members of the AIFS family law team deserve special mention. Dr Belinda Fehlberg freely shared with me her extensive knowledge of family law and pointed me in the direction of a suitable data base. Bruce Smyth assisted me in ways that are simply too numerous to recount. He encouraged, criticised, brought cups of tea, advised on formatting, read drafts and put in some late nights with me towards the end. His belief in the project was unshakeable and I cannot thank him enough.

Dr Raymon Lewis was my supervisor. Raymon is the sort of supervisor that all adult students deserve. He is encouraging and enthusiastic yet retains a critical eye. There were several points at which I now recognise I may have lost my way without him. Family law is ultimately about everything. Without Raymon the thesis would have been considerably longer without being any better. Though it is ultimately for others to judge, my hope is that with Raymon's assistance, the thesis has finished up as readable, whilst making a contribution to the field *and* staying within the word limits.

Finally, a more personal acknowledgement: whilst conducting this research, my relationship with my partner, Banu, was unfortunately ending. Much that is in this thesis speaks to matters that we discussed together over many years. During our time together, as during our time apart, we have also jointly shared the parenting of our two beautiful children, Jonathon and Jeremy. We brought and bring to our parenting quite different styles and attributes. But never has it occurred to us, I believe, that

our differing contributions were not of equal value. Perhaps that is the source of my passion for the child-related aspects of family law.

SECTION 1: SHIFTING VISIONS OF CHILDREN AND FAMILY

CHAPTER 1

Post-separation parenting decisions in Australia:

Issues of Process and Outcome

When one examines individual incidents of decision-making [about children] and attempts to unravel the factors responsible for the course of action adopted, it soon becomes evident that we are confronted with a highly complex, frequently obscure and far from rational process. (Schaffer 1998: 2)

Decisions about children in family law: setting the scene for the research

From biblical times, the capacity to resolve difficult disputes over the parenting of children has been associated with the possession of wisdom. Perhaps not surprisingly, Schaffer (1998) observes that many of the most difficult and contentious child-related issues that require examination and adjudication arise at times of separation and divorce. Consistent with this, as Star (1996) has noted, parenting judgements made by the Family Court of Australia (hereafter “Family Court”) continue to attract spirited, sometimes poorly informed, frequently polarised and even violent criticism.

Yet for all of the passion that these cases arouse, few well-constructed empirical studies of the *processes* by which judges make decisions in post-separation parenting disputes, have been published. Two Australian qualitative studies, cited below, refer to cases heard in the first half of the life of the Family Court. These studies pointed at the time to the continuing importance of gender as a factor in judicial considerations. But the extent to which they were drawn from a representative sample of cases is unclear.

The present thesis expands our knowledge of judicial processes in parenting cases by systematically analysing a sample of judgements that is both contemporary and representative. The importance of expanding our knowledge extends beyond the fact that Family Court parenting judgements continue to attract criticism. Child-related cases present special legal problems that are fundamentally systemic.

As we shall see, in deciding parenting disputes, contemporary Family Court judges in Australia are not permitted to rely formally on particular characteristics of claimants (such as gender) or on past precedents. The welfare or “best interests of the child” criterion¹ upon which all decisions must be based, attempts to recognise the individuality of each child and the unique cluster of needs that are appropriate to each child within a particular separating family. As Finlay, Bailey-Harris and Otlowski (1997: 388) put it:

While the paramountcy principle appears deceptively simple, the great difficulty often is to find the formula that best fits with the principle. Thus for the most part, it is possible to do little more than find case examples by way of illustration.

Lawyers are trained to scan the texts and case commentaries for evidence of patterns of thinking that might predict the outcome of a future case or provide weight to arguments in a future litigated hearing. Though litigants expect such knowledge of their legal representatives, lawyers cannot be confident that what found favour in one case will be carried over into the case with which they are dealing.

Historically, the rules governing formal decision-making in litigated parenting disputes have fallen into two categories. Where the rules are *presumptive*, the task of the decision-maker is to determine which of the claimants meets certain pre-determined conditions. Where, as in the Family

Court, there are no overt presumptive principles, the decision-maker exercises very broad discretion in the weighing up of multiple factors as they apply to a particular case.

The empirical part of this thesis explores the highly discretionary decision-making processes of judges of the Family Court, whose sole decision-making principle is the best interests of the child. However the judgements are examined not so much as legal documents, but as narratives that inevitably reveal something of the Family Court's interpretive slant on ways that families should be structured and ways that children should be raised. Explored in the final chapter, is the extent to which this slant reflects or differs from the aspirations, attitudes and reality of Australian family life.

A further concern of the thesis is how judges resolve the tension between the traditional legal need for predictability, and the requirement to uniquely determine each child's best interests. To what extent do judges find themselves inside an unstructured "wilderness of the single instance"?² To what extent do they fall back, perhaps via a process of what Herring (1999: 99) has called "strained reasoning", upon more covertly constructed tenets and assumptions?

In conducting the empirical part of the thesis, a more specific question is the extent to which any patterns of judicial thinking that might emerge, would coalesce around questions of gender. Debates on the unfairness of Family Court parenting cases to mothers and to fathers are seemingly endless (see, for example, Smart 1995; Kaye & Tolmie 1998). Amongst other things, therefore, I wanted to explore the question of whether or not there was evidence of a general structural attitude to gender and parenting in a representative sample of judgements.

Because family law is not static, an empirical analysis is best located in the context of earlier socio-legal attitudes and struggles. For this reason, the thesis is presented in two sections. Section 1 addresses the legal and socio-historical context for the study by exploring constructions of family, parenting and children that have influenced judicial decision-making in parenting disputes following separation and divorce. Section 2 sets out the methodology and results of the study into decision-making processes in closely contested cases. It then links these results to a number of key issues raised in Section 1.

Presumptive decision-making: an overview

At different times and in differing circumstances, divorce and family law judgements regarding the disposition of children have drawn upon dominant narratives associated with morality, biology, particular social factors or reward for prior services rendered.

Morality-based principles have tended to begin with a presumption that children should not be given over to the care of a parent whose immoral actions are deemed to have unilaterally ended the marriage. Such principles dovetail neatly into fault-based legislative frameworks. Thus, under morality-driven rules, a disqualification to care for children was frequently linked to evidence put to a judge concerning marital misdemeanours. When a sufficiently important disqualifying factor was found, the other claimant tended to be successful by default. Matters of sexual infidelity have been particularly significant disqualifiers, especially when the unfaithful partner was the mother (Nygh 1985).

Morality-based considerations were not infrequently in tension with biologically informed ideas (informed historically by attitudes to gender) either that children should be under the care of their fathers or, as it was later thought, cared for by their mothers.³ In their most stark forms, biological presumptions direct the decision-making process to confine itself to determining who the “real parent” might be.⁴ More commonly, a biological mother or a biological father (depending on which gender was privileged at the time) would be largely if not solely successful on the grounds of having a paternal or maternal relationship with the child.

Probably the clearest example of a presumptive privileging of *social* factors can be found within the primary caretaker standard, which aims to increase decision-making consistency by outlining operationally definable criteria that point to which parent has done most of the caring prior to the dispute. The primary caretaker standard contains many of the presumptions inherent in the concept of psychological parenting strongly promoted by Goldstein, Freud and Solint (1973, 1979).⁵ The underlying presumption of these authors, based on a mix of attachment theory and psychoanalytical theories of child development, was that children, especially young children, need the love and unconditional support of a single caregiver. Within this framework, the task of a court was to determine, as quickly as possible, who that caregiver was and award residence or custody to that person.

The primary caretaker standard has been promoted from time to time in Australia (e.g., Hasche 1989) as the most satisfactory of the decision-making principles. It has also been strongly championed by non-Australian researchers and commentators, perhaps the most vigorous in her support being Fineman (1988). Like some other supporters of the standard, Fineman

sees it not simply in terms of what is best for the child, but also as a reward for services already rendered.

The primary caretaker standard been adopted in certain States of the United States – most notably, perhaps, in West Virginia following Neely’s judgement in *Garska v McCoy*. The complex manner in which the standard is operating in that State has been investigated by Mercer (1998), whose work is further cited in Chapter 4. Recently, the primary caretaker standard was again carefully considered, though on balance rejected, by feminist scholars in Australia (Boyd, Rhoades & Burns 1999).⁶

Some writers have argued for a less immediately presumptive form of the primary caretaker standard. Sandberg (1989), for example, sees the possibility of the approach being employed only if more discretionary or non-presumptive processes fail to lead to a clear result. Sandberg’s approach has prima facie appeal. But in the light of Mercer’s findings, which demonstrate the continuing employment of high levels of judicial discretion even when the primary caretaker standard is applied, it seems unlikely that the approach would take us further.

I turn now to the question of non-presumptive principles and the issues they raise for a court such as the Family Court of Australia.

Non-presumptive principles

Non-presumptive decision-making processes in family law have brought about a new set of dilemmas for courts and judges. These processes are linked to, though not caused by, the introduction of so called “no fault” legislation. Such legislation, in turn, reflects a response to changing

perceptions away from marriage as an institution of social control (and frequently of inheritance), towards a means of developing and nurturing close personal relationships (Edgar 1997; Beck 2000). From this perspective, contemporary marriage breakdown is more generally understood in systemic terms.

A systemic perspective assumes that in normal circumstances - that is, circumstances that do not include criminal behaviours - attempting to pinpoint the initial or major cause of a relationship breakdown is of little or no value. A systemic viewpoint is generally antithetical to unencumbered notions of blame (Furlong and Young 1996)⁷ and informed the simplified procedures for establishing grounds for divorce that were introduced in most western democracies in the 1960s and 1970s. In Australia, the only grounds for divorce became the irretrievable breakdown of the marriage, decided, not necessarily by mutual consent, by the establishment of a period of at least twelve months apart. As Edgar (1995) notes, this was a more radical reform than that which occurred at the time in countries like Britain, France and Canada. But notwithstanding differences in detail, it is clear that by the late 1960s or early 1970s, the “no fault” die had been inexorably cast for all but a few western democracies.⁸

A significant and probably not fully anticipated consequence of this shift, was the fact that removal of fault from considerations related to the granting of a dissolution of marriage, also removed a potential decision-making plank for judges wrestling with questions of what should happen to the children.⁹ Whether overtly or covertly, a judge presiding over a fault-oriented system had a greater opportunity to find a way to ensure that the

children remained with the more deserving parent, however the term “deserving” was defined.

An increasing emphasis on minority rights, which has coincidentally accompanied the removal of fault as grounds for divorce in most jurisdictions, has also made it increasingly unacceptable for judges to link decisions about children to recognisable categories of individuals or to individual beliefs or behaviours. Thus Dickey (1997: 388-391) has summarised the demise of reliance on presumptive principles in parenting cases in an Australian context as follows:

- Determination of the best interests or welfare of the child now depends on the particular facts and circumstances of each case;
- Consequently, no result in a particular case can act as a precedent for another case;
- No commonly recognised factors (such as status quo) can be elevated to a principle;
- No commonly recognised factors such as unusual religious beliefs can lead to a prima facie presumption of parental unfitness.

Under s 68F of the *Family Law Act 1975* (Cth) (hereafter “Family Law Act” or simply “The Act”) the welfare (later to become the best interests) of the child became and remains the sole criterion to be used in determining who will take on the major care of the child(ren) after separation, who will have contact (known in other jurisdictions as access or visitation) and how these two modes of parenting will interact with each other.¹⁰

Section 68F contains, in no specified order of preference, the following broad range of matters which the judge is required to consider in determining what is in the child’s best interests.

- “weighted” wishes;
- nature of relationships with child and prospective carers;
- likely effect of changes brought about by orders;
- practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact on a regular basis;
- capacity of prospective carers to provide for needs, including emotional and intellectual needs;
- child’s maturity sex and background (special reference to Aboriginal and Torres Strait Island children);
- need to protect children from physical or psychological harm (includes harm directed at child and harm directed at others in relationship to the child);
- attitude to child and responsibilities of parenthood demonstrated “by each of the child’s parents”;
- any family violence order applying to the child or a member of the child’s family;
- consider which orders would lessen chance of further child-related legal proceedings;
- any other factors the court thinks relevant.

How s 68F is enacted in practice has become the object of much commentary and debate, which has clear parallels in jurisdictions beyond Australia (see, for example, Kelly 1997). The main issue is an ongoing tension in the execution of this section of the legislation between the extremely wide discretionary powers it affords a judge under a formally

stated non-presumptive legislative framework and the frequently perceived need, reiterated by the High Court of Australia (see endnote 1), for courts to project an image of stability and predictability.

Because a contested parenting dispute is likely to result in “success” either to the mother or the father, it is understandable that by far the most pervasive commentary regarding process and outcome issues in the Family Court relates to explorations of, and perceptions concerning, judicial attitudes to gender. Recent gender-related commentaries on parenting disputes include research-based analyses of the *Family Law Reform Act* 1995 (Cth) (Rhoades, Graycar & Harrison 2000;¹¹ Rhodes 2000), single case commentaries (Kaspiew 1998; Stuhmcke 1998) and a review of “fathers’ rights” groups (Kaye & Tolmie 1998). It will be seen that gender also features strongly in the major studies of judicial processes within the Family Court of Australia summarised in the next section.

Studies of non-presumptive judicial process in parenting cases¹²

Family law texts

The two major current texts on family law in Australia are those of Dickey (1997) and Finlay et al. (1997).¹³ The aim of both texts could be summed up by a statement made by the authors of the second in their Preface (p ix). It is,

... to strike a proper balance between theory and practice and place the explanation of family law rules in an historical and social context, and to stimulate discussion on future directions of reform

Though these authors are clearly writing within a genre that is recognised and highly valued by the legal profession, from the point of view of social science research methodology (and perhaps from within the limitations of my own non-legal training) it is difficult to classify such work. The texts have a different feel to texts on areas such as developmental psychology, which would rely mainly on the results of experimental research. They are closer in some respects to texts on a discipline such as family sociology.

Generally, an important part of the logic of legal texts is that the cases cited act as markers for key ideas and possible precedents for future cases. As noted, however, Finlay and his colleagues suggest (p 388) that the cases in the category of parenting judgements are presented and discussed in the book more “by way of illustration”.

The texts set out to cover the field of relevant judicial statements and in so doing, construct a series of narratives with respect to matters such as property distribution, family life, parenting responsibilities and children’s needs. Methodologically, I would argue that via the case citations – contemporary, historical and cross-referenced – they can be categorised as a form of systematic qualitative research.

Thus notwithstanding a non-presumptive stance reiterated in parenting cases by the High Court¹⁴ and by judges of the Family Court of Australia on many occasions,¹⁵ Dickey (1997: 391-405) identifies six considerations, demonstrated by the citing of relevant judgements, which seem to habitually influence proceedings and outcomes. Finlay et al. (1997: 394-425) also cite the following identical list:

- A preference for maintaining the status quo;
- A propensity to not separate siblings;
- A privileging of the mother-child relationship;
- A privileging of natural parent relationships;
- The wishes of the child;
- Parental conduct.

Statistically speaking, the number of patterns of judicial thought which might justify a decision in a contested parenting hearing under s 68F, could be said to approach infinity. In practice, however, the short list noted above suggests a possibility that the criteria and their multiple permutation possibilities, may well reduce themselves to a considerably more limited number of issues.

Dickey (1997) and Finlay et al. (1997) find evidence for their list of decision-making criteria by citing cases that privilege one or more of the principles noted. In qualitative research terms, these authors and similar commentators might be seen to make use of a form of purposeful intensity-based sampling (Patton, 1990: 182). Another way of conceptualising what is happening in these texts is to think of the process as a form of grounded theory (Glasser & Strauss 1967). A grounded theory approach allows the theory to develop from the data collected (instead of hypothesising in advance what that theory should or might be – more formally termed, the hypothetico-deductive technique).

Grounded theory must be more than mere description. It must have explanatory power (Strauss & Corbin 1990). The family law texts take important steps in the direction of offering explanatory schemas, though it is probably fair to say that they do not aim to take this process to what Rubin

and Rubin (1995) would call a point of saturation. In other words, they describe, summarise and *begin* the process of interpretive analysis.

Formal qualitative inquiries

A related method of research into judicial thinking is to conduct a qualitative inquiry using selected cases to illustrate the existence of a more narrowly focused theme. Hasche (1989) conducted such an inquiry, though it is not clear from what sample she drew her sub-sample of eight cases.¹⁶

In analysing the eight cases, Hasche adopted “the concepts of the anti-discrimination legislation as evaluative standards in my case analysis” (Hasche 1989: 220). She concluded that her intensive study of the cases confirmed the findings of Polikoff (1983a, 1983b) in the United States, and Boyd (1987) in Canada:

...that judges penalise mothers who are in paid employment for not spending sufficient time with their children and that judges attach significance to a father’s remarriage in terms of the availability of substitute female care.

Berns (1991: 233) also conducted such an inquiry into 19 cases, “in which custody or access was at issue and in which the position was not further complicated by factors such as allegations of sexual abuse of kidnapping”. Of the 19 cases, eight involved violence and 11 did not.¹⁷ Though also not specific about her source of data, Berns (1991: 234) implies that she has examined “Custodial practice ... spanning the years 1976–1990”.¹⁸ At the same time, all but one of the cases cited and commented upon by Berns had been decided in the first five years of the existence of the Family Court.

Berns (1991: 234) notes that her work:

... does not constitute a sustained criticism of the actual decisions reached by the court in the custody and access cases examined.

The author adds that:

My concern is not with the outcomes but with the modes of discourse and reasoning and the ways in which those discourses reconstruct and legitimate conceptions of masculinity and femininity which bear a striking resemblance to those which dominate the philosophy of Rousseau.

Berns is especially interested in the tension between Rousseau's egalitarian ideals and his simultaneously idealised and highly gendered solution to child rearing and family functioning. She cites the following passage as evidence:

The obedience and loyalty she (the wife/mother) owes her husband and the tender care she owes her children are such obvious and natural consequences of her position that she cannot without bad faith refuse to listen to the inner sentiment which is her guide, nor fail to recognise her duty in her natural inclination. (Rousseau – translation by Foxley 1911: 149)

On the data presented – keeping in mind that they represent early judgements of the Family Court – Berns mounts a convincing case that at some fundamental level, the Court adheres to a “Cultural Script for Mothering” (Willard 1988) in which a “good mother” should demonstrate no needs or interests that might conflict with complete devotion to her children. Two contrasting judgements in Berns' sample add stark support to her hypothesis. In *Ryan and Ryan*, in which a mother was granted custody conditional upon her continued residence in the same country town (which she found “profoundly distressful”) the judge noted that he:

...formed the opinion of Mrs Ryan that she is big enough and strong enough and has such love for the children that she will regard the necessity for remaining in Mildura (a relatively isolated town in north-

western Victoria) as just one more sacrifice she must make for the children's sake. (Berns 1991: 242)

A year later, the judge hearing the case of *Issom and Issom* observed that:

... whilst Major Issom is presently devoting the whole of his free time to looking after the children and has the clearest intention of continuing to do so, the realities of life cannot be ignored and he may find such selfless actions by him increasingly irksome and difficult to maintain. (Berns 1991: 243)

Berns (1991: 243) finds in this judgement, evidence of judicial discourse whereby:

...mothers are (by nature or compulsion) strong and loving and willing to sacrifice their own freedom and interests to the needs of their children.... [On the other hand, fathers] must ultimately find any interference with their freedom and autonomy irksome and difficult to maintain.

Earlier, Hasche (1989: 229) had noted that:

...admittedly, reported decisions do not have any statistical significance in terms of the probability of mothers or fathers receiving custody. They can, however, provide some information on whether judges rely on *discriminatory* criteria (my italics).

Berns, too, emphasised that her own research

... did not purport to be a definitive analysis of the jurisprudence of the Family Court [but] represents an attempt to explore and to deconstruct the judicial rhetoric which has been developed to give concrete content to the phrase, 'the best interests of the child'... (Berns 1991: 233)

Berns' concern was with "the published judgements as texts rather than for their precedential value" (Berns 1991: 233). Her method involved "an interpretive reading of the judgements as texts [which] provide a written

record of judicial discourse concerning masculinity and femininity and, perhaps more significantly, the needs of children”.

The persuasiveness of both these studies lies in the fact that they can convince the reader of the existence (or at least of the possibility or likelihood) of a pattern of judicial thinking by noting similar themes across a reasonable number of cases. The studies could possibly be regarded as examples of what Patton (1990: 183) would call critical case sampling. Patton suggests that the reasoning behind such sampling is that it permits logical generalisation and maximum application of information to other cases because “if it is true of this case, it is likely to be true of all other cases”.

Exactly *how* the cases discussed in the studies by Hasche (1989) and Berns (1991) were selected, however, remains unclear. Though there is no evidence that it was their intention to do so, the researchers could inadvertently create the false impression that they drew from (in statistical terms) a *population* of published judgements over a set period of time. Clearly, however, not all relevant judgements published during this period are included in the discussions, leaving unresolved questions relating to sampling procedures and negative case analysis. Thus we are unable to discern from these studies:

- how many (if any) judgements which contained no “cultural scripts for mothering” were sampled;
- how many (if any) judgements overtly rejected presumptions regarding gendered views of parenting but were not analysed;¹⁹
- how many statements in the judgements that *were* analysed, put forward a countervailing view.²⁰

I return to questions of methodology in small-scale qualitative samples in Chapter 5. For the moment, it is probably enough to accept the commonsense proposition that, if an appreciable number of judgements can be shown (as is undoubtedly the case in these studies) to suggest the possibility that differing standards apply to mothers and fathers, then this is of sufficient interest to warrant further investigation.

Before moving to an analysis of Australian-based quantitative studies, it should be noted that a further method that increases our understanding of judicial reasoning in parenting disputes is, of course, to ask judges directly what informs their deliberations. I am not aware of any significant study along such lines in Australia and it is not my intention to provide a comprehensive overview of overseas literature. However, I note one study undertaken in the United States, which I have selected for its recency and for the fact that it sampled an appreciable number of judges.

Stamps, Kunen and Rock-Faucheaux (1997) set out to assess judges' beliefs about custody decisions. They sampled 59 Louisiana District Court and Family Court judges, asking them to respond to a questionnaire that covered six custody issues. The results included the finding that the judges preferred mother's care over father's care and indicated that judges largely hold the common perception that a child would experience greater nurturing and care when in their mother's, rather than their father's custody. Just under one third of the judges believed that non-working mothers provided a better home than working mothers, and many judges struggled with the issue of the appropriateness of day care.

Quantitative studies

Horwill and Bordow (1983) and Bordow (1994) conducted empirically-based studies of the outcome of defended parenting cases in the Family Court of Australia some 12 years apart.²¹ The first study drew on 100 consecutive defended cases from the Sydney and Melbourne Registries of the Court. The second reported on the results of 294 defended cases gathered from judges throughout Australia with the full support of the then Chief Judge. The raw results have been variously reported, but possibly the clearest summary of the results of both studies can be found in the pie charts constructed by Bordow (1994: 255).

These charts indicate that in both studies, men were successful in contested applications for custody (as it was then called) in 31% of the cases. Bordow also cites two similar studies of defended hearings in Britain and three in the United States, which found that the percentage of fathers awarded custody varied from 26% to a high of 35%.²² It is worth noting here that the consistency of this range of outcomes is further reinforced by the results of more recent quantitatively-based research overseas. A study reported by Mason and Quirk (1997) examined the results of litigation over children in four distinctive periods: 1920, 1960, 1990 and 1995. In that study, the authors concluded that, despite differing decision-making principles applying at these different times, there was no significant difference in outcome as measured by the percentage of mothers and fathers granted custody of their children.

Of the 262 cases in Bordow's study in which the pre-trial situation was known, the status quo was maintained in 75% of the cases. However, this was skewed according to gender. It was found that 86% of children

living with their mothers at the time of the hearing ended up in their custody. The equivalent figure for fathers was 64%.

The charts show that in the Horwill and Bordow study, which also examined orders by consent, fathers were granted custody by consent in 18% of the applications. In the British and United States studies cited by Bordow, custody orders by consent to fathers were a little more variable, ranging from 6% to 17%.²³

The Horwill and Bordow study, and the Bordow study that followed it, were both largely quantitative in their approach. Though neither provided a rigorous or systematic qualitative analysis, Bordow was able to report in tentative terms, the existence of a number of recurring themes contained in the judgements. These were:

- a maternal preference presumption;
- a “tender years” presumption – that is, small children are presumed to be better off with their mothers;
- a preference for maintaining the status quo, tempered by the fact that, children in the major care of their mothers at an interim stage were, statistically speaking, more likely to remain in that situation than were children in the major care of their fathers.

Bordow’s (1992: 261) summary of the qualitative aspects of her research is as follows:

The outcome of judicial decisions in contested cases, when taken on their face value, suggests that a maternal preference presumption continues to this day although a number of standards and truisms behind it are being reinterpreted and replaced. Although the mother is no longer perceived as the predominantly preferred custodian or as the de-facto psychological parent, the new rules continue to value and reward the concept of nurturing, care-taking and the quality of the parent-child relationships. All these concepts have a common denominator in the form of the traditional division of sex roles in our

society which by default results in a custody award to the primary caretaker. Furthermore, as the primary caretaker function is still in most families carried out by the mother, the custody argument is easily construed to be a gender argument.

An empirically-based study of the outcomes of disputed parenting cases conducted by the Australian Institute of Family Studies and reported upon by Harrison and Tucker (1986: 268) came to similar conclusions:

... despite the increasing emphasis in research and media reports on the growing participation of fathers in the parenting process, it is still unusual for fathers to have custody of their children. *It appears that society at large still sees the nurturing of children as being the primary responsibility of women* (my italics).

The qualitatively-based observations of Bordow add weight to those of Hersch and Berns and run in the same direction as the more speculative conclusions drawn by the Australian Institute of Family Studies. The sampling procedures in these larger studies is such that the quantitative results can be relied upon to provide a fair indication of the extent to which the Court “favours” mothers and fathers. At the same time, the methodology surrounding the qualitative aspects of the analyses is unclear. These studies *may* have identified a fundamental set of underpinning assumptions that inform Family Court judgements. Alternatively, the authors may have begun with a belief about what is going on and selectively attended to the data to find examples of these occurrences.

Interestingly, a recent study of both outcomes *and* judicial reasoning in relocation cases in two areas of Australia (Easteal, Behrens & Young 2000) could find no clear pattern of judicial thinking. Adopting an overtly feminist perspective, the researchers prefaced the reporting of their study with the observation that relocation cases impact more on women because women are more likely to have the major care of the children. They noted

that under international human rights legislation, restrictions on freedom of movement are serious, and that “contact” parents (mainly men) are not subject to the same possible restrictions.

Easteal et al., (2000) found that in two-thirds of all the cases, relocation was permitted. They also found a difference between the two registries studied, the relocation “success” rate in Canberra being only 50% and that in Western Australia being proportionally higher.

The study had the advantage of sampling *all* relocation cases in the two registries over an 18-month period. At the same time, the relatively small numbers (46, of which eight were resolved by consent) made it difficult to draw inferences from the multiple cross-tabulations that were performed.

From a more qualitative perspective, Easteal et al., were able to detect little in the way of recognisable patterns in the judgements themselves. Commenting on this, the authors (Easteal et al., 2000: 254) make but do not expand upon the following observation:

No single factor, then, is determinative of a judge’s view of children’s best interests. The fact that some variables do not play a more distinct role is disturbing to us and confirms our concerns about the position of women in family law.

What specific concerns Easteal and her colleagues have about the position of women in family law is not clear. There does, however, seem to be an implication that in their maternal roles, women *ought* to be the recipients of special consideration.

Tentatively, the authors do suggest that judges might be attracted in their considerations to the notion of “happy families”. By this they mean that that arguments pointing to the unhappiness of a major carer and the

consequent negative impact on the children can be persuasive.²⁴ They note that if this is combined with the prospect of re-partnering and with significant economic advantage, the argument is likely to be more persuasive still.

Current knowledge of processes and outcomes

Taken together, the studies by Horwill and Bordow (1983) and Bordow (1992) would suggest that in contested cases “possession” is not nine-tenths of the law. It appears, however, to be about three-quarters of the law. At the same time, “possession” by a mother is considerably more likely to result in an affirmation of the status quo than “possession” by a father.

These two quantitative studies, especially when considered against the results from Britain and the United States, would also suggest a reasonably stable situation with respect to the “success rate” of men and women who choose to contest custody. The stability might, in turn, suggest a hypothesis of little change in judicial attitudes regarding men and women as parents over time. An alternative hypothesis, however, might be that changes have occurred but in directions that have counter-balanced themselves.

The quantitative studies also indicate that when men choose, for whatever reason, to contest custody/residency in Australia, they are twice as likely to be successful as when they seek orders by consent. When, during a comparative period, they chose to contest custody in Britain and the United States, they are *at least* twice as likely to be successful as when they seek orders by consent.

As noted earlier, the studies of Hasche (1989) and Berns (1991) point strongly in the direction of a very traditional judicial view of women as mothers who are expected to be self-sacrificing for the sake of their children. As noted also, Dickey (1997) and Finlay et al. (1997) suggest six factors that seem to predict outcome, only one of which relates *directly* to a traditional notion of motherhood. An important question, which cannot be answered with certainty on the evidence of these studies, is how much of the variance does the traditional motherhood factor explain?

We have seen that “status quo” is skewed in the direction of mothers – and the more so because more children are in the interim care of their mothers than their fathers at the time of the hearing. A “propensity not to separate siblings” is also likely to be skewed in the same direction for similar reasons. Privileging of the “natural parent child relationship” is also more likely to be an issue when that relationship is between a child and a mother.²⁵

In summary, the studies and texts reviewed in this chapter leave unanswered the following questions with regard to outcome and the reasons for those outcomes.

- whether, as Dickey (1997) and Finlay et al. (1997) suggest, a relatively small number of decision-making criteria do indeed explain most outcomes:
- Whether, as Hasche (1989) and Berns (1991) imply, there might be a more restricted and even more fundamental set of assumptions which transcend these relatively few criteria;²⁶

- whether, on the other hand, it can be shown that there is a recognisable but larger set of independent decision-making criteria employed by judges
- whether, notwithstanding the criteria identified by researchers and commentators to date, the real effect of s 68F, as Eastal et al. (2000) imply, is that the process is essentially an unpredictable one, leading us back towards the “wilderness of the single instance”.

Formal rationale for the current research

Most of the data supporting the formal studies reported upon above is at least ten years old. Some of it is considerably older. For that reason alone, a further study is warranted. There are, however, more compelling reasons for further research into this highly contentious and difficult area of decision-making.

First, we know that across three countries – Australia, the United Kingdom and the United States – across a significant period of time, outcomes with respect to the proportion of fathers and mothers being granted custody or residence in defended hearings have not significantly altered. Whilst clearly informative and methodologically sound, the Australian quantitative research remains limited, as does quantitative research in other countries, in what it says about the “why” of these consistent findings. The Australian quantitative research contains speculative comments about the meaning of the percentages, but no *systematic* analysis of the qualitative aspects of the data.

Qualitative research in Australia has been interesting, even provocative, with respect to its findings. At the same time, it has suffered from significant methodological limitations. It is acknowledged that truly random sampling is difficult to achieve in qualitative research (Le Compte & Preissle 1993). Nonetheless, if one's aim is to have confidence in the applicability of findings beyond the particular judgements analysed, such studies will be enhanced to the extent that they strive from the outset to investigate a data set that is as broadly based and as heterogeneous as possible. They should also be as transparent as possible with respect to the *manner* in which the data are analysed.

Notwithstanding the sampling and methodological limitations of the studies to date, they do point to the possibility that one or more gender-related explanations surrounding traditional notions of motherhood may be at the core of the thinking behind many Family Court parenting judgements. If it is the case that notions of motherhood are privileged by Family Court judges, then what can we learn from those cases in which fathers are successful? Do successful father cases challenge assumptions about the possible privileging of motherhood? Or do they in some way reinforce a dominant view of how mothers should behave and what motherhood should represent? It has been argued (Larrabee 1993) that to move to an ethic of care, we need to move beyond stereotypical notions of gender. But to do this, we must better understand the extent and the manner in which gender features in our contemporary approaches to parenting disputes.

In pursuit of an understanding of contemporary issues, my purpose in the remainder of Section 1 is to explore the tensions and apparently inconsistent assumptions about children and families that existed throughout

earlier periods. I am interested also in nature of the *discontinuous* changes that occurred with respect to a shift from patriarchal principles to a maternal preference, and later from assumptions about the centrality of motherhood to principles of gender neutrality. In addition, throughout the period examined, I note that the question of what to do about perceived fault is never far from the surface. What legacies may fault and blame have left us?

The more contemporary “best interests of the child” narrative is also considered in Section 1. To what extent is it grounded in a solid knowledge of children’s needs? Is there evidence that the law takes children more seriously than before? Or, in masking support for adult needs and/or social stability, is there evidence that children’s best interests are constructed in such a way that “any dream will do”?²⁷

Conducting the empirical research

Having reviewed the historical issues and tensions, the results of which are contained in Chapters 2, 3 & 4, I analysed the judicial discourses found in the texts of a heterogeneous sample of Family Court parenting judgements at first instance. Like Berns, I decided that judicial presumptions and embedded beliefs were best detected in closely contested cases.²⁸ The sampling procedure, methodology, validity and reliability checks are described in detail in Chapter 5. The essential elements of the study are as follows.

I searched an electronic data-base of judgements published between 1988 and May 2000. I initially included all judgements in which appeals²⁹ had been lodged and which contained the terms: custody, access, residence

(the post 1995 equivalent of custody) and contact (the post-1995 equivalent of access). I then excluded all judgements that contained the words: property, abuse, violence and abduction. From the sample thus generated, I read all the judgements to ascertain those that were deemed by the Family Court to be closely contested. These judgements became my final sample.

Before proceeding further, I checked on the extent to which the sample was a heterogeneous one. Specifically, I determined that

- individual judges were not over-represented;
- the gender of applicants and respondents was evenly distributed
- outcomes were roughly similar to those noted in the quantitative studies
- a broad range of issues was reflected in the case material.

Having satisfied myself regarding sampling procedures, I conducted a two-stage content analysis (Chapters 6 and 7) of *all* first-instance judicial statements cited by the appeal court judges. In the final chapter, Chapter 8, I considered the results of this analysis in the context of contemporary legal and social dilemmas.

CHAPTER 2

Divorce as social stigma.

The presumptive decision-making principles
of patriarchy, motherhood and “reward versus blame”

Background

I argue in the previous chapter that a comprehensive understanding of the issues and dilemmas facing contemporary family law judges requires an appreciation of past approaches to post-separation parenting decisions and the legacies left by the shifts from one decision-making principle to the other. To this end, therefore, the chapter offers a critical overview of the three major rule-based principles which featured in family law judgements from the late-eighteenth century until well into the second half of the twentieth century. For the purpose of identification, I have labelled these principles as “patriarchy”, “motherhood” and “reward versus blame”.

In broad terms, the shift from the principle of patriarchy or paternal rights to maternal preference represents a shift from the sort of externalised view of a parent as educator, provider and protector described below by Blackstone (1765/1900), to an internalised, more psychologically oriented (but frequently also idealised) view of a parent as nurturer and overseer of moral and emotional development. The third principle, reward of the “innocent” parent and punishment of the “guilty” parent could be seen to have the dual advantage of evidencing concern for the child’s development whilst upholding the continuing importance of marriage. All three

principles, however, could be said to have operated against a backdrop of concern for larger questions of social cohesion and the control of sexuality.

In the following three sections, the major decision-making principles of patriarchy/paternal rights, maternal preference and reward or punishment for acceptable or non-acceptable behaviour are addressed as discreet categories for the sake of convenience. As the discussion in the latter part of the chapter indicates, the issue is more complex than this somewhat neat division might suggest. Indeed, despite the strength of the presumptive principles, there is ample evidence to suggest that, historically, the challenges faced by judges charged with applying these rules were frequently perceived in ways not dissimilar to the challenges faced by judges in Australia and similar jurisdictions today. Although discretionary powers were more limited in earlier times, there is evidence (cited below) of judges choosing to bypass presumptive laws in order to do what, in their view, needed to be done.

The patriarchal solution

Fraser (1976) notes that the first record of children being seen as the possessions of their fathers can be found in the Code of Hammurabi, written in 2150 BC. According to Radin (1927), the central ideas within this code passed into Roman law whereby the concept of *paterfamilias* allowed the father to enjoy absolute power over his family.

The task of theorising patriarchy is too complex and multi-faceted to attempt in this context. But a common theme in much feminist writing on the subject (e.g., Walby 1992) is that the origins of patriarchy lie in early

opportunities that presented themselves to men to expand their material spheres.³⁰ Its maintenance is seen as essentially envy driven. Relevant to questions of family law is the suggestion that a core issue for men is the envy which comes from a simultaneous recognition and denial of their minor place in the reproductive cycle. Kraemer (1991: 9), a family therapist, puts it somewhat colourfully as follows.

Men as fathers are handicapped as long as they remain in thrall to the inflated god-king, who inspires in the ordinary mortal a hollow performance of parenthood, stripped of its maternal qualities. Whether disguised as idealization or revealed as contempt, fear and envy of women continue to be the prevailing forces.

Edgar (1997) ends his work on Australian men with similar references to the concealed envy of men as a continuing problematic dynamic between men and women. Kraemer and Edgar are amongst those who suggest that men (and women) have much to gain from a male reclaiming of qualities more frequently associated with the feminine. Kraemer, in particular, appears to be inviting men to reclaim those aspects of their parenting roles that have traditionally been assigned to mothers.

In much contemporary literature, but especially feminist-inspired writing, the word “patriarchy” almost invariably has negative connotations. Usually, it is associated with conscious or unconscious attempts by men to maintain positions and structures of power and ownership. Knibiehler (1995) suggests that until well into the nineteenth century, many cultures continued to support a longstanding set of assumptions that children were chattels - almost always the chattels of their fathers. Grossberg (1985) and Derdeyn (1976) make similar claims with respect to the situation in the United States. In Australia, the Family Law Council (1992) suggested that

the terms, custody and access, then in use within the legislation, represented remnants of a proprietorial set of attitudes towards children and recommended, with eventual success, that they be changed.

Mason (1994: 7) cites a Massachusetts Bay Colony statute (Laws and Ordinances of New England) as evidence that the notion of *possession* of children was somewhat more qualified in law as early as the seventeenth century. She suggests that such a statute indicates that in some places at least, “[w]hile fathers had almost absolute control over their children, fathers also had considerable responsibilities, both to their own children and to children legally bound to them as apprentices”.

Mason (1994: 7) describes the legal relationship between father and child as more that of master-servant than chattel, a relationship which

... required that master give something to servant in exchange for the servant’s labour. In addition, a master could not injure his servant, while an owner might theoretically dispose of his chattel in any manner, including extermination.

As in England, children in the United States were valuable as a source of labour throughout much of the nineteenth century. Kett (1977) notes that during the infancy of the United States, children were generally “farmed out” between the ages of seven and 14 after which they became apprentices. According to Kett, fathers had almost unlimited authority over these children, enshrined, as it was in England, in common law.

Commenting on Kett’s (1977) analysis, Mason (1994) again cites evidence of the expectation of legal obligations that sat beside paternal authority. She points to the difference between this and the authority afforded a father in earlier Roman law. In the early Roman republic, paternal authority indeed appeared to be unlimited, a father having “the

atrocious power of putting his children to death and of selling them three times in the open market” (Dionysius cited in Forsyth 1850: 8).

Like Mason, Friedman (1995) emphasises, but with even stronger conviction, that in English law, paternal authority was tied to paternal obligations of maintenance, protection and education. These three obligations were defined by Blackstone (1765) as the cornerstones of the parent-child relation. According to Blackstone (1765: 440):

The *power* (emphasis added) of parents over their children is derived from ... their duty; this authority being given them, partly to enable the father more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.

Thus, in Friedman’s view (1995: 26-27) the power of fathers:

... was purposeful, not a right deriving from natural domination. ... Power is neither absolute nor unconstrained; it rests upon obligation. Where the obligation ceases, so does the power.

This position is consistent with Mason’s suggestion that compared with the absolute power that applied in the Roman republic, fathers’ rights over children in England and America were somewhat softened by their obligations to those children. At the same time, Mason claims (1994: 6) that such softening continued to leave “no room for maternal authority at least during the father’s lifetime”.

Friedman (1995: 26) would agree but also makes the point that Blackstone’s (1765: 441) frequently cited phrase, “a mother as such, is entitled to no power, but only to reverence and respect”, has been too often “irresponsibly severed from its context.” The context is that the phrase is embedded in a section discussing the father’s responsibility to protect his children from early and precipitate marriage. In this passage, Blackstone

also makes it clear that the father is the trustee or guardian of his children and that he must account for that trusteeship when the children come of age. The mother has no such legal obligations and, as Friedman notes (1995: 27), “for those with no obligations – mothers – there is no power”.

An early-nineteenth century case frequently cited by scholars (de Mause 1975; Friedman 1995; Mason 1994; Sayre 1942; Stiles 1984) asserting the rights of the father as paramount except in the most extreme circumstances is that of *Rex v DeManneville*. In that case, Lord Ellenborough of the King’s Bench ruled in 1804 on the right of the father to retain custody of his infant daughter, despite the fact that the mother was breast feeding and that he had forcibly removed the child from her.

The judge noted the limited discretionary powers available to him under the legislation but refused to make use of them on the grounds that the issue did not involve the physical protection of the child. The judge’s decision was upheld during a subsequent petition the same year (*De Manneville v De Manneville*). Stiles (1984: 7) also cites the American case of *Ex Parte Skinner* as a similar case in which the Court of Common Pleas in 1824 refused to interfere with the paternal possession of a six-year-old child, even though the father had been in prison and had a mistress.

Fathers’ proprietorial-type relationships with their children, especially their sons, were also associated with questions of inheritance. In English law, parental rights were associated with land ownership that could only be passed on via male succession (Dickey 1997; Finlay et al. 1997). If the child was deemed legitimate, questions of “custody” were inextricably linked with questions of inheritance.

In property matters, the “doctrine of unity” prevailed in England until well into the nineteenth century. Its dubious justification was found in Genesis 2.24.

Therefore shall a man leave his father and mother and shall cleave unto his wife and they shall be one flesh.

From a legal perspective, the effect of the doctrine of unity “was to ‘suspend’ the very being or existence of a wife” (Dickey 1997: 237).” According to Dickey (1997: 240) the first inroad into the doctrine of unity was made by the *Matrimonial Causes Act* (Eng) and the resulting Australian statutes. The first direct attack came via the *Married Women’s Property Act* 1870 (Eng), the provisions of which were largely taken up by equivalent legislation in each of the Australian States between 1870 and 1893.

By the time these changes came about, the Western world had been altered irrevocably by the experiences associated with the Industrial Revolution. One of the consequences of that revolution was the profound impact it would have on the legal and personal relationships between men and their children.

Motherhood and the emergence of domesticity

Friedman has noted (1995: 17) that although Roman, German and Anglo-Saxon law placed children firmly in the embrace of their fathers until the nineteenth century, within, a forty year period roughly from 1880 to 1920:

A fundamental change had taken place in all Western countries that permitted divorce. This included Belgium, France, England, Germany, the Netherlands, Sweden and Switzerland. The speed of the

transition was quite variable, and the manner in which it came about reflected different political realities. Yet the beginning and the endpoint were the same everywhere: paternal custody had been the norm; maternal custody became the norm.

Why this came about is not particularly clear, but is generally assumed to represent and reflect changes in the social construction of family. Stone (1977) has described a new family type of “affective individualism” which emerged in parts of middle-class and upper-class England in the late-eighteenth century. Its features were affective bonding, a commitment to individual autonomy and personal freedom, a weakening of associations between sexual pleasure and guilt and an emphasis on privacy.

Maidment (1984) claims that the two keys to family change in this period were the idea of “domesticity and the “revolution of sentiment”. Shorter’s (1975: 412) description of domesticity encompasses “the family’s awareness of itself as a precious emotional unit that must be protected with privacy and isolation from outside intrusion”. With regard to the “revolution of sentiment”, Stone places emphasis on the growth of a loving bond between husband and wife, whereas Shorter’s focus is more strongly on maternal love between mothers and their children.

According to Stiles (1984), the presumption in favour of mothers as custodians in the United States began early in the nineteenth century. It was associated with the slow erosion of a strict common law paternal right to custody and the beginnings of a “best interests of the child” discretionary standard of review. She notes the consequences of the significant family restructuring which occurred around the time of the Industrial Revolution.

Stiles (1984) argues that with the Industrial Revolution came a greater division of labour between men and women and a general need for men to

find employment outside the home. Machinery allowed for increased possibilities of surplus production and the chance for families to live on the income of one partner. Many women found themselves in a situation in which they no longer contributed to household income. As a consequence, there was a growing emphasis on extolling the virtues of motherhood and domesticity and the developing idea that men's principal family role was that of breadwinners. No longer the primary place of production, the home became the haven (Lasch 1983) to which the man would return each evening.

This general argument is consistent with Stone's (1977) further observations of late-eighteenth century middle-class families in which greater material prosperity permitted wives freedom from work. As a result:

... although the economic dependence of these women on their husbands increased, they were granted greater status and decision-making power within the family and they became increasingly preoccupied with the nurturing and raising of children. (Stone, 1977: 412)

Anderson (1980) is more cautious about the significant changes to family life that began to take shape at about this time. He notes that:

... we still lack any really satisfactory account of the relationship between the emergence of ideas like privacy, domesticity and of any change in emotion on the one hand, and the economic transformations of the period 1700 to 1870 on the other. (Anderson 1980: 64)

Whatever the causes, however, and whether or not it is possible to assert a matrix of causes with any confidence, Anderson (1980: 47) suggests that

... [the family] became associated with a new set of sex-role ideologies involving the strict segregation of work (performed by men away from home) from domestic concerns (ideally performed in the home by servants under the supervision of women). The home came

to be seen as a haven or retreat from the pressures of a capitalistically oriented competitive world.

