

# IMPOSING GENDER NEUTRAL STANDARDS ON A GENDERED WORLD: PARENTING ARRANGEMENTS IN FAMILY LAW POST-SEPARATION.

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## I. INTRODUCTION

In intact families it is clear that the responsibility of caring for children remains a gendered activity. Research from numerous jurisdictions demonstrates that women still generally shoulder the lion's share of responsibility of caring for children, particularly young children. The fact that women continue to bear this responsibility even when they are in full time employment suggests that such labour is built into our fundamental understanding of what it means to be in the role of a mother. In New Zealand there is no legal insistence that parenting be shared in intact families, and little by way of social policy to create the conditions that might facilitate such sharing.

Nonetheless, at the point of separation, and ironically at the point that the relationship between the parents has broken down, it seems that, increasingly, we are insisting that parenting, in the sense of doing the labour of caring for children, be shared – should this be an obligation that fathers wish to assume at that point. Gender neutrality in the sharing of parenting responsibilities for children after relationship breakdown has become the legal and cultural ideal in many jurisdictions in recent times, including, arguably, New Zealand. In several previous articles<sup>1</sup> we have used a study involving the interview of 21 separated New Zealand mothers to document a claim that some New Zealand Family Law professionals view lots of father contact, regardless of the history, quality and circumstances of that contact, as essential to children's wellbeing and, some even see 50:50 shared day-to-day care as a desirable “norm” post-separation.

In this article we use the accounts provided by the women in this study to explore the consequences of treating parenting at the point of separation as though it is an egalitarian project between mothers and fathers, when in fact the practices of mothering and fathering generally involve the inequitable shouldering of parenting responsibilities both prior to and after separation. First we look at what the research tells us about parenting patterns in intact and separated families to substantiate the claim that parenting practices

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1 Julia Tolmie, Vivienne Elizabeth and Nicola Gavey, “Raising Questions about the Importance of Father Contact Within Current Family Law Practices” [2009] NZ Law Review 659; Julia Tolmie, Vivienne Elizabeth and Nicola Gavey, “Is 50:50 Shared Care a Desirable “Norm” Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand” (2010) New Zealand Universities Law Review 136.

are still overwhelmingly gendered. We go on to find support for this in the accounts provided by the women in this study and discuss some reasons for the resilience of gendered parenting practices. In the second part of this article we outline some of the ramifications of treating parenting as an egalitarian project at the point of separation when as a society we do not insist on the equal sharing of parenting in intact families.

## II. DESCRIPTION OF THE STUDY PARTICIPANTS AND INTERVIEW PROCESS

We were motivated to undertake this research because of the suggestion that women's voices have become increasingly muted in the family law context in recent times; that it is fathers' experiences and claims that have been in the spotlight and influencing the politico-legal system for some time now.<sup>2</sup> In this study we therefore sought to document the experiences of women who have encountered difficulties in negotiating care and contact arrangements within the New Zealand family law system. Although it is not possible to generalise from these accounts, they are useful in generating a fuller picture of the complex challenges that at least some mothers and their children are currently facing. In order to avoid identification of the actual women concerned we have changed their names<sup>3</sup> and modified some non-essential details of their stories.

Between late 2006 and early 2008 we carried out in-depth semi-structured interviews with twenty-one separated mothers living in the upper North Island, New Zealand.<sup>4</sup> The interviews invited women to narrate their experiences of post-separation parenting, particularly, although not exclusively, in relation to legal or quasi-legal processes. Most of the interviews lasted two hours, with some lasting three or more hours. All of the interviews were conducted by one of the three authors, and were recorded and transcribed in full. Subsequently, the transcriptions were read and re-read by the authors to identify the themes contained within the interviews.