In disputes about children, social historians cite numerous examples of nineteenth-century judgements which begin to place increasing weight on the emotional nurturing of children – especially of infants – and correspondingly less weight on the more external needs of Blackstone’s “protection, maintenance and education”. Though as noted, fathers had been traditionally recognised as responsible for children’s external needs, Stiles suggests (1984: 10) that “judges began to recognise the emerging concept of a mother’s peculiar ability to bestow love and affection on a young child”.

The impression gained from many of the nineteenth-century judgements on the matter (all written by men) is that this “peculiar ability” was magical, mysterious and only possessed by women.³¹ What became known as the “tender years doctrine”, which developed either through legislation or via judicial opinion, initially saw the tasks of raising infants as one belonging “naturally” to the mother and then expanded to the idea that girls of all ages and young boys were better in their mothers’ care (Zainalden 1979). By the end of the century, mothers were seen as the better choice for all dependent children. By then, “[w]omen were expected to spend most of their lives raising their children, a task for which they were deemed better suited than their husbands” (Jacob 1988: 128).

In an 1830 Maryland judgement it was reasoned that, although the father was the child’s legal guardian,

... even a court of common law will not go so far as to *hold nature in contempt* (my italics) and snatch helpless puling infancy from the

bosom of an affectionate mother ... The mother is the softest and safest nurse of infancy.³²

An earlier Louisiana decision in 1810 (*Commonwealth v Hamilton*) had denied custody to the mother but suggested nonetheless that she had certain rights as a “guardian by nurture”. Perhaps this is a forerunner of the notion of “psychological parent” promoted more than a century and a half later in the context of psychoanalytic theory, by Goldstein Freud and Solnit (1973).

The extent to which motherhood began to be seen as a biological given which required no proof other than its formal declaration (in increasingly expansive terms), can be seen in an 1840 judgement in the Philadelphia Court of Sessions. This judgement effectively overthrew English common law principles in declaring that:

The reputation of the father... may be stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualification from superintending the general welfare of the infant; the mother may have separated from him without the shadow of pretence of justification; and yet the interests of the child may imperatively demand the denial of the father’s right and its continuance with the mother. In this case, the tender age and precarious state of the infant’s health make the vigilance of the mother indispensable to its proper care; for not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured, every instinct of humanity unerringly proclaims that no substitute can supply the place of HER, [sic] whose watchfulness over the sleeping cradle or waking moments of her offspring is prompted by deeper and holier feelings than the most liberal allowance of a nurse’s wages could possibly simulate.³³

Judgements like this delivered powerful messages to men and were, at best, a mixed blessing for women and ultimately for their children. Flexnor (1959: 85) and Rabkin (1980: 12) suggest that, in the United States, the organised women’s movement saw child custody as simply one issue within

the larger struggle for married women's property rights. But the almost unequivocal endorsement of the superiority of motherhood exacted a price in other areas of the larger suffragette agenda. An 1873 American case denying women admission to the Bar noted that:

... the paramount destiny and mission of women are to fulfil the noble and benign office of wife and mother. This is the law of the Creator".³⁴

It is interesting that psychological theories supporting a maternal preference in the courts came *after* this significant legal shift. Maidment (1984) ascribes the first scientific study of childhood to Darwin, who began a biography of one of his own infants in 1840 but did not publish it until 1877. The excitement this generated revolved around the then emerging idea that adults could only be understood by examining their origins in nature and in childhood. As noted, romantic poets like Blake and Wordsworth had earlier promoted Rousseau's ideas of childhood innocence. Coveney (1967) suggests that Wordsworth's 1802 Prelude, "Child as father of the man" was especially influential in inspiring the early scientific study of the child at the beginning of the twentieth century.

G. Stanley Hall began to systematically inquire into how children thought and felt in 1880. In 1905, in response to a request from the French Government, Binet began the measurement of children's mental abilities with the intention of assisting them in their development towards adulthood.³⁵ A few years later, J.B. Watson commenced a more behaviourist approach to the measurement of children's activities, the hope being that problems of delinquency and mental and physical "retardation"

could be approached in a scientific rather than intuitive or hit and miss manner.

It was Hall who, in 1909, invited Freud to the United States, where his theories were to become widely accepted. Freud had become keenly interested in the child's resolution of fantasies and fears connected with their early experiences of intimate relationships. Freud's research took place at a time when, as noted, motherhood was privileged as *the* parent-child relationship. Even late in his life, Freud (1949: 90) continued to describe the mother's role as "... the prototype of all later love relations".

Rutter (1995) notes that in Bowlby's (1951) earlier work, what came to be known as attachment was considered to be essential to psychologically healthy growth. Attachment was seen to be monotropic. That is, it was almost universally assumed to equate with attachment of the young child to one individual, usually its mother. This was further thought to occur during a brief "sensitivity period". Consistent with this model that suggested a "unique window of opportunity" notion, Rutter (1995: 551) also notes that, "Bowlby drew parallels between the development of attachments and imprinting (Bowlby 1969/82)". Later, however, it became apparent that there were more differences than similarities. By the time Bowlby came to write the book that in many ways summarised his theory (Bowlby 1988), the parallels between imprinting and attachment were no longer mentioned.

The "all or nothing" understanding of the sensitivity period was also modified by Bowlby in the same work. According to Rutter (1995: 551), the current view is that there is a:

... sensitive period during which it is highly desirable that selective attachments develop, but the time frame is probably somewhat

broader than initially envisaged and the effects are not as fixed or irreversible as once thought.

The tied concepts of imprinting, a brief sensitivity period and attachment to one individual (who would usually and preferably be the mother), nonetheless presents a construct which is both intuitively appealing and attractive in its simplicity. Though Bowlby (1988) eventually came to a more complex view that children usually develop selective attachments over a period of time with a number of people closely involved in their care, this is probably less well understood, even amongst some social science professionals, than the original formulation. Recently, for example, a senior child psychologist noted that “Bowlby’s original concepts of children’s attachments to their parents have stood the test of time since the 1960s, 70s and 80s” (Smith 1999: 1). In the more popular literature, too, as well as in numerous Family Court judgements (and even psychologists’ reports written to assist the Court), concepts such as “attachment” and “bonding” are used with considerable imprecision and are not infrequently associated only with mothering.

The suggestion that Bowlby’s early formulations had an intuitive appeal is further reinforced by the sort of statements on child development and motherhood also made by numerous judges in the latter part of the nineteenth and first part of the twentieth centuries. Noted above are American cases in which the words such as “affection” and even “holiness” are juxtaposed with the word “mother”. Maidment (1984: 100) also describes an English case (*Re McGrath 1893*) in which the judge came down on the side of “ties of affection” which today, Maidment suggests, would be called “attachment or bonding”.³⁶ Interestingly, this was a case in

which the judge favoured the child remaining in the care of the person nominated by the mother before her death.

Rousseau's eighteenth-century notions of motherhood also sit comfortably with Bowlby's early formulations. Rousseau's approach has been described above. Perhaps the high-water mark of his romantic idealism can be found in the following passage.

Tender, anxious mother, I appeal to you. You can remove this young tree from the highway and shield it from the crushing force of social conventions. Tend and water it ere it dies. One day the fruit will reward your care. From the outset, raise a wall around your child's soul; another may sketch the plan; you alone should carry it into execution. (*Emile*, Everyman's Library, 1911: 5-6)

It is worth mentioning that there may well be an intriguing link between Rousseau's idealism and a more contemporary psychological explanation for his position. Consider what appears to be a plaintive cry in the word "appeal" in the above citation. Agonito (1977: 413) notes that Rousseau lost his own mother shortly after his birth at Geneva. He had an unhappy and unstable childhood, eventually winning the favour and support, as a young man, of a Mme De Warens. He had several illegitimate children, whom he abandoned to orphanages.

There may be an exquisite irony here. It may be that Rousseau was not himself attached to a carer as an infant. The death of his mother and his likely grieving for her loss may have expressed itself in his idealisation of mother figures. Rousseau appears to have caught the mood of other Romantics who, in turn, made their own contributions to theories extolling the virtues of motherhood.

Australian studies cited in Chapter 1 suggest that under the principle of the best interests of the child, mothers in Australia are awarded custody

or residence in more than 90% of the cases processed by the Family Court. In chapter 1, mention was also made of Mason and Quirk's (1997) intriguing study, which showed that the outcome with respect to custody awards did not alter significantly over four distinct periods of time that spanned more than 70 years of the twentieth century.

One might have expected that at the height of the "maternal preference" era, the percentage of cases that favoured mothers may have been even higher. What gave fathers a chance during this period was the successful prosecution of issues of mental instability or issues of blame and fault – though it would appear that the two areas were not always separated in the minds of judges. There is no Australian study equivalent to that of Mason and Quirk. There are, however, the two reasonably large-scale quantitative studies of Horwill and Bordow (1983) and Bordow (1992) that show an uncanny consistency with each other even though they are drawn from data ten years apart. As noted these studies also show a high level of consistency with studies in Britain and the United States.

The next section examines how parents, but especially mothers, were judged to have failed in their parental duties, sufficiently seriously to lose custody cases. The legislative frameworks considered in this section were both overt *and* at times competing with notions of the interests of the child. An intriguing question, considered later in the thesis, is the extent to which the tensions between these competing principles remain.

Reward and blame

Historically, it is apparent that judicial interpretation has changed according to social and cultural values and beliefs about the basic social institutions of the family and of marriage. The judges, on behalf of the state, are concerned to uphold social stability; when adultery was legally and socially unacceptable, the denial of custody to an adulterous mother upheld the institution of marriage, though could simultaneously also be claimed to conduce the child's welfare in protecting the child against damaging influences. (Maidment 1984: 149)

There were a variety of mechanisms available to the state to encourage marital solidarity. One of them was to tie blame in divorce suits to custody of children. (Friedman, 1995: 56)

Issues of parental fitness, however construed, have probably always occupied the minds of those charged with decision-making over children. In the patriarchal era, for example, expression of disquiet on this issue, which also sought to connect United States divorce law with English common law, can be found in the following "warning" from an 1840 New York judgement (*Ahrenfelt v Ahrenfelt*):

By the rule of the courts of the common law in this state, following the settled law of England, the primary right to the custody and control of children, without regard to sex, and with slight qualification to very early infancy, is in the father, *unless a positive unfitness in him is shown*. (italics added)

As noted in Chapter 1, there is ample evidence (e.g., Nygh 1985) that the unfitness criterion has been generally more easily transgressed by women. Thus, even as they began to make minor inroads into having parenting applications taken seriously, separated women found guilty of adultery could find themselves refused all further contact with their

children. In 1882, in commenting on an adulterous mother, a New York judge noted:

The idea that the court should interfere and impose upon the father husband the duty of admitting her within the privacy of the family is repugnant to every sentiment of virtue and propriety.³⁷

Courts on the other side of the Atlantic could be no less categorical. An early, often cited attitude of the English Court is represented by the judgement of Sir C. Cresswell in *Seddon v Seddon and Doyle*.

It will probably have a salutary effect on the interests of public morality, that should it be know that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of or access to her children.

In Australia the *Seddon v Seddon and Doyle* approach was applied at the discretion of judges for nearly 50 years. Not until 1910 did the Court of Appeal in *Stark v Stark and Hitchens* hold that adultery by a wife should not be a bar to access to her child. Despite this judgement, Moloney, Marshall and Waters (1986: 54) cite evidence that for some further time, courts “continued to display a reluctance to order access for a ‘guilty’ wife”.³⁸

Clearly, much of the history of divorce and the statements and judgements around divorce is also a history of what is deemed to be acceptable behaviour between men and women inside and outside the family (Phillips 1991). The threat of losing one’s children has always been an important sanction against behaviour considered to be outside the norms of the day. Commenting on qualifications placed by courts on the maternal preference principle, Friedman (1995: 56) suggests that:

... using marital obedience to determine custody seemed better designed as a weapon in the state's arsenal to stem the rising tide of divorces than as a proscription for selecting a superior parent.

Indeed as late as 1962 in England, Lord Denning³⁹ appeared to experience little difficulty in linking opinions concerning the sexual morality of women with outcomes for children.

If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them; for no stronger case for the father can be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes for is her return. It is a matter of simple justice between them that he should have care and control. Whilst the welfare of the children is the first and paramount consideration the claims of justice cannot be overlooked.

In this case, one of England's most highly respected judges appeared to be endorsing the following principles:

- children's welfare, though "paramount" is nonetheless subject to other (presumably higher) principles of justice;
- awarding custody of children to an adulterous mother would encourage or at least implicitly endorse such behaviours amongst other women;
- reconciliation is very clearly preferred to separation;
- the act of forgiveness on the part of a partner (in this case the husband) constitutes necessary and sufficient conditions for reconciliation.

This often cited judgement illustrates that coercive efforts to stabilise a marriage in the name of social cohesion continued to feature in family law well into the second part of the twentieth century. It reinforces Nygh's (1985) observation that adultery was considered by the law to constitute a

more serious issue when it involved a woman. It also supports Summers (1975) analysis of society's dualistic classification of women as "damned whores and God's police".

As noted above, Maidment (1984) has argued that the "best interests of the child" principle has been frequently pressed into the service of social cohesion, the upholding of which has, in turn, been seen as the major responsibility of mothers. Logically one might expect that a combination of no fault legislation and a gender-neutral approach to parenting after separation and divorce might lead to a cessation of these practices. However, in the Australian context it is clear from case illustrations noted by Hasche (1989) and Berns (1991) that at least up until that time, moralistic statements directed against mothers had not disappeared from judicial commentary in family law.

Thematic summary

It is beyond the scope of this thesis to go to primary historical sources. Rather, I have extracted common themes in judgements cited by prominent socio-legal historians and commentators. I have paid attention to the views of the analysts and commentators themselves, but I have also considered carefully the words in the extracts of judgements in this literature. This exercise suggests the following thematic summary, which I present as working hypotheses rather than statements of "fact".

- The idea that children have what we would understand today as developmental needs and that these needs might be privileged over parent-oriented rule-based assumptions of ownership or gender, or

innocence and blame, has been suggested in custody judgements in differing ways and with differing outcomes throughout the whole of the nineteenth and twentieth centuries.

- For much of the period, however, the interests of the child, whether explicitly addressed or not, have been formally tied to presumptive rules.
- The presumptive rules employed throughout the period considered were paternal rights; a maternal preference, firstly for children of “tender year” and later for all children; and children as a reward for promotion/enforcement of virtuous or at least morally acceptable behaviour.
- The presumptive rules were closely tied with implicit or explicit assumptions about social cohesion requirements. Fathers were favoured because, within the context of the times, they alone could provide education, protection and financial support. Mothers were then favoured because children’s attachment to mothers, reciprocated by “maternal bonding”, came to be seen as an indispensable ingredient in the development of productive independent citizens.
- Appropriate moral behaviour was emphasised as a way of ensuring the continuity of the family unit and through that, it was assumed, the welfare of the child and the stability of society.
- Scholars cite numerous cases in which the application of one of the rules arising from the above assumptions appeared harsh, unjust or, by contemporary standards in which emotional relationships are privileged, not child-focused.

- Scholars state or imply that judges during this period almost always had (at least indirect) discretionary possibilities open to them which, in difficult cases, afforded an opportunity to rule on less formally legal, more pragmatic grounds according to the “demands of function” (Hurst 1972).⁴⁰
- Choosing to privilege “demands of function” did not generally relieve judges from observing constraints imposed by the dominant values and socio-legal assumptions of the day. Nonetheless, many judges found ways to circumvent these rules and often appear not to have not been challenged for doing so.⁴¹

I suggest that this was the broad historical context from which grew a more formally articulated “welfare” or “best interests” of the child principle commonly used by courts in English-speaking jurisdictions today. Issues arising from this development are discussed in the next chapter. Before moving to this chapter, however, I wish to return to the question of the rapid and largely uncontested reversal of principle from paternal rights to maternal preference which consolidated itself around the turn of the century.

The unclear ingredients of the maternal revolution

Zainaldin (1979) has noted that the nineteenth century saw an emerging interest in the child as an individual whose destiny could be shaped and whose adult contribution to society was determined by the quality of the formal and emotional connections with his or her parents. The

ideas represented a development of the *tabula rasa* notions of Locke.⁴² Zainaldin (1979) points out that the 1851 adoption laws in Massachusetts represented a striking departure from past practices that, in effectively prohibiting a transfer of rights to third parties in disputes over children, had focused almost entirely on questions of blood relationship. He notes the significance of the fact that, surprisingly, the legislation appears to have passed with little or no public debate.

According to Zainaldin (1979), judges were also increasingly inclined to use discretionary powers to pursue children's interests in custody cases. He suggests (Zainaldin 1979: 1085):

...through the discretionary determination of custody, judges acted not only to preserve idyllic childhood, but also to promote an environment that would blend innocence with morality. The child was infinitely malleable, and if environment was important, nurture was critical.

Surprisingly, in the light of the issue she sets out to address (the history of child custody in the United States), Mason confines to a footnote (note 6, p 201) the interesting observation that although historians have analysed the cult of motherhood and the cult of domesticity,

... they fail to analyse how this social phenomenon is translated into custody law. In addition, there has been no examination of the complicated and sometimes contradictory women's rights movement and the cult of motherhood and its effect on custody law in legislature and in the judiciary respectively.

From a Canadian perspective, Bala (1986: 22) also notes that:

... [w]hat is historically interesting is that there was a change from prescribing a very strong preference for fathers, to one with a very strong preference for mothers *apparently without there being a stage where the law was essentially neutral.* (italics added)

Friedman (1995) has reviewed the “received explanations” for the historical change to maternal preference in child custody disputes. She argues as follows:

... that the rhetoric of concern for the best interests of the child in custody disputes that arose concurrently with the rise of motherhood and the removal of absolute paternal rights, seemed to forge an unimpeachable relationship. In fact, it is nearly a classic case of a spurious one. (Friedman 1995: 53)

Grossberg (1985) believes that women’s increasing chances of being awarded custody from the mid-nineteenth century onwards was linked primarily to gains made in America with respect to their right to own property. According to Grossberg, the extended discretion assumed by the judiciary also gave greater scope for the states to encourage proper family life. Women were not only seen as more legally separate individuals, but as individuals with a special capacity to provide moral leadership and childrearing.

Maidment’s (1984) analysis of the situation suggests that in England, too, there was a nineteenth-century increased concern for the welfare of the child. Significantly increased child survival rates and the growth of paediatrics as a profession further encouraged the focus on children. According to Friedman (1995: 46), however, Maidment saw the focus on children and mothers as a diversion from the issue of women’s rights:

... for Maidment, the origins of the principle of equal parenting rights during marriage, and the child’s welfare as the first and paramount consideration in custody cases, are inextricably linked.

There are similarities in the above analyses of Zainaldin, Grossberg and Maidment, but considerable differences also. A further clue to the continuing puzzle surrounding the rapid change from paternal rights to

maternal preference is perhaps found in the words “rights” (attached to fathers) and “preference” (attached to mothers). Friedman (1995: 56) expresses the issue this way:

Had custody law changed according to the logic emanating from the social forces that gave rise to separate spheres, the cult of domesticity and the invention of modern motherhood, the law would have passed paternal rights and obligations to mothers. Maternal custody meant something entirely different than paternal custody, however, for it was expressly predicated neither on right, which was guaranteed by the state, nor on obligations, some of which remained with the father and some of which were relegated to the state.

Friedman suggests that an understanding of why men, whose rights were linked to Blackstone’s obligations of education, protection and financial support, ceded control of their children while continuing to assume financial obligation for them, requires an expanded form of logic. Friedman begins with the premise, noted above, that the legal reason for vesting custody with fathers was that they had sole responsibility for financially supporting, educating and protecting their children. The beginnings of a separation of custody and responsibility occurred when the state took over the father’s educative functions. At about the same time, fathers began to find themselves working away from the domestic sphere, substantially weakening the second of Blackstone’s obligations, “protection”. All that remained intact was the most impersonal of the three obligations, “financial responsibility”. Thus:

... [a]t the advent of the preference for mothers over fathers in matters of custody, mothers were responsible to their children for nurture, fathers for financial support, and the state for education. (Friedman 1995: 119)

This unstable division of parenting labour is a problem that remains a feature of much family life through to the present day (van Dongen 1995). It

has echoes in the question asked by Amato and Gilbreth (1999: 557) who, prior to commencing a meta-analysis of non-resident fathers' and children's wellbeing were prompted to ask: "Do non-resident fathers contribute anything of value, other than money, to their children's lives?"

Friedman suggests that the custody transformation which placed children in the care of their mothers was not associated with a formal revision of what was best for children. She argues that:

... [t]he case was never made that fathers were unable to serve their children's interests. Fathers of the nineteenth century did not receive custody of their children as their just desserts and then suddenly cease to become deserving. If many fathers have become unable or unwilling to fulfil their parental obligations, it is a consequence of the change in structure rather than an impetus for it. Similarly, mothers were not undeserving of the custody of their children prior to the turn of the century, only suddenly to become deserving. (Friedman 1995: 121)

If this observation is correct then the question of what was happening remains. Friedman's analysis is intriguing. She suggests that the maternal preference principle provided a simultaneous solution to several problems.

First, it increased the probability of private financial support for two dependants: the mother (who was still unlikely to have a personal income) and the child.

Second, maternal custody, combined with financial support from fathers, postponed the question of women entering the labour market in any serious way. If they were not obligated to support themselves, their claims for entry into the market and for equal pay were considerably weaker.

Third, children in a close exchange relationship with mothers after divorce were more likely to feel obligations towards their continuing

support in later life. The climate of the time was not sympathetic to taxpayer support of divorced women.

Friedman's observation is a political "line of least resistance" argument. Not only was maternal preference favoured by many conservative legislators, it was also supported by many feminists who argued that it lowered the cost of divorce for women, and that it was associated with increased legal rights.

Finally, the fact that this solution was more likely to keep taxpayers out of the financial loop contained a logic of rough justice. Divorce, still seen as something of a scandal, would be paid for by those guilty of choosing this direction.

But as Friedman points out, her arguments only hold up in a context in which divorce was a relatively rare event. Weitzman (1985) is amongst those who have recognised that when laws meant to be applied to a few begin to be applied to many, unanticipated consequences are likely to arise.

Few, it seems, could have anticipated the extent of the "divorce revolution" that began in many Western countries in the 1960s and 1970s and has continued into the new century. The revolution brought with it the baggage of many unresolved issues around parenting, gender and what was good for children. These issues are the focus of the next chapter.

CHAPTER 3

Divorce and the “Silent Revolution”⁴³

The Formal Abandoning of Presumptive Principles

During the 1960s, a significant backlog of prospective divorce applicants was generated in many parts of the world. The backlog came about not simply because more couples than ever were separating, but because many of those couples were waiting for the passing of simplified dissolution legislation that had at its heart a move away from the determination of marital fault (Phillips 1988). Perhaps nowhere is that backlog more dramatically illustrated than in Australia. Funder (1996: Figure 2.1) has reproduced Phillips’ figures and at the same time highlighted the unprecedented (and not since repeated) peak of dissolution applications that occurred in 1976, the first full year of the Family Court operations.

Fogarty (2001) describes how this pressure for more simplified divorce procedures had been building in Australia since the 1950s. A private members bill was introduced in 1957 by Percy Joske, a leading figure in family law reform, which introduced separation as an Australia-wide ground for divorce for the first time.⁴⁴ The bill, taken up by the then Attorney General, Garfield Barwick, culminated in the *Matrimonial Causes Act* 1959, which, according to Toose, Watson and Benjafield (1968) (cited in Finlay *et al.* 1997: 24), reached a “peak of legislative excellence unequalled in the countries which have inherited the English tradition as to marriage and divorce”. It is a sign of the reformist, even revolutionary times, that this

legislation of “unequaled excellence” was itself comprehensively replaced just over 15 years later.

In the United States, too, Jacob (1988) has described how in the space of less than twenty years, divorce reform largely succeeded in reversing the principles of fault-oriented legislation. At the same time, the laws significantly altered property law and, in most jurisdictions, formally replaced a maternal presumption concerning who would best parent children with no presumptions springing from gender related considerations.

Jacob (1988: 61) mounts a convincing argument that, though it was clearly not the case, much of the change in the United States was presented as “technical revision” and that the profoundly revolutionary nature of the changes was not understood by most of the American public. He describes a complex web of personalities, coincidences and committee structures operating within, and spreading from, the key States of New York and then California. He notes, for example (Jacob 1988: 93), that proponents of reform spoke of the “elimination of cumbersome forms of action” rather than the elimination of fault. According to Jacob, many of the reformers were technocrats whose natural style was one of a low profile.

Keeping a low profile was made easier by the fact that in this time of significant social reform in other areas such as gender and race-based inequalities, divorce reform was not afforded an especially high priority. Jacob (1988: 165) suggests, however, that “the next (reform) proposals will not be considered through the routine policy process; instead, they are likely to attract widespread attention and attract considerable conflict”.

In Australia, the divorce reform debate following the Matrimonial Causes Act continued to be much more public. The same was true of the

United Kingdom. Growing agitation for reform in Australia in the 1960s and early 1970s found a particularly strong and energetic ally in a newly elected Attorney General representing a newly elected Government. Lionel Murphy had personally suffered the indignities of the Australian Matrimonial Causes Act, which, despite its introduction of a five-year ground, remained largely fault oriented.⁴⁵ For this and for broader social reasons (the Australian Government of the day had been elected on a platform of widespread reform, including divorce reform), he was determined to change it. Thus the Australian Government of the day conducted a highly public inquiry into family law reform via a Senate Committee on Constitutional and legal affairs.

In the United Kingdom, the Royal Commission on Marriage and Divorce reported in 1956 and was effectively stalemated on the question of introducing complete breakdown as grounds for divorce. As Finlay *et al.* (1997: 13) record, the nineteenth member of that Commission voted for irretrievable breakdown as the sole grounds for divorce. Whilst this vote provided grounds in theory for breaking the deadlock, the suggestion was much too radical and was rejected by the government of the day. However, as Finlay *et al.* (1997: 13) also point out, “irretrievable breakdown was on the march”. The authors note that it was finally recommended as grounds by the then newly formed Law Commission in 1966 and was subsequently accepted by the government of the day.

On the surface, therefore, the reform processes in the United States which occurred between the early sixties and early eighties were very different to those which occurred in the late sixties and first half of the seventies in the United Kingdom and Australia. Nevertheless, the conditions

calling out for divorce reform in both countries, as in most Western democracies, were not dissimilar.

Many of the pressures leading to higher separation and divorce rates have been noted by researchers such as Weitzman (1985) and Goode (1992) in the United States; Rapoport and Rapoport (1982) and Gillis (1985) in Britain; and Gilding (1991) and Funder (1996) in Australia. Common to their observations are the following.

By the mid-twentieth century, fertility rates were declining as longevity was increasing. The concept of marriage as a lifetime partnership thus took on a new meaning. Couples looked forward to (or in some cases faced with concern) significant increases in both the absolute amount of time they would expect to spend together and the considerably greater proportion of time they would spend without dependent children.

In addition, women's increasing participation in the workforce meant that they were becoming more independent, more "worldly" and had greater access to meeting men and women outside the immediate family circle. As women sought equality on multiple fronts, balancing career and domestic tasks became more problematic.⁴⁶ Some feminist groups saw patriarchal structures within families as a major part of the problem. Nuclear families were seen by some to be inflexible and in need of radical reform. In addition, higher locational mobility, often in pursuit of careers, also resulted in fewer family support structures, which contributed to making companionate style marriages isolated and vulnerable.

In this social context, Jacob and Star have independently commented on what was seen as the increasing unacceptability and hypocrisy of the need to manufacture fault scenarios to fulfil legislative requirements. Jacob

found evidence that in New York, for example, cottage industries had sprung up around the creation of elaborate charades which were then presented to the courts as proof of a partner's adultery. Applicants were in effect required to perjure themselves, whilst courts, judges and lawyers conspired to accept the evidence.

From the point of view of the integrity of the legal system, this situation was becoming increasingly intolerable. Some sort of reform became urgent. As Jacob also notes, the proposed "no fault" reforms had the additional attraction to governments of reducing rather than adding to the costs of divorce processes.

The steady rise towards divorce as a mass phenomenon also meant that the earlier structural problems identified by Friedman in the previous chapter – through which men were effectively excluded from the newly developing emphasis on nurturing roles and women were given responsibility for children but little power – became problems confronted by numbers sufficiently large to make their views and protests heard. But these protests now sat largely within a "no fault" orientation to questions of dissolution of marriage.

The legacy of fault and what to do about children

Commenting on the Australian situation, Star (1996: 99) notes that:

Even though since 1961 there had been a federal provision by which divorce could be obtained after a five-year separation, the law had normally decreed that in most cases, one party to a marriage had been at fault. This attitude had historical roots, growing out of five thousand years of Judeo-Christian moral consciousness as translated into law, and was deeply ingrained into the consciousness of many

members of the community. The approach taken by the Family law Act ran counter to this entrenched view.

In Australia, as in many Western countries, “no fault” changes had an immediate impact. For the first time in history, a significant percentage of the population was being brought into direct contact with divorce courts and with courts’ “ancillary” decision-making principles and processes. Perhaps it was inevitable that the reforms would run ahead of the capacity of many individuals to deal with them. In Australia, protests about the perceived injustices of the Family Court (eg. Tennison 1983; Lehmann, 1983), soon gathered pace.

It is salutary to place protests and early violence against the Family Court in the context of another set of unprecedented social events that occurred at this time. In 1975, the year the Family Law Act was passed, Australia experienced the first and only ejection of an elected government. “The Dismissal”, as it became known, was described by Kelly (1995) as the most significant constitutional crisis the country has ever experienced. As Kelly notes, it was responded to with mass protest but with no violence or loss of blood.

But family-related matters proved to be a different issue. In the early eighties, only a few years after Australia had experienced and survived “The Dismissal”, a Family Court judge was shot dead. In a separate incident, another judge was seriously injured, whilst his wife was killed outright, after an explosive device was left at the couple’s front door. An unsuccessful attempt was made to murder yet another judge in his family home, and in the same State of new South Wales, a seven-storey court building at Parramatta was lifted from its foundations by a further

explosion. In Melbourne, vehicles were driven at speed into court premises.⁴⁷

In response to such incidents, life changed quickly and irrevocably inside the Family Court. Almost overnight, security checks became a way of life. Guards were employed and furniture was rearranged to minimise the chances of planting explosive devices. Security alarms were placed in court counsellors' offices and other parts of the court, and staff were briefed on dealing with life-threatening situations. Judges, by their own vote, reverted to the pre-Family Court practice of wearing traditional wigs and gowns. These public events and the measures taken to counteract them had no counterpart in Australian legal history and were largely foreign to the Australian psyche.

Star (1996) records that no convictions were ever made with respect to these homicides or acts of sabotage. Though at one level, the reasons for the violence remain unidentified, Star (1996: 135) suggests that the Family Court chose to focus on a psychological explanation – that of individual anger directed against authority.⁴⁸ Excluded, by default, were more structural explanations, which might have prompted a closer examination of the place of the then relatively new Court in Australian society or the place of violence in the Australian culture and in Australian homes.

It was assumed at the time that the violence directed towards Family Court judges was probably perpetrated by men in response to the Court's handling of child-related cases.⁴⁹ Amongst the suspects at the time was a small number of men who had in common the fact that the court had denied them access to their children. These men had been judged to be potentially violent and for this reason had been denied access.

It was argued by some that the adversarial rules of legal engagement combined with no fault assumptions about marriage breakdown produced an emotionally powerful combination of forces against which some individuals were likely to react strongly.⁵⁰ Interestingly, it was also demonstrated around that time (Kirby 1985 - now a High Court Judge), that both legal and psychological research leads to a conclusion that in civil matters, adversarial processes are no better at uncovering “the truth” than more open ended procedures in which litigants are given the opportunity to tell their individual stories.

Adversarial processes are a legacy of fault-driven approaches to family law. It is beyond the scope of this thesis (and probably beyond the expertise of its author) to set out the arguments for and against the retention of this system. But the general point I wish to make here is simply that adversarial processes inevitably influence and constrain the final judicial narrative that forms the judgement. One obvious constraint is the greater likelihood of endorsing a win-lose solution to the problem of ongoing parenting after separation and divorce.⁵¹

The tension between a continuing adversarial orientation and the shifting rules with respect to a greater focus on the welfare of children in dispute following separation, can be seen in an early (1976) judgement by Goldstein J. who observed that:

Given the overriding consideration of the welfare of the child, the court must consider the conduct of the parents, not with a view to rewarding one or punishing the other, but to ascertain from such conduct whether the welfare of the child will be better served in the custody of one or the other.⁵²

To assist the new Family Court in determining the welfare or best interests of children in particular instances, court counsellors acting as “welfare officers” were also employed to provide independent psycho-social assessments (Star 1996: 107). But ascertaining what was good for children without recourse to presumptive principles, was new territory. It is not unfair to suggest that few, if any, judges, psychologists or social workers had been specifically trained to adequately interpret what the welfare or best interests under such circumstances might be.⁵³

In one sense, the various “no fault” legislative frameworks that developed in the latter part of the twentieth century reflected a growing appreciation of legitimate differences in any society and of the moral and cultural relativities that this implied. Within this climate, some writers (e.g., Jenuwine & Cohler 1999) have emphasised a growing role for psychology and the social sciences in assisting courts with the decision-making dilemmas they face. Others (e.g., Fineman 1995) see psychology and the social sciences as part of the problem and emphasise the need to return to more legally-based approaches.

It has been argued (Moloney 1984) that in the early days of the Family Court, apart from the stated or implied relativistic stance, which overtly privileged individual outcomes in the interests of the child, parenting decisions in Australia were being made in a near psycho-social vacuum. In Einhorn’s (1986: 130) more strident terms,⁵⁴ custody decisions in the United States were being made during this period via “seat of the pants psychology”.

In this atmosphere, the value of psycho-social reports to the Family Court was less associated with the theoretical rigour that they brought and more with the fact that the reporters had an opportunity to speak directly to the children and to observe them in the presence of their parents and any others involved in their care. This *was* something psychologists and social workers were trained to do and usually did reasonably well. It was something that the legal structures made it difficult (though not impossible) for judges to do.

In the early years of the Family Court, there were no coordinated education programs for judges, lawyers, counsellors or clients that focused on the reasons for, or impact of, the socially important issues, which the changes in decision-making criteria reflected. This absence of an early educative program is less a criticism and more an acknowledgement of the fact that there were indeed few signposts to assist decision-makers, families and ancillary professionals. At the same time, however, it could be argued that the capacity of both public and professionals to absorb these quite radical changes in such a short space of time was probably not fully appreciated. In retrospect, at least, an obvious danger lay in a perception of “palm tree justice”⁵⁵ or in more contemporary parlance, a perception that judgements were no more or less sound than those of North American commercial television’s “Judge Judy”.⁵⁶

Coincidental with this exciting, confusing, emotionally charged and potentially dangerous time, was a growing emphasis on children’s rights⁵⁷ and a growing articulation of the welfare or best interests principle as *the* decision-making criterion. Having formally abandoned presumptions which, *prima facie*, linked outcome with fault, a preference for mothers or other

maternally-related principles such as “status quo”, the best interests principle presented itself as an extremely flexible but potentially very unpredictable decision-making tool.

It was inevitable that the principle would attract a flurry of commentators and researchers whose aim was to reinforce or shift discourses this way or that “in the name of children’s interests”. In the context of the times, however, the more challenging question in my view is how the long-standing maternal preference doctrine was discarded with so little apparent controversy. I address this question in the next section. I also argue later in the thesis that family law continues to experience the legacy of this rapid change of direction, but in ways not always well articulated.

“Abandoning” maternal preference

The frequently cited highpoint in judicial support for a strong maternal preference in Australia was expressed as recently as 1976. In *Epperson v Dampne*, Glass JA observed:

I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers ... That knowledge includes an understanding of the strong natural bond which exists between mother and child. It includes an awareness that young children are best off with both parents, but if the parents have separated they are better off with their mother. The bond between a child and a good mother ... expresses itself in an unrelenting and self-sacrificing fondness, which is greatly to the child’s advantage. Fathers and stepmothers may seek to emulate it and on occasions do so with tolerable success. But the mother’s attachment is biologically determined by deep genetic factors, which can never apply to them.

In the same year, however, the Full Court of the Family Court rejected a presumption in favour of the child's mother. In *In the Marriage of Raby*, the Court noted:

We are of the opinion that the suggested 'preferred' role of the mother is not a principle, a presumption, a preference or even a norm. It is a factor to be taken into consideration where relevant. (cited in Dickey 1997: 395)

Like Mason's (1994) and Bala's (1986) observations (noted in Chapter 2) regarding the puzzles surrounding the rapidity of the shift to maternal preference in the nineteenth and early-twentieth centuries, there appears to be no fully satisfying or comprehensive explanation for this equally dramatic formal shift to making no presumption concerning gender.

Weitzman's argument concerning the change in Californian legislation in 1973 from the maternal preference to the best interests, looks first at a 1972 case. In *Stanley v Illinois*,⁵⁸ it was held that the presumption that an unwed father was not a fit parent was "unconstitutional as a denial of both due process and equal protection". (Weitzman 1985: 468). According to Weitzman (p 231), this essentially human rights argument fuelled the demands being made at the time by men's groups, who claimed that "the sex bias in the old law prevented men from even trying to gain custody".

Jacob (1988) argues that increasing divorce rates brought with them increasing numbers of child-related issues that judges needed to consider. Not the least was a massive increase in the number of cases which required parenting arrangements to be sanctioned as a condition of granting a divorce.

According to Jacob (1988), the significant increase in *numbers* of cases within a context of changing social conditions exposed judges to a

greater variety of post-separation arrangements which, in turn, invited many of them to endorse more flexible arrangements. A logical extension of recognising the legitimacy of flexible arrangements was a greater appreciation of the possibility that children could be adequately parented by fathers and by non-biological parent figures as well as by mothers.

Increasingly, too, Jacob observes, claims were being made by men who were able to demonstrate a history of care of, and close attachment to, their children. As divorce increased, so too did the absolute number of men in this category. In addition, the *percentage* of fathers in the category of significant nurturers to their children within original families may also have risen, partly as a result of feminist encouragement to share the more intimate parenting tasks. Jacob cites evidence that an expanding number of men were moving beyond the traditional breadwinner/protector roles and were growing strongly emotionally attached to their children.⁵⁹

Further, the domesticity assumptions which had grown out of eighteenth and nineteenth-century social changes to middle and upper class families, applied less and less as women of all classes entered the paid workforce in ever greater numbers. Jacob notes that many feminists had begun to emphasise the need for men to share in domestic work in order to assist women to enter the paid workforce and pursue their own careers.⁶⁰

Weitzman, too, cites a number of feminist writers at the time who pursued this line of thought with considerable vigour. For example Gettleman and Markowitz (1974) argued that in order to devote more time and energy to education and job training, women should relinquish custody to their partners. They proposed that the awarding of custody to fathers after divorce should be the norm.

This no doubt represented the extreme end of the feminist spectrum of thinking. At the same time, it was consistent with a growing sense of marriage as a relationship between equals. An assumption behind this line of thought was that men were perfectly *capable* of domestic work,⁶¹ and perfectly *capable* of attending to the intimate nurturing duties traditionally associated with mothers.

Maidment's (1984: 148) analysis of why a gender-neutral parenting principle could pass into law in England in 1973 "without a murmur of opposition", includes the observation that by the 1970s, ideological constructions of family and marriage had formally recognised divorce. Thus the need to defend the family at all costs had passed. Maidment's explanation is at the level of theory. And though in feminist terms, the personal is inseparable from the political, less easily explained is both Maidment's and Weitzman's acknowledgement of the fact that at some level, it must have been obvious that the passing of gender-neutral legislation was bound to have important consequences with respect to the power that mothers could expect to exercise.

Jacob is amongst those who acknowledge that the feminist movements were split on the issue of maternal preference. A consistent approach to gender equality logically meant abandoning notions of female superiority with respect to parenting capacities. On the other hand, to give up a presumption of maternal preference was to surrender one of the few areas of legal power women had acquired.

Perhaps the most satisfactory, if partial resolution of this tension lies in the common observation (Friedman 1995; Jacob 1988; Maidment 1984; Mason 1995; Weitzman 1984) that historically, custody did not feature

largely on feminist agendas. Other issues were judged to be more pressing and question of custody of children were more likely to be thought of in the service of such issues. As noted previously, for example, Mason has argued that earlier feminists were largely interested in the extent to which custody issues would aid in the advancement of *property* rights for women.

In Australia, feminist groups in the seventies were also preoccupied with, and making progress on, a wide range of issues, with family law matters relatively low on the agenda. I could find no evidence in the mainstream literature of that time, of feminist groups speaking out against a gender-neutral stance with respect to parenting disputes. I assume that such opposition would have run counter to the prevailing mood of the day. “Girls can do anything”, was a common slogan in 1970s Australia. The corollary that boys should be encouraged to expand *their* range of career options into the “caring professions” was also prominent at the time in discussions around child development and education.

A more recent line of argument concerning support for a more gender-neutral approach to post-separation parenting issues is that, with rising divorce rates, the absence of fathers in children’s lives was becoming more visible. Father absence has been confirmed in studies in the United States (Amato 1987; Bradshaw, Stimson, Skinner & Williams (1999); Furstenberg, Nord, Peterson & Zill 1983) and in Australia (McDonald 1992; Funder 1996).

A serious difficulty exists, however, in arguing that the maternal preference presumption was formally abandoned because of the recognition of the importance of fathers for children. In the 1960s and 1970s, empirical data on the impact of fathers on their children’s development was very thin.

Indeed, Lamb (1997: 1) has observed that when he published his first edition of *The Role of the Father in Child Development* in 1976:

Social scientists in general and developmental psychologists in particular, doubted that fathers had a significant role to play in shaping the experiences and development of their children, especially their daughters.

It is true that data gathered and interpreted in the 1960s and early 1970s by highly respected researchers such as Rutter (1972), did indicate that father absence impacted negatively on children's lives in ways other than financial. But by drawing on Bowlby's language, even the title of Rutter's work, *Maternal Deprivation Reassessed* (my emphasis), is indicative of where the dominant discourse was located at that time. It is interesting to note in this regard that Ainsworth and her colleagues (Ainsworth, Blehar, Waters & Wall 1978), perhaps the best known of Bowlby's immediate disciples, continued to focus their experimental work on attachment - on the interaction between children and their *mothers*.

In the family law area, discourses privileging motherhood again (if somewhat by default) gained considerable ground as a result of a number of empirical studies in the 1990s conducted mainly in the United States. Seltzer (1994: 256), for example, reported that "large national surveys consistently show an absence of association between non-resident fathers' visits and children's wellbeing". A review by McLanahan and Sandefur (1994: 98) also concluded that, "studies based on large nationally representative surveys indicate that frequent father contact has no detectable benefit for children". Both Seltzer (1994) and McLanahan and Sandefur (1994) note, however, the significantly positive effects of fathers' child-support payments following separation.

Paradoxically, by the time the studies cited by the above researchers were published, a growing body of empirically-based evidence was suggesting that fathers were as capable as mothers of nurturing their children. Thus by 1997, in his third edition of the review of research into fathers and child development, Lamb (1997: 120) was able to summarise the field as follows:

We do know ... that mothers and fathers are capable of behaving sensitively and responsively in interaction with their infants. With the exception of lactation, there is no evidence that women are biologically disposed to better parent than men are. Social conventions, not biological imperatives, underlie the traditional division of parental responsibilities.

What do these seemingly contradictory data mean? Do fathers, as Amato and Gilbreth (1999) asked, continue to be seen primarily as breadwinners? Some evidence suggests that this could indeed be the case. For example, O'Hare (1995) found that the women surveyed in her American study overwhelmingly viewed breadwinning as the crucial role for husbands and fathers. Such attitudes tend to reinforce the results of earlier surveys conducted by Quinn and Staines (1979) and Pleck (1982), which found that while the majority of men wanted to be more involved with their children, the majority of women did not want their husbands to be more involved than they currently were.

De Vaus' (1997a) more recent Australian-based study of family values found a complex array of responses with respect to attitudes towards family responsibilities, careers for women and gender roles in families. For example, 84% of all the men and 83% of all the women surveyed believed that "women should not work full time even when the youngest is at school." At the same time, 30% of all the men and 20% of all the women

thought that women should spend most time on their families. Though these figures become higher with increasing age of those surveyed, the “women should not work full time when the youngest is at school” and “women should spend most time on families” figures, even for the 20 to 29-year-olds was 73% and 19 % respectively.

De Vaus (1997a: 7) also found that, overall, a small majority of men (56%) and a large minority of women (45%) agreed that a “Husband’s job is to earn the money and a wife’s is to look after the family”. Attitudes to these more formalised gender roles differed markedly however, with respect to age of subject, with only 24% of the 20 to 29-year-old group agreeing with the above proposition. Again, the interpretation of these data and aspirations regarding the breadwinning/nurturing roles is complex. For example, de Vaus (1997a: 7) also makes the following observation.

Men and women differed in some unexpected ways regarding careers for women. Women were more likely to say that being a housewife is as fulfilling as working (52 per cent of women compared with 44 per cent of men); and that the home should remain the top priority for a working woman (76 per cent of women compared with 68 per cent of men).

De Vaus (1997a: 6) summarises the data on mothers in the workforce with the observation that, “Overall the acceptance of working mothers⁶² is conditional on her responsibility to her children and her family”.

Aware that ‘there is a substantial body of research showing that positive father involvement in two parent households contributes to children’s development, wellbeing and attainment’, (Amato & Gilbreth 1999: 558) these researchers looked again at the evidence on post-separation fathering. They decided to conduct a further meta-analysis of the (now

increased) number of studies done on post-separation parenting up until that 1999.

The authors initially speculated that if positive father involvement in two-parent households has been shown to contribute positively to children's development, wellbeing and attainment, then the negative survey results on post-separation fathering may simply indicate that non-resident fathers are less salient in their children's lives. But salience did not appear to be the key. For example, several studies on the subject (Amato 1987; Funder, 1991, 1996; Gibson 1992; MacDonald 1990; Wallerstein & Kelly, 1980) have reached the conclusion that many children in single-mother households think highly of their fathers and wish to have more contact with them.

Amato and Gilbreth therefore decided to approach the question of post-separation paternal contact from the perspective of *assuming* that non-resident fathers have the potential to benefit their children, and then to ask why existing studies have frequently failed to provide supporting evidence. They speculated that in focusing on *frequency* of contact and attempting to correlate this with outcome, many researchers might be focusing on the wrong dimension. They recalled, for example, that a study of adolescents' feelings of closeness to their non-resident fathers, which were positively associated with psychological and behavioural adjustment (Buchanan, Maccoby & Dornbusch 1996), were only modestly correlated with frequency of contact.

Amato and Gilbreth (1999) provide a detailed description of their methodology for conducting a meta-analysis of 63 studies dealing with non-resident fathers and children's wellbeing. Their carefully constructed study found positive correlations between outcome and the dimensions of

closeness and authoritative parenting. They note that both these dimensions are extensively described in the general family research literature and both have been shown to impact positively on outcomes for children. Payment of child support was also (again) positively correlated with outcome but frequency of contact was not.

The authors concluded that the dimension of authoritative parenting is an especially critical one for understanding the difference between the sort of contact which contributes to the wellbeing of the child and that which leaves both child and parent frustrated and dissatisfied. Rather than focusing on frequency or length of time spent between father and child, authoritative parenting is a *relationship* dimension which reflects parental support and control, both of which are seen as key resources for children (Baumrind 1968; Maccoby & Martin 1983; Rollins & Thomas, 1979).

According to Amato and Gilbreth (1999: 559), authoritative parents provide a high level of support for their children, as reflected in

... behaviours such as responsiveness, encouragement, instruction and everyday assistance. These behaviours facilitate children's positive development by conveying a sense of basic sense of trust, reinforcing self-concepts of worth and competence, and promoting academic success. Control is reflected in rule formation, monitoring and discipline. Through these processes, children learn that their attempts to affect the environment must operate within a set of socially constructed boundaries. ... The combination of a high level of support with a moderately high level of non-coercive control reflects the authoritative parenting style most consistently associated with children's positive development.

The non-coercive nature of the control is important. It is control that does not generally rely on physical punishment, deprivations or threats of these, because it grows out of the established and continuing relationship between parent and child.

Research such as that described above provides a rationale for bringing fathers back into the picture as viable nurturing parents in post-separation parenting disputes. In an important sense, however, it is research conducted after the event. It provides little or no explanatory power with respect to the question of how and why the rapid change from maternal preference to a formal stance of gender neutrality came about in Australia and elsewhere. It is suggested that this question is ripe for further research.

Such research could possibly shed light on the nature of the current dilemmas that continue to exercise judges asked to rule on post-separation parenting disputes. It could be argued that decision-making has had to take place ahead of the knowledge base needed to support it. In one sense, it is as if judges appointed to courts such as the Family Court of Australia have been catapulted from a world of generally agreed upon principles into a post-modern world of negotiated truths and values. In the earlier world, parenting credentials, and therefore decisions, were largely pre-determined by issues primarily related to by biology, gender or “correct” behaviour – issues the law has traditionally been reasonably well equipped to judge. In the post-modern world, parenting credentials are constantly reconstructed against a shifting and highly contextual backdrop of what is deemed good for the children.

Thematic summary

Though the rapidity of the legal turnaround from father preference to mother preference is not well understood, the privileging of motherhood and

domesticity, and the near exclusive psychological focus on mothering when considering child - development, has been well documented.

But the move from maternal preference to gender neutrality with respect to presumptions about parenting is less well understood both in terms of (again) the rapid legal shift and the psycho-social data supporting such a change. Indeed, it is argued that convincing scientific evidence supporting a presumption of gender neutrality has not been available until relatively recently. Thus, the evidence on men as competent nurturers post-dates gender-neutral assumptions that have accompanied legislative changes in Australia and elsewhere. Similarly, evidence on the potential for positive impact of post-separation contact between children and their fathers has, until recently, been at best equivocal.

I return to the question of the tension between gender neutrality and the presumption of a maternal preference in the final chapter. In the next chapter, I draw attention to the multiple meanings of childhood and family. I argue that an adequate application of a non-presumptive “best interests of the child” principle presupposes the need for decision-makers to be aware of the *range* of possible meanings ascribed to children and families and to be able to articulate their own positions.

I conclude the next chapter by noting an ongoing tension between modernist and post-modernist approaches within the judicial narratives on children and family. I note that there are times when courts appear to be aware that they are constructing acceptable and believable narratives about the issues placed before them. There are other times when judicial statements betray a belief that they are pursuing a truth “out there” that can be found, if only the investigation processes are sufficiently rigorous.

CHAPTER 4

Multiple narratives of children and families

Children as individuals: the challenge of the single instance

In his analysis of the constructions of British childhood from 1800 until the late-twentieth century, Hendrick (1990) suggests no less than ten ways in which children have been understood and responded to during the period.⁶³ This included the romantic (innocent) child of Rousseau,⁶⁴ and of the poets, Blake, Coleridge and Wordsworth, and the evangelical child of Calvin and Wesley, whose untamed (sinful) will needed to be subjected to the will of God. Earlier twentieth-century notions of the psychological child (theories of Klein, Winnicott and Freud are examples), included the belief that children were responding to, and needed to pass through and resolve an avalanche of inner conflicts. The more family and publicly oriented child evolved out of extending outwards, the developmental ideas of Winnicott, Bowlby and others.

As James and Prout (1990a) point out, psychological and psychosocial theories of childhood, which have dominated much of the twentieth century, began to assume an aura of universalism. They note that Richards (1974), a highly respected British psychologist and Kessel and Siegel (1983) in North America are key researchers who have challenged such universal laws of child development. Richards (1986: 3), for example, refers to:

... the criticism of psychology based on universal laws that were supposed to hold good across all societies at all historical times. It was

argued that such terms as “the mother” and “the child” not only conveyed a meaningless generality but also misrepresented the relationship between individual and social worlds and portrayed social arrangements as if they were fixed by laws of nature.”

In the introduction to their edited publication, James and Prout (1990b) have observed that the universality of childhood is located in children’s biological immaturity. Beyond that, however, they see the term “childhood” as a social construction within a given time and place. That is, “[t]he institution of childhood provides an interpretive frame for understanding the early years of life”. (James and Prout 1990b: 3)

A social constructionist approach to childhood provides a framework for moving beyond a good deal of the argument that sprang from Aries’ (1962: 125) well-known but contentious assertion that the concept of childhood did not exist until some time after the middle ages. Some of Aries’ most powerful arguments in support of this assertion centred around iconic depictions of children as miniature adults. The pictures Aries points to are not in dispute. What they *mean*, however, with respect to constructions of childhood at that time, is very difficult to be certain about from a contemporary perspective.

Part of the attraction of Aries’ position also springs from the fact that the very brutality of many early child-rearing practices, summarised by social historians such as de Mause (1975) and immortalised in the novels of Dickens, make it difficult for a twenty-first century observer to comprehend that developmental needs of children were in any way recognised.

Yet Pollock (1983), whose work consisted of a painstaking analysis of 415 primary sources between 1500 and 1900, paints a considerably less negative picture. Rhetorically, Pollock (1983: 263) also asks:

... why should past societies have regarded children in the same way as Western society today? Moreover, even if children were regarded differently in the past, that does not mean they were not regarded as children?

As Woodhead (1990) observes, any attempt to universalise the *needs* of children must also be seen in the context of social and cultural choices available. Throughout much of history, these choices were quite limited. Ochiltree and Edgar (1980: 7) have noted, for example, that “[u]ntil late in the nineteenth century, life was precarious for young and old, rich and poor, in a way which is not experienced in the twentieth century”.

Ochiltree and Edgar provide an example of this by summarising Shorter’s (1976) recording of the births and deaths in an ordinary German family in the late-nineteenth century. The family is described by Shorter as typical of many European families in the period.

Johann Michael Frank, a baker in 1892 married a woman whose first husband had died. They had five children, all of whom died, except the youngest who survived to maturity. The mother died when the youngest child was five years old. The father remarried, once again to a woman who had lost one husband. Such a loss these days would almost certainly be emotionally crippling for the remnants of the family but it was not unusual for the times. (Ochiltree & Edgar 1980: 7)

Woodhead (1990: 62) goes beyond his criticism of the universalisation of children’s needs by somewhat provocatively suggesting a moratorium on the very phrase. He argues that “needs” can be viewed

merely as shorthand, an economical way of conveying the author’s conclusions about the requirements of childhood ... arguably such expressions may also be serving as a very credible veil for

uncertainty and even disagreement about what is in the ‘best interests’ of children”.

Woodhead draws attention to an extensive literature on the philosophical complexities of the concept of need. His analysis of children’s “needs” also appears to echo Mnookin’s range of “best interests” criteria (listed below). Woodhead shows how such “needs – natural, social, psychological and cultural – all have authoritative backing in the literature even though some appear mutually incompatible”.

Woodhead presents cogent arguments which point to the power of constructions made in Western cultures in the name of attachment. Whilst he accepts the likelihood that certain, probably universal, developmental stages related to attachment have been established by key researchers,⁶⁵ he finds that Bowlby’s linking of attachment and imprinting, noted in the previous chapter, offers a cautionary tale.

Woodhead reminds readers that much of Bowlby’s experimental work took place with monkeys, a species that has evolved with a clear mother-infant developmental structure. Though Bowlby (1988) effectively recanted from a position that assumed the necessity of a *critical* relationship with the child’s mother, Edgar (1995: 15) notes that Leach’s (1994) highly influential work on child-care continues to be based on this “outmoded attachment theory which claims that children need constant one to one care for the first three years”.

In the social sciences, solutions are rarely if ever so simple or linear and never completely located outside the cultural context in which they are proposed. As Dally (1982) has pointed out, for example, Bowlby’s gendered and monotropic hypotheses, coincided with and were used to promote a

post-war change in family circumstances in which men were being repatriated from military duties and women were no longer required in the workforce.

In Australia, as elsewhere, the majority of women were increasingly unwilling to heed the call back to domesticity. Their aspirations to continue to experience the freedoms (and increasingly the economic necessities) associated with being in the paid workforce brought new dimensions and a renewed urgency to questions of what constituted appropriate child-care. Though the heat generated around the child-care debate has many sources, Pease and Wilson (1995) suggest that one of the reasons the arguments are seemingly endless, is that the notion of the need for a single “psychological parent” (assumed almost always to be the mother), remains deeply embedded in Western culture. The popularity of contemporary child-care “manuals” like those of Leach (1994), mentioned above and, in similar vein, Kellmer-Pringle (1980), provide support for Pease and Wilson’s position.

As also previously noted, the need for a family court to determine who is *the* psychological parent (the presumption again being that there can be but one) has been argued strongly by theorists such as Goldstein, Freud and Solnit (1973, 1979) as the logical basis for decision-making in post-separation disputes.⁶⁶ Woodhead (1990) argues that the idea of a single psychological parent, who in addition happens to be a mother or mother figure, is adaptive to a society that values maternal care within nuclear families which, in turn, are seen as the main productive unit.

In Woodhead’s view, what might be called gendered monotropism has primarily sustained post-industrial means of production in capitalist economies. Though couched in the language of children’s best interests, it

has served the child only secondarily. The fact that it is not a necessary view of successful child development is supported by cross-cultural evidence (e.g., Smith 1980) that demonstrates how children are capable of forming strong and secure relationships with up to ten “caretakers”. It is also supported by a wealth of anthropological evidence (e.g., Mead 1971) that describes the existence of a wide variety of successful family structures. The relevance of considering the question of idealised versus multiple family forms is considered in the next section.

Deconstructing the nuclear family

Most of the structural instability inherent in Shorter’s (1976) graphic example of nineteenth-century family life portrayed in the previous section, arose as a consequence of high mortality rates which were outside the control of family members. Closer to home and closer to our own era, Burns (1980) has painted a picture of considerable (though more hidden) instability in Australian family life in the first three quarters of the twentieth century.⁶⁷ Through a careful examination of Magistrate Court records and associated documents, Burns has shown that spousal violence and desertion were commonplace. Her research questions the image of the stable nuclear family, which a superficial interpretation of low divorce rates might suggest existed through much of the era.

Stone (1990) and Phillips (1991) offer differing but overlapping perspectives in their interpretation of the extent to which the rising divorce rate in the twentieth century reflects fundamental changes in human expectations. Stone finds similarities between the cycle of marriage, death

and remarriage described by Ochiltee and Edgar, and the pattern of marriage, divorce and remarriage with which we are more familiar today. Stone identifies a new family type of “affective individualism” which began to emerge amongst the middle classes in the late eighteenth century. Stone also invites us to reflect on the fact that, though the overt reasons may be quite different, the average length of marriage and consequent remarriage rates have not altered greatly.

Phillips (1991), on the other hand, places a greater emphasis on the qualitative differences in family sentiment, which emerged in the nineteenth century. Shorter (1975) also notes the “rise in sentiment”, though he sees the beginnings of this more clearly expressed around mother-child bonding and attachment than around adult to adult relationships. Goode (1992), who has researched marriage patterns since the 1940s, suggests that as many of its social and educational functions were take over by broader institutions, a search for intimacy within a committed relationship is what increasingly came to define marriage during the twentieth century.

Funder (1996) cautions about too great a focus on the explanatory power of the family microsystem and the role of inter personal relationships in the explanation of broad social change. At the same time, the work of social historians such as Goode would nonetheless suggest that the perceived absence of an intimate adult to adult relationship has increasingly been seen as sufficient to persuade many to undertake the considerable disruptions and difficulties associated with separation and divorce.

As previously noted, the dramatic rise in divorce applications following the introduction of the Family Law Act in Australia is illustrated by Phillips (1991: 225).⁶⁸ The figures leave little doubt that the general

removal of “fault” as a necessary criterion for obtaining a dissolution of marriage, encouraged many who might otherwise have put up with the legal status of their situation to seek what is (somewhat quaintly) described in law as “principal relief”. As the legal and social constraints on leaving a marriage have eased, steadily increasing numbers in most Western countries have “voted with their feet”. They have done so, despite the financial hardship and multiple disruptions (Smyth & Weston 2000) such a decision frequently brings.

Importantly, the fact that in Australia the majority of the formerly married repartner within five years (Funder 1996) suggests not a rejection of marriage and family itself, but a search for more satisfying expressions of living within intimate relationships. The results of this search for intimacy also includes the formation of groups of individuals who fall outside the conventional definition of nuclear families.⁶⁹ Of course a major “wild card” in many such quests for second chances at intimacy, is the structuring of parenting arrangements.

The struggle which judges and other professionals experience in coping with the aftermath of separation and divorce and with child disposition questions, is not merely a function of hugely increased numbers. The struggle relates to an absence of consensus regarding what defines a well-functioning family and, as a corollary, what is “best” for separating families. In Australia, deep-seated notions of the well-functioning family still tend to be equated with images of a semi-autonomous nuclear family living within one household (Edgar 1995; Funder 1996; Gilding 1991, 2001).

Goode (1992) has described this nuclear family ideal within a contemporary context as fragile. Looking at the situation from the child's perspective, Mead (1971: 87) went even further.

Every American child learns, early and in terror, that his whole security depends on that single set of parents who, more often than not, are arguing furiously in the next room over some detail of their lives. A desperate demand upon the permanence and all-satisfyingness of monogamous marriage is set up in the cradle.

At the same time, there is evidence that many children appear to take out a sort of emotional insurance policy. In two studies of children's perceptions of kinship networks, Johnson, Klee and Schmidt (1988) and Klee, Schmidt and Johnson (1989) demonstrated the considerable variability and complexity of children's active construction of family. The children in the studies identified and included many significant others who were not part of the formal family structure.

Using a modified version of Kvebaek's family sculpture technique (Cromwell, Fournier & Kvebaek 1980), Funder (1996) also demonstrated that from a child's perspective, "family" can look very different to the formal family structures which might present themselves as options to courts and similar decision-makers. Funder (1996: 67), who summarised related work in this area, concludes with the observation that "the majority of children appear to construct families without limiting themselves to the family as it existed at the break".

The legal, sociological and psychological literature is replete with brave attempts to define the term "family" and, based on the definitions, to suggest the critical resources, beyond food and shelter, which families require if they are to prosper. Though I understand the need to link services

to structures that can be defined, as a psychologist, I am drawn to the sort of fine-grain research summarised by Funder. Not only is such an approach capable of being child-centred, it seems to place an emphasis on matters which promote the sustaining and continuing development of stimulating and caring relationships. As noted, it is these matters which are at the heart of many of the threats to family life in the first place.

Maclean and Richards (1999), citing the work of Bastard and Veonche (1996), address the ongoing challenge of personal and institutional accommodations to an expanding view of what constitutes family. In their view, the complexity of family forms suggest that an appropriate response from family courts should be one which “exhorts rather than prescribes, by offering information [and] encouraging alternative dispute resolution rather than legal remedies” (Maclean & Richards 1999: 269). At the level of structure, the range of family “types” to which the law must accommodate itself is well illustrated by the subjects of investigation into “non-traditional” families by (Lamb: 1999a) and his colleagues. Amongst the family structures identified in this volume are stepfamilies, adoptive families, families headed by lesbian and gay parents, families living in poverty, multi-racial families and families in which children are subjected to neglect or violence.

On one reading, a history of formal decision-making in family law parenting disputes could be seen as a history of attention to the dominant voices of the time and of relative inattention to voices which were more muted, or silent. It has been noted that the voices of both men and women have been muted during different eras. At the same time, the voices of those

living in family structures outside the mainstream definition of family have been heard only faintly or not heard at all⁷⁰.

This and the preceding section suggest the need to move beyond a search for universalist approaches to children's developmental needs or family structure. When decisions need to be externally imposed, the arguments put forward so far in this chapter call for the sanctioning of arrangements that are flexible, sensitive to the subtleties of adult child relationships and, coincidentally, make no *a priori* presumptions about the impact of particular family structures.

But this is not an easy call for those charged with dispensing justice, reflecting societal norms and aspirations and simultaneously focusing on the interests of the child. Are there any verities upon which a Family Court judge might rely?

Continuing modernist and postmodernist tensions in family law

In the same year in which the Family Court of Australia opened its doors to a public that was queuing in the streets to file its applications⁷¹, Mnookin (1975: 260-261) astutely observed:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values in life in warm interpersonal relationships or in discipline and self-sacrifice? ... [W]here is the judge to look for the set of values that should inform the degree of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if a judge looks at society at large, he [sic] finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.

Einhorn's (1986: 119) questions follow a very similar line.

What should a society do for the children of divorcing parents? What values should we take into account in making our decisions about child custody, and what assumptions underlie those values? Should we consider the rights of the children, the mother or the father, or, if all three, whose rights are more important than the rest? If, instead of rights, we think about 'best interests,' what do we really know about the best interests of children, or, for that matter, of mothers and fathers?

The option of presumptive principles meant that judges in earlier times could largely bypass these difficulties. Yet Einhorn's analysis of American custody cases demonstrates that at least from the mid-nineteenth century onwards, judges in that country demonstrated an increasing willingness and a capacity to make observations and enter into lines of reasoning no less tortured and difficult than those contained in contemporary judgements.

Consider, in this regard, one of several judgements cited by Einhorn in support of his claim. In *United States v. Green* Mr Justice Storey declared in 1824:

As to the question of the rights of the father to have custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, *but for the benefit of the infant* (my italics) ... When, therefore, the court is asked to lend its aid to put the infant into the custody of the father and to withdraw him from other persons, it will look into all circumstances and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes ... It is an entire mistake to suppose that the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in his custody.

Mason (1994: ix) suggests that the relationship between parents, children and the state is "arguably the most fundamental relationship in a

society”. She not only claims that, “[t]he social attitudes and the legal norms embedded in this triangle determine the way we raise our children”, but that, in addition, they “provide the basis of social continuity within a nation”.

In Mason’s terms, legal approaches to the resolution of parenting disputes can be seen as attempts to promote social continuity in ways consistent with dominant ideas of the day. These approaches have been described in a number of contexts – for example, Grossberg (1985) in the United States, and Maidment (1984) in the United Kingdom. In addition, writers such as Phillips (1991), Gillis (1985) and Golder (1985) have included commentary on parenting judgements within the broader context of their analyses of the history of divorce. Numerous others (e.g., Mirafiotte 1985; Moloney, Marshall & Waters 1985; Mercer 1998) have also summarised decision-making principles as a conceptual prelude to their research into law and post-separation parenting issues.

In Einhorn’s view (p 120), regardless of context, these decision-making principles reflect:

... a knot of contradictions, reflecting society’s changing values about human nature; a history of flip-flopping assumptions about what, men, women and children are like, what’s good for them and who owes what to whom.

In a contemporary setting, Einhorn’s “knot of contradictions” is perhaps most likely to manifest itself by a careful examination of judgements related to closely-contested cases – that is, in cases in which no significant disqualifying factor, no obvious personality blemish or no compromising incident, can be identified.

Closely-contested cases arouse a degree of legal discomfort, which derives from more than the mere fact that they are inherently difficult to decide upon. *In the Marriage of Smythe*, for example, the Full Court of the Family Court observed that if matters are said to be evenly or finely balanced,

... all that has occurred is that the court has not yet determined which of the factors of most relevant to welfare should be given pre-eminence over other matters.

In citing this case Dickey (1997: 396) notes somewhat bluntly

... the possibility that the facts and circumstances of a residence case can be finely balanced [has been] rejected by the majority of the Full Court of the Family Court in *In the marriage of Smythe*.

Dickey (1997: 405) also appears to agree with the Full Court's assessment in this case when he notes that:

... in such circumstances the court of first instance has not sufficiently scrutinised the facts and circumstances presented to it concerning the best interests of the child.

This interpretation appears to stand in some tension with other judicial statements. In the key case of *Gronow v Gronow*, for example, Murphy J of the High Court (cited in K&Z 6.5 – see Chapter 7 of this thesis) observed that:

reasons for judgment, necessarily in many cases, especially in a finely balanced case, are a rationalization of a largely intuitive judgment based on an assessment of the personalities of the parties and the child.

In somewhat similar vein in the same case, Stephen J (517 – see Chapter 7) observed:

The very fact that each of Annabel's parents has much to offer her, there being little to choose between them, no doubt leads, easily

enough, to different minds forming different views concerning her best interests. The learned trial judge herself, after a most careful assessment of all material circumstances, concluded that matters are evenly balanced between the parties. And so they were: *one supposes that her Honour might, in the ultimate weighing up of competing considerations, easily enough have come to a conclusion the opposite of that at which she in fact arrived.* Had she done so I would not have thought it possible, looking at the recital of circumstances which her reasons for judgment contain, to have said that she had erred. (my italics)

The tension in the statements made within these two cases appears to relate to a fundamental philosophical question about what is going on when judges are weighing up the evidence. The Full Court's stance in *Smythe* would appear to imply a modernist approach, which assumes that the task of the judge is to discover a truth that is "out there". The truth, it is assumed, is accessible if the Court is sufficiently diligent to sift through enough of the evidence. The attitude expressed in *Gronow*, on the other hand, appears to endorse something approaching a more post-modern approach in which multiple truths are acknowledged.

Thus Murphy J's statement speaks of intuition, a realm of knowledge clearly outside the normal parameters of legal argument. In narrative terms, Stephen J's observations suggest that a judge is required to use his or her expertise to construct an interpretive account that *fits* what has been presented as closely as possible. Stephen J acknowledges, however, that an alternative narrative leading to the "opposite" result could be equally unassailable under the current rules, which govern the appeal process.

The idea, promoted in *Smythe*, that a custody or residence case only *appears* to be finely balanced because, as yet, insufficient evidence has been gathered, clings to the notion of externally-based truths about children's developmental needs and family structures. It appears to be based on an

assumption that a truth “out there” can be discovered through ever more diligent investigations or applications of the law. Such assumptions remain within a positivist meta-narrative of dispute resolution in parenting cases which, as previously noted, reflects a legacy going back at least as far as the judgement of King Solomon.

Perhaps it is the archetypal nature of the Solomon story, the discovery of the good parent, the rooting out of good and evil, and the subsequent delivery of justice, which makes it so alluring. When King Solomon decrees that the solution to the dispute between the two women is to cut the baby in half, the real mother is prepared to give up her child rather than see it die. The imposter is thus exposed and Solomon enhances his reputation as a wise ruler.

A more contemporary account of this story is told in Bertolt Brecht’s *Caucasian Chalk Circle*, later re-worked as a short story, *The Augsburg Chalk Circle*. Interestingly, in this version, it is again two *women* who are asked to tug at the child over whom they are in dispute. Whoever pulls the child across a chalk line will be deemed the “true mother”. Once again, the “true mother” relents, rather than have her child injured or torn apart. Once again the imposter is exposed.⁷²

Like all good archetypal accounts, these stories invite a simultaneous consideration of several morals.

First, the true parent-child link is between a *mother* and a child. In each account, the father has no stake in the action.

Second, the determination of custody necessitates the exposition of an imposter. Moreover, the imposter clearly has such evil intent that she is

prepared to see the child killed or seriously injured rather than lose the battle.

Third, the sign of a true mother is that she is prepared to sacrifice all for the sake of her child. This spirit of sacrifice is rewarded by the wise and independent arbitrator who grants her possession of the child.

Fourth, the judge of the truth of the matter in each case is objective, detached and male. The meta-narrative is that parenting disputes may be resolved according to clear principles, which are largely a-contextual.

Fifth, the truth is viewed as an either/or proposition. One outcome excludes the other. Only one claimant can be the true custodian in any given situation.

Sixth, truth is arrived at by the use of clever devices via which an unsuspecting villain is tripped-up and exposed.

Seventh, the subjects of the disputes, the children, need no special pleading or independent representation because in each case a wise and benignly disposed system will take care of them.

Finally, the stories are strongly suggestive of a generalisable postscript such as the following:

The wicked imposters are punished for trying to deceive a wise judge. A wise judge can discover the truth behind disparate claims about parenthood. The imposters will be caught. Real parents and their children will live happily ever after.

In contemporary family law, there is, of course, intermittent reinforcement for the preservation of an adversarial dispute resolution process that may from time to time expose clearly unmeritorious parenting applications. But the difficulty in uncritically supporting a process which is adversarial at its heart, is that it makes insufficient distinction between cases

in which imposters (such as the violent, controlling spouse) need to be exposed, and the more “run of the mill”, if humanly complex cases, in which two or more parental figures have different stories to tell.

The possibility that after a fully contested case a parenting decision can *legitimately* fall in more than one direction, is surely a challenging idea for litigants who are heavily invested emotionally and financially in a particular outcome. In a Canadian study published after that country’s first federal divorce legislation in 1968, Bradbrook (1971) presented a series of hypothetical custody disputes to fifteen Supreme Court judges and found very significant differences in the approach taken to the same fact situations. Bradbrook (1971: 571) concluded by observing “[i]nvariably, lawyers and litigants must feel that the outcome of their cases in this field will depend largely on ‘luck of the draw’ as to which judge is assigned to hear the case”.

From a narrative perspective, the important issue arising out of Bradbrook’s study is not that judges reached different conclusions on presentation of the same “facts”. From a narrative perspective in closely contested cases, each parent will have a legitimate story to tell. At one level, a narrative analysis would be interested in the stories told by each of the players – parents, the children, other carers and witnesses – as well as the constructions of judge, barristers and non-legal experts. As noted earlier, an important aspect of the research presented in the second section of this thesis is the question of which values and assumptions were privileged by the decision-maker, the judge, and which were left under-explored or unexplored. At the same time narrative analysis begins with the assumption that judicial values cannot be separated from, but rather respond to and

shape the very perception of the “facts” presented in each case (Amsterdam & Bruner 2000).

A good example of this process is described in Mercer’s (1998) analysis of a contemporary attempt to revert to rule-based decision-making.⁷³ In researching how West Virginia judges have recently applied the primary caretaker principle (which aimed to increase consistency by outlining ten operationally definable decision-making criteria), Mercer found a continuation of the widespread use of judicial discretion. She concluded that the primary caretaker rule had no more predictive value than the “best interests of the child” standard.

Mercer was interested in better understanding what might be motivating judges to depart from the more potentially predictive primary caretaker rules. She examined, for example, the idea of “wavering in one’s commitment”, a concept contained within the West Virginian legislation. She found that the judgements that referred to this all referred to mothers. The act of wavering in one’s commitment included one case of a woman who had, on occasions, spent the night with a man in her home. The man had also “been seen” with her child. From such examples, Mercer (1998: 107) concluded that the judgements contained a “preoccupation with a mother’s sexuality and sexual behaviour.” Such a theme, of course, has strong echoes with preoccupations which go at least as far back as the European ecclesiastical courts of old (see, for example, Dessaix 1996).

Mercer’s analysis, when considered against the remarkable stability of findings in the outcome research noted in Chapter 1, raises the question of the extent to which support for radically different decision-making principles at different times has obscured the existence of more stable

patterns in judicial thinking. In other words, is there a set of fundamental decision-making principles to which judges return in parenting cases, despite the many variations which appear to exist within the judgements themselves? Is there evidence that many judges cope with the sort of problems noted by Murphy J and Stephens J by imposing on the material a more archetypal meta-narrative about the parenting of children?

Elster (1989) claims that in parenting cases judges do and indeed *must* regularly “smuggle in”⁷⁴ considerations beyond those which they are formally required to address. According to Elster, the expression of these considerations is often covert. One must search between the cracks, so to speak, to find them. One must search as much for what is omitted from the discourse as for what is present.

Thus, whilst the interests of the children dominate the rhetoric in current family law cases, there are ample historical and contemporary reasons to view the decision-making processes with caution and with a degree of respectful⁷⁵ scepticism. Before turning to analysis of contemporary closely contested parenting cases in the Family Court, therefore, a more considered comment on the “best interests” principle is appropriate.

Continuing socio-legal narratives “in the best interests of the child”

Dickey (1997) notes that for all Australian courts the “best interests” or welfare of the child is now the paramount consideration in the determination of issues concerning parental responsibility for children. Though different courts may employ different statutory formulae to signify

that the interests or welfare of the child is the paramount consideration, according to Dickey (1997: 374), they all “signify precisely the same principle”.

The 1995 amendments to the *Family Law Act 1975* altered the term “welfare” to “best interests”. The new term brought the Act into line with Article 3 (1) of the United Nations Convention on the Rights of the Child. Again, however, as Dickey explains (1997: 375), “Parliament did not intend any alteration of this principle by replacing [the words]”.⁷⁶

There is considerable discussion in the Australian literature and in Australian cases as to the precise meaning of “paramount consideration”. Much of that discussion centres around the status of any issues not directly related to the child, and whether all issues are subordinated to the welfare or best interests as the paramount consideration. There is consensus that the best interests of the child, whilst paramount, is not the *only* consideration in matters of parental responsibility. Dickey suggests that the key to understanding the intention of the legislation lies in the meaning of the word “consideration”. The word implies other factors are also relevant and, in the Australian context, this allows scope for wide judicial discretion.

In an important article, Kelly (1997) has explored some of the problems associated with the best interests principle. Kelly (1997: 377) identifies:

The lack of consensus as to its meaning; the question of weighting the best interests criteria; the meaning of these criteria for children of different ages; the manner in which important psychological concepts are used to provide meaning; and the uninformed, often highly personal interpretations inserted into discussions of the best interests of the children.

Kelly sees the best interests standard as a Pandora's box, but one whose contents is nonetheless worth exploring. She believes that we need to expand our efforts to make the standard more workable.

Kelly's most cogent argument in favour of preserving the standard centres around the idea that it allows for the consideration of children on a case by case basis, thereby lessening the chance of considering them as a homogeneous group for whom a single or predictable outcome might be appropriate. She points to changing social mores and values, such as altered attitudes to parents with disabilities and parents with non-heterosexual orientations, and notes that the best interests standard is able to adapt itself to meet these changes.

With regard to the problem of personal interpretations that the highly discretionary aspect of the standard allows, Kelly acknowledges (p 384) the potential for the "unexamined psyche" to dominate in some decision-makers. She offers three examples in which decision-makers adopt what are essentially psychological compensatory mechanisms that stem from losses or absences in their own lives. One of these examples is that of a person who grew up without a father and as a result fails to recognise a father's importance to a child in a particular case. A further example, in a different category of "unexamined psyche" cases, addresses the possibility of links between outcomes and the gender of the decision-maker. In weighing up the issues, a female judge might, for example, privilege motherhood.

Kelly's article is focused on present and future concerns. Maidment (1984) takes a more historical and more sociological perspective with respect to the psyche of the decision-maker. In Maidment's (1984: 149) view, the welfare/best interests principle, though ostensibly child centred,

... has always been and probably always will be a code for decisions based on religious, moral, social and perhaps new social science-based beliefs about child-rearing. Not only will these beliefs inform the decisions which will thus change according to the change in beliefs, but these decisions were in the past and are for the present made by adults for adults about adults.

Some of the tension and the confusion with regard to the best interests standard also seem to coalesce around another aspect of the primacy issue. Rapoport, Rapoport and Strelitz (1977), for example, suggest that the primacy argument runs counter to the realities of day-to-day family life. They make the obvious but significant point that parents' needs and children's needs are not always coterminous. In non-separated families, arrangements are routinely worked out to arrive at a tolerable mixture so that none of the adult and non-adult parties concerned will suffer unduly. Such arrangements are subject to change as individuals develop and as family structures change. But in Rapoport et al.'s terms, the idea of assessing those changes on the basis of the child(ren)'s needs being primary, would be regarded as strange and unbalanced in many non-separated families.

In many ways, the "best interests/welfare" principle could be said to have had a chequered history. Historically, it has sat beside, and sometimes justified adherence to, patriarchy as well as to a maternal preference. It has also co-existed with punishment of the "guilty" parent and a variety of modified positions in between. In Maidment's historical analysis of the welfare principle (Maidment 1984 Chapter 6) she observes that many women who fought for change that favoured the interests of the child were just as concerned with their own rights. Similarly, Mason is one of a number of commentators who connect women's earlier concerns about the interests

of the child with their concern for gaining property rights for themselves. (see Mason 1995 Chapter 4)

Herring (1999) argues that the formal adherence to the best interests or welfare principle can continue to serve to distract from the realities of what is going on which, according to Herring, is usually a more deep-seated adult-oriented agenda. Not surprisingly, perhaps, the robust adversarial nature of defended proceedings through which these agendas are pursued, can be put forward as a reason why the very child, who is the subject of those proceedings, should not be in attendance. The absence of the child, in turn, helps legitimate vigorous examination and cross-examination of parents and other potential carers and witnesses “in the name of the child”.

It is sometimes overlooked that, in one sense, there was nothing new in the Australian Family Court’s overt declaration of the interests or the welfare of the child in post-separation parenting disputes as paramount or primary. For example, the Australian *Matrimonial Causes Act* 1959 (Cth) stated (Section 85) that “...the court shall regard the interests of the children as the paramount consideration”. As noted earlier, however (see Finlay et al. (1997: 25), divorces under the Matrimonial Causes Act continued to be granted largely on fault-oriented criteria. Almost inevitably, the assessment of children’s futures frequently became part of the collateral damage. To the question of how the interests of the children were considered in such a fault-saturated atmosphere, Faulks (1996: 64), a Judge of the Family Court of Australia, has somewhat wryly suggested, “there was some dalliance with the symmetry of contrasting children’s interests and parents’ interests”.

Clearly, then, the Family Court's "best interests" declaration carried with it significantly different implications to a similar declaration attached to the legislation that preceded it. At the same time, what has been common to both pieces of legislation has been the virtual exclusion of children from direct engagement with the legal processes that impact on them.⁷⁷

In considering the interests of the child, Hill and Tisdall (1997: 322) have summarised Article 12 of the United Nations Convention on the Rights of the Child (1989) as: "The child's right to express an opinion and to have that opinion taken into account, in any matter or procedure affecting the child." They summarise Article 13 as: "The child's right to obtain and make known information and to express his or her views unless this would violate the rights of others."

It would seem both axiomatic and a matter of normal justice that parties who have an interest in the direct outcome of a dispute should have an opportunity to have input into the decision-making processes. Equally, it seems likely that the physical absence of one of the parties who have a stake in a dispute will alter the dynamics of the decision-making processes in ways more likely to favour the aspirations of those who are present.

Family law litigation processes are certainly unusual in their elevation of the interests of one of the parties involved in the dispute (the child) to the status of "paramount", whilst frequently allowing no representation or, at best, allowing only indirect representation of that party's views. Much of the opposition to more direct forms of representation, which would include the physical presence of children for at least some of the proceedings, possibly begins with the sort of assumptions expressed by Faulks (1996: 76), who notes:

It is widely thought that it is not appropriate for children to be sitting in a court-room hearing the allegations and counter-allegations made by their parents in custody cases. Whilst it may be true that such allegations ought not to be made in custody proceedings, it is difficult to imagine how - given *human nature* and the emotional circumstances surrounding a custody case – bitterness, anger and resentment will not produce allegations (my italics).

But bitterness, anger and resentment do not accompany all separations. Nor are all parenting disputes, even those that proceed to fully defended child-related hearings, motivated by such sentiments. Though the difficulties are considerable, it should not be beyond the wit of legislators and arbitrators to devise a process in which the focus of the discussion is not on past misdemeanors (unless these can be shown to critically impact on the child's welfare) but on competing *future* parenting plans.

The fact that litigation processes remain adversarial and largely backward looking, and that this can, in turn, be used to support arguments which would seek to continue to exclude the presence of children from any part of the proceedings, may again suggest that deeper issues are at stake. For example, drawing on empirical research in which divorcing mothers and fathers were asked about how they negotiated conflict over their children, Day-Sclater and Yates (1999: 272) have argued that the dominant discourse of children of divorce as vulnerable victims (rather than, say, resilient adapters) “provides a repository for the parents’ feelings of vulnerability which they find difficult to ‘own’ for themselves”. The authors suggest that such a discourse:

... permits parents to focus on children's vulnerability (in a process psychoanalysts call projection) and so to experience their own vicariously, at one step removed. (Day-Sclater & Yates 1999: 272)

This theoretical position goes some way towards explaining the contradictory (one might even say bizarre) processes which can be observed in adversarially-driven litigation over children. It is not uncommon in such proceedings to witness a sequence of detailed allegations, the effect, if not the aim of which is to belittle or shame a former partner, and to hear that such allegations are required to achieve a result that will be “in the interests of the child”. It is not uncommon to find that at the conclusion of such processes, the court will be at pains to exhort parents to now put their bitterness behind them.

Clearly, the “best interests of the child” standard has proved itself to be nothing if not versatile. But an important ongoing question is how to retain the worthy aim of a flexible decision-making regime that “considers the individual child’s developmental and psychological needs” (Kelly 1997: 385) whilst addressing the problem of the unexamined (or at least insufficiently examined) psyche. It is suggested that, “in the interests of the child”, an insufficiently examined psyche can operate at many levels. As Kelly highlights, it can reflect very personal issues in the decision-maker. As Day-Sclater and Yates (1999) suggest, it can also reflect very personal issues in the parents. And as observers like Maidment (1984), Mason (1995) and Herring (1999) have noted, it can be used in the service of and even to obscure much broader agendas.

A further possible insight into the ambivalent attitude that legal (and other) processes adopt towards the question of how to engage with children is provided by Cunningham (1995: 32) who has observed that:

The peculiarity of the late twentieth century, and the root cause of much present confusion about childhood, is that a public discourse that argues that children are persons with rights to a degree of

autonomy is at odds with the remnants of the romantic view that the right of the child is to be a child. The implication of the first is a fusing of the worlds of adult and child - and of the second the maintenance of separation.

Despite the fact that divorce is now commonplace, does it continue to leave us with a sense of collective guilt about how our striving for personal autonomy and satisfaction impacts on children? Though children's lives in a variety of family settings are frequently disrupted by parental career aspirations, mobility, economic and housing policies, compulsory land acquisition and a variety of other private and structural changes, perhaps divorce is more personally confronting in that regard with respect to where it leaves the children.

Perhaps our unease about what to "do" with the children of divorce also links to our knowledge that the history of the treatment of children in Western societies is not a history of which those societies can be proud. For example, de Mause's (1975) work,⁷⁸ noted earlier, is subtitled "*The untold story of child abuse*". And whilst, as also noted above, other historians of childhood, such as Pollock (1983), would not be so sweeping in their assertions, there can be little doubt that many children have suffered greatly and continue to suffer greatly at the hands of adults.

Our possible guilt and accompanying unease may also be demonstrated by the fact that until very recently, most studies into the consequences of divorce for children have been conducted through the eyes of adults (Pryor & Rodgers 2001)⁷⁹. Though Pryor & Rodgers note a number of studies in which children were consulted about the impact of separation and divorce, they also cite the fact that McDonald's (1990)

Australian study of children's responses to separation and divorce was based on her observation that:

While adult views on children's adjustment and the role of post-separation access have been widely canvassed, children's own feelings about divorce and their perceptions of current access arrangements have rarely been sought in any depth. (McDonald 1990: 10)

There is little doubt that our responses to post-separation parenting dilemmas would be different were we to consult children more directly and take their responses seriously. In this regard, McDonald (1990: 45) concludes her study with the observation:

Children's wishes regarding future relationships with both separated parents are often disregarded by adults who conclude that *they* are cognisant of their children's feelings. Research to date does not support that view.

In Australia, Chisholm (1999) has issued a challenge to legal complacency on the issue of engagement of children. The issue of actively listening to children has also been strongly argued by Mason (1999) in the United States, and James and Richards (1999) in the United Kingdom. As Otlowski and Tsamenyi (1992) note, the task has been made more urgent in Australia by its endorsement of the United Nations Convention on the Rights of the Child.

As noted in the introductory comments in this thesis, Herring (1999: 99) has argued that one of the costs of continuing to promote a welfare/best interests principle as primary or paramount is that it forces judges and others into "strained reasoning" in which the interests of parents are covertly rather than overtly accommodated. He cites a number of examples of this from English cases. In one 1997 case,⁸⁰ the judge observed:

The mother and the child are one for the purposes of this unusual case and the decision of the court to consent to the operation jointly affects the mother and the son and so affects the father. The welfare of the child depends upon his mother. (Herring 1999: 94)

There is a sense in which Herring's linking of this problem to the "welfare/best interests" principle is correct. At the same time, this first section of the thesis demonstrates that child disposition questions, both historically and in our complex contemporary culture, represent a quintessential example of a "study in the limitations of rationality" (Elster 1989).

Thus in a concluding statement to her analysis of the Family Court of Australia's first twenty years, Star (1996: 213) observes,

... the more the hard repetitive issues in family law are examined – issues of law such as difficult contact cases ... the more it should be acknowledged that there are some areas of human experience that cannot be dealt with adequately by the law ... This is so whether or not ... the crucial tension between rules and discretion swings to one side of the pendulum or the other.

Clearly the best interests standard places considerable onus onto the decision-maker to identify, prioritise and find "a way through the maze"⁸¹ of issues that can go towards the question of how a child is to be parented following separation and divorce. In addition, it is likely that in Australia, the 1995 Reform Act, with its emphasis on ongoing parental responsibilities, the duty to protect children from violence and abuse, and the right of the child under normal circumstances to a continuing relationship with both parents has not made the task easier.

What, then, is a contemporary decision-maker to do? An analysis of judgements in closely-contested cases aims to shed light on how the multiple issues associated with family, children and children's best interests

are resolved in post-separation parenting disputes. It aims to better understand:

how [judges] try to make their actions comprehensible within some larger series of events that they take to constitute the legal system and the culture that sustains it.⁸² (Amsterdam & Bruner 2000: 110)

Clearly such an analysis does not itself begin in an historical or cultural vacuum. My aim as a qualitative researcher is to remain as open as possible to what arises, whilst recognising that I, too, am part of the very culture I am investigating. Further, it is clear from the preceding review that a number of issues have dominated past attempts to find solutions to post-separation parenting disputes. They have included monotropic views about attachment and relationships, assumptions about gender, multiple views about the nature of childhood and concerns about morality, especially the sexual morality of women.

The next chapter, then, describes how the task of analysing judgements in closely-contested cases is to be accomplished in ways that maximise reliability and validity – or, in terms more akin to qualitative research (Caulley 1994: 18), in ways that maximise credibility, transferability, dependability and confirmability.