- 2 "Concerns have recently been expressed that .. [public] debate is now so firmly centred on fathers' relationships with their children that the voices of women are no longer being heard, and that women are losing confidence in the legal system": Alison Perry, "Safety First? Contact and Family Violence in New Zealand: An Evaluation of the Presumption Against Unsupervised Contact" [2006] 18:1 Child and Family Law Quarterly 1, at 19; Judge Peter Boshier, "Media – Openness in the Family Courts", 8 August 2006, Manawatu Family Court's Association, Whararata, Massey University, Palmerston North <<http://www2.justice.govt.nz/family/publications/speeches-papers>> (last accessed 10/22/09); Wendy Davis, "Gender Bias, Fathers Rights, Domestic Violence and the Family Court" (Dec 2004) Butterworths Family Law Journal 299, at 299, 309; Carol Smart, "Preface" in Richard Collier and Sally Sheldon (eds), *Fathers Rights Activism and Law Reform in Comparative Perspective* (Hart Publishing, Oxford and Portland, 2006) vii, at vii-viii.
- 3 Please note that, in order to avoid identification of the women concerned, the names we have assigned to our interview participants may not be consistent across all of the published articles that elaborate on different aspects of this study.
- 4 The project was granted ethics approval by the University of Auckland Human Participants Ethics committee.

The majority of participants joined the study following the publication of a story on our project in suburban newspapers; several others were recruited through snow-balling.<sup>5</sup> The women ranged in ages from their late-20s to mid-50s. Two were Māori, fourteen were Pākehā and five were migrants from other western countries. Just under half of the group were either in receipt of the Domestic Purposes Benefit or on a low income, another seven were earning moderate incomes, while a few were in high-income employment. The women had been separated from the fathers of their children for one to twelve years, and their children ranged in ages from fifteen months to fourteen years. In seven cases there had been a history of physical violence (male on female) prior to separation, and in two additional instances there had been non-physical abuse (for example, threats of violence and destruction of property).

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

### III. PARENTING AS A GENDERED ACTIVITY

#### *A. Intact Relationships*

In intact families it is clear that the responsibility of caring for children remains a gendered activity. Although liberal feminists have for some time pointed to the benefits that would accrue to mothers, fathers and children of genuinely egalitarian parenting, there is extensive international research documenting that fathers still do not generally share equally in the responsibilities of parenting when families are together<sup>6</sup> Any increase in the

5 Word of mouth from existing interviewees.

6 Karen Henwood and Joanne Procter, "The 'Good Father': Reading Men's Accounts of Paternal Involvement During the Transition to First Time Fatherhood" (2003) 42 *British Journal of Social Psychology* 337, at 339-340; Jil Matheson and Carol Summerfield (eds) *Social Focus on Men* (London, HMSO, 2001) at 20; Melissa Milkie, Suzanne Bianchi, Marybeth Mattingly, John Robinson, "Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being" (2002) 57 (1/2) *Sex Roles* 21, at 21-22; Diane Reay, "A Silent Majority? Mothers in Parental Involvement" (1995) 18:3 *Women's Studies International Forum* 337; Sara Gable, Jay Belsky and Keith Crnic, "Coparenting During the Child's 2<sup>nd</sup> Year: A Descriptive Account" (Aug 1995) 57 *Journal of Marriage and the Family* 609; Edith Gray, *Measuring Parental Involvement in Couple Families in Australia: What is Parental Involvement and How Should we Measure it? Negotiating the Life*

amount of domestic labour<sup>7</sup> and childcare that fathers do in intact families has been modest. In the words of one scholar “[a]n international array of qualitative studies... suggest that shifts by fathers to greater involvement with their children have been less than dramatic.”<sup>8</sup> In Australia it has been said that “despite widespread approval of the idea of shared parenting (in intact families), it has not been adopted in practice, even in relative terms.”<sup>9</sup>

Some studies raise the possibility that the recent emergence of the involved father as a western cultural ideal may prevent many men from being honest with themselves and others about their lack of involvement with their children. Annette Lareau, for example, who interviewed a sample of fathers, “found that most fathers did not know very much about the details of their children’s lives because, relative to mothers, they did not provide very much day to day care.”<sup>10</sup> These fathers, by comparison, had detailed knowledge of their career and leisure activities. What is noteworthy is that, “fathers who seemed unfamiliar with the details of their children’s daily lives nevertheless suggested that they were intensively involved in the children’s lives; some even suggested an egalitarian division of labour.”<sup>11</sup>

The research literature suggests that women still tend to carry the major responsibility for childcare in intact families even when they are employed outside the home full-time.<sup>12</sup> In fact some studies suggest that when women

- Course Discussion Paper DP-002, 2000, Discussion Paper Series, Demography Program, Research School of Social Sciences, Australian National University, at 12-13, 19; Laura Sanchez and Elizabeth Thomson, “Becoming Mothers and Fathers: Parenthood, Gender and the Division of Labour” (1997) 11:6 Gender and Society 747, at 763, 766; Dwenda Gjerdingen and Bruce Center, “First-Time Parents Postpartum Changes in Employment, Childcare, and Housework responsibilities” (2005) 34 Social Science Research 103; Susan Walzer, “Thinking about the baby: Gender and Divisions of Infant Care” (1996) 43:2 Social Problems 219; Joan Aldous, Gail Mulligan and Thoroddur Bjarnason, “Fathering over Time: What Makes the Difference?” (1998) 60:4 Journal of Marriage and the Family 809, at 818; Colin James, “Winners and Losers: The Father Factor in Australian Child Custody Law in the 20<sup>th</sup> Century” (2006) 10 Legal History 207, at 228; W. Jean Yeung, John Sandberg, Pamela Davis-Kean and Sandra Hofferth, “Children’s Time with Fathers in Intact Families” (2001) 63:1 Journal of Marriage and Family 136; Barbara Pocock, “Youthful Aspirations Meet Unbending Cultures? How Young Australians Plan to Organise their Jobs, Care and Housework” (2005) 20:46 Australian Feminist Studies 91 at 107.*
- 7 S Coltrane “Research on Household Labour: Modeling and Measuring the Social Embeddedness of Routine Family Work” (2000) 62 Journal of Marriage and the Family 1208.
  - 8 Gillian Ranson, “Men at Work: Change – or No Change? – In the Era of the “New Father”” (2001) 4:1 Men and Masculinities 3, at 5-6; Esther Dermott “The ‘Intimate Father’: Defining Paternal Involvement” (2003) 8:4 Sociological Research Online at 9.2: “While the ‘culture’ presents images of fathering that suggest radical change, repeated studies of the ‘conduct’ of fatherhood indicate only small scale alterations in behaviour.”
  - 9 Lyn Craig, “Does Father Care Mean Fathers Share? A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children” (2006) 20:2 Gender and Society 259, at 276.
  - 10 Annette Lareau, “My Wife Can Tell Me Who I Know: Methodological and Conceptual Problems in Studying Fathers” (2000) 23:4 Qualitative Sociology 407.
  - 11 Ibid, at 408. See also Craig, above n 9, at 262.
  - 12 Mothers go to considerable lengths when they work to avoid trading off parental childcare, by means such as decreasing effort put into housework, and “forgoing sleep, self-care and childfree leisure time.” Lyn Craig, “How Employed Mothers in Australia Find Time for Both Market Work and Childcare” (2007) 28:1 Journal of Economic Issues

are employed there is a minor or no increase in the amount of time fathers spend on childcare,<sup>13</sup> although not all studies have found this to be the case.<sup>14</sup> Yeung, Sandberg, Davis-Kean and Hofferth found that although mothers work hours made no difference to father involvement, “when mothers contribute a substantial share of the total family income, fathers become more involved with their children on weekends.” Even in this study, however, mothers earnings made no difference to father involvement on weekdays when “mothers still shoulder the lion’s share of the parenting.”<sup>15</sup>

However, the issue is not just one of time. Research suggests that when men do take on childcare they are likely to view themselves as “helping” mothers and more likely to play with children than do the work involved in sustaining them.<sup>16</sup> Laura Sabattini and Campbell Leaper comment that:<sup>17</sup>

... mothers remain in charge of the day to day child care tasks, such as feeding and bathing, as well as children’s emotional and physical comfort. Fathers are more likely to assume responsibilities that are more sporadic, such as playing with the children, and their parenting participation is often viewed as discretionary.