SECTION 2: ANALYSING CLOSELY-CONTESTED CASES

CHAPTER 5

Methodology

Introduction

The questions raised in the penultimate paragraph of the previous chapter call for a response based on a *qualitative* analysis of judicial statements. Additional reasons for conducting a further qualitative study of post-separation parenting judgements have also been canvassed in Chapter 1. In summary, they are:

- Previous data that have been the subject of systematic qualitative research are more than 10 years old;
- Family Court parenting judgements have been and remain controversial. They continue to attract contradictory interpretations about their underlying presumptions;
- Larger scale quantitative studies address the question of what is happening (outcomes) but are more limited in their capacity to articulate why;
- Qualitative studies in Australia have been somewhat unclear with respect to sampling procedures and methodology, leaving findings uncertain and/or ambiguous;
- Notwithstanding methodological and sampling problems, qualitative studies in Australia nonetheless suggest the existence (at the time the studies were conducted) that stereotypical gender-related attitudes may persist;

- The results of these more formal qualitative studies, though they must be questioned on methodological and sampling grounds, are not inconsistent with observations (also canvassed in Chapter 1) made in the major case commentaries.

These reasons point to the need for a further qualitative study which has the following characteristics:

- Judgements delivered within the past 10 years;
- Transparent and replicable sampling procedures;
- Heterogeneity regarding types of cases, presiding judges, outcomes and gender of applicants;
- Accessibility of data;
- Transparent and replicable methodology.

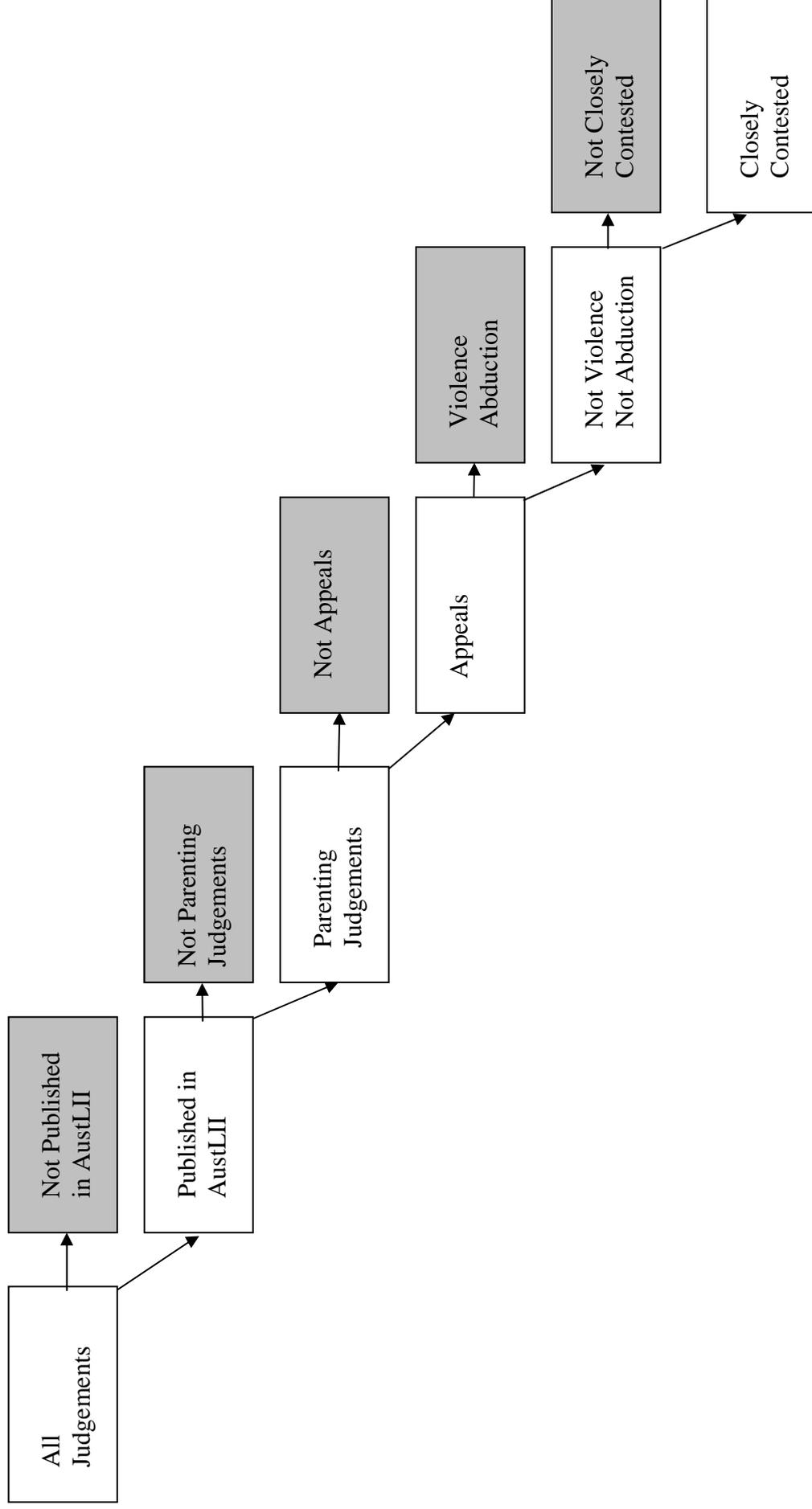
This chapter describes and justifies the sampling procedure that was adopted. It demonstrates the effectiveness of this procedure by showing how on key variables the sample of closely-contested parenting judgements is a heterogeneous one. The chapter then describes the method by which the judgements were analysed and how issues of validity and reliability (or “trustworthiness” (Caulley 1994) in the language of qualitative methodology) were attended to.

Sampling

The sampling procedure for the present study is summarised in Figure 1. The cases were derived from a search of all appeal judgements related to parenting disputes over custody or residence published electronically under AustLII,⁸³ a Family Court auspiced

Figure 1

Outline of purposeful sampling: Screening criteria of AustLII cases



database, between 1988 (when electronic publishing commenced) and May 2000 (when data gathering ceased).

The criteria for inclusion in, and exclusion from, the study are described below, as are the reasons for pursuing these criteria. The cases are selected for inclusion into AustLII by a judicial committee, currently chaired by the Deputy Chief Justice of the Family Court of Australia. A major AustLII publishing aim is the achievement of maximum variation in the cases (personal communication, Chair, AustLII publications committee). Thus, the Committee Chair has noted that in considering whether or not to publish, the following questions are addressed.

- Does the case establish law or change existing principles?
- Is the judgement critical of existing law or principles?
- Does the judgement contain a useful review of existing law or principles?
- Does the approach taken assist in a particular way in resolving the conflict within the dispute?
- Does the judgement overturn a previously reported judgement at first instance?
- Is the reporting of the case likely to be in the public interest?
(There is considerable public interest, for example in cases, which fall under the category of “relocation cases”.)

Sampling from AustLII, therefore, increases the chances that any common patterns detected in the study are likely to hold up over a wide range of cases rather than just the particular group studied.

The sampling procedure was also designed to be easily accessible to all researchers. Its aim was to be transparent, free from any obvious researcher bias and capable of being scrutinised and replicated.

The transcripts of all these judgements are universally accessible on the world wide web at www.austlii.edu.au/ The transcripts also contain the paragraph numbers used to identify the particular judicial statements in the results set out in the next two chapters.

Appeal judgements rather than judgements at first instance were chosen because, via the appeal process, the clients themselves define those aspects of the case, which they believe to be problematic, non-reflective of societal norms or in some other way unfair. If the appeal court accepts that grounds for appeal do indeed exist, it is then required, *inter alia*, to direct itself to those particular parts of the judicial narrative highlighted by the appellant.

Because my interest was in judicial narratives concerning men and women who both appeared to be functioning as good or at least adequate parents, I wanted to exclude cases in which violence, abuse or abduction of children were mentioned in the judgement. As an effective and replicable (though also imperfect)⁸⁴ screening device, I initially conducted an electronic search of all judgements using the Boolean descriptors (“custody” or “residence”) & (“appeal”) & (“not property”, “not abuse”, “not violence”, “not abduction”). This yielded a sample of 104 judgements. I then read all these judgements and excluded cases which did not involve “closely-contested” parenting disputes.

In the first level analysis of cases which forms the next chapter, I justify the inclusion of each case in the “closely-contested” category. Generally, determination of being in this category was by way of a direct statement to that effect by the judge at first instance, or one or more of the appeal judges. Phrases like “finely balanced”, “finely poised” and “determined by the weight of a feather”, as well as the phrase, “closely-contested” itself, are examples of judicial statements which placed the case in-scope. In several cases, though such words are not used, the inference that the case is closely contested is clear from other statements which I identify in the text. This process reduced the sample size to 30.

Many of the 74 judgements not included in the sample at this point revealed themselves to be appeals which were concerned with technical matters such as costs or procedural issues. Others were shown to be disputes over child financial support or over property. (For example, in the latter case, it was found that elimination of the word “property” did not account to all financial disputes. Similarly, in several cases, the word “residence” – which replaced the word “custody” in the *Family Law Reform Act 1995 (Cth)* – referred not to children but to the matrimonial property.)

Verification was required with respect to my decision to exclude the 74 cases judged to be not in the closely contested parenting category. To do this, I asked a psychologist colleague to read through a random sample of 20 of these cases and to search for statements to indicate that the appeal was either not related to a judgement about parenting or was not related to a closely-contested

parenting case. My colleague found no closely contested parenting cases in this sub-sample.

Determination of the 30 “in-scope” cases was independently verified by asking another colleague, also a qualified psychologist, to find evidence of statements about each case being a closely-contested appeal related to a parenting dispute. He was asked to bring to my attention evidence which might place any case outside the category of a closely-contested parenting dispute about which a litigant had appealed. This process resulted in five further rejections.⁸⁵

The sampling technique employed was thus a purposeful sampling, described by Caulley (1994: 7) as:

... a strategy to be used to help manage the trade-off between a desire for in-depth, detailed information about cases and the desire to be able to generalise. The logic and power of purposeful sampling lies in selecting *information rich* cases for study in depth. Information rich cases are those from which one can learn a great deal about issues of central importance to the research.

Patton (1990: 182–183) has identified 16 forms of purposeful sampling, each more or less suited to particular situations and each likely to lead to influence the direction of the research and expand or limit the usefulness of the analysis. In Patton’s terms, the present study was based on a criterion-based purposeful sample which, in turn, was drawn from a pool of cases published by AustLII.

Returning to the final sample of 25, it is important to revisit the question of the extent to which it is likely to be one representative of all litigants who would have been deemed to have been closely contesting a custody or residence case. Had there been some hitherto

unrecognised bias in the sampling procedure it is likely that clusters would reveal themselves around key variables like type of case, year of judgement, name of judge, gender of applicant, gender of appellant and outcome.

As noted in Table 1, the range of issues addressed in the cases was extensive. This suggests that the sampling had no detectable in-built bias towards a particular issue or issues. It also suggests that the judicial publications committee referred to in the footnote above, appears to be fulfilling its brief of ensuring that a wide variety of cases are finding their way into AustLII.

Table 1 also reveals that at least 18 and up to 22 judges were represented from a total of approximately 50 judges within the Family Court. This further reduces the chances that the initial computer-driven search contained an unanticipated selection bias.

In interpreting this, it should be noted that individual judges are designated by letters of the alphabet rather than names except in the four cases in which the appeal court did not name the trial judge. It will be seen that three cases were heard by the same judge and two cases by another. The remainder were all heard by individual judges. The number of judges within the Family Court fluctuated somewhat during the period spanning the judgements, but stood at 50 at the time these results were being analysed.

Table 1.
Cases by Name, Type, Feature and Judge at First Instance

Name	Type	Special Feature (s)	Judge
A&J	Relocation	Mother in lesbian relationship; child needs “constant presence” of father	A
Christianos	Relocation	Status quo; male child with father 11 years	B
Doyle	Interim Custody	Time at home as evidence of primary care. Quality of care not considered	–
Drenovac	Custody	Young children deemed emotionally hurt by separation and in need of mother	C
Duck	Custody	Split Custody – status quo affirmed	D
Firth	Custody	Grandparents’ religious beliefs restricting mother’s relationship with her children	E
Fisk	Custody	Children in father’s care 15 months	F
Hong	Custody	Mother loses despite being seen as having a stronger case – unavoidable absences	G
K&Z	Relocation	Mother absences seen as serving her own needs	H
Kneller	Custody	Father’s contact with children halved due to perceived stress of travel.	I
Lalor	Interim Custody	Interim sharing pending final hearing	J
Lavette	Custody	Mother considered “too laid back” to deal with child’s asthma	K
Lavrut	Interim Custody	Child’s wish to be with father	–
McCall	Relocation	Mother blamed for marriage breakdown and non-consideration of children’s needs	L
McMillan	Custody	Father’s plan to receive parenting benefits a “drain on public purse”	I
Moddel	Custody	Mother’s inability to cope couched in vague medical terms	D
Peterson	Custody	Refusal to allow independent report. Child’s wishes determined by judge	M
Ploetz	Custody	19-month status quo; father supported by extended family	N
Re Evelyn	Custody	Surrogacy case. Biological mother favoured over social mother. Biological mother favoured over biological father	O
Robbins	Custody	History of shared parenting. Mother seen as natural choice. Presumption that father would wish to return to full-time work	P
Ross Doyle	Custody	Deemed a poor parenting choice either way. Mother’s “platonic” relationship deemed unnatural	–
Sheridan	Custody	Father’s role is to provide income	I
Smith	Custody	Presumed that father would need career and would need a partner to assist with care of child	Q
Toon	Custody	Father’s contribution would be “intellectual” Mother’s contribution would be “emotional”	R
Ward	Relocation	Status quo and biology privileged	–

Note. – = Not available

The results of sorting by year of judgement are noted in Table 2. This reveals examples from every year except the years 1999 and 2000, with no particular year being significantly over-represented.

In interpreting this, it should be noted that though the cases are appeal cases, the year refers to the year of the hearing at first instance. Thus the chances of finding a 1999 or 2000 case at first instance which had been heard on appeal and successfully submitted for publication, were relatively small. It will also be noted that two cases pre-date the date at which AustLII commenced publishing (1988). This is accounted for by the fact that the publication date from the point of view of AustLII, is the date of the appeal rather than the judgement at first instance.

In terms of outcomes of the cases at first instance with respect to gender, the results of Table 2, presented on the next page, approximated those reported by Bordow and Horwill (1983) and Bordow (1994) in their larger studies.

Finally, as Table 3 (see two pages ahead) demonstrates, the gender of both applicants and appellants was also roughly equally divided.

Table 2.

Residence Order and Year of Judgement

Residence order		Year of Judgement	
Name	Residence to	Name	Year
Moddel	Father	Firth	1987
Christianos	Father	Moddel	1988
McCall	Father	Duck	1988
Ploetz	Father	Christianos	1989
Lavette	Father	McCall	1989
Lavrut	Father	Ploetz	1989
A&J	Father	Lavrut	1990
Fisk	Father	Ross Doyle	1990
Hong	Father	Lavette	1991
K&Z	Father	Doyle	1992
Firth	Mother	Toon	1992
Doyle	Mother	Peterson	1993
Toon	Mother	Ward	1993
Ward	Mother	Drenovac	1994
Drenovac	Mother	Lalor	1994
Sheridan	Mother	McMillan	1994
Robbins	Mother	Robbins	1994
Kneller	Mother	Sheridan	1994
Smith	Mother	A&J	1995
Re Evelyn	Mother	Fisk	1995
McMillan	Great MGM	Kneller	1995
Lalor	Interim Shared	Smith	1995
Peterson	MGM	Hong	1996
Duck	Split	K&Z	1997
Ross Doyle	Split	Re Evelyn	1998

Table 3.
Gender and Status of Applicant and Appellant

Applicant sort		Appellant sort	
Applicant	Case	Appellant	Case
Both	Ross Doyle	Fa/Intvnr	Firth
Father	A&J	Fa/Partner	Re Evelyn
Father	Christianos	Father	Doyle
Father	Drenovac	Father	Drenovac
Father	Hong	Father	Kneller
Father	Kneller	Father	McMillan
Father	McCall	Father	Peterson
Father	McMillan	Father	Robbins
Father	Peterson	Father	Sheridan
Father	Robbins	Father	Smith
Father	Sheridan	Father	Toon
Father	Toon	Father	Ward
Father	Ward	Mo/S Fath	Duck
Mo/Partner	Re Evelyn	Mother	A&J
Mother	Doyle	Mother	Christianos
Mother	Duck	Mother	Fisk
Mother	Firth	Mother	Hong
Mother	Fisk	Mother	K&Z
Mother	K&Z	Mother	Lalor
Mother	Lalor	Mother	Lavette
Mother	Lavette	Mother	Lavrut
Mother	Lavrut	Mother	McCall
Mother	Moddel	Mother	Moddel
Mother	Ploetz	Mother	Ploetz
Mother	Smith	Mother	Ross Doyle

Thus on the key variables, the sample appears a heterogeneous one. Therefore, though the sample is clearly in the non-probability category, it nonetheless possesses the characteristics of a sample which is likely to be representative of the population of closely contested cases in which appeals were made to the Full Court during the period.

Methodological strengths and limitations

The study consisted of a content analysis of all statements of judges at first instance which were cited by the appeal court. The analysis does not include statements from the appeal court itself. Rather, the appeal courts' verbatim references to the judicial statements from the cases at first instance, provide a highly-focused window into these judgements because, by definition, they addresses the most critical, controversial or problematic aspects of the case. Thus a strength of this method is that the appeal process brings to bear the focused attention of the appellants and respondents (and their legal representatives), as well as that of three experienced Family Court judges, on critical aspects of the initial judgement. In many ways, the appeal process could be said to take the reader to the heart of those aspects of the judgement which distinguish the merits of one parent from those of the other. The method also has limitations that are discussed in the final chapter.

In conducting the analysis of the judgements at first instance, my emphasis was on narrative and structure rather than statements or words in isolation. I was interested in the stories constructed by the judge. I was interested in examples of the way in which certain stories became dominant and were reinforced as a means of assisting the final decision making.

This form of analysis places researchers very much *inside* the text. It creates a tension between attempts to adopt and hold a meta-position, and a recognition that researchers bring their own histories,

ideas and narratives to the case material.⁸⁶ I found it important to begin by conforming to a discipline of summarising the basic characteristics of each case and simultaneously resisting the temptation to “over-interpret” the data too early. I developed a summary sheet for each case which is elaborated upon at the beginning of Chapter 6.

In the early stages of data analysis, I conducted an independent reliability check with respect to my capacity to identify judicial stories and themes accurately. I presented a colleague with a list of themes that I had identified and asked him to provide line numbers or paragraph numbers of examples (and any counter examples) in the texts within a random sample of eight judgements. I had identified nine themes and had found a total of 37 examples across all nine. There proved to be disagreement about two examples with respect to two themes (one for each theme) suggesting inter-rater agreement of almost 95%. There were disagreements in a few cases about whether a theme began or concluded on a particular line of the transcript but these were judged to be minor. There was no disagreement about identified counter examples.

The study was designed to conform as much as possible to Caulley’s (1994) criteria of trustworthiness. According to Caulley (1994: 17–18) the trustworthiness of a qualitative analysis is maximised by paying attention to: prolonged engagement; persistent observation; triangulation; negative case analysis; peer debriefing and member checks.

Prolonged engagement and *persistent observation* were fundamental aspects of this study. Put simply, having arrived at a final sample, I spent many hours in front of the computer screen. I returned time and time again to the final sample of judgements, further developing some ideas, rejecting others and sometimes resurrecting previously rejected ideas or incorporating them into my thinking in another form.

Triangulation is a form of cross-checking of data – “by use of different sources, or different methods, or different investigators, or cross-checking across times and instances” (Caulley 1994: 17). According to Smith (1997: 195), the essential rationale behind the concept of triangulation is that, “if you use a number of different methods or sources of information to tackle a question, the resulting answer is more likely to be accurate”. Smith notes that the term derives from navigation whereby an object is fixed from the plotting of two independent locations. He suggests that the term tends to imply a *fixed* truth, whereas, in much qualitative research, there is no assumption of such a level of truth. In the present study, triangulation could be said to increase the level of confidence with which the conclusions are drawn.

A major means of cross-checking in this study resulted from its maximum variation sampling. It is clear from a glance at the distribution of cases in Table 1 that the range of issues was broad and the number of judges high. Table 2 also reveals that the cases were very evenly distributed across the years. Thus the study can be seen to meet the “different investigators” and the “time and

instances” triangulation criteria because each judges at first instance can be seen as a different primary “investigator”, and because the “primary investigations” (the judgements) were quite evenly spread over an 11-year period (the then life of AustLII as a publication).

With regard to the question of openness to *negative case analysis*, the chances of detecting judicial statements which negated the dominant themes were increased in two ways. First, as noted, the reliability with which I could both identify themes and determine counter-examples was independently tested and found to be high. Second, the appeal court provided its own independent scrutiny of the judgements at first instance.

This is because a standard *modus operandi* of the appeal court in dealing with the appellant’s criticisms of the judgement at first instance is to search for other examples of judicial statements, which modify or contradict the criticism. Thus at least some of the work of providing counter evidence to claims of judicial bias had already been done by three experienced appeal court judges.

Peer debriefing was an ongoing, at times daily, part of my experience of engaging with the data. Mainly as a result of being on sabbatical leave at the time the research was conducted, I was fortunate to have multiple opportunities to converse with my psychology and family law colleagues.⁸⁷ In addition, I had the opportunity to take my material at different stages of analysis to my supervisor. Our agreement at those times was that he would act as a “devil’s advocate”. I was required at those times to bring back evidence that would support interpretive statements I had made with

seemingly insufficient proof. In this way, potential disagreements between us were resolved. In the event that doubts regarding the validity of any interpretation remained, I took the conservative view and simply did not pursue that particular line of thought.

Strictly speaking, Caulley's (1994) concept of member checking assumes that the researcher is continually exposing the findings to those from whom he or she has gathered the data. In my case, the data was text. Nonetheless, the fact that the judgements were published electronically afforded me varied means of keeping track of thoughts and hypotheses and of checking these via a process of peer debriefing. I was able to develop a code whereby statements thought to be interesting or relevant could be highlighted within the text. My own comments were written in a different text, as was the commentary of the appeal court judges. By dating each draft, I kept track of developing ideas and hypotheses and could easily revisit earlier comments. By using line numbering and paragraph numbering, I was able to identify and retrieve texts accurately. By using the "Find" search function of the word processing package,⁸⁸ I was also able to further check for evidence of other examples or counter-examples of themes initially identified.

Having completed the matters described above, there is, I believe, no formulaic or definitive way of proceeding from this point.⁸⁹ Initially, the process is essentially organic, in the sense that ideas and hypotheses arise, modify themselves, fall and sometimes reappear in a different form. In order to remain both in and above the text, however, it is important to impose a level of discipline whereby

each case is subjected to description and analysis, which conform to the same pattern of headings. Using the headings outlined above, in the next chapter I describe and provide a first-level interpretation with respect to the 25 cases in the final sample. From these descriptions and interpretations, I develop a hypothesis related to the persistence of gender-related presumptions which I explore in greater depth in Chapter 7.

CHAPTER 6

Results: First-level analysis

In this chapter, I consider each of the cases in the sample in alphabetical order. The full texts of each case, along with the line or paragraph numbers cited in this and the following chapter can be found by going to the website, www.austlii.com. In order to orient the reader in each instance, I begin by offering a basic description of the case, a synopsis of the legal details and outcomes, and a summary of the core issues. I then justify the inclusion of the case in the “closely contested” category by pointing to relevant judicial statements⁹⁰ in the text. Again relying on judicial statements, I summarise the core socio-legal issues that support the outcome.

Next, I step back from the more descriptive elements of the case considerations by reflecting on them, in Amsterdam & Bruner’s (2000) sense of the term, as judicial narratives. I do this by assessing “how [judges] try to make their actions comprehensible within some larger series of events that they take to constitute the legal system and the culture that sustains it” (Amsterdam & Bruner 2000: 110).

I attend first to the structure of the narrative. Relying on the judicial statements themselves (or on occasions on unambiguous summaries by the appeal court *about* these statements, I tease out what is emphasised (or privileged) in the narrative and what is not emphasised or rejected (not privileged). This, in turn, leads to the formation of an initial hypothesis or hypotheses that might be seen to constitute a meta-narrative (or meta-narratives).

The methodology assumes that these meta-narratives will be confirmed or not confirmed as the number of cases examined, builds up. Thus, though it is clear in this chapter that the judgements contain multiple individual narratives, I conclude by suggesting that much of the variance can be explained by focusing on the traditional gender-based assumptions embedded in a large majority of them. I explore this working hypothesis further in Chapter 7 by re-focusing on those cases in which mothers and fathers were unambiguously successful in their applications.

In summary, then, the cases below are all examined, in turn, under the following headings:

- type of case
- legal details and outcomes
- summary
- selection criteria (i.e. what evidence is relied upon to place the case in the ‘closely contested’ parenting category)
- core socio-legal issues supporting the judgement
- the judgement as narrative
 - structure of the judicial narrative
 - what is privileged in the judicial narrative
 - what is not privileged or less privileged in the judicial narrative
- initial hypothesis

Content analysis of appeal judgements: the casesCase 01: A & JType of case

Custody and relocation interstate. Shared parenting since birth of the child. Mother in long-term lesbian relationship at time of application.

Legal details and outcomes

Applicant:	Father
Result:	Custody to Father. Holiday access to mother
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The case concerns custody applications with respect to a four-year old boy. A shared parenting arrangement existed both before and after separation. Both parents were living in a provincial city in Victoria, though the mother spent some time away from the home in pursuit of tertiary qualifications in Melbourne. The father had not re-partnered at the time of the hearing. Following the separation, the mother began living in a lesbian partnership and that relationship was continuing at the time of the hearing. The father wished to relocate to Adelaide where he had the offer of inexpensive accommodation and support from his mother. He wished to take the child with him to Adelaide.

Selection criteria

The judge found that the husband had ceased employment after the birth of the child to assist in his care and that the parties cared for the child “equally and evenly” (9)⁹¹ and that “both parties have been significantly involved in the upbringing of the child since separation”(14). The case was seen as “relatively evenly balanced” (26). The term “evenly balanced” is also used in paragraphs 33 and 58 and the term, “finely balanced” is used in paragraph 62.

Core socio-legal issues supporting the judgement

The judge found that the equal sharing arrangement “in the circumstances of these parties” had not proved successful for the child or for his best interests (14).

The judge observed it was “inappropriate for children to observe overt displays of affection between persons in a continuing and committed homosexual relationship” [and that] “although the husband had not expressed concern about the wife’s sexual preference until the proceedings commenced, this was not to be taken against him”. (21) He also found further that the wife and her female partner “moved to some extent in homosexual circles” but concluded that this was not an adverse factor (21 and 25).

On the issue of interstate relocation, the judge observed that “many children are required to move into new surroundings and make new friends and do so successfully without important trauma.” (22). He further noted, “The importance of the husband’s contact with L. is one of the most, if not the most important of the factors that weigh into the balance. If L. stays in Ballarat, he will have relatively little contact with the husband in the sense that it will not be constant, even though it might be in relatively large blocks of school holidays” (26). He agreed with the Counsellor’s view that there was “need for adequate contact with the husband as a balancing figure in the child’s emotional development” (31).

The judge found that whilst both parties offered full-time care the wife would need support from Ms R. if she advances her studies in the future and that this was likely to happen. He further found that

the husband had a great deal of experience in caring for the child and that his level of experience surpassed that of the wife (32).

The counsellor's report concluded that regular communication between the husband and the child "would be essential for [the child] whose need for nurturing and a constant male figure will grow as he develops" [and that it would be particularly important in this case that the child] "have a husband [sic] figure close by" (33).

In a summary statement, the Full Court noted (59):

His Honour found that it was important that the child maintain regular and close contact with the husband for reasons which included because [sic] the wife's proposals entailed her continuing a homosexual relationship. This was a finding of primary fact by his Honour which led him to make the ultimate finding that the welfare of the child required that the husband be granted custody. This finding of primary fact was open to his Honour on the evidence and it was not, in our opinion, necessary for him to give more detailed reasons for this finding of fact.

The Full Court also found that, "His Honour was entitled to place weight on [the counsellor's] evidence and did so. In effect he regarded that as tipping the balance in what was otherwise an evenly balanced case" (33).

The judgement as narrative

Structure of the narrative. There is a strong endorsement in this narrative of the need for the male child to have "constant" contact (26) with a male role model. Specifically rejected is an alternative whereby, because of the distance, this child would have contact with his father only for limited blocks of time. This issue is

seen by the Appeal Court (26) as the most important matter which the trial judge weighed in the balance.

The narrative has a circular quality with respect to this key question. The “constant contact” notion is endorsed by the counsellor who, so far as one can see, cites no evidence to support her observation. It is then taken up by the court. Although the judge probably falls short of discriminatory comments regarding homosexual relationships, he cites with approval the earlier case which speaks of the “relevance” of the issue (21) but does not explain what the relevance refers to. In addition, although the fact that the mother moved in lesbian circles is noted but then discounted as an issue, there remains the curious comment about the inappropriateness of displays of affection between lesbian women.

What is privileged in the judicial narrative? Specifically privileged is the idea of ongoing contact between this father and his son. Endorsed (33) is the counsellor’s comment that the child had a need for “nurturing and a constant male figure” [which would] “grow as he develops”. This endorsement is accepted by the Full Court as the issue “tipping the balance” in the case.

The mother was said (23) to be less “experienced” as a parent. This seems to be mainly a function of her age (22 years). She was in fact thirteen years her husband’s junior.

Also privileged is the father’s desire (16) to seek low-cost accommodation elsewhere even though the consequence of this is that the child “would experience disturbance” (22) and that it was

likely to lead to the severing of an ongoing relationship with the mother.

What is not privileged or less privileged in the judicial narrative? The judge commences his deliberations with a negative disposition towards shared parenting arrangements, noting (14) that “*as might be expected* (my italics), the equal sharing arrangement in the circumstances of these parties had not proved successful for the child or for his best interests”.

The narrative also demonstrates considerable ambivalence and even confusion over the consequences of the mother being in a homosexual relationship. For example, the judgement endorses a “no display of affection” regime whilst at the same time suggesting that the fact that the mother moved in homosexual circles was not a relevant factor (21 and 25). Support for the narrative regarding the “relevance” of homosexuality is sought from a family law case heard twelve years earlier (21). Thus the narrative privileges this somewhat dated material over research-based evidence which was available at the time.⁹²

Concern is expressed (32) that the mother may resume studies and be dependent upon her partner for financial support. Thus further studies are not privileged as a step towards possible career enhancement and financial independence. There appears to be no equivalent analysis of the father’s situation, even though it is acknowledged (61) that he is in poor financial circumstances.

Also not privileged is the likely impact of a move from known surroundings and relationships on *this* child. Rather, the judge reverts to a general observation (22), which notes that “many children” are not traumatised by such situations.

Initial hypotheses

Several hypotheses suggest themselves from Case 01:

1. Shared parenting arrangements are likely to attract judicial scepticism;
2. Bona fide actions of parents in seeking an improvement in their material situation are likely to be viewed sympathetically, even in cases in which the consequences include the substantial loss of an ongoing parenting role for the “other” parent;
3. A father’s desire to improve his financial situation and possible career prospects is more likely to be approved of than a similar desire in a mother;
4. A male child’s perceived need for “nurturing and a constant male figure” is more likely to be more strongly emphasised in situations in which the alternative is to be brought up in a lesbian household.

Case 02: ChristianosType of case

Custody dispute prompted by planned relocation overseas. A 12-year old boy had been in custody of his father for most of his life with fortnightly access to his mother.

Legal details and outcomes

Applicant:	Mother
Result:	Relocation permitted. Access to mother one month per year in Australia
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The parents married shortly after the birth of their only son and separated a little over a year later. The boy remained in the custody of the father who repartnered shortly afterwards. The mother had regular fortnightly access after that.

The application for relocation was made approximately eleven years later. The father wished to move to Yugoslavia with his partner and now 12-year-old son. He was in fact committed to such a move, having already purchased vehicles in Yugoslavia which he planned to use in a business venture in that country. The mother opposed the move and applied for custody of her son.

Selection criteria

It was acknowledged by the Full Court (9) that this was a case in which another judge could have come to a different conclusion on hearing the same arguments.

Core socio-legal issues supporting the judgement

The judge weighed the issues required of him in Section 64 (6) and weighed them in favour of the father. He was especially influenced (11) by the fact that the child had been in the day-to-day care of his father for approximately ten years and that he had a close relationship with his father and stepmother. He acknowledged a good relationship between the child and his mother (11) and dealt with that issue by attempting to ensure yearly access. He did this by requiring (6) that the father deposit money for the purpose in an Australian account. It was noted (23) that Yugoslavia was not a Hague Convention signatory, so that cooperation with the Family Court's orders in this matter would have to be on the basis of good will between the countries. The court appreciated the mother's anxieties in this respect but clearly felt (24) that the risk was not excessive.

The judge also took into serious consideration what he saw as the bona fide nature of the application. That is, the father had serious intentions to conduct a business in Yugoslavia. The Full Court reinforced this view by citing with approval (27) the case of *Holmes v Holmes* in which an important consideration in relocation cases is

said to be the “bona fide” nature of the intention. If the intention is bona fide, the court should then be reasonably satisfied “that the custodian will comply with orders for access and other orders made *to ensure the continuance of the relationship between the child and the non-custodian*” (my italics).

The judgement as narrative

Structure of the narrative. In this case, the father presented the court with a *fait accompli*. He had already purchased vehicles in Yugoslavia (4) and it was clear that his intention was to migrate to that country (see last part of Appeal Court commentary in paragraph 29). However, the fact that there was no discussion about or criticism of the pre-emptive nature of that action (see comments in paragraphs 3 and 4), suggests an underlying presumption that the father is entitled to make decisions about his future financial welfare, even though it is clear they will impact negatively on ongoing relationships between the child and his mother.

In support of allowing a relocation, a distinction is made in the judgement (11) between a “close” relationship with the father and a “good” relationship with the mother. Having made such a distinction, it becomes less problematic to assert the right of the father to pursue his business interests *and* retain custody, at the expense of radically changing the nature of the relationship between the child and his mother.

The father’s pre-emptive actions support an assessment that his actions are bona fide and that this is not (28) a “spoiler” application.

An acceptable motivation to move, accompanied by perceived good intentions regarding future contact between the child and the other parent, is regarded (27) as weighing heavily in favour of the father.

What is privileged in the judicial narrative? Privileged in this narrative is a pragmatic orientation to the notion of primary parent in a situation in which the child has been in the custody of that parent for eleven years. Also privileged over qualitative aspects of the relationship between the child and his other parent, is the desire of the father to improve his financial circumstances.

What is not privileged or less privileged in the judicial narrative? Not privileged is the *ongoing* nature of the relationship between the other parent (in this case the mother) and her son. A critical sub-text within the narrative is that the mother-son relationship continues (and presumably fulfils the court's obligations to the child) even if the amount of contact is severely reduced and the frequency is curtailed to once per year. The narrative requires an acceptance of the proposition that a viable *parenting* relationship can continue in circumstances in which, at best, mother and son will spend a month of holiday time together each year.

To achieve such a result, the language of the narrative is important. Throughout the judicial narrative, the words "relationship" and "parenting" are not paired but remain separate from each other. There is no exploration of a *parenting* relationship between mother and son from a qualitative perspective. Indeed,

given that the father was committed to going to Yugoslavia in any case, the only “commodity” the Court has at its disposal in such circumstances is the manipulation of quantities of time (see paragraphs 15 and 16).

Initial hypotheses

A father’s wish to improve his business prospects is likely to be accepted by the court as legitimate and ultimately successful grounds for a relocation application when a long-standing parenting arrangement exists.

To seriously contemplate a substantial relocation option, the court is likely to adopt a language of primary care which privileges the relationship between the child and the parent who wishes to move. It is likely to down play an authoritative parenting role for the other parent, whilst continuing to use the word, “relationship” with respect to the child’s interactions with both parents.

Case 03: Doyle

Type of case

Interim custody hearing a month after separation

Legal details and outcomes

Applicant: Mother-father cross-applicants

Result: Interim custody to mother

Appellant: Father
Result of Appeal: Dismissed

Summary

The couple was married for just over seven years. They had two daughters aged at the time of the hearing four years and seven months. The mother left the home without prior notice and moved to her parents' house. She took her daughters with her. Over the following two weekends the father had access but the mother would not permit him to have the children with him on an overnight basis. On the Sunday of the second weekend, the father took the children back to the matrimonial home and kept them with him until the date of the interim hearing some five days later. Following the weekend incident, the mother applied, and the father cross applied, for custody of both children.

Selection criteria

The judge determined (9) that no status quo situation existed. Whilst it was common ground that the mother had spent more total time than had the father in caring for the children, this was balanced by the fact that it was also conceded (18) that she had been ill for much of the time since the birth of the second child and had needed external parenting support.

Core socio-legal issues supporting the judgement

The judge found (9) that no status quo had been established. In the words of the Full Court (20), the judge “was concerned, particularly having regard to the tender age of these children, to ensure a continuity in the environment ... an environment which would effect the greater stability for the children between the date of the hearing of the interim application and the hearing of the substantive application”. Being an interim hearing, the case was time-limited. The judge made no finding with respect to the mother’s illness or the amount of support she needed to continue in her role as a parent. He ruled (18) that the mother was the primary caregiver largely on an analysis of the comparative amounts of time each parent had spent in the home. In the same paragraph, the judge noted that “at the highest” the father’s claim was that he had shared the caregiving with his partner.

The judge went on to summarise the situation (22) as follows:

Whilst those proposed arrangements – that is the proposed arrangements of the husband – are no doubt the best that could be made in the circumstances, and would certainly be quite adequate if nothing better were on offer, I am of the opinion that they run a poor second best to the alternative of the children remaining predominantly in the care of their mother, who has been their primary caregiver to date.

The judgement as narrative

Structure of the narrative. A narrative about primary caregiving is strongly linked to the amount of *time* spent in the home. The father’s caretaking role is not examined, the judge noting

that a sharing of the parenting is the father's "highest claim". The narrative also places emphasis on continuity of environment for children of tender age (20), though it is silent about the fact that the mother removed the children from that environment when she left the matrimonial home.

The narrative also largely ignores the strong *prima facie* evidence that the mother is struggling with her parenting role due to an unspecified illness. Instead, it focuses on the father's weekday hours of work the practical problems this causes for future parenting plans.

What is privileged in the judicial narrative? Within the restricted circumstances of an interim hearing, the judge privileged the *time* spent by each parent with the children and used this as a measure of "primary caretaking". The presumption, then, is that the primary caretaker, so defined, will be the interim custodian. Continuity of environment for small children is also privileged.

What is not privileged or less privileged in the judicial narrative? The issue of quality of parenting and evidence about the impact of the mother's illness is postponed to a further hearing. The father's support for the mother and care for the children during the mother's illness is all but dismissed.⁹³

Initial hypotheses

The perception of “caring for” created by time spent at home with children will usually be privileged over the perception of “caring about” created by the external breadwinning role of a parent. In interim hearings (and possibly in defended hearings) the concept of “primary caretaking” is likely to be equated with the amount of time spent with the child(ren). More qualitative issues of care are unlikely to be examined in interim hearings.

Case 04: Drenovac

Type of case

Custody dispute in which parents were living “under one roof”.

Legal details and outcomes

Applicant:	Father
Result:	Custody to mother. “Liberal access” to father
Appellant:	Father
Result of Appeal:	Dismissed

Summary

The parents separated after approximately eleven years of marriage. At the time there were three children of the marriage, aged eight, six and two. The gender of the children is not clear from the material. At the time of the father’s application for custody two years

after the separation, the parents had been living under the one roof. Although it is not stated explicitly, the parents appear (5 and 6) to have been effectively sharing the parenting up until the time of the application. What appears to have prompted the application was that the father was now in a position to offer the children the chance to continue to live in the matrimonial home, though he also proposed continuing to work full time. The mother, who had been home full time with the children at various times prior to the separation, now proposed working two to three days per week.

Selection criteria

Noted by the Court (32) as “A difficult custody hearing in which the decision could have gone either way”.

Core socio-legal issues supporting the judgement

The judge was impressed by the fact that the children had been in the mother’s full-time care at various times in the past. She noted that:

N, for instance, has had the benefit of three years during which her mother was not working. From the children’s perspective it is more usual for the mother rather than the father to be looking after them. Continuity of that pattern favours the mother. (11)

She also concluded (22) that:

On balance, taking all of these factors into account, I believe that the continuity of the pattern of care, rather than location, is more important and that the children will be most advantaged if their mother has most of the day-to-day care of them with their father having regular contact.

The judge accepted a marginally closer relationship between the mother and one of the children on the basis of issues raised in the family report (23), in which it was stated that “she appears to have identified somewhat with the mother and have a strong bond with her. She obviously loves her father and is very relaxed and comfortable with him”.

The judge conceded (19) that one factor favouring the father was his superior ability to offer the children intellectual assistance in their homework and studies. She also found, however, that the children were still young and their main task for the next few years at least will be coping with the emotional hurt occasioned by the break-up of the family (19).

The judge noted (20) that “although he [the father] will continue to work full time, nevertheless he would endeavour to devote as much time to the care of the children as would be possible. On the other hand, the mother “was intending to work two or three days a week but for the rest of the time she would be available as a full-time supervisor for the children, coping with all the things that happened to children in life such as sickness, school commitments and the like” (21). This conclusion was drawn even though the mother’s paid work plans altered during the case. The judge had observed (12):

She was working full time but then decided that she would give up work and initially become a full time caretaker for the children but her final proposal involved her in part time work on two or three days a week.

The judgement as narrative

Structure of the narrative. The mother's history of providing periods of full-time care and the likelihood (despite changes of mind throughout the case) that she would be in a position to devote more time to their care than the father, serves a narrative of ongoing emotional hurt resulting from the separation that will significantly occupy the children in the coming years. As noted in the appeal (9), the narrative does not arise directly from factual material canvassed in the case itself. Rather, the construction of a narrative of ongoing emotional hurt appears to be an extrapolation by the judge from the Court Counsellor's observation (23) that one of the children was sad about the break-up of her parents. This construction, in turn, privileges the mother as the person who has the capacity to "be there" for her children. The father's role is seen as less emotionally and more externally and educationally oriented.

What is privileged in the judicial narrative? Though the parents had been separated for more than two years, it had been under the one roof. Nonetheless, the judicial narrative is one which emphasises deficit and hurt following the separation. Privileged in this context (19) is a presumed superiority of the mother in assisting the children to continue to cope with the emotional hurt in the years to follow.

Overtly, this superiority is linked to time spent with the children and time planned "at home" after the separation is

completed. The narrative is also reinforced by the statement from the family report which speaks (24) of a “strong bond” existing between the mother and the oldest child. Although the word “bond” is used imprecisely in this judgement (as indeed it is in others),⁹⁴ it seems here to imply a strong reciprocity in the relationship. In the same paragraph, the report notes that the oldest child “loves her father and is very relaxed and comfortable with him”. This statement emphasises more the feelings of the child towards the father, than qualities in the father.

What is not privileged or less privileged in the judicial narrative? The presumed better intellectual support which the father could provide for the children (19) is seen as less important than the emotional support deemed to be required over the coming years to assist the children come to terms with the “continuing hurt” of the marriage breakdown.

In addition, the judge observes (11) it is “more usual for the mother rather than the father to be looking⁹⁵ after them (the children)”. The term “more usual” is ambiguous. At one level, it could be construed as a statement of fact – that is, it is more common for mothers to be at home and for fathers to be working away from home. But “more usual” could also be construed as a value statement. The phrase can be interpreted as “the way it should be”.

Initial hypotheses

The Court is likely to favour a psychological deficit model of post-separation child development. That is, needs arising out of children's perceived ongoing hurt are more likely to be privileged than other needs. When such emotional needs are privileged, the mother is likely to be favoured as the principal carer and the father is likely to be seen as making more externally based contributions.

Case 05: Duck

Type of case

Custody, in which there had been split custody for two years prior to hearing.

Legal details and outcomes

Applicant:	Mother (with father as cross-applicant)
Result:	Affirmation of status quo
Appellant:	Mother
Result of Appeal:	Upheld on the grounds that the status-quo was considered almost exclusively, leaving the other matters requiring consideration under section 64 under-explored or not explored at all – Re-trial ordered

Summary

The couple was married for approximately eight-and-a-half years. Following the mother's departure and re-partnering, the father had the care of both children of the marriage for approximately six months. At that time, the younger child, a girl then aged five, went to live with her mother. The boy, then aged eight, remained in the care of his father. There was liberal access in both directions. After approximately two years of this arrangement, the mother applied for custody of her son. The father cross-applied for custody of his daughter.

Selection criteria

Judge saw nothing to suggest that each would be other than a responsible parent (5) and found that both parties were quite acceptable as custodians (6).

Core socio-legal issues supporting the judgement

The judge found that both parents were quite acceptable as potential custodians and that there was nothing about their present de facto spouses that would be adverse (5).

He placed the onus on each of the parents to demonstrate why the status quo should be disturbed (7) – pointed out by the appeal court to constitute an error in law.

The judge noted that he could not discern from the evidence, any ground which would justify interfering with these quite satisfactory arrangements of long standing (8).

He therefore came to the conclusion that despite the fact that each of the parties had conducted the case on the basis that the children should be reunited, he should leave the status quo as it was. In effect, the status quo became the sole determinant. He made orders whereby the husband and wife were to have the joint guardianship of the two children of the marriage, but the wife was to have the sole custody of daughter and the husband was to have the sole custody of the son, with reasonable access to both parents.