- 69; Lyn Craig, “Is There Really A Second Shift, And If So, Who Does It? A Time-Diary Investigation” (2007) 86 *Feminist Review* 149, at 153. S Coltrane “Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work” in R Milardo (ed) *Understanding Families in the New Millennium: A Decade in Review* (MN: NCFR, Minneapolis, 2001) 427, at 431; Jennie Dilworth, “Predictors of Negative Spillover From Family to Work” (2004) 25(2) *Journal of Family Issues* 241; Arlie Hochschild *The Second Shift* (Viking, New York, 1989. Darquise Laflamme, Andree Pomerleau and Gerard Malcuit, “A Comparison of Fathers and Mothers Involvement in Childcare and Stimulation Behaviours During Free-Play with Their Infants at 9 and 15 Months” (2002) 47(11/12) *Sex Roles* 507, at 517; Jennifer Glass, “Gender Liberation, Economic Squeeze, or Fear of Strangers: Why Fathers Provide Infant Care in Dual-Earner Families” (1998) 60 *Journal of Marriage and the Family* 821.
- 13 Paul Amato, “Who Cares for Children in Public Places? Naturalistic Observation of Male and Female Caretakers” (1989) 51 *Journal of Marriage and the Family* 981, at 981; Beth Manke, Brenda Seery, Ann Crouter and Susan McHale, “The Three Corners of Domestic Labour” Mothers’, Fathers’ and Children’s Weekday and Weekend Housework” (1994) 56 *Journal of Marriage and the Family* 657; Julie Seymour, “No Time To Call my Own’ Women’s Time as a Household Resource” (1992) 15:2 *Women’s Studies International Forum* 187; William Marsiglio, “Paternal Engagement Activities with Minor Children” (1991) 53:4 *Journal of Marriage and the Family* 973; Susan Sanderson and Vetta Sanders Thompson, “Factors Associated with Perceived Paternal Involvement in Childrearing” (2002) 46(3/4) *Sex Roles* 99.
- 14 Rosalind Barnett and Grace Baruch, “Determinants of Fathers’ Participation in Family Work” (1987) 49 *Journal of Marriage and the Family* 29; William Doherty, Edward Kouneski and Martha Erickson, “Responsible Fathering: An Overview and Conceptual Framework” (1998) 60:2 *Journal of Marriage and the Family* 277, at 286-289; Caroline Gattell, “Whose Child is it Anyway? The Negotiation of Paternal Entitlements Within Marriage” (2007) 55:2 *The Sociological Review* 352.
- 15 Yeung, Sandberg, Davis-Kean and Hofferth, above n 6, at 153. Craig, “Is There Really A Second Shift, And If So, Who Does It? A Time-Diary Investigation”, above n 12, at 163.
- 16 William Marsiglio, comments that: “[o]ne consistent pattern found in previous research is that when fathers do participate in child care and other household tasks they usually do so in limited ways. They offer “help” to their partners on tasks of their own choosing and often assume a play mate role, whereas women usually retain the primary responsibility for their children.” Marsiglio, above n 13, at 974. Sanderson and Sanders Thompson, above n 13.
- 17 “The Relation between Mothers’ and Fathers’ Parenting Styles and Their Division of Labor in the Home: Young Adults Retrospective Reports” (2004) 50 *Sex Roles* 217 at 218; Yeung, Sandberg, Davis-Kean and Hofferth, above n 6, at 153.

Fathers do not, in general, take responsibility for the overall picture and tend to undertake the less demanding or essential jobs, as well as the ones that do not need to be done at a fixed time.