The judgement as narrative

Structure of the narrative. This is a narrative of “leave well enough” perhaps reinforced (though there is nothing explicit in the text to this effect) by the fact that the boy will remain with the father and the girl with the mother.

From the Full Court’s point of view, the problem is that judicial narratives must be seen to be broken down into a series of smaller exercises of judgement. The process demands no watertight proof with respect to any of the matters under section 64. However, the process does demand that the issues must be formally visited and weighed against each other after appropriate attention to observation and reasoning. In other words, the judicial narrative must have a structure which “hangs off” S 64 in some recognisable way.

One can only speculate as to why the judge did not at least nod in the direction of this formal requirement. Perhaps it was because there was little to choose between both parents; a story which might have declared one parent as “winning” was seen by the judge as

requiring a weighing-up exercise which would be inevitably contrived. Perhaps it is the very contrived nature of the exercise (described in the case of Robbins, below, as coming down on one side with the weight of a feather), which was the source of the judge's reluctance.

What is privileged in the judicial narrative? It is clear from the statements of the trial judge and from the statements of the appeal court that what was privileged was the status quo, the effect of which was to leave the boy with his father and the girl with her mother. The privileging of the status quo was curiously qualified by the judge's statement (8) that "all things being equal, it would be preferable for brother and sister to be in custody of the same parent".

What is not privileged or less privileged in the judicial narrative? In this case the judge appeared unwilling to weigh the differences between the parties on the criteria required of him in section 64. He formed the view (4) "that each of the parties was a reliable witness". He "saw nothing to suggest that each would be other than a reliable parent". He found that "both parties were quite acceptable as potential custodians and that there was nothing about their present de facto spouses that would be adverse".

Initial hypotheses

A possible implicit principle is that a perceived status quo is more likely to be affirmed in cases in which non-infant boys are in

the care of their fathers and girls are in the care of their mothers. To the extent that this pattern might be detected in other cases in the sample, it suggests a frame of mind that connects parenting role models with gender. That is, they may be an assumption, no longer supported in the research literature,⁹⁶ that, other things being equal, boys will do better if they have a male parental role model and girls will do better if their parental role model is female.

A further hypothesis relates to the realistic difficulty of applying S 64 to closely-contested cases. It is as if this case presented the judge with a practical solution which allowed him to avoid the obvious difficulties associated with applying the Section.

Case 06: Firth

Type of case

Custody dispute in which one side held exclusive religious beliefs.

Legal details and outcomes

Applicant:	Mother. Cross-applications by maternal grandparents and father
Result:	Custody to mother. No contact permitted between children and father or children and grandparents for a year
Appellants:	Father and maternal grandparents
Result of Appeal:	Dismissed

Summary

There were four children of the marriage. Since the separation, the 18-year-old child had been living with the mother. The next youngest child was living with the father. The two youngest children had been living with maternal grandparents. The grandparents, who were members of the Exclusive Bretheren Church, were not willing to allow contact between the children and their mother until she “got right” with the Church. The father, who was less hostile to the Church, had been permitted contact with the two children by the maternal grandparents.

The mother applied for custody of the two children in the care of her parents. Cross applications were made by both the grandparents and the father for custody.

Selection criteria

Though words like “finely balanced” were not used, this case was clearly closely contested in the sense that the judge had to weigh up matters which were difficult to compare. The degree of difficulty is strongly indicated by the fact that the case was heard (28) over 13 days. The children expressed a wish to remain in the care of their maternal grandparents. The judge gave credit to the grandparents for having cared for the children in a satisfactory and appropriate way (29).

The grandparents, however, held beliefs which the judge felt would restrict the children in their adaptation to an Australian

lifestyle. (In addition, the grandparents had restricted the mother's contact with her children and had made future contact conditional on her "getting right" with the Exclusive Bretheren Church.)

Core socio-legal issues supporting the judgement

The judge determined that the father was "a person of no credibility" and was motivated by "malice and a desire to hurt the wife rather than to advance in any real or effective way the welfare of the children" (par 29). (The dispute was thus reduced to one between the mother and the grandparents.)

The judge considered the short-term effects of significantly disturbing a status quo for the younger children and compared them with the longer-term benefits of being in the custody of the mother (31). He favoured the latter course.

The judge gave considerable weight to the general restricted lifestyle and separateness of the Bretheren Church from the normally-accepted community activities (31). He spoke of the desirability of the children being brought up in a "libertarian lifestyle" such as that enjoyed by the majority of children in Australia today (12 and 50).

The judgement as narrative

Structure of the narrative. The narrative is one supportive of bringing up children in an open society which is seen as representing Australian culture. It is a carefully constructed narrative which seeks not to denigrate the beliefs of the Exclusive Bretheren. At the same

time, the narrative leaves the reader in little doubt that the children are seen as under threat of being drawn into fundamentalist views which will make a future relationship with their mother and a future relationship with most members of society conditional on her acceptance of those same views. The threat is to be averted by taking the sort of steps a court would normally reserve for cases in which there was evidence of abuse or the serious threat of abuse. Therefore the narrative achieves the dual purpose of acknowledging individual freedom of religious expression and at the same time, by its actions, placing the grandparents and the father in a category of litigants normally reserved for suspected or proven child abusers.

What is privileged in the judicial narrative? The judge clearly privileges a libertarian lifestyle for children (12 and 50) when the alternative is a lifestyle seen to be confined by exclusive and restricted beliefs and practices. He is prepared to weigh this more heavily than the wishes of the younger children and the potential problems associated with disturbing the status quo.

At the same time, the judge goes to considerable lengths (12) to refrain from direct criticism of the Exclusive Bretheren Church. Clearly mindful of S 116 of the Constitution, which speaks of the right to freely exercise one's religion (see paragraph 21), the judge treads a careful path in a case in which it is found that the grandparents were offering their daughter an ongoing relationship with her children, conditional upon her return to the Church. The

delicate nature of this case is also suggested by the fact that it lasted for 13 days.

What is not privileged or less privileged in the judicial narrative? A restricted religious lifestyle is clearly less privileged within the context of the “libertarian lifestyle” of Australian children.

Initial hypotheses

Insofar as their claims to continued guardianship are concerned, there are limits to a parent’s or guardian’s right to freedom of religious expression. Those limits include situations in which similar beliefs are required of the other parent or guardian as a condition of continued involvement with the children.

Though the evidence may not be easy to obtain and the line between freedom of expression and the abuse of that freedom with respect to the child is a delicate one, this is the sort of situation in which an adversarial style inquiry may be especially appropriate. One reason for this is that an adequate finding in such a situation must go beyond the question of who is better placed to have the major care. It must also actively consider the ways in which the continuing role of that carer can be ensured.

Case 07: Fisk

Type of case

Custody, in which the children were in the interim care of their father for 15 months prior to the hearing.

Legal details and outcomes

Applicant:	Mother
Result:	Custody to father. Access to mother
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The couple was married for approximately 15 years, and appear to have also had an earlier period of cohabitation. During the marriage, three children were born who were, at the time of the hearing, aged 13, 11 and seven. The mother had initially moved out of the matrimonial home and moved directly into her new partner's home, taking the children with her. Interim orders made a month later required the return of the children to the care of the father in the matrimonial home. A custody contested hearing took place 15 months later.

Selection criteria

The judge concluded that the children would be adequately cared for by either party and that neither party's claim was greatly superior (6). The case was described (39 and 45) as a "finely balanced case" which "may have gone either way".

Core socio-legal issues supporting the judgement

The judge formally considered evidence in relation to 12 factors under section 64 (paragraph 5). He gave most weight to the wishes of the children and the opinion of the social worker supporting these wishes. He also favoured a continuation of the status quo and ruled (6) that the father was more likely to place the children's wishes ahead of his own.

The judge found that the mother had lied in her evidence to the Court and suggested that "it follows that if the wife lied, then so did her supporting witnesses" (15).

The judge expressed "astonishment" (25) that the mother "made no offer and expressed no desire to return to the matrimonial home to live". He also found (27) that the mother demonstrated insensitivity towards the children by moving with the children from the matrimonial home and immediately occupying the bed of her new partner.

The judgement as narrative

Structure of the narrative. It is clear in this case that the judge had sufficient material available to him in the form of the children's wishes, the continuation of a status quo and the endorsement of this arrangement by a social worker, to use his discretionary powers to rule in favour of the father.

The narrative went further, appearing to contain echoes of a "Damned Whores and God's Police"⁹⁷ view of women as mothers. Although the circumstances surrounding the marriage breakdown are

not described, the judge sees the mother's actions at the time as nonetheless blameworthy. Though the speed of her moving into another man's bed is couched in terms of insensitivity to the children's needs, there also appears to be a fascination with the mother's sexuality.⁹⁸

The narrative contains other expectations about how mothers should act. The use of the word, "astonishing" (25) to describe the perceived lack of resolve on the part of the mother to attempt to regain custody of the children after an interim hearing had gone in the father's favour, suggests a belief that mothers will always, or should always sacrifice their own needs for the sake of their children.⁹⁹

The narrative's traditional view of male and female parenting roles is further reinforced by the observation in paragraph 14 that "there were other people able to assist the father in this (parenting) endeavour".

What is privileged in the judicial narrative? The judge constructs a coherent and consistent narrative (see 6) in which the wishes of the children, the views of a social worker and a continuity of a status quo all point to the same outcome.

What is not privileged or less privileged in the judicial narrative? Although, as noted, the case is said to be finely balanced and capable of going either way (39 and 45), the narrative with respect to the mother paints a generally negative picture which

clearly does not privilege her account of events or the accounts of her supporters. Indeed, the judge sees the mother and all her supporters (14) as untruthful. In particular, the mother's actions in moving from the matrimonial home into the house of another man is seen as insensitive to the children. Once the children were ordered to return to the matrimonial home, the mother's perceived lack of resolve in returning to the home herself is also viewed negatively.

Initial hypotheses

The Court is likely to take a negative view of women who do not meet stereotypical standards of motherhood. The Court is likely to expect that mothers will always privilege their own needs ahead of those of their children. The negative view of a "failure" to meet such expectations is likely to be stronger when the needs of a mother that have been placed ahead of those of their children are sexual in nature.

Case 08: Hong

Type of case

Custody, in which the mother was absent for periods during and after the marriage due to circumstances beyond her control.

Legal details and outcomes

Applicant: Father

Result: Custody to father. Liberal access to mother

Appellant: Mother
Result of Appeal: Upheld. Inadequate reasons given for
decision – retrial ordered

Summary

The couple was married for approximately five years during which time they had one child, a boy. The mother is from China and the marriage was complicated by her need to return to China when the child was less than two years old to meet immigration requirements. She did not take the child with her as, according to the father (though this is disputed by the mother) her chances of successfully returning to Australia were greater if her child remained in the country.

On her return from China, the mother obtained factory work for about six months. Later, the couple moved from Perth to Sydney in the hope of improving their employment prospects. The father remained there only a short time and returned with the child to Perth, living on this occasion with his parents. The mother remained in Sydney for surgery and then returned to Perth where she started a business connected with a Sydney-based product. The couple again lived together for approximately six months. At that time, the mother needed to finalise matters in Sydney, as the business had not been successful. She claims she was not permitted to take the child with her and when she returned the father had again moved into his parents' house. After several months, the couple made a further attempt at reconciliation, which broke down after a further six

months. The father once again moved into his parents' house with the child.

Three months later, the father applied for custody and for an order restraining the mother from removing the child from the state without his consent. Over the following six months there were various arrangements by consent which gave the mother care of the child for approximately six days in every fortnight. In the three months prior to the hearing, the arrangement was again altered so that the mother and father had care of the child week about. By the time of the hearing, the child was four years old.

Selection criteria

The case was placed in the evenly balanced category of cases by the Full Court (76). Both parents were viewed as well capable of properly caring for the child (133–134). The judge expressed confidence that both parents had an excellent relationship with the child and would do everything in their power to promote his welfare (140–141).

Core socio-legal issues supporting the judgement

As noted by the Full Court, it was difficult to discern the critical reasons which led to the decision. The judge noted (90) that the husband presented “as a mature, caring parent who has given extensive consideration to the responsibilities and duties of parenthood”. At the same time (109), she found “that the child may

well be confused as to who is his main caregiver as between the husband and the grandparents”.

The judge noted that “The wife presented as a sensitive, affectionate, caring parent who was quite emotional in giving her evidence and is obviously very upset by the breakdown of the marriage and by the fact that it has resulted in her having restricted contact with her son. She impressed as a warm person who by dint of some very hard work, now has a good command of English. In general, I found her a credible witness, although reluctant to give the husband any credit for his achievements as a father” (97–101).

Seemingly inconsistently, the judge went on to observe that “it remains to be seen how the husband will cope with the full-time care of the child without the assistance of his parents. This is in contrast to the wife’s proposal that the existing arrangements for the care of the child continue while he is with her” (115–117). Referring to the mother’s criticism of the father’s alcohol consumption, she concluded 120–122) “that his drinking habits, although regular and sometimes exceeding the recommended limit of four drinks a day, do not affect his care of the child, although there is a ‘safety net’ in this regard while he is living with his parents”.

The judgement as narrative

Structure of the narrative. The major distinguishing feature in this case appeared to be that the child had spent more time in the presence of his father and paternal grandparents. This came about initially because the mother had had to return to China and seek

Australian citizenship. On this and on several other occasions when she was apart from her husband, it was common ground that, for whatever reason, he did not permit her to keep the child with her.

Although the judge never states the case clearly, it seems from statements such as that connected with the father's alcohol consumption that she was considering a custody "package" which included the paternal grandparents, who clearly had a long-standing relationship with their grandson. Putting to the side any legal difficulties which might arise out of the fact that the grandparents were not applicants in the proceedings, from a narrative perspective, a fair comparison would have been the respective households – as the mother was by this time living with her own parents.

What is privileged in the judicial narrative? The assistance being offered to the father by his parents appeared to be privileged as, on other matters, the mother's credentials were either as good as or better than the father's.

What is not privileged or less privileged in the judicial narrative? The Appeal Court found the conclusion of the judge to be puzzling as the mother was not criticised (though she was said to be "emotional"), whereas the judge expressed reservations about the father. It appears to be assumed, though not overtly stated, that the paternal grandparents were the key element. But even more puzzling is the fact that the mother also had the support of her parents and was living with them.

Initial hypotheses

Fathers are more likely to gain custody of a child if they are perceived to have support for their parenting. Fathers' chances may be better in this regard if the child is a boy. Mothers may jeopardise their chances if they are seen to have placed their own needs (even "legitimate" needs) ahead of the needs of their children.

Case 09: K & ZType of case

Custody. Relocation case (less than 200 kms) in which the mother had lived interstate without the children for a period but had otherwise shared the parenting of the children for all but 11 months of an almost four-year period of separation.

Legal details and outcomes

Applicant:	Mother with cross application by father
Result:	Residence to father with defined contact to mother
Appellant:	Mother
Result of Appeal:	Upheld. Reversal of orders, giving residence to mother

Summary

The children, two girls, aged eight and six at the time of the hearing, had been in a shared parenting situation for all but eleven

months of the separation period of approximately three and three-quarter years. Intending to study in Sydney for two years, the mother left the children in the care of the father in Hobart after sharing the parenting for about fifteen months. She returned to Hobart, however, after five months and resumed the shared parenting arrangement. Six months prior to the trial, the mother moved to Launceston, again to further her studies. She applied for a residence order to allow her to take the children to Launceston, but at an interim hearing the judge ordered that the children remain in the care of their father and that the mother have contact every second weekend as well as at holiday times. At the full hearing some six months later, the mother applied and the father cross-applied for a residence order. Each parent favoured liberal contact arrangements.

Selection criteria

The trial judge considered the case to be closely-contested because of a tension between the children's wishes and the stability of the environment in which they currently found themselves (7.10). He also noted, "I must, however, make it clear that both husband and wife in this case are intelligent people, and both could care for the children well. Whichever parent the children are with, the children will be brought up well and with considerable imagination and endeavour" (2.2).

Core socio-legal issues supporting the judgement

The mother was described as “a histrionic witness who sought to argue her own case” (2.2). The judge determined that the mother was “not dedicated to the children’s welfare quite as wholeheartedly as she claims to be but rather at times acts self-indulgently” (2.2). He also found that where credit issues arose, he generally accepted other witnesses against the wife (2.2).

The wishes of the young children to be with their mother were discounted by the judge due to what he saw as inappropriate influence by the mother. He noted that the children worried about their mother but saw the father as “solid” (2.5).

The judge found the wife’s discussions about her financial situation with the children to be “manipulative and wrong” (2.12). He was of the view that the wife had on two occasions moved away from the children “to further her own ends” (2.14).

The judgement as narrative

Structure of the narrative. This is a case in which, though no criticism is levelled at the father, the Court finds itself with two small girls who miss their mother and who have also adopted a belief that “girls should be with their mothers”. Given that there is no serious question of incompetence on the part of either parent, the dominant narrative becomes “children as a reward for self-sacrifice”. The corollary is that the mother’s efforts to study towards a career are then constructed as less than worthy than the efforts of the father.

The dominant narrative is then supported by more negative interpretations regarding the mother's behaviour and motivation. She is seen as "histrionic". She is not "wholeheartedly dedicated" to her children and is at times "self-indulgent". Consistent with such a view, the mother then becomes less reliable than other witnesses on issues of credit. Her discussion of money matters within earshot of the children is "manipulative and wrong". The fact that, with the support of his partner, the father completed the degree requirements for his own career prior to the separation is not mentioned in the narrative. Rather, it is the mother who has chosen to "further her own ends".

What is privileged in the judicial narrative? Privileged is the father's "solid" (2.5 and 4.11) and more self-sacrificing behaviour, in not putting himself above the children's needs (2.14). The narrative does not provide examples of this behaviour per se. Rather, it notes the fact that the father remained in the same geographical location as the children and contrasts this with the actions of the mother.

What is not privileged or less privileged in the judicial narrative? Pursuit of career aspirations which took the mother away from her children is seen as self indulgent (2.2) and furthering her own ends (2.14). The children's strongly and emotionally expressed wishes are discounted because they are seen to be influenced by, or perhaps resulting from, the mother's manipulation

(2.5) and “histrionic”(2.2) behaviour. The judge sees the children’s distress at not living with their mother as having been created or encouraged by the mother’s own needs. In addition, because the mother is judged negatively (2.2) and the father positively on issues of credit, predictions about future relationships and support networks likely to be of assistance to the children are also seen to favour the father (2.9 and 2.14).

Initial hypotheses

The Court is likely to begin with an implicit or explicit assumption that mothers will sublimate their needs and desires and sacrifice their happiness (and in this case their careers) for the sake of their children. Once such an assumption is made, relatively ordinary if less than perfect parental actions by mothers can be constructed as further evidence supporting the dominant narrative of mothers “wavering in their commitment” (see again Mercer 1998).

Case 10: Kneller

Type of case

Custody, in which parents were living approximately two hundred kilometres apart. Young children living with their mother expressed a wish to live with their father.

Legal details and outcomes

Applicant: Father

Result: Custody to mother. Access to father reduced from fortnightly to monthly
Appellant: Father
Result of Appeal: Dismissed

Summary

The couple had been married for nine years and lived in a country town in NSW. Following their separation, the father moved to a town about two hundred kilometres away and commenced residing with members of his family. Three young children of the marriage were left, by order of a local court, in the care of the mother with fortnightly and holiday access ordered for the father. At the Family Court hearing seven months later, the two older boys, then aged five and a half and six and a half, expressed a wish to live with their father. The third and youngest child, aged three, expressed no wish. After considering the wishes of the children along with other matters, the judge awarded custody to the mother. Although access had not been contested, he also reduced the fortnightly access granted to the father at the earlier hearing to one weekend per month.

Selection criteria

The Judge noted (40–42) that the children “had a close and affectionate relationship with each of the parties. Neither party impugned the quality of the children’s relationship with the other party and there was little to choose between them in that regard”.

Core socio-legal issues supporting the judgement

The judge concluded that the children's wishes to be with their father needed to be qualified in view of their "tender years" (72). He referred to the danger of the "Disneyland factor" in the views of children so young (62). The Judge was critical of the father's mother and of his sister as prospective assistants in the custody of the children (5). On the other hand, he was impressed by the mother's partner, seeing him as a positive influence so far as her case was concerned (50).

In reducing access, the judge cited evidence of stress associated with driving and the expenses associated with travel for the purpose of access (97). The judge was also influenced by the position of the mother in this regard, who indicated that she would seek monthly rather than fortnightly access in the event that she was not awarded custody (122–123).

The judgement as narrative

Structure of the narrative. This narrative reflects a general presumption that young children are likely to be better cared for by their mothers. The judge is impressed by the mother and a Mr Melton with whom she had formed a relationship (45). He was less impressed (50–52) by the father's family, whom he assumed would have a significant role to play if the father were awarded custody. He believed that these factors weighed more heavily than the wishes of children whom he still regarded (72) as being of "tender years".

The significant reduction in a seven-month access arrangement and the way in which the access decision was made, suggests that the relationship between the father and his children was not highly valued. It is difficult to match this attitude with a statement to the effect that the children had a close and affectionate relationship with their father (40) and with the desire on their part to live with him. It is likely that the long-term effect of this order would have been to gradually estrange the children from a parental relationship with their father. Ironically, it is likely that the seemingly unsolicited “Disneyland” comment would have become a self-fulfilling prophecy.

What is privileged in the judicial narrative? Privileged in this narrative is the judge’s own assessment of the prospective carers and living conditions over the wishes of young boys to be with their father. Also privileged, is the custodian *mother’s* view regarding access arrangements.

What is not privileged or less privileged in the judicial narrative? The father’s *relationship* with his children is undervalued. The “Disneyland” comment (62) suggests that, in the judge’s view, the children’s desire to be parented by their father was unrealistic. The judge also rejected the father’s proposal that a fortnightly journey of two and a half hours of travelling time in each direction was within his capabilities and that the resultant contact with his children would be in their interests. Rather, the proposed

arrangements were seen as too stressful (98) and expensive (136) for the father and too tiring (137) for the children.

Initial hypotheses

The Court is likely to treat access or contact as a secondary issue. It is not likely to be afforded the same close attention that characterises custody or residence hearings. The primary purpose of contact/access, which is to promote an ongoing meaningful relationship between parent and child(ren), may be undervalued or lost sight of.

Case 11: Lalor

Type of case

Interim custody involving the non-return of a child after alleged suicidal thoughts on the part of the child.

Legal details and outcomes

Applicant:	Mother
Result:	Interim shared parenting
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

Following separation the child had lived for a year with the mother and then for almost two years with the father (1 and 3). The latter arrangement was affirmed following a contested hearing. The mother then refused to return the child following the first access period after her daughter had allegedly expressed suicidal thoughts related to remaining with the father. The mother sought assistance from a court counsellor who, after interviewing the child, made a notification to the Department of Family and Community Services under section 70 BB of the Family Law Act. The mother then applied for interim custody on the grounds of a change of circumstances. The judge left custody with the father but ordered what amounted to a shared parenting arrangement. Three independent psychological reports,¹⁰⁰ taken as a whole, were inconclusive in their findings.

Selection criteria

There was a history of the child spending substantial amounts of time with each parent. In addition, as noted above, at the time of the application custody was with the father whilst the child was allegedly expressing a wish to live with the mother.

Core socio-legal issues supporting the judgement

The judge delivered a brief interim judgement in which he noted, (15):

... we now have a disturbed child, and it appears to me that the appropriate way to relieve that disturbance is to provide for the child to spend more or less equal time in the home of each parent. Whether that is on a week about basis from shorter exchanges, is a matter, I suppose, for the parties, but I will make an order that until further order, the child reside in the care and control of the respective partners on alternate weeks.

The judgement as narrative

Structure of the narrative. The judicial narrative in this interim hearing is a brief one, the principal aim of which seems to be to both maximise the chances of an unbiased hearing in a future contested case and, at the same time, afford a degree of protection for the child should the suggestions of suicidal ideation prove to be correct.

What is privileged in the judicial narrative? This is an interim hearing and the judge appears to be careful not to privilege any particular view. At the same time, the interim shared parenting arrangement could be seen as acting responsibly in taking seriously the *possibility* that the suicidal ideation is real.

What is not privileged or less privileged in the judicial narrative? Probably wisely, the judge left open any interpretation with respect to the source of the child's "disturbance". Though he had access to three current reports on the child's welfare and though

each noted the child's self reports of anxiety about living with her father, they were not internally consistent.¹⁰¹ Nor had the reports been tested via examination or cross-examination.

Initial hypotheses

The suggestion of suicidal ideation in a child requires a serious response. In making decisions in interim hearings, the court is likely to attempt to find a balance between signalling the seriousness of the issue and pre-empting the results of a future trial. The interim decision is likely to attempt to build in a mechanism whereby the child's emotional state can be adequately monitored.

Case 12: Lavette

Type of case

Custody. Half-siblings had been split between parents for 18 months prior to hearing.

Legal details and outcomes

Applicant:	Mother
Result:	Custody to Father
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The couple lived together and subsequently married, the relationship lasting approximately six years. The wife brought a two-year-old daughter from a previous marriage into the relationship. She was 10 years old at the time of the hearing. The couple initially separated under the one roof and for the following 10 months shared the care of the one child of the marriage, a boy who at the time of separation was also aged two years. After that ten-month period, the wife left the house with her daughter and for the following fourteen months, until the hearing, the child of the marriage remained in the care of his father with access to the mother. By the time of the hearing, therefore, in which the mother had applied for custody, the child was almost four years old. By this time, both parents had also repartnered.

Selection criteria

Noted by the Appeal Court (22) that an opposite conclusion with respect to custody in this case “would have been equally acceptable” (22). Trial judge found that the child “had equally a very real love and affection for each of the natural parents and was also able to relate well to each of the de facto companions of each parent” (7). It was noted also (8) that “this was one of those cases which can properly be described as finely balanced between the parties”.

Core socio-legal issues supporting the judgement

The status quo of fourteen months in this case is described as significant in the life of a child not yet four years old (25). This weighed more heavily than the argument which favoured the child continuing a day-to-day relationship with his half sister with whom, it was noted by the judge (8), he had “a very strong relationship and one that was particularly of importance to [him]”. After the production of tape recordings by the mother, some of the father’s evidence was found to be false due either to poor memory or lying, but this in the end was found not to disqualify him as a parent or seriously damage his case (31). The judge took the child’s asthmatic condition into account (4) and, on these grounds, also appears to have favoured the more obsessive personality of the father as against the “extremely laid back” approach of the mother (11).

The judgement as narrative

Structure of the narrative. Overtly, much of the narrative was built around the child's medical condition. The fact that this was an asthmatic child who might at times require a rapid and planned response appears to have weighed heavily on the judge in this case. Had the child not been asthmatic and had the mother not been seen (by the court counsellor as well as the judge) to have been *very* relaxed in her approach to parenting, it is possible that the attributes of the father – obsessiveness (35), the fact that he was shown to have lied (31 and 34) and proof of an inappropriate exercise of control over his former partner (31) may have loomed larger in the weighing-up of options.

The fact that the judge was reluctant to pursue further the revelation of the father's lying, seems to indicate a strong desire on his part not to depart from the dominant narrative of the father being in a better position to care for the child from a physical point of view. The judge notes (31):

I must say that I had up until that point completely believed what the husband had put before me by way of affidavit evidence and oral evidence as to the conversations. I had no choice at that point but to come to the conclusion either that the husband's memory was not as good as I had thought it was or else that he was lying and I don't particularly care which. I don't think there is anything more to be said about that but it was an effective way of proving that the husband's evidence, as to those points, was wrong.

The phrase, "I don't particularly care which" and the subsequent sentence seem unusual in the context of a forum in which witnesses swear to tell the truth. The comments also need to be also

seen in the context of the mother's claims made earlier in the case. The mother had told the court (3) that she had not been in a position to take her son with her when she left the matrimonial home because she had been fearful of her husband. The revelations of lying noted above did not alter the observations sustaining the dominant narrative (3) that "the husband's evidence was more believable than the wife's".

What is privileged in the judicial narrative? Clearly privileged in this case is the status quo of fourteen months duration in the life of a child under the age of four (25). Also privileged is the more planned approach of the father to parenting which included detailed contingency plans in the event of a serious asthma attack (11). Both parents had re-partnered. The court was unclear (see paragraph 20) how much time the mother planned to devote to parenting her son (i.e., what proportion of her time would be in paid work) but seemed clear that the father's current partner would play a significant role in the continued parenting of the child.

What is not privileged or less privileged in the judicial narrative? Less privileged is the child's relationship with his half sister, though this is described as very strong (8). Also effectively ignored (see judge's statement in paragraph 31), is the fact that important evidence given by the father was clearly shown to be false. As noted, this has possible wider relevance in that the mother claimed (3) that at the time of leaving the house, "she desisted from

her efforts to take him (the child) because she was in genuine fear of the husband”. What became the status quo was established at this point. Despite the finding that important testimony given by the husband proved to be false on the matter of alleged intimidation, the judge persisted with a view, as also noted (3) that “the husband’s evidence was more believable than the wife’s”.

Initial hypotheses

A parent’s perceived superior response to a potentially life threatening condition is likely to weigh heavily in the Court’s deliberations. A mother who leaves her child is likely to be looked upon with suspicion and her behaviour defined in terms which could be interpreted as neglect. Such an attitude is unlikely to be significantly altered by factual revelations which “explain” the mother’s departure.

Case 13: Lavrut

Type of case

Interim custody. Complex history of child being in the custody of his mother after separation but also spending considerable periods of time with his father.

Legal details and outcomes

Applicant:	Mother
Result:	Interim custody to father

Appellant: Mother
Result of Appeal: Dismissed but directions given for a prompt defended hearing

Summary

The couple was married for approximately six and a half years. When they separated, the child, then also aged six and a half years, remained in the care of his mother whilst his father enjoyed regular access. There was a brief cessation of access about two years after the separation when the father served a short period in prison. Shortly after the father's release from prison, he did not return the child after an access period. The mother was granted custody of the child approximately two months later and the case was adjourned for a full hearing. The mother also gave an undertaking at that time that she would not take him to the house of a "Mr Jan Cherry". Regular access to the father continued for a further eight months after which, as a result of an expressed wish of the child, parenting commenced on a week about basis. Shortly afterwards, however, the father again refused to return the child after one of the agreed upon periods. The mother made a further application for custody which was heard, on an interim basis, some weeks after this incident. At that hearing the judge awarded interim custody to the father. This remained in place up to the time of the mother's appeal a little over four months later. At the time of the appeal the child was a few days short of his eighth birthday.

Selection criteria

Judge declared (9) that he was “not satisfied either way”.

Core socio-legal issues supporting the judgement

The appeal Court notes (9) that “a factor if not *the* factor, which influenced the trial judge to make the order that he did related to the wishes of the child. The trial judge is cited (9) as saying, “I do think it is very likely, on the evidence, that Christian, in fact at the moment, wants to live with his father”.

The judgement as narrative

Structure of the narrative. In psycho-social terms, the dominant narrative around interim hearings is usually one of crisis intervention which at the same time attempts to impose minimum structural change.¹⁰² This was not the approach taken in this case, despite the fact (12) that neither parent had formally applied for a custody order. Rather, it appears that, faced with a complex history and accusations of breaches of orders by both parents, the trial judge seized upon the alleged wishes of a rather young boy but simultaneously ordered that the contested hearing be expedited.

A major difficulty in this case is that there is very little narrative to examine, either in terms of details concerning the history of the case, or in terms of judicial comment. Given that there was no question of the child being at risk in the care of either parent and that there was clearly no time in this interim hearing to hear anything but the most rudimentary evidence, it would appear that the judge simply

took a line of least resistance approach. That is, he used the only piece of relatively clear evidence to guide his interim decision, clearly intending that a more adequate investigation would take place shortly.¹⁰³

What is privileged in the judicial narrative? What is privileged in the interim hearing to the virtual exclusion of other considerations, are the perceived wishes of a seven-year-old child.

What is not privileged or less privileged in the judicial narrative? The major recent history in this case, which included the father's imprisonment, the likelihood that earlier orders had been breached and the fact that the child had spent more than three-quarters of the period between separation and the hearing in the care of his mother, gave way in this case to the wishes of the child.

Initial hypotheses

By their very nature, it is likely that interim hearings are more likely to throw up "outrider" results. These results are likely to be justified on pragmatic grounds such as the lack of availability of time and also on the grounds that a full hearing to consider the matter in detail can be expedited. Systemically, the reasons behind such orders for expedition can be lost and the original intention of the Court thus thwarted.

Case 14: McCallType of case

Custody. Relocation case involving a move from Tasmania to the Mainland of Australia.

Legal details and outcomes

Applicant:	Cross-applications by mother and father
Result:	Custody to father. Access to mother
Appellant:	Mother
Result of Appeal:	Upheld

Summary

The relationship survived for just on six years, the couple having married a few months after beginning cohabitation. Two children were born of the marriage. The boy was just on five years at the time of separation. His sister was almost two. The wife had had a clandestine relationship during the latter part of her marriage. Soon after that relationship was made public, she left her home in Tasmania with the children and immediately commenced cohabitation with the other party in Melbourne.

Applications for custody and related orders were made simultaneously in Launceston (Tasmania), and in Melbourne. The end result was a hearing in Launceston in which, by consent, orders were made giving “care and control” to the wife and various periods

of access to the husband. Agreement was also reached with respect to the payment of airfares, notification of any change of address and future confidential counselling. These arrangements remained in place until the contested custody hearing more than twelve months later. At this hearing, the judge ordered that custody revert to the father and that the costs of access to the mother, which required air tickets, be shared between the parents.

Selection criteria

The trial judge concluded (26) that as between the husband and wife, they had “discharged in almost equal proportions the duties of caring for the children during the times that they were in the matrimonial home”.

Core socio-legal issues supporting the judgement

Blame of the mother for her part in the break-up of the marriage featured strongly in the judgement (see, for example, paragraph 22 and four separate references in paragraph 23). The strong bond between the paternal grandmother and the children was noted (24) and the fact that she “proved herself more assiduous in seeing to the children’s health and educational needs than has the wife”. The trial judge was critical of the wife’s “angry dealings with the children” and her “propensity to use indecent language to them”, which he considered was “both demeaning to them and diminishes the role of the mother as a model for the children” (27). The judge was also critical of the fact that the wife had kept her Melbourne

address secret from the husband for some time and found that as part of a joint plan with her new partner, she had obtained an ex parte order from the court in Melbourne by “perjured evidence” (27).

Following extensive medical evidence related to (mainly) the wife, the judge concluded that the children were not at risk in her care (33). On evidence relating to two other matters, however, the judge concluded (39) that the wife was a “potentially unstable person”. He was also critical of the wife’s partner, suggesting that he was unlikely to marry the wife (40) and describing him as “an enigma” (42). Finally, the judge compared the wife’s “nebulous plans” and uncertain future in Melbourne with the stability and security of a rural environment which would be available if custody was awarded to the father (45). He looked favourably upon the fact that the father would be strongly supported in his care of the children by his mother.

The judgement as narrative

Structure of the narrative. This is a narrative of overt gender-related blame – blame for “causing” the breakdown of the marriage and blame for things done and not done in the role of mother. It is strongly traditional, parochial and gender-oriented in its views. For example, it is seen as axiomatic that rural life would be preferable for children to life in a large city. The fact that the mother did not have firm plans to marry is interpreted as her having “nebulous” intentions regarding the future. Alleged negligence regarding attending to a child’s medical matters is assumed to be the fault of

the mother, with no mention of paternal responsibility. The father's own parenting plans are intimately tied to the assistance he will receive from his mother. The father's own personality and parenting capacities, however, receive scant attention.

The narrative sets out to unambiguously justify a particular conclusion. It does so within a framework of strong gender-related assumptions. It is relentlessly negative in respect of the mother's actions whilst barely touching on the father's attributes of limitations. It represents an undisguised regression to mother blaming of which there are many examples from the earlier part of the twentieth century. The father's case is supported by default and by virtue of the fact that he has the assistance of his own mother.

What is privileged in the judicial narrative? The judicial narrative paints a picture, largely by inference, of a rural environment which is familiar, stable and supportive (23, 45 and 48). The father's parenting plans are privileged not so much in their own right, but because of the support of his mother and in contrast to those of the children's mother which, as noted, are constructed in a unyieldingly negative light.

What is not privileged or less privileged in the judicial narrative? The mother's parenting capacities are effectively ignored in the narrative as the focus is elsewhere. It is assumed that the breakdown of the marriage was the mother's fault (23) and that her actions in removing herself from the environment suggest selfish

motives and a disregard for the needs of her children (22 and 45). Extensive medical investigations of a highly personal nature lead to a conclusion that there was no evidence that the mother would be less than adequate as a parent. Nonetheless, two further incidents (described by the Appeal Court – paragraph 35 – as “rather unusual”), lead the judge to conclude there was a “lack of stability in the wife (36) and that she was a “potentially unstable person” (39). Two incidents with respect to not seeking medical treatment for one of the children further lead the judge to describe the wife (41) as “a failure as a mother”. There is no analysis of the impact of separating the children from the care of their mother after a 17-month status quo in another state (see paragraph 58) and an inadequate analysis (see paragraph 46) of the wife’s overall proposals.

Initial hypotheses

The expectation that mothers will sublimate their needs and desires and sacrifice their happiness for the sake of their children persists in Family Court judgements and a times finds overt and unqualified expression. As noted in the case of *K & Z*, once such an assumption is made, other relatively ordinary if less than perfect actions by a mother can be constructed as further evidence supporting the dominant narrative.¹⁰⁴

Case 15: McMillanType of case

Custody. Very young mother and young father. The mother withdrew her application allowing the maternal great grandmother to apply as intervener.

Legal details and outcomes

Applicant:	Father
Result:	Custody to maternal great grandmother Access to father
Appellant:	Father
Result of Appeal:	Appeal allowed

Summary

The child in this dispute was born to young parents. At the time, the mother was aged 15 and father aged 18. Their relationship persisted for a further nine months, during which the child spent the majority of his time with his maternal great grandmother. Two weeks after the separation of the parents, the father, who had returned to live with his parents, retained the child after an access period. The mother applied for custody and the father cross-applied. The father was granted interim custody several days later. A few weeks after that, the great grandmother intervened and sought sole custody, at which point the mother abandoned her application. Again the father was awarded interim custody with regular access granted

to the grandmother as intervener. The child then remained in the care of the father until custody was awarded to the maternal great grandmother following a contested hearing approximately eight months later.

Selection criteria

The judge found (30) “there is now nothing to choose between his great grandmother and his father in the matter of his bonding”. Citing the counsellor’s report, the judge noted that there is “a strong bond both ways”. In the same paragraph, the judge also noted that “The Counsellor could express no preference for the members of either of the competing households in terms of appropriateness for the future nurturing of this child”.

Core socio-legal issues supporting the judgement

The great grandmother’s house was seen to provide a more stimulating environment (33) with more diversity (34). In contrast, the father’s household was described as “myopic” (34). The judge made several references to the inadvisability of the father remaining on social security benefits. He saw it as an unnecessary drain on the public purse (35), an inappropriate role model for the child (35, 46 and 48) and likely to encourage a culture of welfare dependency (48). The judge also noted that the maternal great grandmother was more willing to allow and encourage access were she granted custody (18) than was the father (15 and 35).

The judgement as narrative

Structure of the narrative. The narrative in this case supports a basic starting position on the part of the judge that men are more suitably employed as providers for their children rather than as nurturers. Thus, despite the judge's and counsellor's acknowledgment that this is a closely-contested case (see paragraph 30), the final conclusion (38) is that the welfare of the child *requires* (italics added) that he be returned to his great grandmother's care. Such a strong conclusion suggests a narrative which is highly selective in the attention given to particular issues. For example, though the maternal grandmother is described in glowing terms and the family is seen as very supportive, that fact that neither her husband nor her adult children appeared willing to actively support her application (19) was simply discounted. Largely discounted, too, were the concerns of the counsellor (18) regarding the grandmother's physical environment. In effect, the counsellor saw the environment as "having some disadvantages". The counsellor's description of a somewhat chaotic environment was seen by the judge as "stimulating".

What is privileged in the judicial narrative? Privileged is the fact that the father has "the advantage of youth" and is the natural parent (16). On the other side of the ledger, the grandmother's physical environment is perceived to be more stimulating. Also privileged is the more generous attitude by the maternal grandmother towards ongoing contact with the non-custodian.

What is not privileged or less privileged in the judicial narrative? Not privileged are the father's plans to take care of a young child whilst remaining on supporting parents' benefits. A narrative is constructed whereby the father, who is living on social security benefits in his parents' "neat and conventional residence" (18) in a country town, is seen to be living a "myopic" existence (34) providing an inappropriate role model for his son, being an inappropriate drain on the public purse and falling into a pattern of welfare dependency (35 and 48).

Initial hypotheses

"Able bodied" men who opt to play a significant nurturing role rather than engage in full-time work, may attract a level of scepticism from the Court, especially if they draw on supporting parents benefits to achieve this end. The level of disapproval is likely to be stronger if a female parental figure is seen to be available as an alternative carer.

Case 16: Modell

Type of case

Custody case in which the mother was suffering from an undiagnosed "nervous reaction" possibly associated with the birth of triplets.

Legal details and outcomes

Applicant:	Father
Result:	Custody to father
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The couple was married for approximately nine years. They had two children and then had triplets. Whilst the mother was carrying the triplets in utero, her own mother died. The suggestion is that the wife suffered “some sort of nervous reaction” (7) around this time. For a short time, the children were taken into care. The couple separated approximately a year after the birth of the triplets.

Selection criteria

Judge noted (5) with respect to the father that “he is an intelligent man, in stable employment and a responsible parent to his children”. He also noted of the mother, in the same paragraph, that she is “a sensitive intelligent woman who loves her children and wants them in her care and living with her”. The judge went on to observe that it was necessary for him to deal with “the welter of conflicting evidence” before him.

Core socio-legal issues supporting the judgement

The judge generally accepted the father's evidence over the mother's (6). On the basis of evidence from two welfare workers, from his own observations and from his preference for the father's evidence, the judge accepted that the mother had had "some sort of nervous reaction or developed some sort of condition, which caused her responses to ordinary situations to change dramatically" (7). He concluded (8), "The Respondent has not satisfied me that she is presently capable of taking on the task that she would ask she be allowed to take on, even making all other assumptions as to finance and assistance in her favour".

The judgement as narrative

Structure of the narrative: Though clearly a difficult situation, the narrative is a limited one which raises potentially serious process questions. The brevity of the Full Court's analysis¹⁰⁵ seems to parallel the gaps in the narrative account in the original judgement. For example, though the father is judged to be stable and responsible (see paragraph 14), his capacity to cope with five young children as a single parent whilst remaining in employment is not raised or questioned.

Though the mother's "condition" is not formally diagnosed, it is constructed nonetheless within the constraints of a medical model. In other words, it is constructed as *her* issue. The broader issues and the relationship between the mother's "condition" and her capacity to parent are not included in the narrative.

What is privileged in the judicial narrative? The judge privileged stability and responsibility in the father. He also privileged evidence from witnesses and the husband concerning a formally undiagnosed condition of the mother. In addition, his observations of the mother in the witness box led him to conclude that elements of the undiagnosed “condition” persisted, sufficient for him to question her capacity to take parental responsibility of her children.

What is not privileged or less privileged in the judicial narrative? What appears to be not privileged is a serious attempt to understand the mother’s difficulties and, more importantly, the connection between these difficulties and her capacity to parent. Readers of the judgement are left with no idea about whether it might be a grief reaction to the death of her mother, post-partum depression, a response to the stresses associated with giving birth to triplets and dealing with a relationship breakdown, a combination of these factors or something else. Because there is no professional diagnosis of the condition, there is also no prognosis with respect to its likely course or its likely effect on the future parenting capacities of the mother. Indeed it could be argued that the father’s application was successful mainly by default.

Initial hypotheses

The Court is likely to construct perceived mental incapacity or mental illness in individual rather than systemic terms. Courts are also unlikely or unwilling to make the more fine grain connections between such perceived difficulties and the capacity to parent. Courts are unlikely or unwilling to seek the sort of expertise required to assist in addressing these issues.¹⁰⁶

Case 14: PetersonType of case

Custody. Grandmother as intervener with respect to one of four children.

Legal details and outcomes

Applicant:	Father
Result:	Custody to grandmother as intervener
Appellant:	Father
Result of Appeal:	Dismissed

Summary

Upon separation, the father left the four children in the care of their mother in Brisbane and took up residence in Mildura (in north-western Victoria). A little over a year later, at the request of the mother, the father returned to Brisbane for the purpose of taking the children into his care and bringing them to Mildura. He found,

however, that the oldest of the children had been residing with the maternal grandmother and that she was not prepared to hand the care of this child back to the father. The father then returned to Mildura with the three other children and subsequently applied for custody of the other child.

A further fifteen months ensued before orders were made in the Family Court, sitting in Mildura, which affirmed the status quo – three children in the care of the father and the oldest in the care of the grandmother. Because the judge at the time wished the assistance of an independent report, he made interim orders at that stage and ordered that a report be made available for a future hearing. That hearing took place approximately six months later, despite the fact that a report had not been prepared. It was noted that the absence of a report was not the fault of the parties.

At the hearing, a request by the father that the case be adjourned until a report could be prepared was refused. A further request, agreed upon by both parties, to adjourn for twenty-four hours to enable a locally-based psychologist to prepare a report was also refused despite the fact that the psychologist was available and willing. Instead, the judge opted to interview the child whose custody was being contested. His final orders again affirmed the status quo.

Selection criteria

No suggestion was put forward that either parental figure was in any way inappropriate as a custodian. The father was the

custodian of three of the children and the grandmother had the fourth in her care. The status quo was affirmed. High Court Judgement in *Gronow*, dealing with discretionary judgements in closely-contested cases is cited (7).

Core socio-legal issues supporting the judgement

The wish of the child as determined by judicial interview was to remain with his grandmother (14). This was seen to be consistent with more than two years of residence with the grandmother immediately preceding the hearing (14). The relationship with the grandmother was deemed to be closer than the relationship with the father (14). The child's education and emotional needs were seen to be better promoted by his grandmother (15). It was argued that removal from the grandmother at that time would "devastate the stability and security that he has in his life and the happiness he has in his current environment" (15).

The judgement as narrative

Structure of the narrative. The narrative is one which privileges judicial observation outside the court setting over the opportunity for independent assessment of the child and the parties. The assessment was available and desired by the parties but deemed unnecessary by the judge. Thus, the narrative contains a meta-narrative concerning the use of the extensive discretionary powers available to the Court. The meta-narrative includes a presumption

that a judge is competent in ascertaining the wishes of a nine-year-old boy in a one-off interview.¹⁰⁷

Though the child's wishes were not the only matter considered by the judge, the narrative suggests that the child interview had a strong and perhaps disproportionate bearing on the outcome. Possible evidence of this is found in the fact that the judge appeared to express strong views concerning the likely outcome of the case right from the beginning of the hearing. Though the appeal was dismissed, this early indication of judicial thinking before other evidence had been presented was described by the second Appeal Court judge (1) as "unfortunate".

What is privileged in the judicial narrative? What is privileged in the narrative is the stability arising out of the status quo, an assessment of the educational opportunities available and the wishes of the child. Also privileged is the judge's capacity to directly assess the wishes of the child and his relationships with family members in preference to an assessment made by a behavioural science professional – in this case either a family court counsellor or a clinical psychologist (see paragraph 6).

What is not privileged or less privileged in the judicial narrative? Not privileged in this case is the opportunity for all four children of the marriage to live together or, given the distances involved, to have any significant contact with each other. Also not

privileged is the opportunity for an independent expert's assessment of the child's wishes, needs and attachments.

Initial hypotheses

Formal and transparent processes for obtaining children's wishes by professionals qualified to do so, even when available, will not necessarily be valued or required. A single judicial interview of a child who has been in the care of one of the parties to a dispute for many months can fulfil the requirements to take account of the wishes of that child. Such an interview can amount to a key piece of almost unassailable evidence, so long as the other aspects of Section 64 are formally acknowledged. A supplementary hypothesis is that processes more akin to "palm tree justice" (see Chapter 3) may be a more likely outcome of proceedings when the Court is conducting circuit hearings in country locations.

Case 18: Ploetz

Type of case

Second custody application on the grounds of a change of circumstances.

Legal details and outcomes

Applicant:	Mother
Result:	Custody retained by father
Appellant:	Mother

Result of Appeal: Dismissed

Summary

In 1988, the father was awarded custody of the only child of the marriage, then aged four. The father lived with his parents in a country town in northern NSW between that time and the time of a further hearing 19 months later. This hearing took place because the mother, who had since remarried and was now at home full time, argued a change in circumstances sufficient to reverse custody. The mother now lived in a country town in southern Queensland.

Selection criteria

The decision making task was described (10) as a difficult one. High Court case of *Gronow* cited, including references to the provision of reasons for judgement in finely-balanced cases (4).

Core socio-legal issues supporting the judgement

The father's sporting activities were said not to detract from his established parenting role, especially as the father had the support of his own parents. The mother's remarriage and full-time availability after a nineteen-month status quo was not considered a sufficiently compelling change of circumstances. The mother was criticised for employing private investigators to check on the father's sporting activities. The judge "preferred the husband's evidence" to that of the investigator's (6).

The judgement as narrative

Structure of the narrative. The narrative is structured around the “tender years” (8) of the child and the presumption that, in view of her age, she is best served by a continuity of her environment. A change of environment was seen (7) as having the potential to place the welfare of the child at risk. Though the father’s involvement in sporting activities was acknowledged, this was offset by the fact that the child had the benefit of a relationship with members of her extended family, especially the father’s own parents (7). Indeed the mother was criticised (6) for having the father’ sporting activities independently investigated.

What is privileged in the judicial narrative? Perceived stability is privileged in this case – the advantages of this child of “tender years” remaining in the environment she has known all of her life. Also privileged (7) is the fact that the child has a “well known” extended family in the area in which she resides.

What is not privileged or less privileged in the judicial narrative? The offer of full time care by a mother who resides some distance away is insufficient to sway the Court in view of the fact that the child was in an environment with extended family supports that she had known all her life.

Initial hypotheses

A long-established status quo in the life of a small child is unlikely to be disturbed in the absence of compelling reasons to do so. Extended family support will further assist the case of a father in such a position. In such cases, the father's day-to-day care is unlikely to come under close scrutiny.

Case 19: Re EvelynType of case

Custody application by natural mother and partner following change of mind after agreeing to altruistic surrogacy arrangement.

Legal details and outcomes

Applicant:	Biological mother and partner
Result:	Custody to biological mother and partner Access to biological father and surrogate mother
Appellant:	Biological father and surrogate mother
Result of Appeal:	Dismissed

Summary

There are two couples in this case, the "Q"s, who were residing in Queensland and the "S"s, who were residing in South Australia. The Qs have an adopted son of Aboriginal descent who

was three years old at the time of the hearing. The Ss had three children at the time of the hearing aged between three and seven years. Both couples had been married for approximately ten years. Mrs Q was infertile due to a total hysterectomy which had taken place prior to her marriage and about which Mr Q had full knowledge.

The couples had a strong friendship and spent a number of holidays together, during which time the infertility of the Qs was openly discussed. After one such holiday, Mrs S put to her husband the possibility of conceiving a child using the sperm of Mr Q. Her husband was strongly supportive of the idea. After a further holiday together (by which time the Qs had adopted their son), the Ss put the idea to the Qs. They were simultaneously shocked and extremely grateful and asked for time to consider the matter. In the following months, Mrs S renewed her offer on several occasions and the Qs finally accepted.

The Qs travelled to South Australia for the birth. Mrs S spent five days in hospital and both couples spent a further six days in a flat, during which time the Qs were the primary caregivers of the child. Mrs S was registered as the mother in the State of South Australia and Mr Q was registered as the father. Mrs. S breastfed Evelyn in the hope that this would encourage lactation in Mrs Q. However friction developed between Mrs S and Qs at this time as Mrs S believed Mrs Q was not willing to persist with efforts to breastfeed. She subsequently expressed concerns about the capacity

of Mrs Q to nurture Evelyn and to keep her informed about her progress.

Following the Qs return home, the contact between the two couples was not what Mrs S had hoped it to be. She became frustrated by what she regarded as an inadequate level of communication and was struggling with the ramifications of her decision to hand the child over to the Qs. After attended grief counselling and also a relinquishing mothers' group, she finally determined to bring Evelyn back to South Australia. To this end, Mrs S travelled to Queensland and forty-five minutes after arriving at the Q's house, left with Evelyn.

Selection criteria

The judge noted (67–70):

It is apparent that this case is not about parenting capacity. The Court is dealing with four different personalities and quite different parenting styles. However, it is clear that each household has the capacity to provide a very high standard of care for Evelyn. Each of the adults loves the child and they are each committed to her welfare for the future. Simply stated, all of the parties wish to have the pleasure of raising this young girl.

Core socio-legal issues supporting the judgement

The judge determine (461–462) that Evelyn will suffer problems relating to issues such as abandonment and identity during her adolescence and that Mrs S was best equipped to deal with those problems. He found (463) that Mrs S would suffer extreme grief if Evelyn was not placed with her, and (464–465) that the loss to

Evelyn of not growing up with her biological half siblings outweighs her loss of her relationship with her adopted brother, Tom.

The judge regarded the fact that Mrs S was the biological mother of Evelyn as a “factor in her favour” (488). With respect to Evelyn’s adolescence, the judge noted (505) that in his view, “Some of the potential problems, such as the perception of rejection by her biological mother, necessarily disappear with a placement with the Ss”. In addition, he was satisfied (506-508) “that other issues, such as identity issues, sexuality issues and a sense of being different, are less likely to emerge as problems for Evelyn in the S household. Further, if they do arise, they are likely to be better accommodated in that environment”.

The judge also concluded (531–532) that the biological mother was “the only person who can provide definitive explanations relating to her own motives and thinking on many critical issues surrounding Evelyn’s creation and placement”. He further noted (538–541) that Evelyn would cope better with being a visitor to the home of her biological father than to the home of her biological mother.

The judge added to this observation (542–546) that “the prospect of Evelyn having problems arising as a consequence of a sense of loss of the opportunity to be raised with her biological siblings is a greater loss than that likely to be occasioned if she is now separated from Tom. On that issue, I have accepted the proposition advanced by Ms M, and in part conceded by Professor N, that a child is likely to place some special significance on

biological sibling relationships which is not so readily replicated in non-biological relationships. The judge went on to note (551–552) that, “In a more positive vein, I accept the evidence of Ms M and Dr R to the effect that the optimum environment within which Evelyn can deal with the longer-term issues is in the home of her biological mother”.

The judgement as narrative

Structure of the narrative. This case is described by the Full Court (442) as “a groundbreaking area of the law”. Whilst this might be the case in a jurisdictional sense, the narrative deals with much which is familiar in post-separation parenting disputes.¹⁰⁸ Much of the narrative in this case centres around the issue of how a child would respond to the knowledge that she had been given by her biological mother into the care of her biological father and his wife. The judge was also concerned with the relative merits of growing up with half siblings (in a biological sense) compared with a sibling who was adopted into the family.

What is striking about this narrative is that, although it was constructed in the late-nineties, it reads in many ways like a judgement which could have been delivered prior to the enactment of the Family Law Act. Its focus is on the “extreme grief” (463) which will be suffered by the biological mother and the quasi-magical quality of the mother-child relationship. There are no equivalent statements regarding the “other” mother, who had cared for the child for twelve months prior to the hearing. The narrative

supports a presumption that a relationship, yet to be developed between the child and her half siblings, will naturally grow to be more important to her than her existing relationship with her adopted brother.

What is equally striking and also reminiscent of narratives of an earlier era, is the fact that the emphasis on parental biology is focused almost exclusively on the mother. In the description of events leading up to the biological mother's removal of the child from the care of the Ss, the only reference to the father (186 – 188) is as follows:

After further reflection on that day, Mr Q drove to Mrs S's mother's home ... a drive of some two hours, with the view of confronting Mrs S about her decision. A highly charged conversation took place, but Mrs S persisted with her decision to reclaim the child. She apparently returned to South Australia the next day.

The judge also privileges biology, but again, the biological links are female. He notes, for example (538 – 541):

I have concluded that, on balance, a child in Evelyn's situation is more likely to cope readily with the prospect of being required to visit the home of her biological father and step-brother from the comfort of the home of her biological mother and two biological sisters and one biological brother, than she would on the alternate outcome.

What is privileged in the judicial narrative? What is overwhelmingly privileged in this case is biological motherhood and a biological relationship between siblings.

What is not privileged is the ongoing relationship of 12 months duration between the child and her biological father and the child

and her social mother. What is also not privileged is the existing relationship between the child and her aboriginal adopted brother. What is almost entirely missing from the judgement are statements about the role of either the biological or social father.

Initial hypotheses

Deep-seated assumptions about gender and biology remain not far from the surface, but are generally less explicit in comments in more “conventional” family law cases. When the circumstances *appear* to be sufficiently unusual and sufficiently different to “normal” separation disputes and when no sense of blame attaches to the mother, the court is likely to revert to earlier views which privilege motherhood and biology. In such cases, the role of the father can once again all but disappear from narratives associated with nurturing and with the loss of opportunities to nurture.

Case 20: Robbins

Type of case

Custody in which there had been shared parenting of a young child prior to the hearing.

Legal details and outcomes

Applicant:	Father
Result:	Custody to mother
Appellant:	Father

Result of Appeal: Dismissed

Summary

Following separation, the mother and father effectively shared the care of their small son for approximately three and a half years (though the trial judge made the interesting remark that (9), “if anything, there was just a little bit more primary care given by the respondent (mother) rather than the applicant”). During that period there appear to have been several attempts at reconciliation, culminating in a five-month yacht trip.

Following the yacht trip, the mother left Queensland with the child and went to South Australia. The judge found (13) that the mother received carte blanche permission from her solicitor to remove T. from Queensland and from contact with his father, with whom the child had a close relationship. It was noted at the same time that the mother had not informed her solicitor of the shared custody and access arrangement entered into by the parties in late 1990 or early 1991.

In the following month, a Family Court judge ordered the return of the (then) four and a half year old boy to the custody of his father in Queensland. As a result, the mother returned to Queensland and a month later she and the father agreed on parenting arrangements which saw the major care remain with the father with significant amounts of access to the mother. A little over four months later, the access was increased by consent to a point where the judge observed (19) it effectively amounted to a shared parenting

arrangement. This was the situation at the time of the contested hearing five months later at which the mother was awarded custody.

Selection criteria

The trial Judge found (20) that the mother and father were loving parents, who would endeavour to do their very best by advancing T's welfare. He found (21) that each parent would be: first, a proper custodian of T. and be capable, if on their own, of giving good care to the child; and second, able to provide suitable accommodation and make proper arrangements for T's supervision. In the same paragraph and in paragraph 23, he described the case as being "finely-balanced".

Core socio-legal issues supporting the judgement

The critical issue was the perception of the mother's greater emotional attachment to the child. Educational proposals, accommodation and the child's network of friends were also deemed to be superior with respect to mother's proposal (23), though all by "just a very feint feather" (25).

The judgement as narrative

Structure of the narrative. A key feature of the narrative occurs in paragraph 24.¹⁰⁹ In what appears to be a remark to the side but is more likely to be central to the judge's thinking, he suggests that had the mother not removed the child to South Australia, there

would, in effect, had been no custody contest. The conclusion is factually incorrect¹¹⁰ and seems to emanate from an assumption that the mother would naturally be the child's "real" parent. Such a narrative appears to be reinforced by judicial concern (52) that the father's long service leave was coming to an end. There is a further presumption, unable to be verified or refuted from the material in the transcript, that the father's clear intention (or only option) was to return to full-time employment.

The case is characterised by vagueness with respect to how the judge came to the conclusion that "just a little bit more primary care had been offered by the mother" and with respect to how the "featherweight" was placed on one side of the ledger. Interestingly (though it is not the focus of the research), the case is also characterised by an unusual level of vagueness on the part of the appeal court.¹¹¹

The vagueness in the narrative masks some curious contradictions. The logic of paragraph 24 suggests that the mother appears to have risked being unsuccessful, not on the grounds of her general capacity as a parent, but on the grounds of a particular error of judgement. In addition, after an acknowledged shared-parenting arrangement of more than four years, there is no criticism of the fact that the mother simply assumed that the father could fly more than 2000 kms to visit his son from time to time; or, alternatively (14), that "*he could pay for her and T. (the child) to fly to Brisbane so he could exercise access*" (my italics).

Thus the narrative betrays a strong undercurrent of both a presumption in favour of maternal care and a presumption in favour of more traditional gender roles. The absence of any serious criticism of the mother's actions suggests a narrative comfortable with the role of the father playing a secondary role. The final orders also leave the question of future access indeterminate. A curious outcome following the stresses of a contested hearing, this leaves the father in a vulnerable position with respect to negotiating his future parenting role.

What is privileged in the judicial narrative? Privileged in the judicial narrative is a perceived greater emotional attachment of the child to the mother and an underlying presumption that even in a situation in which it is common ground that a substantial amount of shared parenting has taken place, the mother remains the primary caretaker.

What is not privileged or less privileged in the judicial narrative? Though the judge suggested that the child's welfare would be advanced "in either party's hands" (25), there is a parallel presumption that the father's input had been associated with the fact that he had been on extended leave. There is a presumption that the father would return to full-time employment and an implied link between this and the quality of the parenting he could then offer.

Initial hypotheses

When a couple shares the parenting of a young child and are in dispute regarding its future in an evenly balanced situation, the child is likely to be judged as more attached and emotionally connected to the mother. When a child is young, attachment and emotional connection, so determined, is likely to be privileged over other factors.

Case 21: Ross Doyle

Type of case

Custody in which one child was living with each parent. The Judge was concerned about the parenting skills of each parent.

Legal details and outcomes

Applicant:	Both
Result:	Status quo of split custody confirmed
Appellant:	Mother
Result of Appeal:	Dismissed

Summary

The couple lived together in Tasmania for a little under four years during which time two children were born. Initially, the mother left with the children and resided with her own mother in Sydney. After a failed reconciliation attempt, both parents applied for custody and an interim order was made granting custody to the mother.

The next day, however, the father took one of the children with him and returned to Tasmania to live with his parents. This situation persisted until the Family Court hearing. The mother, in the meantime, had had four changes of residence. At the time of the hearing, she was sharing accommodation with a man but was intending to seek public housing accommodation. The father, for his part, was intending to marry a woman who had four children of her own and reside with her.

The Court ordered a continuation of the status quo – that is, that one child remain with the mother and one with the father.

Selection criteria

The judge noted (12), “I find this a very unsatisfactory case to have to determine because both choices are very poor”. The judge struggled with the choice and finally decided to leave each child with the parent who was caring for him at the time of the trial.

Core socio-legal issues supporting the judgement

The judge saw both parents as “confused young adults” (13). Given this assessment, the essential rationale for the decision is found in a juxtaposition of paragraphs 12, 16 and 18. The judge found that each parent offered a poor choice (though clearly not so poor that he was willing to contemplate a referral to welfare services). Given the fact that the father intended to marry a woman with four children (each fathered by a different man), the judge was reluctant to add another child to that equation. Given the mother’s

history of instability (at least in the geographical sense), and some evidence of behaviour that bordered on neglect (17) the judge was not confident that she could cope with the readjustment that would be required if the other child came back into her care.

The judgement as narrative

Structure of the narrative. The narrative is one that takes a pragmatic view of a difficult situation. At the same time, it is a narrative which goes beyond what is required in order to arrive at the conclusion of preserving the status quo. There was evidence from past incidents (see, for example, paragraph 17) to suggest that the mother might indeed have difficulties in coping with the reintroduction of the second child. There was also evidence (25) that the paternal grandfather was likely to provide a significant level of stability in the life of the child in the care of the father.

Despite this, the judge described the situations of both the mother and the father's intended partner (15) as "unnatural". The mother attracted this title because she was sharing a flat with a man and described the arrangement as "platonic". The intended partner's situation was so described because she had borne four children to four different fathers.

What is privileged in the judicial narrative? The status quo is privileged as providing the best chance of stability for these children.

What is not privileged or less privileged in the judicial narrative? A chance at an ongoing relationship between the two brothers is not privileged. It is clear, too, that the judge is not impressed with either of the women as mothers. In his statements about both of them, the judge appears especially wary of their sexuality. In the case of the father's intended partner, he is concerned that she has clearly been involved in a series of relationships. In the case of the mother of the children in dispute, he finds some difficulty in believing that she would be sharing a house with a man without a sexual involvement.

Initial hypotheses

The Court will need to be convinced of minimum levels of maturity in order to award custody to a parent. The Court is likely to be especially disturbed when the sexuality of women who are mothers is too overt.

Case 22: Sheradin

Type of case

Custody in which there had been interim shared parenting of two young children of marriage prior to trial. The father also applied for custody of (but subsequently altered application to access to) another older child who was the child of a previous relationship of the mother.

Legal details and outcomes

Applicant:	Father
Result:	Custody to mother
Appellant:	Father
Result of Appeal:	Allowed

Summary

Application by father for custody of two young children of marriage and reasonable access to wife and cross-application by wife for similar orders with custody in her favour. This led to orders by consent regarding interim arrangements in which children were in the care of each parent on a shared basis. The father had the children in his care at his parents' house for four days per week. The mother had the children in her care in the former matrimonial home for three days per week. The original application by the father for custody of an older child who was the child of the mother by a previous relationship was altered at the time of the trial to an application for access. The final orders gave custody of the three children to the mother and access to the father.

Selection criteria

The Judge found (11) “both parents to be competent and caring as regards their children and able to provide adequately for the needs of the children, including their emotional and intellectual needs”.

Core socio-legal issues supporting the judgement

The father was judged to be in a better position to provide for the children financially. A conclusion drawn from this was that it would be better for the children to be in the mother's custody or in the day-to-day care of the father's parents whilst the father worked. The judge noted, amongst other things, that "it goes without saying that the children would benefit from the improved living standards which regular income from employment would confer" (9). He also noted (9) that the father "appears well-qualified to obtain regular and well-paid employment. Should he do so he will be able to play a significant role in the future in their support and will incidentally provide a better role-model for the children than he does at present".

The judge also compared the likely outcome of differing results with respect to the children's religious experience. He found the father (24) to have a "tendency towards inflexibility" in his attitude towards the children's religious upbringing. The mother was judged (25) to be "less rigid" in her support of a Catholic upbringing for her children. With regard to the paternal grandparents, the judge noted (26) that "The evidence [before him] establishes that they are somewhat rigid in their religious attitudes". More generally, the judge ruled (27) that the children "will continue to be raised within the Catholic faith, but in a more relaxed and flexible atmosphere than they could expect in their grandparents' household". Additional statements comparing rigidity with a more flexible and more relaxed atmosphere occur in paragraph 28.

The judge also considered the relationship between the children and their half-sister whom, it had been conceded, would remain in her mother's care. He noted (27) that custody to the mother would ensure that the children remained "united with the older sister to whom they are closely bonded".

The judgement as narrative

Structure of the narrative. Three core issues provide a backdrop for the narrative in this case. The first is a clear perception on the part of the judge that the preferred role of fathers is that of providers rather than nurturers. The second is a preference for religious observances that are seen as more "flexible" and more "relaxed". The third is a preference that siblings should where possible remain together. All three issues point in the direction of custody to the mother. A challenge to this outcome, the father's assertions that the mother had suffered from depression, is dismissed (44) as "symptomatic of the smear campaign adopted, in particular, in the conduct of the husband's case". The challenge is responded to in this manner despite the fact that it was common ground (42) that the mother had suffered from depression after the birth of both children of the marriage.

What is privileged in the judicial narrative? Privileged in the narrative is the father's capacity to provide financially for his children, an ongoing relationship between the two young children

and their older half-sister, and approaches to religious upbringing which are seen to be flexible and relaxed.

What is not privileged in the judicial narrative? Not privileged are the nurturing aspects of the father-child relationship and a more formal approach to religious upbringing.

Initial hypotheses

The Court is more comfortable with men in provider rather than nurturing roles. When faced with the alternatives, the Court is more likely to favour a “relaxed” rather than formal religious upbringing. However the manner of expression of such a preference is recognised as a very delicate issue (see also earlier comments in the case of Firth).

Closely-contested cases can provide a platform for judges to express more personal views and to selectively attend to information which might not support the consequences of these views.

Case 23: Smith

Type of case

Custody in which, with consent, the child had been left in the care of the father shortly after the parents’ separation, the mother taking an interstate posting to do an eight-month course. The mother applied for custody upon return from the posting.

Legal details and outcomes

Applicant: Mother
Result: Custody to mother
Appellant: Father
Result of Appeal: Dismissed

Summary

The couple was living in RAAF married quarters in Queensland at the time of the birth of their only child. They separated when the child was two years and eight months old, at which time the mother travelled to Melbourne to commence an eight-month course. During this period, by consent, she left the child in the care of the father. Shortly after arriving in Melbourne, the mother commenced a relationship with a man whom she subsequently married.

Following completion of the course, the mother was given a posting to Richmond (outside Sydney). The father, in the meantime, moved to Canberra with the child. Upon taking up her Richmond posting, the mother applied for custody in the Sydney Registry of the Family Court. The case was transferred to the Canberra Registry and heard some 10 months later, by which time the child had been in the father's care for 17 months and was aged four years and three months.

Selection criteria

The judge noted (27), “I find it very difficult to make any particular decision between the parties”. It was also noted (38) to be a “finely-balanced case”.

Core socio-legal issues supporting the judgement

The core socio-legal issue in this judgement, noted in a lengthy statement in paragraph 27, is a projected stability of environment for the child. In that paragraph, the mother was seen to offer such stability on the grounds that she had remarried and was expecting another child. The judge was sceptical, on the other hand, of the willingness of the father to place commitment to parenting above commitment to work. He was also concerned about the father’s capacity to parent adequately without the assistance of a female partner.

The judge expressed concern about the father’s controlling behaviour, suggesting that he had “endeavoured to exert a controlling influence and a dominating influence over the relationship of D (the child) with his mother”. At the same time, again in paragraph 27, he noted, “Mr Smith has never done anything, as far as the future of D is concerned, which would lead me to conclude that he would not [sic] make decisions which would not be in D’s favour”.

The judgement as narrative

Structure of the narrative. The judge in this case constructs a narrative which reflects a traditional view of the roles of men and women. Despite the fact that Mr Smith has effectively been a single parent for approximately 17 months, he sees his short-term future not as an active parent but as work oriented. He notes (27) that:

Mr Smith at age 28 is a person of obvious talent, consideration and sensitivity in many respects. He is a person that I cannot believe will want to remain out of the workforce ... I found the evidence about his future employment difficult to be comfortable about.

The judge even predicts a future repartnering, partly at least, for the sake of the child. He notes,

I find it difficult to believe that (Mr Smith) will not re-partner at some time relatively soon and indeed this will probably be for D's benefit as much as anything else. That is, however, an uncertainty that I find difficult to balance in the overall equation.

The judge then turned his attention to a complementary narrative which saw the mother's past as questionable but her future in more acceptable terms:

Ms Bradshaw for her part has now remarried, is expecting another child. She does offer, at least at this point, a more predictable stable future than does Mr Smith

At the same time, the complementary narrative comes with a warning about mothers who seek to enhance their careers. It is noted in the judgement that:

If anything, the evidence, as it stands, based on the past would support (the father) in this respect over Ms Bradshaw. It was Ms Bradshaw who chose to leave D behind and go to Melbourne to further her career. It was Mr Smith who chose to

remain and look after D full time and to abandon his career at least temporarily.

What is privileged in the judicial narrative? What is broadly privileged in this case is a series of values based on presumptions about the future. More particularly, the judge privileged a notion of stability and based this, in the first instance, on a presumption that, as a person of “talent, consideration and sensitivity” the father would wish to return to the workforce and that future work commitments taken on by him would place the child in a less stable environment than the alternative being proposed by the mother.

Next, the judge was aware that the mother was pregnant at the time to her second husband. Her second husband’s work entailed many months away at sea. The judge’s second presumption, therefore, was that the mother would not wish to, or would not be required to, enter paid employment and would thus be expected to devote herself full time to parenting.

Third, the judge predicted that the father was likely to repartner. An embedded assumption within this prediction seems to be that it would be the new partner who would take on the major parenting role. Thus the logic of awarding custody to the mother is complete.

What is not privileged in the judicial narrative? Not privileged is the 17-month status quo held by the father or the father’s capacity to responsibly balance possible future work and parenting commitments. Despite his “track record”, the father is seen

as needing the support of a female partner in this endeavour. Also not privileged (though in this case it did not lead to her losing custody), is the mother's choice to pursue a career whilst leaving the child in the care of his father.

Initial hypotheses

The Court is likely to support outcomes which replicate traditional gender roles. Men with a proven track record of successful parenting may nonetheless continue to be seen as performing a task not suited to them or ultimately not expected of them. They are still likely to be seen as more suited to engaging in a full-time career out of the home and in need of female assistance with parenting. Women who place career aspirations ahead of their parenting roles are likely to be viewed negatively and will need to show that they have or intend to "redeem" themselves in this regard.

Case 24: Toon

Type of case

Custody. Each parent worked shift-work and shared the parenting of two small children for 15 months prior to separation and for nine months between the separation and completion of the trial. The father had repartnered. The mother had a mild intellectual disability.

Legal details and outcomes

Applicant:	Father
Result:	Custody to mother
Appellant:	Father
Result of Appeal:	Dismissed

Summary

The couple separated after a marriage of about four-and-a-half years. At the time their two children were approximately three-and-a-half and two years of age. Following the separation, the husband, after initially living for a short period in a caravan park, persuaded the wife to vacate the house and to agree to a shared parenting (alternate days) arrangement. Shortly afterwards, the wife, then living with her parents, refused to return the children. The husband instituted proceedings and a judicial registrar ordered the return of the children and a resumption of the shared arrangement. The wife requested a review of the decision. After ordering an interim report, the judge heard the case approximately a month later. She ordered a continuing shared parenting arrangement and adjourned the case for a full hearing. The hearing commenced about two-and-a-half months later but could not be completed. It resumed about three months after that and judgement was delivered the following month giving custody and guardianship to the wife and access to the husband.

Selection criteria

The judge noted (9) that the husband was better able to provide for intellectual needs in the long term and that, “As regards the physical care of the children, each party appears to be able to care adequately for the children”. It was described (25) as a finely-balanced case. The Judge accepted the conclusions in the family report that the two children had a good relationship with each of the parents. She referred to the accommodation of both of the parties as adequate (15). There was a history of shared parenting of young children for 15 months prior to separation and for nine months after separation (see paragraphs 2–8).

Core socio-legal issues supporting the judgement

The mother was seen by the judge as better able to attend to the children’s emotional needs, whereas the father was better able to attend to their intellectual needs. The mother was judged able to cope in the short term with limited professional support. The judge also expressed concern (9) that the father, and especially the father’s new partner, would not be supportive of the mother in her parenting role.

The judgement as narrative

Structure of the narrative. In this case the judge is faced with the reality of a man who has separated from his mildly intellectually disabled wife and repartnered. The situation is made more complex by the fact that a shared parenting arrangement with regard to two

young children had existed for approximately two years. Although the reasons for the 15 months of shared parenting prior to the separation clearly relate to the pragmatics of shift-work, the judge constructs a narrative (30 and 31) of the father's actions to secure agreement on a continuation of shared parenting after the separation as motivated by the need to dominate.¹¹² The judge then notes the fact that the children are attached to their mother (which is common ground) and sets this *against* the father's contribution, which is seen as in the realm of education and intellectual input.

As acknowledged by the Full Court (see again paragraphs 30 and 31), the evidence supporting both the domination narrative and the narrative of the mother's superior emotional attachment are very thin. As the Full Court also notes (28 and 29), however, in the end there is effectively no option but to rely on the "truth" of the judge's more subtle observations and (to put it in more post-modern terminology), to accept the narrative she constructs around those observations.¹¹³

This is a case in which it would have been very difficult from a "human" point of view to deprive an intellectually disabled mother of substantial contact with her children who were attached to her. Though it had been recommended in the counsellor's report (see paragraph 19), the option of continuing a shared parenting arrangement does not appear to have been seriously considered. Whether the non-consideration of this option is a function of the adversarial win/lose orientation of court hearings, or whether it was

more formally considered and dismissed in the judge's mind, is not clear from the transcript.

What is privileged in the judicial narrative? Privileged in this narrative (after some hesitation) is a judgement about the emotional care of the children over their intellectual development (9). Also privileged (9) is a perception of the mother being the more "friendly parent". The fact that the mother is intellectually disabled and will be a sole parent is counterbalanced by the knowledge that she will receive ongoing professional assistance.

What is not privileged or is less privileged in the judicial narrative? Not privileged is approximately two years of shared parenting. Also not privileged was superior intellectual input or the fact that the father had repartnered.

Initial hypotheses

Mothers, when compared to fathers, are more likely to be perceived by the Court as having the stronger emotional attachment to their children. A perceived stronger emotional connection is likely to be valued over other qualities such as a capacity to attend to intellectual or educational needs. There is a possibility that fathers' efforts to continue shared parenting arrangements will be seen by the Court as primarily motivated by a desire to exercise control over the mother.

Case 25: WardType of case

Custody and relocation case which concerned two children. Both were the natural children of the mother but only one was the natural child of the father.

Legal details and outcomes

Applicant:	Father
Result:	Custody to mother
Appellant:	Father
Result of Appeal:	Allowed

Summary

The couple was together for approximately three and a half years, during which time a child was born. She was a little under three years old when her parents separated. The other child, who appears to have had no contact with her natural father and called the husband “Dad”, was aged approximately seven years and eight months at the time of her parents’ separation. At a hearing after the separation, the mother was awarded custody and the father was awarded weekend and mid-week access. At a further hearing approximately six months later, the father again applied for custody in the event that the mother relocated. The mother was permitted to relocate and the father was awarded lengthy periods of holiday

access. The judge included in his reasons for judgement that the father was not the older child's natural father.

Selection criteria

The judge noted (6):

I am left then with two loving parents both seeking custody of the children. Both parents work full-time but each is able to make adequate arrangements for the children when they are at work. I accept that each of the parties would be a satisfactory custodial parent.

Core socio-legal issues supporting the judgement

The judge noted (6):

I have determined to grant guardianship and custody to the wife on the basis that she is the natural parent of both children whilst the applicant husband is only the natural parent of the younger child. I accept the evidence that Chloe enjoys a close relationship with the husband and refers to him as 'Dad'. He is the child's stepfather and the child's 'psychological' father but at the same time, the child is aware the applicant is not her natural father.

Later in paragraph 6, the judge added:

There is no suggestion the children should be separated. They are close in age and appear to be closely bonded to each other. In my view, it is more appropriate for Chloe to be brought up by her natural mother. In these circumstances, it is better that the mother have custody of both children and I propose to so order.

The judgement as narrative

Structure of the narrative. In this case, the judge dispensed with his normal obligations to weigh the competing claims in a closely-contested case and effectively justified this action by seizing upon the fact that only one parent was the natural parent of both

children and elevating that to a presumptive principle. Having come to such a conclusion, everything else appears to have followed, including a willingness to permit the mother to relocate many hundreds of kilometres with the inevitable significant changes this meant for the relationship between the children and their father.

The narrative contains no exploration of the meaning of the children's relationship with their father. The judicial comment in this regard is reduced (6) to the fact that the father is one of two "loving parents". This absence, in turn, makes the narrative supporting the difficult issue of relocation much less problematic.

What is privileged in the judicial narrative? What is clearly privileged in this case is the status of a natural parent over that of a person who has been in the role of (as the court noted in paragraph 8) psychological parent for approximately half the life of the child. The ongoing relationship of the two sisters was also privileged, though, as the Full Court noted (8), this was more by way of a *consequence* of the primary issue of biology.

What is not privileged or is less privileged in the judicial narrative? Not privileged and indeed scarcely even considered in the narrative (see reference to this in paragraph 15), was the qualitative aspects of the relationship between the person who was not the natural parent of the child.

Initial hypotheses

The court is more likely to privilege biology over qualitative relationship issues, especially when the biological connection is between a mother and her children.

Patterns within the judgments

From a narrative perspective, the judgements considered in this chapter contain many differing and overlapping stories around family life, children's needs and parenting styles and capacities. There are stories about the dangers of shared parenting and about the benefits of seeking to improve a family's material situation. There are observations about morality, commitment, religious observance and the importance of biology. Judges express opinions about the grief associated with divorce, how it might or should be handled, who is best equipped to handle it and about how it impacts on children. They speak of children as robust and they speak of children as vulnerable. Judgements are made of parents who tell the truth, of parents who lie, and of witnesses who support parents in their truth telling or deception.

There are complex narratives, closely argued narratives and narratives that seize on one particular feature of a case. There are narratives that overtly privilege a particular view of how things should be and narratives that embed judicial/social expectations in a much more subtle fashion.

An examination of the hypotheses derived at the conclusion of the cases above reveals that 14¹¹⁴ of the judgements support narratives that are, in part at least, directly gender related, whilst a further six¹¹⁵ come to conclusions which have less direct but nonetheless significant gender implications. Only five¹¹⁶ judgements arrive at outcomes based on lines of reasoning that do not appear to be linked to presumptions about gender.

It could be argued that these are only working hypotheses and that none of the hypotheses, especially considered in isolation from each other, can be proved to be “true”. In addition, though they emerge from a careful analysis of the socio-legal arguments put forward by each judge and of the narratives that inform the judgements, it remains possible that the hypotheses nonetheless reflect a systematic selective bias on the part of the researcher.

A simple analysis of outcomes might also support a conclusion of gender equity. Thus, of the 22 unequivocal results – that is, those outcomes that did not leave one or more of the children in the care of *both* parents or parental figures – ten favoured fathers and 12 favoured mothers or mother substitutes. As previously noted, though the present sample is not large enough to sustain any statistically valid conclusions with respect to numerically considered outcomes, the results are similar to those reported in earlier larger-scale studies in Australia. The results of these larger-scale studies have been interpreted from time to time as indicators of the “fairness” of the Family Court from a gender perspective.

Thus a tension exists around apparent gender equity on the grounds of numerical outcome and a working hypothesis of overt and covert gender-based presumptions embedded in a majority of the judicial narratives. Perhaps judges do frequently demonstrate gendered presumptions but in largely inconsistent ways that favour mothers and fathers in roughly equal proportions. Or perhaps a more consistent and more fundamental process is occurring.

One way of possibly resolving the tension around this issue is to compare the judgements that favour fathers with the judgements that favour mothers, but in the context of the identified gender-based presumptions that contribute to the outcomes. This second level of analysis occurs in the next chapter.

CHAPTER 7

Second level analysis: Do fathers “win” or do mothers “lose”?¹¹⁷

In what follows, I consider first, the evidence regarding a gendered orientation in the ten cases in which the father was unambiguously “successful” at first instance. I develop a hypothesis that, when fathers are successful, two accounts of events are likely to feature simultaneously in the judicial narratives.

First, mothers are likely to be described in some detail as having failed or having been unable to conform to certain stereotypical views of motherhood. These stereotypical views relate especially to mothers’ willingness and capacity to be present and self-sacrificing on behalf of their children.

Second, fathers’ parenting attributes, even if they have been displayed for a considerable time, are likely to be scarcely, if at all, spoken of. Indeed, I shall argue that there is a belief expressed that some of these “successful fathers” are not capable of parenting alone and need assistance, preferably from a person who can act as a mother substitute for the child(ren).

I triangulate¹¹⁸ this hypothesis by summarising the cases in which mothers are successful. I suggest that these cases contain little detail about the parenting capacities of both genders. Rather, the evidence suggests that mothers are likely to be successful if there is a perceived *absence* of the sort of maternal characteristics that are stereotypically seen as negative. In particular, it is important that there is an absence of evidence that these mothers in some way

placed their own needs ahead of those of their children. As in the “successful fathers” cases, men’s parenting capacities again remain largely unexplored in these cases. Where brief assessments of men’s parenting roles are made, they are largely seen as providing external instrumental support. Again, men tend to be seen as in need of assistance, should they find themselves in a position requiring them to take on a major parenting role.

This hypothesis of privileging the self-sacrificing heroic mother, whilst simultaneously presuming that fathers will be inadequate, absent or in need of assistance, is further triangulated by considering in more detail the one surrogacy case in the sample. “Re Evelyn”¹¹⁹ is a recent case. It forms part of the “successful mothers” sample but is the first dispute resulting from a surrogacy arrangement to be dealt with by the Family Court. Though *both* the biological parents and *both* their partners were parties to the dispute, the case was constructed by the Court as a dispute between the birth mother and the social mother. Almost nothing is said of the contribution that either of the men would make to the life of the child.

What I believe is happening from a gender-related perspective, and what I propose to illustrate in the remainder of the chapter, is summarised in Table 4, which appears on the following page.

Table 4.

Descriptions of mothers and fathers in “successful fathers” and “successful mothers” cases

“Successful Fathers” Cases

Mother (detailed negative descriptions)	<ul style="list-style-type: none"> • Not self-sacrificing/not committed • Immoral/promiscuous • Absent • Mental or physical illness
Fathers (brief descriptions)	<ul style="list-style-type: none"> • Significant pre-existing parenting arrangement • Supported by others – especially own mother/family or female partner

“Successful Mothers”/Maternal Grandmothers Cases

Mothers (brief descriptions)	<ul style="list-style-type: none"> • Perceived willingness to place children’s needs first • More time with child(ren) evidenced as “primary caretaker” role • Assumed to be more emotionally connected with child(ren)
Fathers (brief descriptions)	<ul style="list-style-type: none"> • Solid & reliable • Little use of emotional language • Supporting/breadwinning role • more suitable and better role model for children

“Successful fathers” judgements

1. In **McCall**, the judgement contains a clear expectation that good mothers should sublimate their needs and desires and sacrifice their happiness for the sake of their children. The judge speaks of:

... the disruptions in the children’s lives which (the mother) caused by precipitously withdrawing from the marriage and taking the children with her from Tasmania to Victoria to live with another man in a de facto marriage. (22)¹²⁰

The judge also notes:

The situation which the wife has achieved is that for her own motives and without the best interests of the children in mind, she has withdrawn from her marriage and set in chain a course of events which has seen the children’s home broken up and sold and seen them removed from their father and from the familiar continuing care given by their grandmother and grandfather. ... They now live in rented premises with rather nebulous plans for future accommodation and the children have been required to make adjustments to Linus Smith, to his children and to life in the metropolis of Melbourne as against a rural environment in which they formerly lived, and with all this added to separation from their father and grandparents. (23)

Once such an assumption is made, other relatively ordinary if less than perfect parental actions are constructed as further evidence supporting the dominant narrative of mothers as needing to be self-sacrificing. For example, the trial judge assessed two episodes in which it was alleged that the mother did not attend adequately to the medical needs of her children as indicative that she was “a failure as a mother” (41). He was critical of the wife’s angry dealings with the children and her “propensity to use indecent language to them” which he considered was “both demeaning to them and diminishes the role of the mother as a model for the children” (27).

In response to questioning about a tragic incident in which the father's sister and children were shot dead, the judge reported (37) that:

She (the mother) gave an answer, then volunteered quite unnecessarily "He shot Joshua first and nothing was left of little Josh". This chilling and upsetting statement which nobody in the Courtroom wanted to hear, caused the husband's mother to rush from the Court in distress.

The judge described the mother's second partner, whose first wife had given very favourable evidence on his behalf, as an "enigma" (42). Though it does not appear that the question was ever put to him, the judge also surmised that the mother's current partner would be unlikely to marry her. He described their future as a couple as "nebulous".

In summary, this judgement constructs a narrative of gender-related blame – blame for "causing" the breakdown of the marriage and blame for things done and not done in the role of mother. For example, the alleged negligence regarding attending to children's medical matters is assumed to be the fault of the mother only. There is no mention of paternal responsibility. Indeed, the father's own personality and parenting capacities receive almost no attention, his future plans appearing to be intimately tied to the assistance he will receive from his mother.

The elements which go to construct the narrative in this case are effectively selected through a filter of a morally-linked highly-gendered lens through which the judge "sees" the case. Consistent

with such an approach, the narrative is relentlessly negative with respect to its interpretation of the mother's actions whilst barely touching on either the father's attributes or limitations.

2. The case of **K & Z** also appears to support an expectation that mothers will sublimate their needs and desires and sacrifice their happiness (and in this case their careers) for the sake of their children.

The mother was described in **K & Z** as “a histrionic witness who sought to argue her own case” (2.2). The judge determined (2.2) that the mother was “not dedicated to the children's welfare quite as wholeheartedly as she claims to be but rather at times acts self-indulgently”. In the same paragraph, he also noted that where credibility issues arose, he generally accepted other witnesses' statements against those of the wife.

The wishes of the two young girls to be with their mother were discounted by the judge in this case as being due to what he saw as the mother's inappropriate influence. He suggested (2.5) that the children “worried” about their mother but saw their father as “solid”.

The judge also found the mother's discussions about her financial situation with the children to be “manipulative and wrong” (2.12). He was critical (2.14) of the fact that the wife had on two occasions moved away from the children “to further her own ends”. He gave no credit to the fact that on both of these occasions the mother was pursuing studies in order to enable her to obtain

professional qualifications. Equally, he did not comment on the fact that it was common ground that the father had obtained his own qualifications during the marriage and that his wife had supported him during this time.

In this case, though no criticism was levelled at the father, the court found itself with two small girls who missed their mother and who appeared to have also adopted a belief that “girls should be with their mothers”.¹²¹ Given that there was no serious question of incompetence on the part of either parent, the dominant narrative chosen by the judge became “children as a reward for self-sacrifice”. Amongst other things, this construction allowed for the mother’s efforts to study towards a career to be then constructed as less than worthy than the efforts of the father.

As in the case of **McCall**, the dominant narrative is also supported in other ways by more negative interpretations regarding the mother’s behaviour and motivation. She is seen as “histrionic” – a word whose very origins are, of course, heavily gendered. She is not “wholeheartedly dedicated” to her children and is at times “self indulgent”. Consistent with such a view of the mother, is the judgement that she is also less reliable than other witnesses on issues of credit. Finally, the narrative speaks of the *mother’s* desire to “further her own ends” as if this is incompatible with the role of parenting.

3. In the case of **Fisk**, the judge found (27) that the mother demonstrated insensitivity towards the children by moving with the

children from the matrimonial home, at which point she “moved into Mr Bourke’s bed”. He expressed “astonishment” (25) that the mother “made no offer and expressed no desire to return to the matrimonial home to live”. The judge also found that the mother had lied in her evidence to the Court and suggested (15) that “it follows that if the wife lied, then so did her supporting witnesses”.