Some research suggests that when both parents are working in paid employment, mothers and fathers might spend similar amounts of time with their children, but mothers still take most of the responsibility for the “work” of the children.<sup>18</sup> In the words of Suzanne Bianchi:<sup>19</sup>

... mothers, for the most part, continue to be “sweepers” (to borrow a soccer analogy)... Their job is to be ever attentive to what needs to be done to assist in covering the goal – to what they must do to ensure their well-being and that of their family. In protecting the goal, first things come first: Mothers may have the luxury of worrying about providing fun, stimulation, and educational outings for their children, but only after they can ensure that their children are clothed, well nourished, and safe. If they have more to attend to than is possible for one person, they ultimately step back and allow others to provide the “fun” or “rewarding” contributions if that step is needed to get the job done.

New Zealand does not have data on the gendered division of childcare.<sup>20</sup> The most current Australasian research comes from Lyn Craig who has used diary data from the Australian Bureau of Statistics Time Use Survey (involving 4,000 randomly selected households) to measure the differences between mothers and fathers commitment to childcare. She found that

18 Kimberly Renk, Rex Roberts, Angela Roddenberry, Mary Luik, Sarah Hillhouse, Cricket Meeham, Arazais Oliveros and Vicky Phares, “Mothers, Fathers, Gender Role, and Time Parents Spend With Their Children” (2003) 48 (7/8) *Sex Roles* 305 found that fathers and mothers in their sample (recruited from the university community) were not spending significantly different periods of time (mothers a little more) either being in direct interaction or accessible to their children, but mothers were still doing most of the responsible work of childcare. See also Gatrell, above n 13, at 367, who found in her small sample of couples (20) with high income earning professional women all but one of the men did seek to equalise their involvement in direct childcare, including changing, feeding and bathing the child. All but one of the men, however, did not do child related domestic chores that did not involve direct interaction with the child, such as washing clothes or packing lunches. “Thus, with one exception, all mothers found themselves responsible for child-related domestic work.”

19 “Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?” (2000) 37:4 *Demography* 401, at 412.

20 It does have data on the gendered division of work (both paid and unpaid). Statistics New Zealand 2000 shows that “men and women’s total hours of work are very similar but... men undertake more paid work and women more unpaid work”. Cited in Paul Callister, *The Changing Gender Distribution of Paid and Unpaid Work in New Zealand*, New Zealand Treasury Working Paper 05/07, June 2005 at 14. D Stevens suggests that that ratio of women to men’s work is 0.96 (“Equity Or Equality: A Study Of The Time Men And Women Spend In Paid And Unpaid Work In New Zealand Households” (2002), paper presented at the Time Pressure, Work-Family Interface, and Parent-Child Relationships, International Time Use Conference, Kitchener-Waterloo, Ontario, Canada, March 21-23). It is not clear whether simultaneous activities are measured in either of these studies to incorporate multi-tasking. In the Australian context Lyn Craig draws on data from the Australian Bureau of Statistics (ABS) *Time Use Survey* (information from 4,000 randomly selected households) to find a clear disparity between the total workloads of mothers and fathers, much of which consists of simultaneous (secondary) activity, and some demographic differences in female (but not male) total workloads. She concludes that: “the view that the second shift is a myth is only sustainable by averaging social groups very broadly and by excluding multi-tasking from the measurement of total work activity.” See Craig, “Is There Really A Second Shift, And If So, Who Does It? A Time-Diary Investigation” above n 12.



mothers spend about double the time on childcare, either as a primary or a primary and secondary activity, as fathers with similar labour force status and family circumstances. Furthermore:<sup>21</sup>

... compared to fathering, mothering involves not only more overall time commitment but more multitasking, more physical labour, a more rigid timetable, more time alone with children, and more overall responsibility for managing care. These gender differences in the quality and nature of care apply even when women work full-time.