In this case the judge had ample material available to him, in the form of the children’s wishes, the continuation of a status quo and the endorsement of this arrangement by a social worker, to use his discretionary powers to rule in favour of the father. What calls for further analysis is why the judge went considerably further in his comments.

Although the circumstances surrounding the marriage breakdown are not described, the judge determined that it was the *mother’s* actions at the time which were blameworthy. Especially blameworthy in the judge’s eyes was the speed of her moving into another man’s bed. The blame is couched in terms of insensitivity to the children’s needs. But the language also suggests an interest in the mother’s sexuality. An hypothesis that some judges may be uncomfortable with the juxtaposition of motherhood and sexuality is reinforced by the use of the word “astonishing” (25) to describe the perceived lack of resolve on the part of the mother to attempt to regain custody of the children after an interim hearing had gone in the father’s favour.

The judge’s criticism of the mother’s behaviour also appears to ignore the reality that, having been unsuccessful at an interim

hearing, the range of options open to her was very limited. Generally, the only option available would have been to make an application for a defended custody hearing. This she did. In the interim, it is difficult to see how she could have regained possession of the matrimonial home except perhaps by force. The fact that the mother then appealed against the decision made at the defended hearing also seems to indicate a level of commitment in gaining custody of her children.

As with **McCall** and **K & Z**, the judge's traditional view of male-female parenting roles in this case is further suggested by the observation that the father was aware (14) that there were other people able to "assist" him in this endeavour, and that the mother would "be able to give the appropriate advice or render the appropriate assistance" on the occasions that the children were in her care.

4. In the case of **A&J**, the judge expressed considerable ambivalence about the fact that the mother of the four year old child was lesbian and was living in a lesbian relationship. He noted (9) that the parents had cared for the child "equally and evenly", describing the case as "finely-balanced" or "evenly-balanced" on at least four occasions (26, 33, 58 & 62). Nonetheless it is clear in this case that the mother's lesbianism was seen by the court to constitute a problem in itself. The judge noted (21) that it was "inappropriate for children to observe overt displays of affection between persons in a continuing and committed homosexual relationship".

There was much in this case to suggest that the parents were not in high conflict and that they had made commendable attempts to act decently towards each other and towards their child. Perhaps this was the reason why the judge felt moved to add (21) that “although the husband had not expressed concern about the wife’s sexual preference until the proceedings commenced, this was not to be taken against him”.

The court in this case seems more concerned with the structural issues than with the parenting processes, which have occurred since the birth of the child. The judge notes (14) that “*as might be expected*” (my italics) the equal sharing arrangement “in the circumstances of these parties” had not proved successful for the child or for his best interests. Throughout the judgement, there is very little examination of the skills or deficiencies of the parties as parents, or of those who are likely to play a parenting role – in this particular case the father’s mother and the mother’s partner.

Thus a characteristic of the judgement is the unusually generalised nature of the statements which support the issues upon which the decision ultimately turned. For example, on the issue of relocation (this was a case in which the father wished to move from a Victorian provincial city. To the capital city of the State of South Australia), the judge remarked (22) that “*many children* are required to move into new surroundings and make new friends and do so successfully without important trauma” (my italics).

Perhaps the most telling generalised statement was around the perceived need of the child (who happened to be male) for a

constant male figure. The judge endorsed the Counsellor's report¹²² (33) that regular communication between the husband and the child "would be essential for [the child] whose need for nurturing and a constant male figure will grow as he develops" [and that it would be particularly important in this case that the child] "have a husband (sic) figure close by". Indeed the judge went further, regarding this counsellor's view (33) as tipping the balance in the case.

In the five "successful father" cases reviewed so far, an important feature of the narratives was that the mothers were judged as unwilling to uphold traditional notions of what constitutes appropriate expressions of motherhood. In these cases, the mothers' lifestyle choices were linked with their capacity to parent. In each case, the father's parenting qualities were scarcely considered. Indeed in three of the cases, the judges seemed relieved that the fathers would be significantly supported in their parenting roles by other women.

5. In the case of **Moddel**, the mother was seen as unable to cope with the care for her five young children. She was seen to have an undiagnosed "condition" described (7) only as "some sort of nervous reaction" which appeared to follow the birth of triplets. The judge's observations of the mother in the witness box led him to believe that elements of this "condition" remained.

This was not an easy case by any standards, the judge noting the "welter of conflicting evidence" that was before him. We learn that the mother's own mother died whilst she was carrying the

triplets in utero. But nothing is said about the presence or absence of social supports during this time. Rather, the mother's incapacity to care simultaneously for two young children, bear and deliver triplets and cope with the death of her own mother, is couched in (albeit vague) medical terminology. At one level, the medicalisation of the problem absolves the mother from possible blame. At another level, the obvious failure to inquire into what support structures were available seems to imply that mothers are in some way simply expected to manage.

It could be argued that within the win/lose framework of adversarial proceedings, and in the face of a hopelessly inadequate assessment of the mother's situation, the judge was presented with very little choice in this case. It could also be argued, however, that when faced with a mother who appears to be unable to care for her children, courts find it difficult to know what to do. The end result was that, although the father assumed the major care of five young children, there is almost nothing in the judgement which addresses his parenting skills. He is described (5) only as "an intelligent man, in stable employment and a responsible parent to his children".

6. **Hong** also appears to fall, this time more covertly, into the category of maternal inadequacy. Considered in isolation, the evidence for this statement is weak. But considered against an emerging pattern of perceived maternal neglect or incapacity, the puzzling conclusion noted by the Full Court might be better understood.

In this case, the mother had spent significant periods of time away from the child, due first to her need to return to China and apply for Australian citizenship from that country; and later due to her need for surgery in another Australian State. In this case, the Full Court noted that, in its view, the comments of the judge at first instance regarding personal and parenting attributes generally favoured the mother. The judge had described the mother (101) as “a sensitive, affectionate, caring parent”. Although she had also described the father (90) as “warm and caring” she had earlier observed (2) that she regarded the father’s plans as uncertain, noting (4) “it remains to be seen how the husband will cope with the full-time care of the child without the assistance of his parents”.

The Full Court’s degree of puzzlement at the outcome might possibly be explained in the following way. The judge spent a considerable proportion of the judgement in describing the details surrounding the mother’s absences. Whilst the reasons for her absences were overtly acceptable, the covert message embedded in the outcome seems to be that mothers should be *seen* to place their children first. Thus if mothers are not seen to be unambiguously privileging their children needs, even men whose parenting capacities are (rightly or wrongly) seriously questioned by the court, are more likely to be successful.

7. In **Lavette**, the mother also “abandoned” a young child. She vacated the house with a daughter from a previous marriage and left the care of her two-year-old son with the father. By the time of the

hearing, the child had been in the major care of his father for fourteen months. The status quo thus established influenced the judge, but so too did a perceived difference in the parents' approach to the child's asthmatic condition. Thought it was common ground (8) that the child had a strong relationship with his step-sister, this was counter-balanced in the judge's mind by what he described (11) as the mother's "extremely laid back" approach to her son's asthma. At the same time, the judge described the father's approach to the asthma condition (11) as "obsessive".

Like **Hong**, the outcome of this case was puzzling. The father was shown (via tape recordings) to have lied about conversations in which it was alleged he had pressured his wife to leave the house. As noted in the previous chapter, this elicited the following response (31) from the judge:

I must say that I had up until that point completely believed what the husband had put before me by way of affidavit evidence and oral evidence as to the conversations. I had no choice at that point but to come to the conclusion either that the husband's memory was not as good as I had thought it was or else that he was lying and I don't particularly care which. I don't think there is anything more to be said about that but it was an effective way of proving that the husband's evidence, as to those points, was wrong.

Notwithstanding these comments, the judge observed (3) that "the husband's evidence was more believable than the wife's".

It is true that whatever the circumstances of the wife's departure, the lengthy status quo which had been established in this small boy's life was now a reality which needed to be weighed carefully. On the other hand, one cannot help but speculate, again

within the context of the cases described above, upon the extent to which it was regarded as unacceptable by the judge that the mother moved out and left her son.

The evidence in the case appeared to support the mother's statement that, due to pressure from the father, she saw herself having little choice but to move out and leave her son in his father's care. As noted above, that evidence was dismissed. Even though it sits uneasily with the fact that the mother was prepared to pursue custody in a defended hearing and then take her application to appeal, the judge's description of her attitude as "extremely laid back" suggests a perception of maternal neglect. "Laid back" is not defined by the judge in behavioural terms. Whether "true" or not, the "laid back" finding serves the function of supporting a dominant narrative of dereliction of duty on the part of the mother which in turn adds considerable weight to the father's case for custody.

Again in this case, though *both* parents had repartnered, the court placed emphasis (20) on the important role the father's new partner would play in the upbringing of the child. The mother's partner was not mentioned.

8. The case of **Lavrut** was an appeal against an interim hearing, the result of which had been in place at the time of the appeal for more than five months. For some time prior to the interim hearing, the child had been living week about with each parent, a situation which, as noted in **A&J**, is not always looked upon favourably by courts. It is clear that following the separation, the mother had not

played a traditional role of major carer in this case and in this sense, the result fits the pattern. However, little can be learned from an analysis because, as an interim hearing, the judge gave the case very little time. His main conclusion (9) was that he was “not satisfied either way but I do think it is very likely, on the evidence, that Christian, in fact at the moment, wants to live with his father.” The appeal court was clearly concerned with the paucity of evidence upon which a decision that had led to a status quo situation had been made. The appeal court ordered that a defended hearing be expedited.

9. In the case of **Ploetz**, the father had had custody of his four-year-old daughter for nineteen months. It appears, though it is not clear, that the mother had left the marriage and left her small child in the care of his father. The mother had made an earlier unsuccessful application for custody but the details of this and the reasons for her lack of success are not described in the judgement. She had now remarried, lived interstate and was offering full-time home care.

Thus there is no evidence that her “failure” as a mother to obtain custody at the beginning of the period of separation influenced the judge. Overtly, the judge was simply reluctant to disturb what appeared to be a stable 19-month status quo for a four-year-old child. At the same time, he made no positive comments regarding the father’s parenting skills or his relationship with his daughter. Indeed, the judge conceded (7) that the mother had been able to demonstrate that the father spent considerable time pursuing

sporting interests. But he also countered this finding by noting (7) that the father had the support of his own parents and that of his “well known” extended family in his parenting role.

10. In **Christianos**, a relocation case, the father had repartnered and had had custody of his son for eleven years. During that time, the mother enjoyed regular access. It was the father’s pending overseas relocation plan which brought on the mother’s application for custody. The father had raised the stakes in this case, having already bought a business in Yugoslavia knowing that the boy wished to remain in his care. This case raises important issues about the nature and meaning of parenting for the parent who does not have major care (permission to relocate meant that the mother would see her son, at best, only once a year). But the case does not appear to raise significant gender-based issues.

Summary of “successful fathers” cases

In all the above cases, the nurturing and other parental qualities of fathers receive scant attention. From the point of view of the narratives which support the judgements, it can be argued that in all the cases analysed, the success of the fathers comes about largely by default. In three cases (**McCall, K&Z and Fisk**) the mothers are overtly criticised for allegedly placing their own needs above those of their children. In one case (**A&J**) the mother’s homosexuality is clearly seen as problematic and in another (**Moddel**), what appears to be a case of severe depression brought on by an overwhelming set of life circumstances, is constructed purely in medical terms. A disturbing aspect of this case is that a woman who does not appear to be acting as a mother “should” act, appears to be left unsupported and reduced to the status of a “condition”. At the same time, a father of largely unknown capacities (at least so far as the material in the judgement is concerned) is awarded custody of five young children.

Taken at face value, the results of two further cases are puzzling. In one (**Hong**) the judge appears inconsistent in her observations. Whilst describing both parents in positive terms, her description of the mother is (correctly) noted by the appeal court to be more positive than that of the father. Indeed, the judge expresses real concern about the capacity of the father as a parent unless he continues to rely on the assistance of his parents. In the other case (**Lavette**) the judge describes the father as having an obsessional approach to his son’s asthma. He also acknowledges but appears to

ignore the father's failure to tell the truth about his domineering and threatening attitude, an issue quite critical to the mother's case and likely to be predictive of future parenting difficulties.

A mere affirmation of the status quo does not appear to provide an adequate explanation for the results in both **Hong** and **Lavette**. An hypothesis consistent with both cases and consistent with cases described earlier, is an embedded dominant narrative that mothers should not be seen to "abandon" their children. Against such a narrative, reasons for the "abandonment" are not so important. In both cases, the demonstrated and not insignificant paternal limitations are noted but not acted upon by the judges.

Lavrut conforms to a pattern of custody being awarded to a father when the mother has not played a traditional parenting role. However there is insufficient detail in this appeal against an interim hearing to carry an argument further in this case.

Ploetz and **Christianos** appear to fall more conventionally into that category of cases in which the status quo becomes a major factor. As a case involving a very major relocation, **Christianos** raises important issues regarding the nature of the relationship between children and their "other" parent, but those issues are beyond the scope of this paper. From a gender perspective, however, even in **Ploetz** the judge finds reassurance in her decision by the fact that the father will have the ongoing support of his parents and extended family.

“Successful mothers” judgements

In the following **12** cases, mothering is constructed in traditional terms. Mothers are nurturers who have spent and/or are better suited to spending more time with their children. In the cases in which it is an issue, biological motherhood is privileged, whilst the social attributes of both the mothers and fathers are described only briefly. Mothers, however, are seen to be more in touch with the children’s emotional needs, whilst the attributes of fathers are generally constructed in non-emotional terms. Paternal parenting capacities are more often seen as instrumental – for example, intellectual input, help with homework and, most importantly, breadwinning.

1. In **Drenovac**, the parents had been separated under the one roof for approximately two years. The judge found (19) that the father had a superior ability to offer the children intellectual assistance in their homework and studies. The father had continued to work on a full-time basis. The fact that the mother had had a three year period in which she had not been in paid employment (11) went a long way to persuading the judge that her “continuity of care” was a significant issue in this case. The mother appeared to respond to judicial expectations by adjusting her plans accordingly during the course of the hearing. The judge observed (12):

She was working full time but then decided that she would give up work and initially become a full time caretaker for the children but her final proposal involved her in part-time work on two or three days a week.

Alongside the question of continuity of care, an important presumption underpinning the judicial narrative was that young children are inevitably hurt by divorce and that a mother is better equipped to deal with this issue. Thus, in favouring the mother's claim, the judge also asserted (19) that because the children were still young, their main task for the next few years, "at least", would be coping with the emotional hurt occasioned by the break-up of the family.

2. In the case of **Doyle**, the mother, who suffered from an unspecified psychiatric and physical illness, had nonetheless remained at home and on that basis was held to be the primary caretaker of the two young children. It was acknowledged that the father, who ran a legal practice, had needed to support his children and his wife financially. The father claimed (18) that the mother had had almost continuous and extensive assistance from regular babysitters. But the court was again concerned (20) about the "tender age" of the children. It emphasised the need for continuity of parenting of small children and equated this with the care that had been provided by the mother. The father's concerns about the quality of the care that had been provided and the question of what continuity meant in this case, do not appear to have been taken up.

The unspoken presumption was that the father's role should continue to be that of breadwinner.

3. In the case of **Kneller**, the mother was working on a part-time basis and had continued to have the children in her care since the separation some months earlier. The judge noted (40-42) that the children "had a close and affectionate relationship with each of the parties. Neither party impugned the quality of the children's relationship with the other party and there was little to choose between them in that regard". At the same time, the children's wish to remain in the care of their father was interpreted by the judge (62) as "the Disneyland factor". The judge placed emphasis on his negative assessment of the character of the father's mother and sister (50-52), clearly implying that they would be important assistants to the father were he to gain custody.

The father lost his custody application in this case, but also had a previous access arrangement reduced from fortnightly to monthly on the grounds that the five-hour return trip was too onerous for the children. What is particularly interesting about this case is that the initiative to reduce access came from the judge. The mother had not requested that the father's access be altered and the judge gave no advanced warning that he had been thinking along these lines. The judgement itself and the fact that the matter was not foreshadowed prior to delivery of the judgement suggests that in this case the court placed relatively low value on the father-child relationship.

4. In the case of **Sheridan**, the judge was generally more impressed by the mother but at the same time overtly constructed the father's role as that of an external support and breadwinner. He concluded (7) "that it would be better for the children to be in the mother's custody or in the day to day care of the father's parents whilst the father worked". The judge noted (8) that "it goes without saying that the children would benefit from the improved living standards which regular income from employment would confer". He also noted (9) that the father:

... appears well-qualified to obtain regular and well-paid employment. Should he do so he will be able to play a significant role in the future in their support and will incidentally provide a better role-model for the children than he does at present.

5 In **Robbins**, the judge decided in favour of the mother "by just a very faint feather" (25). At the same time, though the couple had effectively enjoyed a shared parenting arrangement prior to the mother taking the child interstate without warning, the judge noted (51) "I cannot get over the fact that if it had not been for the running of the respondent (mother) that the child would still be, in effect, in the custodial possession of the respondent".

In this case, the fact that the father's long service leave was coming to an end, also weighed on the judge's mind (51). Two presumptions in the judgement, neither of which appear to have been supported by evidence, were that the father would inevitably wish to

return to full-time work and that this would negatively impact on the child were he to remain in his care.

6. In **Smith**, the judge observed (27) that “Mr Smith has never done anything, as far as the future of D is concerned, which would lead me to conclude that he would not [sic] make decisions which would not be in D’s favour”. The judge noted (27) that at the time of separation, “It was Mr Smith who chose to remain and look after D full-time and to abandon his career at least temporarily”. In weighing the applications, however, the judge seemed to find it difficult to envisage that the father would be satisfied with or capable of sustaining the role of major parent or that he could balance this with work commitments. He observed (27):

He is a person that I cannot believe will want to remain out of the workforce. ...I find it difficult to believe that he will not re-partner at some time relatively soon and indeed this will probably be for D's (the child's) benefit as much as anything else

This case initially appears to run counter to the hypothesis that women who are seen to “abandon” their children are likely to lose custody or residence. In **Smith**, however, the judge appeared to be reassured by the fact that the mother was now pregnant to a man whom she had married. The man was a sailor who would be at sea for about six months each year. It seemed to be assumed that as a result of these circumstances, the mother would be at home on a full-time basis for the foreseeable future.

7. The case of **Firth** ran for 13 days and revolved around the difficult civil rights issue of bringing up children in a religious environment which was, by any standards, likely to restrict the children's immediate and possibly future options. In this case, the father and the maternal grandparents had effectively joined forces. The judge was unimpressed by the father but gave credit (29) to the interveners (the maternal grandparents) for having cared for the children in a satisfactory and appropriate way. It was common ground that the children (aged 10 and 12) wished to remain in the care of their grandparents and that they had had only limited contact with their mother since the separation of their parents. Critically perhaps (30), this was a case in which the mother had clearly tried to assume the major care of her children but, having left the religious sect, had been effectively blocked by the father and her own parents. Thus she had not "abandoned" her children.

The judge was clearly troubled by the restricted lifestyle the children would be likely to experience should they remain in the care of their grandparents or their father. Needing to tread delicately on the civil rights issue, he expressed confidence in the mother's capacity to overcome the obstacles in front of her. He noted (28) that he was "satisfied that the wife is well and adequately equipped to rebuild in the children their full confidence and trust in her".

8. **Toon** was a difficult case in that the children were judged to be clearly attached to a mother who was intellectually disabled. Part of the judicial construction of this situation (13) appeared to be that

the father's main contribution to the parenting of the children would be that he could provide an intellectual perspective, whilst the mother's would be emotional. The father in this case, whatever his motives, was in a delicate position because any discussions between himself and his former partner could be constructed as exploitative.

In the end, this is a case in which, as the Full Court notes, there was effectively no option but to rely on the "truth" of the judge's observations about the differing parental contributions and to accept the narrative she constructed around those observations.

9. **Ward** was a relocation case, which privileged biological motherhood. Though neither parent attracted any criticism from the judge, the decisive factor in this case is noted in paragraph 6.

I have determined to grant guardianship and custody to the wife on the basis that she is the natural parent of both children, whilst the applicant husband is only the natural parent of the younger child.

Two further cases in which a maternal grandmother and a maternal great grandmother were favoured over the father (the mothers being not directly involved) are also considered within the category of "successful mothers".

10. The case of **McMillan** was one in which the mother was very young at the time of the birth of the child and took no formal part in the proceedings. The maternal great grandmother was awarded custody on the grounds that her environment offered more stimulation (33) and that she was more disposed (18) towards regular

contact between father and child than was the father between the child and the great grandmother.

At the same time, the case betrays a more fundamental judicial attitude with respect to fathering. The judge made several references to the inadvisability of the father remaining on social security benefits were he to gain custody. He saw claiming benefits not as a means to assist in the provision of good parenting, but as an unnecessary drain on the public purse (35), an inappropriate role model for the child (35, 46 and 48) and likely to encourage welfare dependency (48). He described the father's attitude of wishing to remain at home on supporting father's benefits (34) as "myopic".

11 The case of **Peterson** had a complex history. Three of the children were in the full-time care of the father, but for a variety of reasons the youngest had remained with his maternal grandmother in another state. Due largely to resource problems within the Family Court, there had been several aborted attempts to hear the case and to provide an independent psychosocial report. On the occasion in question, the case was listed for hearing in a country town. Once again, no report had been prepared. However, though both sides had found and agreed upon the services of a local psychologist willing to provide an independent report within 24 hours, the judge refused to stand the matter over and opted to interview the young child himself. He awarded custody to the grandmother based on his assessment of the child's wishes.

The case of “**Re Evelyn**”: A surrogacy dispute

Because of its special characteristics, this case is considered in greater detail. As a case outside the usual scope of Family Court hearings, it is argued that the result provides further triangulation or cross-validation for an hypothesis that traditional notions of self-sacrificing motherhood are privileged, whilst fathers are more comfortably categorised as financial providers and visitors to their children. The case was described in some detail in Chapter 6 but for the sake of ease of following the argument, the factual details are again summarised below.

“Re Evelyn” involved two couples, the “Q”s, who were residing in the State of Queensland, and the “S”s, who were residing in South Australia. The Qs had an adopted son of Aboriginal descent who was three years old at the time of the hearing. The Ss had three children at the time of the hearing aged between three and seven years. Both couples had been married for approximately ten years. Mrs Q was infertile due to a total hysterectomy which had taken place prior to her marriage and about which Mr Q had full previous knowledge.

The couples had a strong friendship and spent a number of holidays together, during which time the infertility of the Qs was openly discussed. After one such holiday, Mrs S put to her husband the possibility of conceiving a child using the sperm of Mr Q. Her husband was strongly supportive of the idea. After a further holiday together (by which time the Qs had adopted their son), the Ss put the

idea to the Qs. They were simultaneously shocked and extremely grateful and asked for time to consider the matter. In the following months, Mrs S renewed her offer on several occasions and the Qs finally accepted.

The Qs travelled to South Australia for the birth. Mrs S spent five days in hospital and both couples spent a further six days in a flat, during which time the Qs took on the role of primary caregivers of the infant whom the Court has called “Evelyn”. Mrs S was registered as the mother in the State of South Australia and Mr Q was registered as the father. Mrs S breastfed Evelyn in the hope that this would encourage lactation in Mrs Q. However friction developed between Mrs S and Mrs Q around a perceived unwillingness to persist with efforts to breastfeed. Mrs S subsequently expressed concerns about the capacity of Mrs Q to nurture Evelyn and to keep her informed about her progress.

Following the Qs return home, Mrs S became frustrated by what she regarded as an inadequate level of communication. She was simultaneously struggling with the ramifications of her decision to agree to place Evelyn in the care of the Qs. After attending grief counselling and a relinquishing mothers’ group, she determined after approximately nine months to bring Evelyn back to South Australia. To this end, Mrs S travelled to Queensland and forty-five minutes after arriving at the Q’s house, left with Evelyn.

The pages of description of events leading up to the biological mother’s removal of the child from the care of the S’s contain a reference (188) to Mrs S “reclaiming” Evelyn. Perhaps the

word “reclaim” foreshadows the judge’s deep-seated view in this case. It is as if, despite the complex set of events and a history of care of Evelyn by her father and his partner, true “ownership” belonged to the biological mother. The judge found (463) that “Mrs S will suffer extreme grief if Evelyn is not placed with her”. No mention was made of the grief of the father, who had cared for his daughter for eight or nine months. Significantly, though, it was acknowledged that Mrs Q would also experience grief at the loss of Evelyn.

From the perspective of Evelyn, the judge found (461-465) that she would suffer problems relating to issues such as abandonment and identity during her adolescence; that Mrs S (the biological mother) was “best equipped” to deal with those problems; and that the loss to Evelyn of not growing up with her biological half siblings outweighed her loss of her relationship with her adopted brother, Tom.

The judge also noted (505) that, “Some of the potential problems, such as the perception of rejection by her biological mother, necessarily disappear with a placement with the Ss”. There are no similar statements regarding the father or the father’s partner. Indeed, the judge declares (547) that, “In the longer term, I have a sense that Evelyn would find residence in her mother's home as a more *natural* situation.” (my italics).

“Re Evelyn” will no doubt prove to be the subject of considerable public commentary from a number of perspectives. But revealed by even a cursory examination of the case, are contemporary

assumptions (the case was heard in 1998) which clearly continue to privilege biological motherhood. The judgement constructs biological motherhood as something qualitatively different to other parent-child relationships and certainly qualitatively different to the relationship between children and their fathers. The judge privileges biology over nurturing and female biology over male. He concludes (538–541):

... that, on balance, a child in Evelyn's situation is more likely to cope readily with the prospect of being required to visit the home of her biological father and step-brother from the comfort of the home of her biological mother and two biological sisters and one biological brother, than she would on the alternate outcome.

Summary of “successful mothers” cases

Nine of the twelve successful mother/maternal grandmother cases are characterised by traditional maternal roles before and/or after the separation. Mothers and mother figures had stayed at home with their children either full time or at least for some of the time and were planning to not work or to work only part time, if awarded custody. In **Doyle, Robbins** and **Smith** it is presumed, with implicit approval, that the fathers will continue in full-time employment. At the same time, this clearly disadvantages them in their applications for custody or residence. In two further cases **Sheridan** and **MacMillan**, the judge makes more explicit statements about breadwinning being the preferred role for men and one that will serve as the most appropriate role model for their children.

In the case of **Firth**, the mother's restricted contact with her children after the separation was seen (probably correctly) as something beyond her control. Though there were no statements in the judgement attesting to the mother's parenting qualities prior to the separation, and though the children did not wish to return to her care, the judge was satisfied that the mother would be able to restore confidence in the children's perception of her as a parent.

The exceptions to the "traditional mother" hypothesis were **Smith** and **Ward**. In the case of **Smith**, the child-care arrangements prior to the separation are unclear. What is clear is that the mother had left the child in the care of his father whilst she pursued her career interstate. She had, in the meantime, formed another relationship with and subsequently married a man who was a sailor and who was expected to be at sea for about six months each year. She was expecting a child by this man and it was presumed that because of her circumstances, her parenting role would now take precedence over her career aspirations. In **Ward**, both parents were seen as caring and competent even though both planned to continue to work full time. From the judge's perspective, however, the solution to this case centred firmly around the question of biological motherhood.

"Re Evelyn" also unambiguously privileges biological motherhood. It is argued, firstly, that though this case prompted a complex and lengthy narrative about parenting, belonging and biology, the questions requiring resolution are, at root, not greatly different to the questions addressed in any relocation case in which

parents or parental figures, lay claim to a major parenting role with respect to a child.

The uniqueness of this case from the Family Court's perspective, presented it with an opportunity to comprehensively review the issues salient to making decisions about the future of children, or to take the option of reverting to a more traditional gender-based approach. The Court appears to have taken the latter alternative.

In the final chapter, the findings from the research are placed in context. It is suggested that the findings are both consistent with those of previous qualitative research in Australia, and at the same time, add to our knowledge base.

In the light of a "best interests of the child" philosophy, the paradox is noted that the continuing struggle with regard to asserting a gender-neutral starting point, has its origins in a somewhat confused and essentially *adult*-oriented approach to parenting disputes in the 1960s and 1970s.

In reviewing a number of advances in our knowledge base of factors that might inform judicial decisions, it is also noted that some of the key indicators appear to point in contradictory directions.

In the light of these difficulties, a question posed is whether or not litigation in closely-contested parenting cases has a credible future. In addressing this question, a distinction is made between decision-making *processes* in closely contested cases and the ongoing debates regarding *outcomes*. It is argued that processes can be made more transparent, whilst outcomes are likely to remain

controversial and a source of great disappointment in individual cases.

CHAPTER 8

The persistence of the nurturing/bread-winning dichotomy: contextualising the findings

Introduction

Though the study described in Chapters 6 and 7 contains methodologically determined limitations, the findings are nonetheless consistent with, and add credibility to, findings from other Australian and overseas research. So far as I am aware, there is no qualitative research into outcomes in non-presumptive jurisdictions that has not identified gender-oriented *a priori* presumptions in judicial reasoning about children and parenting. The claim of the present study is that it identifies the underlying structure of this reasoning in a heterogeneous sample of publicly accessible cases in a contemporary Australian context.

Further studies are required to both test and refine this knowledge base. In the first instance, a similarly acquired sample of judgments at first instance in closely contested-cases is needed. The results of such a study, were they in the same direction, would counter concerns that in relying on those statements identified by the appeal court, the current methodology did not inspect the whole of the narrative of the judge at first instance. It would also counter a concern about the possibility that closely-contested cases that are

subject to appeal, may contain gender-related thinking about parenting that is generally not present in non-appeal cases.¹²³

Nonetheless, a good working hypothesis at this stage is that Family Court judges continue to construct parenting along traditionally gendered lines and tend to reduce complex dilemmas raised in closely-contested parenting disputes to a relatively small number of gender-related dimensions. To put it at its simplest, self-sacrificing nurturing is *expected* of mothers, whilst fathers' primary role continues to be seen as breadwinning.

The research suggests that there is no evidence that gender-related constructions of parenting hypothesised and in some cases identified by earlier researchers have abated in the past ten years or so. Indeed, when in the context of the 1998 *Re Evelyn* judgement one considers the predictive comments of Gilding (2001) and Fogarty (2001) - who identify biotechnology and advanced genetics as important emerging issues in our understanding of families - one sees little evidence of likely changes in thinking, at least in the medium term. Indeed on the basis of *Re Evelyn*, one might be forgiven for assuming that self-sacrificing biological motherhood will continue to reduce all claims by fathers to scarcely more than an afterthought. Perhaps ironically, though, a significant challenge posed by this very biotechnology may be an increasing difficulty in the very definition of the "true" mother and "true" father.

As noted in Chapter 1, in the first year of its operations, the Family Court of Australia clarified the principle that there should be no *a priori* presumptions about the merits of either gender. Though it

has reasserted that principle on many occasions since, such reassertions appear to be in conflict with the findings from this and previous studies.

The broad question of how a gender-neutral stance became incorporated into the legislation in Australia and elsewhere has been addressed in Chapter 3. As noted in the section on the “abandonment” of maternal preference, analysts such as Jacob, Maidment and Mason and Weitzman place this development generally within the context of social and legislative advances in equal rights. More particularly, they place it within the gender equality movement that dominated social discourse in the 1960s and the 1970s.

These writers also suggest that whilst parenting issues were beginning to gain greater salience for men at this time,¹²⁴ they were not high on women’s family law reform agendas during this period. Indeed, they note that many of the women who wanted greater participation in the paid workforce could see benefits to themselves deriving from more active parenting involvement by fathers. As Weitzman points out, some feminist writers at the time positively encouraged women to support custody applications by fathers.

It will also be recalled that one of Jacob’s arguments as to why gender neutral legislation was introduced in such a short space of time, is that the rapidly rising divorce rate in the 1970s was accompanied by a large increase in the *absolute* number of men who successfully sought major parenting orders. In the language of psychology, this argument might be equated with one of intermittent

reinforcement. In other words, it could be that judges encountered sufficiently large *numbers* of men (as we have seen the *percentages* remained relatively static) successfully contesting a parenting dispute and, in so doing, began to see parenting by fathers as more normal and less problematic than they might otherwise have assumed.

This argument is not particularly convincing within the Australian context, however, because, again as previously noted, the gender-neutral aspects of the legislation were asserted very early in the life of the Family Court. It was much too early for the newly-appointed judges to have developed a “feel” for the success or otherwise of men’s custody claims, let alone any long-term outcomes that might have been associated with being brought up by a single father.¹²⁵

It is common ground amongst the analysts that gender-neutral parenting principles “in the interests of the child” emerged rapidly and with little debate in the context of “no fault “ legislation and a general emphasis on equality between the sexes. But the mere assertion of a principle or a right, even in law, does not of course guarantee that it will be honoured. These questions are determined in part by the speed of introduction of the concept and the level of explanation and popular support accompanying its introduction. What, then, were the core attitudes of judges at the time and what efforts were made to engage with them about these attitudes?

I could find no work on this in an Australian context. Weitzman’s research on judicial attitudes following the introduction

of gender-neutral custody legislation in California is, however, revealing and likely to have had parallels in this country. Puzzled by the virtual absence of any change in judicial ordering in parenting disputes in the three years following the introduction of this legislation in 1973, Weitzman (1985: 235) found that a large majority of the judges she interviewed continued to express a preference for the mother to have custody of young children.

Weitzman notes:

In fact, 81 percent of the Los Angeles judges we interviewed thought there was still presumption of the mother for pre-school children, although most of them qualified their responses by noting that the presumption was an *attitudinal predisposition* (my italics) rather than “the law”. As one judge put it: “Even though the law says there isn’t a presumption, *I think mothers make better mothers*” (italics in original).

These results were repeated in a second study of judicial attitudes in Illinois in 1976 (Johnson 1976, cited in Weitzman 1985: 236). According to Weitzman, this study also revealed an “underlying assumption that the mother would assume custody”.

The evidence noted in Chapter 3 and reinforced in the early judicial attitude studies in the United States, points to a likely conclusion that gender-neutral parenting legislation was introduced ahead of the capacity of the decision-makers to adjust to it.¹²⁶ More importantly, from an Australian perspective, the present study suggests that many judges probably continue to struggle with the concept of gender neutrality with respect to parenting and struggle to find ways of adapting to it. Sometimes this uneasy truce with the

principle reveals itself in subtle language or in seeming omissions of one side of the argument. Sometimes, as we have seen, judges seem to find themselves unable to resist making overt statements that are more obviously rooted in traditional presumptions about gender and parenting capacities.

Understanding what judges are doing, how they are reasoning, and in particular how they are constructing the issues that confront them within the “best interests” rubric, has been the primary focus of this study. Attempting to further contextualise judicial behaviour in the form of “why” questions, naturally goes beyond the data and, of course, immediately raises the prospect of additional research which would seek such information from judges directly.

Were one to tackle this task, one way of preparing to speak to the judges themselves about what influences them would be to think about the sort of questions that might be covered in an interview. In conducting such an exercise in my own imagination, I was drawn to the following issues.

- What legacy or legacies have the gender neutral parenting presumptions of the 1970s left us?
- How “in tune” is the gender-neutral assumption with current gender-related family values in Australia?
- Regardless of the reasons for its original assertion, what other social and psychological information have we acquired since 1976 that might reinforce or challenge the wisdom of the gender-neutral stance taken in the first year of the Family Court?

In this final chapter, I propose to consider these questions in turn and attempt to summarise some of their implications for family law. I then conclude this thesis with a more broad-based observation on the nature of the parental decision-making task that, as we have seen, has preoccupied many legal and non-legal thinkers in the past and will no doubt continue to do so.

The legacy of gender-neutral parenting legislation and its “adultist” origins

Whether or not a gender-neutral stance towards parenting disputes is a “good thing”, supported by current psychological knowledge, or reflective of contemporary social and family values, there seems little doubt that its origins lie in a confusion between adult-oriented ideas of gender equality and what is “best” for children. Weitzman’s (1985) analysis of the forces behind the California legislation (see Chapter 3) is particularly revealing in this respect. It will be recalled that according to Weitzman, a major impetus for the gender-neutral provision came from concerns about a constitutional issue related to the “rights”¹²⁷ of an unmarried father.

It has frequently been argued that the justification for awarding the care of children to the “non-guilty” party in fault-oriented jurisdictions was never primarily focused on the interests of the children themselves. Rather, its aims lay elsewhere, including addressing the perceived need to foster a sense of social stability. It

can also be seen, at least with the wisdom of hindsight, that a gender-neutral approach to parenting disputes was likewise not primarily child-focused, but rather resulted from the need to solve two simultaneous problems. One was the vacuum created by the demise of “no fault” legislation. The second was the impact of feminist critiques of patriarchy and the resultant efforts of women and men to find ways of relating to each other with a greater sense of equality and mutual respect.

As noted in Chapter 1, Fogarty suggests that it has taken the Family Court all of its twenty-five year existence to work through the implications of “no fault” legislation. As also noted, the struggle for equality between the sexes has produced feminists of sameness (we are equal because we are essentially the same) and feminists of difference (we are different but nonetheless equal).¹²⁸ In relation to decision-making about children, Fogarty (2001: 96) has somewhat intriguingly noted that “the removal of fault from what?” is a question that continues to be addressed by the Family Court.¹²⁹ In relation to equality between the sexes, some feminists of difference in the field of family law (e.g., Fineman, 1988, 1995) assert that one of the differences between the sexes is a woman’s innate capacity to be a better parent.

Clearly, then, a gender-neutral approach to parenting disputes both as a response to “no fault” legislation and to aspirations of equality between adult men and women, has not proved to be easy to manage. And at least part of the reason for this is that the aspirations

towards neutrality have been oriented more towards adult than children's needs.

Thus singularly missing in the judgements in the present study, are serious attempts to understand adequately the world of the children in dispute or to hear formally from those children who were old enough to articulate a view. From this perspective, the study is supportive of those researchers and theorists, noted in Chapter 4, who argue that the best interests of the child principle largely masks adult needs and concerns. Indeed, I would argue further, that what Edgar (1993) has called an adultist approach to children, found its more contemporary family law expression in the confused aspirations to interpret the best interests of children in gender-neutral terms.

I argue this not because gender-neutrality has proved itself to be an inappropriate principle in itself. (Indeed my own position is that in the long term, it is the only tenable position that can be taken.) Rather I put forward this argument because the gender-neutrality referred to sprang from issues about which adults were struggling *with each other*.

It is important to recall that not only did gender-neutrality offer a solution to the two problems noted above, but that in Australia, the United Kingdom and much of the United States, it was proposed at a time when the prevailing psycho-social view of the child continued to be that of the developing (or one might say "underdeveloped") adult.¹³⁰

The multiple constructions of childhood and some of their ramifications were discussed in Chapter 4. Suffice it to say here that many contemporary childhood researchers and theorists have made use of the United Nation's adoption of the Convention on the Rights of the Child in 1989,¹³¹ as a springboard for change in the direction of seeing children as persons in their own right. Essentially, they have challenged the dominant pre-Convention notion of childhood as a sort of stage to be passed through prior to taking one's place as a citizen.

Mason and Steadman (1997: 35), for example, see children as, "acting on, as well as being acted upon, by the social world." They also cite James and Prout's (1995: 90-95) view of children as "possessed of individual agency, as competent social actors and interpreters of the world [with] complex fractal and multi-subjective selves". In an Australian context, similar sentiments are expressed throughout Funder's (1996b) edited work, *Citizen Child*.

Though couched within the language of children's best interests, it is clear that the children themselves were largely secondary to the development of non-gendered presumptions in parenting disputes. Further, if the legacy of gender equality in 1970s parenting legislation was primarily about equality between adults, the danger is that we will *remain* focused on adult constructions of the problem of how to parent after separation and to reinforce decision-making criteria that continue to reflect adult preoccupations and presumptions.

A contemporary challenge for judges, and for all of us, is to revisit the concept of gender-neutral parenting, but with renewed emphasis on the perspective of the child. To do this requires continuing serious reappraisal of long-held perceptions of children combined with a willingness to discard much of our own social baggage and the baggage of hastily put together legislative reforms of the 1970s. But how realistic is such an aspiration? Would a family court that put children's needs ahead of adult gender-related concerns find itself too far ahead of current Australian attitudes and practices?

Gender and current Australian family values

The survey of Australian family values reported by de Vaus, (see Chapter 3, was based on data from a total of 8845 respondents across three samples. All three surveys were taken from national random samples, which, according to de Vaus, permitted generalisation to the adult Australian population.

As de Vaus (1997a: 4-5) also notes, responses to questions of changing family values are not only dependent on sampling strategies, but also on the nature of the questions asked. Thus commonly debated questions such as whether Australians are becoming more divided, whether there is less agreement on core values and whether society is increasingly composed of fragmented groups with opposing interests, are difficult to answer with precision because of the way each survey is structured and because meta-analyses are therefore not always comparing compatible data sets.

We do know that Australian family values have been changing over time (McDonald 1995). De Vaus' analysis, which summarises responses from three separate groups sampled over the first half of the 1990s,¹³² nonetheless paints a quite traditional overall picture on questions of children, parenting and work commitments. According to de Vaus (1997a: 9-10):

... a large majority of respondents stressed that caring for young children should take priority over work for mothers and the majority supported the traditional breadwinner role of men and family role for women. They believed that a family suffers if a mother works full time.

Interestingly, with respect to the seemingly never ending controversies concerning post separation parenting arrangements, a majority believed that two parents are needed to bring up a child and felt that it was not acceptable for single parents to bring up a child. There were also, however, some shifts away from traditional values. For example:

... there was general acceptance of women working so long as children and family came first. People were not defining women merely in terms of children. Only a minority thought that women prefer children to jobs and very few believed that women need children to be fulfilled.

Perhaps surprisingly, gender differences with respect to these traditional family values were minor, with men tending to be (though not always) a little more conservative. More significantly, on every issue in which a gender difference was recorded:

... the generation gap was much wider ... [Indeed] the clearest and most consistent finding is that there is a marked generation gap in family values, with older people holding more traditional views than younger people.

The survey material with respect to attitudes to divorce reveals tensions and apparent contradictions in the responses. For example, although the majority of people believed it was not acceptable for a single parent to bring up a child, only 19 per cent overall believed that the couple should stay together for the sake of the children. Although only 14 per cent believed that marriage should continue for life when the person was unhappy, 78 per cent believed in the marriage for life ideal; and an even greater number (87 per cent) believed that people should enter marriage without entertaining the possibility of divorce.

Multiple speculations and interpretations can be placed on the data set analysed by de Vaus. A theme that appears to stand out, however, is the value place on personal happiness. This value, in turn, appears to lead to considerable flexibility of thinking in both men and women when it comes to challenges to otherwise held ideals. Thus in the face of the prospect of an unhappy relationship, many who hold particular views about parenting and children's needs seem prepared to modify these views considerably. This endorsement of flexibility is to some extent reflected in our more scientifically derived-knowledge base.

What do we know now about gender, parenting and child development that we did not know in 1976?

In 1976, the first full year of the Family Court's operations and the year in which the Court asserted an unequivocal policy of gender neutrality with respect to parenting disputes, Lamb published

the first edition of *The role of the father in child development*. In the most recent volume (third edition) of that same publication, Lamb (1997: 1) observed that in 1976:

... social scientists in general and developmental psychologists in particular doubted that fathers had a significant role to play in shaping the experiences and development of their children, especially their daughters.

Since 1976, our understanding of the socially constructed nature of parenting has developed to a point that enabled Lamb (1997: 120) to assert:

... we do know ... that mothers and fathers are capable of behaving sensitively and responsively in interaction with their infants. With the exception of lactation, there is no evidence that women are biologically disposed to better parent than men are. Social conventions, not biological imperatives, underlie the traditional division of parental responsibilities.

Although we still appear a considerable distance from a comprehensive theory of child development, we know much more than we did in 1976¹³³ about the two-way transactional nature of parent-child relationships. We are clearer about the fact that children are born, not as a Lockian *tabula rasa*, but as biological entities that come complete with a temperament that develops and that interacts in a two-way fashion with parents and other carers (Lewis 1990).

As a consequence of this knowledge, we better recognise the child's individuality and the active role each child plays in his or her own development. Thus, as Sanson and Wise (2001: 45) have observed:

... we cannot presume that the same parenting strategies will work for all children. Parenting practices must fit the child and the culture. Parenting has in some senses become a more complex endeavour than in the past.

We have known for some time (Baumrind 1968) that, beyond the mix of temperament and the cultural and physical environment in which they find themselves, children do far better in the presence of authoritative (rather than authoritarian or permissive) parenting. As noted in Chapter 3, authoritarian parenting is a *relationship* dimension characterised by a combination of warmth, support and control. Only recently, however (Amato and Gilbreth 1999 – also cited in Chapter 3), have we seriously considered the implications of this knowledge with respect to optimal arrangements for post-separation parenting.

In addition we now appreciate more fully that family *processes* hold much greater explanatory power with regard to the wellbeing of children, than do family structures. The importance of structure lies in the social capital and support it offers rather than in its particular form. With respect to divorce, Rutter (2000: 635) has summarised this understanding succinctly.

It is crucial to differentiate between risk *indicators* and risk *mechanisms* ... For many years, it was assumed that a child's separation from his or her parents created a major psychopathological risk. Once, however, the circumstances of separation were investigated, it became clear that the main risk derived, not from separation per se but rather from the family conflict and discord that accompanied some varieties of separation and not others. (italics in original)

Although we now know that fathers are just as *capable* of nurturing their children as are mothers, many of the traditional

parenting and work-related values noted in the previous section continue to be reflected, in turn, in the behaviours of men and women in original families. Pryor and Rodgers (2001: 201) note that findings across studies in the 1980s and 1990s suggest that the average proportion of time fathers spend engaged with their children, compared with mothers, is about 44 per cent. The equivalent time fathers spend being *available* to their children (again compared to mothers) is approximately 66 percent.

Despite Edgar's (1997) finding of demonstrable benefits to employees who offer flexible work schedules to parents, Pryor and Rodgers also suggest (p 202) that fathers are doubly disadvantaged in their attempts to juggle work and parenting. They are more likely than mothers to be employed full time, and they are more likely to encounter workplace hostility if they attempt to opt for flexible arrangements in order to spend more time as parents.

At the same time, again as noted in Chapter 3, studies in Australia and elsewhere consistently show that men shoulder a considerably smaller proportion of domestic tasks than do their female partners, even when paid work commitments are factored in to the equation. A puzzle in the Australian context, which may again add to evidence of the persistence of traditionally gendered attitudes, is that women do not generally believe this lack of balance to be unfair (Dempsey 1997b).

Making sense of our current knowledge-base

A Martian visitor sent to report on parenting practices in Western countries might well reach a conclusion that there are no discernible rules, and that almost nothing is as it is formally described. S/he might return to Mars puzzled, perhaps amused, and perhaps also with serious concerns about the future of our species. Amongst the many tensions the visitor might have observed are the following.

Under the United Nations Convention on the Rights of the Child, children are deemed to have the same human rights as adults. Yet “rights” applied to children represent a special case (Coady 1996). More than most other groups, children are dependent on others to represent their interests and to ensure that their rights are both articulated and respected (Floud 1976). At the same time, Qvortrup et al. (1994) suggest that this does not mean that adults possess a “natural right” to exercise power over children. Untangling these issues has been the object of considerable debate and discussion.¹³⁴

Our visitor would learn that there is no biologically determined gender barrier to the adequate nurturing of children and yet observe that in Australia, the vast majority of two parent families continue to construct themselves along the traditional lines of men as major breadwinners and women as major carers (Family and Community Services Report 1999; Wolcott 1997). The visitor would also note that the attitudes of most men and women and the

dominant culture within Australian industry, support such a traditional division of labour.

Our visitor would not be surprised to learn, therefore, that when parents divorce, a large majority of children continue to remain in the major care of their mothers. S/he would note, however, that many of these children continue to think highly of their fathers and want to spend more time with them. Many fathers, for their part, also continue to wish for greater involvement with their children, long after separating from their partners (Smyth, Sheehan and Fehlberg 2001)

At the same time, many of these same children (some more than others and some at certain ages more than others) also express the need for a level of stability that comes with routine, regular access to peers and a sense of place and belonging. Yet again, our visitor would note that a desire for such a sense of place and belonging is in tension with market forces, which frequently dictate that economic advancement is dependent on a willingness to relocate. Freedom of movement would also be observed as a cherished (adult) right, argued for strongly in family law relocation cases.

Also looking from the outside in, it would be clear that despite the dominant culture, a proportion of men continue to seek a major parenting role after separation and divorce. Some men will have played a major parenting role in the original family and might see themselves and/or their children as deserving of this continuity. Many, however, will have played a less active parenting role than

their partners. Yet our observer would have discovered that post-divorce relationships between children and parents can be very different to the relationships that existed in original families.¹³⁵

Finally, our Martian visitor might have been both impressed and perplexed by the following realisations. Children need a level of guidance and protection. Children also need appropriately paced opportunities for growth and development, allowing them to increasingly become their own guides and self-protectors within the constraints of their own cultures. If the visitor could return home with a single dictum that has emerged from contemporary developmental psychology, it might be that *each* child needs to be responded to and accepted for who he or she is (Freeman 1985).

Yet such a dictum lies at the heart of the difficulties that must be confronted in externally located decision-making processes. For arrangements, responses and relationships that promote best outcomes for children are not easily described or defined. Indeed there is a sense in which each is a single instance – a uniquely tailored and mutually reinforced integration of each parent's (or parental figure's) and each child's respective temperaments and needs. How on earth, might the visitor ask, can such material be processed, understood and decided upon by an externally-located arbitrator? In making a decision in such cases, how can family courts avoid Lord Tennyson's (see Chapter 1) "wilderness of the single instance"?

The future of externally-imposed post-separation parenting decisions

It can be argued that our increased understanding of the complexities of childhood, child development and parenting issues, has decreased rather than increased our confidence in arriving at “correct” outcomes in litigated family law disputes. Indeed, with respect to the sort of cases described in the present study, the task that judges currently set themselves may, as Elster (1989) suggests, exceed the “limitations of rationality” .

Concluding his analysis of the first twenty-five years of the Family Court of Australia, Fogarty (2001: 99) ventures into the hazards of predicting the changes that will take place in the *next* twenty-five years. He sees a virtual end to drawn-out complex litigation over property, suggesting that:

... after many more inquiries and draft Bills, a strict family law and other relationships property regime – with emphasis upon mediation and arbitration as the almost exclusive model – will finally come about, society no longer being of the view that it should continue to afford the luxury of tailor-made individual hearings.

Although Fogarty makes no similar prediction with respect to processes that will resolve parenting disputes, he suggests, somewhat refreshingly, that:

... the debilitating discussions of the present time about sexuality and relationships will be seen as an oddity of the past.

He also suggests that the shape of families in the future will be significantly influenced by:

... work equality, advanced genetics, an ageing population, serial monogamy and serial relationships, the necessity for pre-relationship agreements and the *low birth rate*. (my italics)

Will children in this future scenario be fought over more fiercely because of their scarcity, or will advancing notions of children's rights ensure the continuing development of more genuinely child-focused processes? In their review of the 1995 Family Law Reform Act, Rhoades, Graycar and Harrison (2000) are sceptical of closely-contested litigation over children because they are sceptical of parenting applications by men, whom they see as largely motivated by issues of power and control. Like Brown et al. (1998), they suggest that the Family Court's future "core business" with respect to litigation over children will be around issues of violence and abuse. Brown et al.'s (1998) recommendation that violence and abuse cases be identified and dealt with separately and as a matter of priority has been generally endorsed by the Court and by commentators.

But what of the majority of separating families in which violence and abuse is not an issue? The present study would suggest that when men from these families do take their desire to play a major parenting role as far as the Family Court, they are likely to succeed only if their former partners do not live up to a stereotypical view of motherhood. In other words, they are unlikely to succeed as parental figures in their own right.

In interpreting the law in this way, judges subvert the overt intention of the legislation but simultaneously reflect the values of

most Australians and the parenting practices in the majority of original and separated families. Judges manage this with some difficulty, frequently, it would seem, through a process akin to what Herring (1999: 99), as previously noted, has called “strained reasoning”.

One solution to this problem would be to stop the practice altogether by screening out closely-contested cases and accepting as suitable for defended hearings, *only* those cases in which there are allegations of violence or abuse. In this way, Court policy would determine that the “core business” with respect to children would become violence and abuse cases. A fault orientation would again become the norm.¹³⁶

However, there are several difficulties with this solution. One is that dispute resolution in closely-contested cases would enter an almost exclusively private realm, an issue that has been the source of comment in many publications in Australia and elsewhere (e.g., Astor 1990). A second is that such a practice would carry with it an implicit endorsement of the status quo with regard to parenting arrangements in original families.¹³⁷ The implied message would be that there were no issues worthy of serious debate. Rather, the issues might be seen as “adjustment questions” that can be resolved through less formal processes. A third related difficulty is that the practice would offer no space for the consideration of new developments in family forms and family living arrangements. For example, though the judicial reasoning in *A&J* (in which the mother had entered into a lesbian relationship) leaves a good deal to be

desired, it is important that such cases are formally considered and subjected to a level of public and professional scrutiny.¹³⁸ *Re Evelyn* is clearly another case in point.¹³⁹

It is true that in the unenviable task of examining such cases, judges are required to weigh up imponderables. It is true that the research into what fathers are capable of, how children develop, what children want, what mothers want, what society values and how society acts, can point in quite contradictory directions. It is also true that even carefully constructed proposals by highly respected social science researchers that suggest guidelines to assist decision-makers (Kelly & Lamb 2000) have attracted criticism and alternative recommendations (Solomon & Biringen, 2001).

In the face of this disagreement and complexity, there remains the fundamental question of whether judges can do any better in their processing of closely-contested cases? The answer is in the affirmative, if the focus remains on process rather than outcome.

The research reported upon in this thesis has concerned itself with *processes* associated with the thinking behind the decisions - rather than with the decisions themselves. (No attempt was made to assess the merits of particular outcomes as this would have required a different research design; and as judges attest, the *results* in some of the cases examined could have legitimately gone in more than one direction). A focus on process is necessarily sensitive to the *transparency* with which opposing (or seemingly opposing) issues are considered.

A fully transparent judgement in a closely-contested case would confidently assert what is known about gender and parenting, biology and parenting, and sexuality and parenting. It would place the dispute within the context of our knowledge of child development and of what we know about current societal values and norms. It would be careful in articulating (from the children themselves as much as possible) evidence about the children's perceptions, needs and attachments.

A fully transparent judgement would confidently assert this knowledge *without at the same time being bound by any individual part of it*. A parent or a child might be disappointed or even angry about the result because nobody in this most difficult of jurisdictions can be certain that a result will fall in his or her favour. On the other hand, what children and parents have a right to expect, is a judgement that canvasses all the relevant issues evenly and fearlessly, whilst fully acknowledging the very human and sometimes contradictory dilemmas these issues raise for society and for the decision-maker.

And whilst transparent judgements and transparent thought processes should be a litigating family's right, it must also be said that even in the face of such transparency, the law is, and will remain, a blunt instrument when it comes to understanding and ruling on human relationships. Though law has at its disposal, the benefit of increasingly sophisticated social science research findings, at the beginning of a new millennium, the situation remains

essentially no different from what it was when Oliver Wendell Holmes (1881)¹⁴⁰ declared:

... the truth is that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent, only when it ceases to grow.

Legal processes in this area *can* become increasingly transparent. And much can be learned from an exploration of the tensions and dilemmas presented by parents in dispute in finely balance cases. At the same time, Wendell's observations remain salutary for all who would contemplate embarking upon this expensive, uncertain and emotionally taxing undertaking of litigating over children.

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Pertini and Davis (1982) 8 Fam LR 20
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Re Evelyn (1998) 23 Fam LR 53
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SECTION 1:

NOTES

¹ For detailed descriptions of how this principle informs parenting decisions of the Family Court of Australia, see Dickey (1997: Ch 17); Finlay, Bailey-Harris and Otlowski (1997: Ch 7); Parker, Parkinson and Behrens (1994: Ch 25). Chapter 4 of this thesis critiques the principle and provides an evaluation from the perspective of the narratives constructed by judges to support decisions “in the best interests of the child”.

² The term, cited by the High Court of Australia in the case of *Mallett*, (see “CASES CITED”) is taken from Alfred Lord Tennyson’s “Alymer’s Field.” The High Court was concerned that the result of broad-based judicial discretion not be a set of judgements that appear to bear little relationship to each other.

³ The language here is significant. “Under the care of” with respect to fathers and “cared for” with respect to mothers connote different notions of what children need. It will be seen that the idea that fathers provide for, whilst mothers nurture, children remains strongly ingrained in thinking to the present day.

⁴ Interestingly, the task of determining the “real/biological” parent, the task which confronted King Solomon, resulted in a judgement that has traditionally linked his name with the idea of a wise ruler (Elster 1989). In Chapter 4, I examine further how Solomon arrived at a determination of who was the “real” parent via a process that fits within a tradition of adversarial-based examination and cross-examination. I note the paradox that though “wisdom of Solomon” is legendary, his method of investigation, which assumes a single truth “out there”, is more representative of the problem than the solution in modern family law cases.

⁵ Both works have been critically reviewed by a number of researchers and commentators. A review of reviews of Goldstein et al. (1973) is provided by Crouch (1979). An excellent critique of both books is that of Richards (1986).

⁶ This is an interesting review in that each of the authors has written her own assessment of the principle. Though all see it as raising problematic issues connected with preserving stereotypical views of women as mothers, Boyd, writing from a Canadian perspective

comes down in favour on balance, whilst Rhoades and Burns, writing from their Australian experiences, arrive at the opposite view.

⁷ Relationship counsellors and therapists are familiar with this issue and, over the past thirty years or so, have explored ways of dealing with feelings associated with responses informed by notions of blame and self-righteousness. Consider, for example, the “workaholic” husband who is rarely home and the wife who has an extra-marital affair. Though each can blame the other and muster arguments that support a view that the other’s “crime” is more serious, this process will ultimately prove futile (and probably destructive), regardless of whether the decision is to stay together or separate.

⁸ Exceptions include the Irish Republic and Malta, both strongly Catholic countries in which the notion of divorce itself has been problematic.

⁹ Some of the early Family Court judgements in which fault “crept in” as a factor in parenting cases are cited by Nygh (1985). Nygh notes that this was followed by subsequent Full Court judgements which overruled fault-oriented statements. At the same time, it is fascinating to note a comment by Fogarty (2001: 96), a highly respected former senior judge of the Family Court. Reflecting on 25 years of the Court’s existence, Fogarty observes:

In addition, the unanswered question was, removal of fault from what? – in particular, in relation to children and property. These were not seriously addressed at the time or in the legislation, and it has taken the Family Court the next 25 years to work through these issues.

¹⁰ Major care was originally known as custody, whilst the “other parent” was usually granted access. Following the commencement of the *Family Law Reform Act 1995* (Cth), these words were changed to residence and contact respectively. For background to this development, see Harrison and Graycar (1997: 327-330)

¹¹ For a review of the research that informed these critiques, see Moloney (2001a) and the authors’ reply (Rhoades, Graycar & Harrison 2001). See also commentary by Parkinson (2001) and Dewar (2001).

¹² These studies focus on the Family Court of Australia but also include occasional reference to parenting judgements in other courts.

¹³ I have not included the major text of Parker, Parkinson and Behrens (1994) in this summary. Although it includes excellent commentary, its design is such that it selects key (but usually not complete) texts from other scholars, leaving as a teaching tool many questions open for the student to pursue further.

¹⁴ The case frequently cited by the Full Court in this respect is *Gronow v Gronow*

¹⁵ See, for example, a clear statement on this issue in *In the Marriage of F and N* [1987] FLC 91-813 at 76,136.

¹⁶ With respect to the question of the extent to which judges take relative income levels into account in child-related decision-making (an issue raised but not further developed), Hasche drew upon (p 224), “all custody cases reported in the Family Law Cases since 1977”. It is likely, therefore, that the eight cases relied upon to develop the gender discrimination hypothesis in custody cases, were also drawn from the same source.

¹⁷ Berns lists a total of 22 cases (p 235) in which violence was noted by the Family Court but makes no further comment on the remaining 14.

¹⁸ She also notes in Footnote 7, p. 235 that she “... examined the published judgements since the enactment of the *Family Law Act* in 1975”.

¹⁹ Nygh (1985) notes several such judgements.

²⁰ Berns (1991: 237) supplies only one clear example. Having made a statement in *Lythow and Lythow* supporting the notion that a young child needed the constant care of her mother, Watson J added, with respect to issues of possible child neglect, that this was clearly as much the responsibility of the father as it was the mother.

²¹ The data for these studies were gathered in 1980 and 1992.

²² Though it should also be noted that the “other” (mainly split or shared parenting arrangements) in the UK studies accounted for 21% of the cases in one study and 33% in the other.

²³ In the “consent” category, only one of the British studies had a reasonably large percentage (32%) of “other” arrangements. The remainder of the studies had very small “other” percentages, which meant that custody by consent went to mothers in this group between 84% and 90% of the time.

²⁴ This certainly appeared to be a key argument in *B and B* - seen at the time as a test case for relocation disputes following the implementation of the *Family Law Reform Act 1995* (Cth)

²⁵ There is a telling example of this in *Re Evelyn*, a surrogacy case considered in the present study. In that case (see Stuhmecke 1998), the judge placed considerable weight on the biological links between mother and child, whilst ignoring the biological links between the child and her father.

²⁶ In factor analysis terms, this is equivalent to asking whether or not the six or so identified factors are themselves subsumed by a higher order factor (or at least smaller number of higher order factors).

²⁷ From “Joseph and the amazing technicolour dreamcoat”.

²⁸ As noted above, Berns excluded judgements which contained allegations relating to issues such as sexual abuse and kidnapping - her purpose being to minimise the number of more obvious elements likely to be seized on by a judge to support his or her decision. Berns does not provide further detail about her exclusion criteria and, as also noted, included in her analysis are a number of cases in which there were allegations of violence.

²⁹ I expand on the question of choosing appeal judgements as a “gateway” to judgements at first instance in chapter 5.

³⁰ This was also essentially Engles’ (1940) view. Not all feminists (Walby included) agree, however, with Engles’ proposition that a pre-patriarchal era existed in which women had greater power, only to lose it.

³¹ Not of course the first (or the last) time women have been so categorised, though the mysterious attributes can be both positive and negative. For example, as the name suggests, nineteenth and early-twentieth century theories of hysteria saw the problem as peculiarly female emanating in some unspecified way from the womb (Shorter 1997).

³² *Helms v Franciscus*

³³ *D’Hautville v Sears*

³⁴ *Bradwell v Illinois*,

³⁵ The large-scale misuse of this fundamentally sound idea has been tellingly described by Gould (1981).

³⁶ A multi-layered exchange of view between the law, as it attempts to reflect societal values, and the social sciences, which strive to discover consequences, correlations and relationships within and between social systems, inevitably places limits on the confidence of any analysis of the interaction between the two disciplines. Margolis (1993) suggests that in family law, the social sciences have generally played a game of catch-up. The research questions have tended to be grounded in, rather than challenging of, the assumptions of the day.

³⁷ *Crimmins v Crimmins.*,

³⁸ see for example *B v B and T*

³⁹ Lord Denning *Re L (Infants)*.

⁴⁰ According to Stiles (1984: 24), Hurst suggests that the role of American law in a period of rapid growth of the country was influenced by the “demands of function”. By this he means that courts and institutions of social order paid more attention to immediate, practical operational problems and less attention to larger potentially more universal values.

⁴¹ For example, as Stiles (1984: 11) notes, early nineteenth-century American courts asserted maternal rights only indirectly as they were “reluctant to renounce explicitly the father’s paramount right”.

⁴² To my knowledge, Locke made no specific comment on the outcome of custody cases. In his *Of Civil Government* (Locke 1690) he did, however, argue that both parents should have authority over their children and that the authority of parents derives from the child’s need for protection and guidance. Perhaps more radically, when we consider contemporary notions of psychological parenting (Goldstein, Freud & Solnit 1973) and the child’s own construction of who is significant in the family (Funder 1996), Locke suggests that the right of a parent who (in modern terms) fosters a child, should be considered greater than the right of a biological father.

⁴³ The term was used by Jacob (1988) to capture what he saw as the transformation of divorce law in the United States in the 1960s and 1970s. As noted in the chapter, the processes by which the revolution was achieved were more clamorous and more public in Britain and Australia. The word, “silent” nonetheless retains some currency as it is likely that few Australians fully appreciated the fact that the Family Law Act did indeed represent a revolution in our thinking about marriage, families and how decisions should be made when one or more members of a family declared it to be no longer viable. In addition, it will be argued that the declaration that gender was a neutral issue in the consideration of disputes between parents was indeed a revolution – and one that appears to have been introduced both quietly and without empirical support.

⁴⁴ Fogarty (2001) notes that Western Australia had provided a no-fault ground (separation for five years) in 1939. According to Fogarty:

Although the ground was heavily hedged about with qualifications as to be of very limited value in practice, it represented a significant change in fundamental principle and set a precedent which was heavily relied upon by those who sought to provide a no-fault ground Australia wide.

⁴⁵ Finlay et al. (1997: 25) point out, divorces as late as 1975 under the Matrimonial Causes Act were granted to an overwhelming degree on the fault oriented criteria of desertion, adultery and cruelty.

⁴⁶ The songwriter, Leonard Cohen, has captured this tension in his ironically entitled “Democracy is coming to the USA”, with the lines, “From the homicidal bitchin’ that goes on in every kitchen to determine who will serve and who will eat”.

⁴⁷ These events are noted by Star (1996). As Victorian Director and occasional National Director of the Family Court Counselling Service at the time, they and related events remain etched in my memory.

⁴⁸ See for example, the then Chief Justice Elizabeth Evatt’s comments in the *Australian* of 25 June 1980 in which she said, “There are some, however, who remain out of the reach of the Court’s services, some who are so disturbed by their feelings of frustration, anger and bitterness, that they seek revenge”.

⁴⁹ As acting National Director of the Family Court Counselling Service for part of this period, I was aware that there were at the time a number of suspects - men whom the Court had denied access to their children. Indeed I was asked to be present when one of these men

was interviewed. To my knowledge, however, no charges were ever laid against any of the suspects and thus the reasons for the violence have never been fully explained.

⁵⁰ See, for example, Robert Thomson's (1984) interview with Don McKenzie, then Principal Director of the Family Court Counselling Service. "Violence at the Court is Difficult to Predict." *Sydney Morning Herald* 7 March 1984 p 9.

⁵¹ I am not arguing here that adversarial approaches *caused* the violence to which the early Family Court was subjected. It is clear that the court was attempting to navigate through a period of significant social change and that its decisions would inevitably be displeasing to some litigants. Violence can never be a legitimate response to such displeasure. Clearly, however, the speed of change in combination with continued adversarial litigation, provided a challenging environment for the court as well as for litigants and their advisers.

⁵² *In the marriage of Kress.*

⁵³ As a Family Court counsellor who commenced work on the first day of the court's operations, I found my previous training as a psychologist and family therapist to be quite inadequate. Indeed the structuralist assumptions made by such leading family therapists of the day as Minuchin (1974) offered no coherent theoretical or practical approaches that might assist in working with separating families. Similarly, some of the judges who had been appointed under the legislation as suitable "by reason of training, experience and personality" had had no experience or practice in the field of family law prior to their appointments.

⁵⁴ Einhorn is referring to the situation in the United States. My overarching thesis is that what is demonstrated in the literature is a story of grappling with very similar psychological and socio-legal issues in Australia, Britain and the United States. See in particular on this issue Goldsteing and Fenster's (1994) "Comparative highlights of British and American legal systems as they pertain to child custody." – especially pages 52-54.

⁵⁵ The term is used by Mason (1994). Bala (1986: 16) also provides a footnote, which suggests that the term was coined by Bucknbill L. J. in *Newgosh v Newgosh*, a decision not fully reported but noted at (1950) 100 L.J. News 525.

⁵⁶ "Judge Judy" is an American commercial television program. Allegedly, the litigants agree to have their cases televised and are required to abide by the judge's ruling. A feature

of the program is its considerable pragmatism. “Judge Judy” makes quite overt assumptions about motivations and quite rapid rulings on the “facts” of the cases.

⁵⁷ Hodgson (1992: 226) suggests that the beginning of the children’s rights movement “can be traced to the middle of the nineteenth century when Jean Valles attempted to establish a league for children’s rights in the aftermath of the Paris Commune”. In the twentieth century, 1979 was declared to be the International Year of the Child and this coincided with a flurry of activity designed to raise awareness of children’s needs and adults’ obligations. Following the adoption of the United Nations Convention on the Rights of the Child in 1989, the first World Congress on Children, Law and Rights took place in Sydney, Australia, in 1993.

⁵⁸ *Stsnley v illinois*

⁵⁹ At the same time, there is an ongoing debate about the extent to which men have “really” embraced these new roles. Consider, for example, Smart’s (1989:15) analysis that “... fathers’ relationships with children entail a power relationship with the children’s mother. The exercise of access rights continues this power relation or at least the potential for the exercise of this kind of power relationship. ... Notwithstanding that a father may have genuine feelings for his children, access gives him ample opportunity to continue his power relationship with his wife or even create a new potential for the negative expression of this power”.

⁶⁰ It is generally more recently that family law “feminists of difference” such as Fineman (1995) have argued strongly that women have more to gain by continuing to assert the superiority of the mother role and backing legislation which recognises this.

⁶¹ The fact that almost all studies on the topic in Australia (e.g., Australian Bureau of Statistics (1994) *How Australians Use Their Time*. Cat No 4153.0, Canberra; Dempsey 1997a) and elsewhere suggest that women continue to take on a disproportionate amount of domestic work, is a serious issue, though not the point being made here.

⁶² De Vaus points out that though his use of this term denotes women in the paid workforce, this does not imply that those not in the paid workforce are not working.

⁶³ Writing from an Australian perspective, Sanson and Wise (2001) suggest a very similar list.

⁶⁴ Hendrick includes Locke within this category, though see James, Jenks and Prout (1998: 15-17) for a discussion on the similarities and significant differences between the philosophers Locke and Rousseau in this regard.

⁶⁵ For example, Schaffer (1984) has established that infants appear to be predisposed to pay attention to the human face and seek proximity, comfort and nutrition from caregivers. Shaffer and Emerson (1964) also found that infants protest vigorously if separated from attachment figures at around seven or eight months of age. And according to Kagan, Kearsley and Zelazo (1978), this behaviour does not appear to be modified by cultural settings.

⁶⁶ As Richards (1988) has noted, the more radical recommendations of these authors, which would have given total decision-making authority to the “psychological parent”, has not been adopted by family courts. At the same time, these works have remained extremely influential. For example, according to Anna Freud’s biographer (Young Bruehl 1991), *Beyond the best interests of the child was at that time, the most widely read text in family law.*

⁶⁷ See especially Chapters 7 and 10. Burns’ research is particularly useful in that it covers a period which ends shortly after the commencement of the Family Law Act in Australia in late 1975.

⁶⁸ Phillips’ reproduction of the Australian divorce rate in graphic form shows a dramatic peak in the first year of the operation of the Family Law Act, and a subsequent falling back to the resumption, by extrapolation, of a line indicating a more linear increase. The graph suggests that many had waited for the introduction of a “no fault” system.

⁶⁹ See for example De Vaus & Wolcott’s (1997) *Australian Family Profiles*

⁷⁰ See, for example, Millbank’s (1998) account of the Family Court’s struggle to recognise the legitimacy of lesbian families, in which the two major child carers are women.

⁷¹ This was literally the case in the Melbourne Registry at which I commenced work as a Family Court Counsellor on the first day of the Family Court’s operations.

⁷² For an interesting feminist analysis of this story, see Jackson (1994: 63).

⁷³ I am not assuming here that those who support a return to greater predictability via rules necessarily believe there is a single truth to be pursued. Some possibly do. But many, I take

it, see a reversion to rules as a mainly pragmatic response to an ongoing area of unresolved tension.

⁷⁴ Elster is not accusing judges here of dishonesty or of blind prejudice. Rather, his interest is in how judges adapt themselves to the matching of principles with their own human understanding of, and reaction to, the cases in front of them.

⁷⁵ I use this word not (as can sometimes be the case in “legal speak”) as code for its opposite meaning. Rather, I use the word to signal the fact that decision-making in this field is extremely difficult, and that my reading of many cases in the course of this project demonstrated how seriously the vast majority of judges of all eras took the task.

⁷⁶ The term “welfare” is also more frequently associated with children at risk. Though it continues to be the term favoured in English legislation, it has the potential to be problematic because, as Maidment (1984) notes, the rationale for the very extensive direct and indirect involvement of family courts in the lives of children is that divorce places *all* children at risk. This is a perhaps an understandable but nonetheless over-inclusive response. As Amato (1993) has shown, divorce correlates significantly with a number of negative consequences for children. The differences between children of divorced and non-divorced populations are small, however, with a great deal of overlap between the two groups.

⁷⁷ I acknowledge the availability in certain circumstances of separate legal representation for the child (Keough 2000) and of the possibility of calling expert witnesses on the child’s behalf. In such situations, however, the child’s participation in the processes directly impacting on him is much more oblique than the participation of his or her parents.

⁷⁸ de Mause’s views probably represent the extreme end of the spectrum in this regard. As Cunningham (1995) points out, de Mause was influenced by a psychoanalytic orientation through which he saw the necessity for children to pass through developmental stages not only individually but from a more historical point of view.

⁷⁹ Pryor and Rodgers commence Chapter 4, “Children’s perceptions of families and family change” with a simple but poignant plea from a 15-year-old boy – taken in turn from a study by Gollop, Taylor and Smith (2000). “Try to take into account the kids’ views because kids know what they want more than the parents do because they’re them”.

⁸⁰ *Re T (A Minor) (Wardship: Medical Treatment)*

⁸¹ Adapted from the title of the recent report on pathways for families experiencing separation (Commonwealth of Australia 2001).

⁸² As Amsterdam and Bruner point out, this shares something in common with Kermode's (1967) "feat of making sense of how we make sense of our lives".

SECTION 2:

NOTES

⁸³ I am grateful to Associate Professor Belinda Fehlberg for drawing my attention to the existence of this database.

⁸⁴ The search served the purpose of screening out a considerable number of cases that were predominantly property disputes or that focused attention on issues of violence, abuse or abduction. To do this via a reading of the many judgements contained in the database would have been very tedious. At the same time, the search allowed a significant number of “unwanted” cases to remain in the sample. There are multiple examples of how this can happen. “Not property”, for instance, did not exclude the possibility that the case may have nonetheless been predominantly about money. (Indeed in one case the term “residence” referred to the family home.) On the other side of the coin, the exclusion of cases with terms like “violence” and “abduction” did not guarantee that all the potential closely-contested cases were captured. In scrutinising some further AustLII judgements selected at random, it became clear that there were some in which the negative descriptors did not apply to the case in question. A dramatic example of this is a case in which the judge was at pains to make it clear that this was a family in which there had never been a hint of violence on the part of either parent, either towards their children or towards each other. The descriptors used in the present study served the function of reducing a long list of cases to a list which was manageable. It assisted in the production of a suitable number of closely-contested cases and, importantly, it left a trail which other researchers can clearly follow. In future studies, the initial searching process could be further refined.

⁸⁵ Hodak was a closely-contested case but not an appeal. (In reading the judgement, I had not noticed that the word “appeal” had appeared in a different context.) A further two cases were rejected on the grounds that there was disagreement about the closely-contested nature of the dispute. Though Pannell had been initially accepted as in the closely-contested category, evidence had emerged during the hearing that it was not.⁸⁵ Martin, though cited by the judge at first instance as closely-contested, was emphatically regarded by the appeal court as not in this category.

Finally, two further cases were identified as falling somewhat outside the category of a conventional parenting dispute. Van Aalst was a case in which the father was not contesting a change in the parenting arrangements. Rather, the custodian mother was (in the language of the day) contesting guardianship because she wished to exercise greater control over the children's religious upbringing. Newling was an application by a father with respect to commencing contact with his daughter who had been adopted some years earlier (against the father's wishes) by the mother's second husband. Though both these cases raise interesting issues about perceptions of parenting, it was decided that, on balance, it was better to confine the analysis to the cases which dealt with more conventional parenting disputes.

⁸⁶ I do not believe that any researcher begins with a non-position in such matters or a position free from any potential bias. In my own case, I have published material (e.g., Moloney 2000) on what I see as a widespread neglect of the value of the role of fathers as nurturers. I am therefore likely to be especially sensitised to this (and correspondingly less sensitised to evidence of the opposite) in my reading of the judgements.

⁸⁷ Much of this research was carried out while I was a visiting scholar at the Australian Institute of Family Studies. I am extremely grateful for the expertise and support afforded to me by the Institute staff.

⁸⁸ I explored the merits of using a dedicated qualitative research program (NUD.IST 1997) for this purpose, but decided that in this case, it offered no advantages over the functions available in Microsoft Word. For a discussion on the relative merits of using dedicated packages or the functions within modern word processing for this type of data, see relevant chapter in Coffey & Atkinson (1996).

⁸⁹ However, as (Potter 1997: 129) notes, "... lack of "method" in the sense of some formally specified set of procedures and calculations, does not imply any lack of argument or rigour". In this regard, Billig (1988) prefers the word "scholarship" to "method".

⁹⁰ Wherever possible, I rely on statements within the judgement at first instance as cited verbatim by the appeal court. At times, however, I rely on summary statements *about* the judgement at first instance made by the appeal court judges.

⁹¹ Numbers in brackets in this and the following chapter refer to the line numbers or paragraph numbers as they appear in the original published texts.

⁹² Much of this evidence is reviewed in Lamb (1999). It suggests no link between parenting by homosexual parents and later gender identity issues. Indeed, the research suggests that the only difficulties encountered by children in these positions appear to stem from problems with stigma and social prejudice.

⁹³ I believe this is a reasonable overall interpretation, even though it would appear that an element of the transcript in a critical paragraph (18) is probably missing. Paragraph 18 reads [sic]: “Except for week-ends, when the husband made a definite attempt to spend more time at home with the wife and children than he had done previously, the bulk of their services.” I assume that the judge made mention here of the “bulk of the services” being, in his view, provided by the wife.

⁹⁴ Rutter (1995: 564) refers to the “superglue notion” of maternal bonding that grew (incorrectly in his view) out of attachment theory.

⁹⁵ The term “looking after” is also ambiguous. As van Dongen, Frinkin and Meno (1995: 91) have noted, such expressions are “loaded terms”. In this case, a certain type of “looking after” is privileged. Whilst not directly stated, it is likely that the “looking after” favoured by the judge is looking after within a home environment in which the mother would be in a position (15) to spend more time with the children.

⁹⁶ See Lamb’s (1997) analysis of this issue.

⁹⁷ See Summers (1975).

⁹⁸ A similar fascination is noted by Mercer (1998) with respect to a number of cases in her study in which mothers had extra-marital sexual relationships.

⁹⁹ Having been unsuccessful at an interim hearing, the range of options open to the mother outside of waiting for a defended hearing was, in fact, limited.

¹⁰⁰ The case is complicated by the fact that the most recent of the reports was obtained after the child had been assured by the counsellor that she would permit only the judge to see the report. Rightly or wrongly (the court avoided ruling on this) the counsellor gave this assurance after the child expressed reluctance to speak for fear that it would upset her father.

¹⁰¹ The referral to the Department of Family and Community Services was prompted by statements alleged by the mother of the child's expression of suicidal thoughts (para 4). However, these were not elicited in the report by that Department (para 13). At the child's initial interview with another family court counsellor, she claimed a loss of memory with respect to the interview with the Departmental counsellor.

¹⁰² See statement from Judge 2 of the Appeal Court (paras 1 and 2). Although early cases such as *Cilento and Cilento* and *Pertini and Davis* suggest that it is generally not in a child's interests to disturb summarily a longstanding custodial arrangement unless good cause can be shown, these cases are not seen to be authoritative. That is, they "do not lay down hard and fast rules". (See para 2 of the remarks of the second judge in this appeal case.)

¹⁰³ In retrospect, the difficulty with the judge's strategy was that, at the time of the appeal, the interim arrangement had persisted for more than four months. Even the Appeal Court's intervention to ensure the case would now be heard promptly, meant that the interim situation would, by the time of the fully contested hearing, have endured for at least six months.

¹⁰⁴ Again, these less than perfect actions appear to be in the same category as "wavering in one's commitment", which Mercer (1998) notes is applied almost exclusively to women in their role as mothers.

¹⁰⁵ The Appeal Court makes only brief references to the trial and dismisses the appeal in less than a page of argument.

¹⁰⁶ For a contemporary Australian perspective on this issue, see Waters (1999). In this article, the author discusses the relevance of the distinction between mental illness and personality disorders to the family law context, and explains why, as a general rule, mental disorders which have an intermittent course are less likely to impair parenting than are mental disorders which have a course of continuous disability. The author states that in his experience, there is no mental illness or personality disorder which provides an absolute barrier to contact, or even residence, orders. His view is that the person best qualified to satisfy the Court as to the relevant issues in relation to a parent's mental state is not a

general psychiatrist who sees one person, but a child psychiatrist who has also been trained in general psychiatry and who has the opportunity to hear from both parents.

¹⁰⁷ Whilst the judge was legally entitled to interview the child (Order 23 rule 5 – see para 8), the considerable problems associated with this action are unacknowledged in the judicial narrative. The interview was a “one-off” clearly conducted in circumstances of considerable pressure by a person not specifically trained to conduct such interviews. There was no evidence of a control for recency effect (it was noted in paragraph 8 that the interview was conducted with the consent of the *grandmother*, in whose care it is assumed the boy was at the time); and no reliability check via a follow-up interview or interviews.

¹⁰⁸ Although surrogacy raises legal ethical and social issues not encountered until the 1980s, the core issues set out in s 64 of the Family Law Act and which the judge is required to consider and weigh in this case, remain essentially the same. The decision is to be made according to an assessment of the best interests of the child. Time and time again, the Full Court has rejected the idea that any one of the factors the judge is required to consider may be elevated to a principle which could in some way eclipse the other matters being considered

¹⁰⁹ “I cannot get over that fact that if it had not been for the running of the respondent that the child would still be in effect in the custodial possession of the respondent”.

¹¹⁰ The comment (paragraph 24) that had the mother not gone to South Australia, “the child would still be in the custodial possession of the respondent (i.e. the mother) incorrectly implies that this was the situation prior to her departure. As noted in para 11, at the time the mother left, both parents and the child, having completed a five-month cruise, were residing at the father’s house. In addition, although in an overall sense the trial judge found (para 9) that “there was just a little bit more primary care given by the respondent”, he also added, “I do not think much rises or falls on that”.

¹¹¹ Consider, for example, the curious logic in the following transaction (para 39):

HIS HONOUR: What precipitated his application for custody, the fact that she shot through to Adelaide?

MR. MCGREGOR: Yes.

HIS HONOUR: Does he have any complaints about her parenting prior to that?

MR. MCGREGOR: No. Your Honour will not find one single criticism of the mother personally, or of the mother's parenting skills in the husband's material, either written or oral.

HIS HONOUR: They are not words – if we had not had had a little bit of a run, this Court would not have been put in an invidious position of having to determine the matter.”

To which the Appeal Court replied (paragraph 40): “It was open to his Honour to make the findings that he did and there can be no complaint about the manner in which his Honour has exercised his discretion”.

With respect to appeal submissions in relation to fourteen grounds dealing with findings of fact or weight (para 42), the Appeal Court simply replied (paragraph 43): “We do not propose dealing specifically with each of these grounds as we were satisfied that his Honour took into consideration the relevant factors required of him by the Act and the findings he reached were open to him on the evidence”.

¹¹² Whatever his motives, the father was in a delicate position. By this I mean that *any* discussions between himself and his former partner could be constructed as exploitative because of the intellectual imbalance between them.

¹¹³ In the end, too, within the limitations of a win/lose orientation, the question of whether a perceived stronger emotional attachment outweighs intellectual or other resources, is one that, as noted in earlier chapters, each culture and era will answer differently.

¹¹⁴ These are A&J (final paragraph of the “Hypothesis” section); Drenovac; Fisk; Hong; K&Z; Lavette (second paragraph); McCall; McMillan; Re Evelyn; Robbins; Sheradin (first paragraph); Smith; Toon; and Ward.

¹¹⁵ These are Christianos (first paragraph); Doyle; Duck (first paragraph); Kneller; Ploetz; and Ross-Doyle (second paragraph).

¹¹⁶ These are Firth; Lalor; Lavrut; Moddel; and Peterson.

¹¹⁷ Much of this chapter has appeared in the *International Journal of Law Policy and the Family*. See Moloney (2001b).

¹¹⁸ See definitions of Smith (1997) and Caulley (1994) in Chapter 5

¹¹⁹ To assist the process of case comparison, I have highlighted the case names in this chapter in bold.

¹²⁰ As in the previous chapter, numbers in brackets refer to line or paragraph numbers as they appear in the published judgements.

¹²¹ The six-year-old is quoted as saying of her mother, "... she's the one that gots [sic] us alive and girls should live with their mummy". (4.4) Her eight-year-old sister told the counsellor she thought of her mother every day. Poignantly, she says, "I miss mummy a lot, she's my only mummy. We haven't been able to see her much and she sometimes cries" (4.2).

¹²² Mention of "counsellors' reports" raises the important issue of the extent to which judicial decisions correlate with the views of the independent experts (in Australia - usually Court employed psychologists or social workers). Almost from the outset, the Family Court asserted the importance of subjecting independent reports to close scrutiny. In *In the Marriage of Hall* (1979) at pp 78.619-820, the Court noted, *inter alia*: "There is no magic in a Family Report. A judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court or that the judge is abdicating his [sic] responsibilities."

To my knowledge, no study of "compliance rates" between independent expert and judicial decision-making in parenting cases in Australia has been conducted. Interestingly, though, Bradshaw and Hinds (1997) found after examining 51 custody evaluations by expert witnesses, that male and female evaluators significantly favoured the parent of their own gender. They proposed (though did not demonstrate) that judges, too, might be influenced by gender-laden beliefs. In a further study of the contents of affidavits, Hinds and Bradshaw (1998) found that solicitors, too, apparently reinforced gender-based stereotypes. Though it would present challenging methodological problems, the manner in which solicitors, barristers, expert witnesses and judges interact around the construction of narratives that support decisions in parenting cases clearly opens up a very fruitful area for future research.

¹²³ Though to my knowledge nobody has suggested this nor advanced a reason why it might be the case, nonetheless the *possibility* remains.

¹²⁴ The main reason given is the rising divorce rate, one effect of which was that more men than ever had to think seriously about their parenting roles. Another part of the explanation

may lie in the fact that the 1960s and early 1970s were generally times of optimism and high employment without the more frenetic and sometimes fragmented work styles that are frequently observed today. It may be, especially in the context of an emphasis on gender equality that men felt themselves to have more time available for parenting.

¹²⁵ A piece of research waiting to be undertaken in this regard, is the relationship between Family Court Counsellors' reports provided under Section 62G(8) and the outcomes of the defended hearings for which the reports were written. It would be interesting to know what impact these reports had on judges. See generally on this issue Davis (1987), Monahan and Walker (1994), and specifically with respect to the Family Court of Australia, Mullane (1998). It would also be interesting to conduct a qualitative analysis of these reports – particularly the early reports – with the aim of better understanding what issues and principles were privileged by the counsellors.

¹²⁶ Weitzman (1985) correctly points out that a comprehensive analysis of how post-separation parenting decisions are made must go beyond judicial attitudes and practices. Weitzman's own study surveyed lawyers as well as the separated couple themselves (though not their children). She found a complicated pattern of responses, reminiscent in some ways of the twists and turns that are apparent in de Vaus' (1997a) more contemporary survey of "family values" in Australia. I take Weitzman's point regarding the interactive complexity of the issue. At the same time, whilst they are no doubt influenced by lawyers' arguments and by their perception of public opinion, judges do in one sense continue to provide a fixed point of reference that, in turn, impacts on negotiations conducted and opinions formed "in the shadow of the law" (Mnookin & Kornhauser 1979). My focus throughout this thesis has been on this part of the equation.

¹²⁷ It would be interesting to explore the extent to which the needs and rights of the child intruded into this case.

¹²⁸ Perhaps in Australia, this development in feminism has parallels with a move from immigration policies of equality through assimilation promoted in the fifties and sixties, to multiculturalism promoted from the mid-seventies, in which differences were celebrated within a framework of equality.

¹²⁹ Unfortunately, Fogarty does not expand on this observation. As a former senior Family Court judge, such an expansion would make fascinating reading.

¹³⁰ At the psychological level, Freud (1913: 107, cited in Neustadter 1989: 209) described children as, “no more than a homonculus, a primitive form of the complex and higher being represented by man”. More recently, developmental psychologists such as Newman and Newman (1975: 255) proposed that children are lower on the evolutionary scale and that “The emergence of individual into adulthood represents [the] major transition of life”. At the sociological level, Parsons (1965) saw the socialisation of children as representing steps towards maturity.

¹³¹ See Hodgson (1992) for an historical analysis of the 70 years of debates and proposals at an international level that culminated in the UN Declaration.

¹³² The 1989-90 National Social Science Survey (4513 respondents); the 1993 National Social Science Survey (2203 respondents); the 1995 Australian Family Values Survey (2129 respondents).

¹³³ Although, as Sanson and Wise (2001) point out, the seminal paper on the reconceptualisation of parent-child interaction was written by Bell in 1968, Reese and Overton (1970) described this view, which saw the influence of children on parents as being just as important as the influence of parents on children, as incompatible with then current (and essentially mechanistic notions) promoted by many behaviourists, psychoanalysts and others.

¹³⁴ See, for example, in an Australian family law context, Otlowlki and Tsamenyi (1992)

¹³⁵ Power (1992) has summarised how, notwithstanding its prevalence, separation and divorce can dramatically change relationships and can set off a chain of events that results in significant changes in individuals and in how they interact with the world. This is consistent with the finding that post-divorce relationships between children and their fathers (and presumably their mothers) are more strongly related to factors that occur during and after the separation itself, than to the parenting arrangements that existed in the original family (Lamb 1999b).

¹³⁶ A fault-oriented regime is also one to which adversarial processes are probably more suited. Adversarial processes struggle with competing perceptions and descriptions of

relationships. They appear more at home with cases that set out primarily to discover whether or not certain alleged incidents occurred.

¹³⁷ An assumption here is that litigation and judgements have a role in shaping public opinion. For an interesting discussion on Mnookin and Kornhauser's (1979) "shadow of the law" argument, see Wade (1998).

¹³⁸ See, for example, Millbank (1998).

¹³⁹ Reviewed, as noted in Chapter 1, by Stuhmcke (1998).

¹⁴⁰ Cited in Fogarty (2002: 99).