Women were therefore more constrained by their childcare commitments and more likely to either tailor their work lives to fit around childcare or give up paid employment.<sup>22</sup> In Craig's study, twenty-nine percent of the total time mothers spent with their children was in a sole charge capacity, whereas for fathers it was eight percent.<sup>23</sup> Craig concludes that this means that fathers were not relieving women of responsibility for childcare when they were with their children. Moreover, because more than 90% of father's time with children was mediated by the presence of others, fathers had limited experiences with full independent care of their children. Fathers' lack of experience with the sole care of their children clearly has consequences for the quality and quantity of fathers' contact with their children following divorce:<sup>24</sup>

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

Although we did not specifically ask the women in our study about the division of parenting responsibilities prior to separation, all of them described arrangements in which they were the primary caregivers. These women were the primary carers even when they earned roughly the same amount as their former partners, or were the primary income earners for the family. For example, Petra was the family breadwinner prior to separation, yet also took primary responsibility for the child, who was in day-care for most of the week. Petra did most of the preparing of meals and feeding the child, dressing, packing the bag for day-care, bathing, evening book reading and putting the child to bed, getting up in the night, immunising, taking

21 Craig, above n 9, at 259. Craig measured secondary activity (child care conducted simultaneously with other activities) because it gives a fuller picture of the magnitude of time spent with children as well as the subjective experience of providing that care – “the density of activity associated with children and an indication of the level of work pressure involved.” She also measured task allocation because some tasks are less pleasurable and more constraining than others, for example, those that have to be done on schedule. If women have to be with children at certain times because they are picking children up from school and doing the evening routine then they do not have the same flexibility that men do about when to be present: “If the women are employed, this means that they will have to leave work at a particular time, while men may be able to stay later when required. This could have implications for promotion and career advancement.” As Craig notes, “There is a difference between having full responsibility for a job and giving occasional help.” For one thing, full responsibility means mothers often end up being the default parent when no one else can be found to care for the children.

22 Ibid, at 275. “A Career Woman's Work is Never Done: Females with Jobs Still do the Bulk of Household Chores” Monday Dec 10 2007, *New Zealand Herald* A10.

23 Craig, above n 9, at 271-272.

24 Ibid, at 275.

the child to the doctor and either administering medicines or briefing the father, fostering the child's friendships, organising after school and holiday activities, and shopping for birthday and Christmas presents for the child and her friends. In Briar's case she and the father both worked full-time on comparable wages prior to the separation, and although the father was an involved parent and they had intended to share parenting equally, the reality didn't match those aspirations. Like Petra, she also did most of the caring work, taking responsibility for day to day tasks like bathing, evening book reading, settling the child to sleep, as well as routine and special tasks such as buying the child's clothes, fostering her friendships, organising after school and holiday activities, birthday parties, and so on. She also did the majority (3/5) of pickups and drop-offs to school and acted as default back-up to the father when he wasn't available. She remarked that, although the child had a good relationship with both her parents, there was a clear strong primary relationship with her as the mother. For instance, the child had always struggled with separation from her, while being content for her father to come and go.

Of the women who were the unwaged primary caregivers prior to separation, some had experienced the father of their children as "helping out" with the children. For example, Natalie said that the father was very helpful when she had two young babies and needed the assistance. Nonetheless, he had never cared for the children by himself until after the separation. For other women in our study, however, father involvement was not a feature of their parenting experiences prior to separation. Ruth, for instance, noted that the father of her children was, "hardly ever there, particularly in the last 18 months of us being together." Vicki talked about the father sitting on the couch playing video games and then, when the child was four days old, disappearing for days without being contactable, even though the baby was colicky and she had complications from the birth and couldn't walk properly. To get the support she needed to recover from the birth Vicki travelled overseas to her parents' home and a month after she returned he again disappeared for 10 days in a row. She was isolated, living in a rural area, and the child was sick at the time. Several other women experienced no involvement from the father *at all* until the child was seven months in one case, and a year old in the other, at which points in time a paternity test conducted by the mothers confirmed their claims that the fathers were the biological parents and the fathers began to have some involvement with their children. In another case the mother was unable to name the father on the birth certificate because the father denied paternity and wanted nothing to do with the child, even though she was living with him at the time that she conceived and gave birth to the child. At some point after separation he changed his mind and began to insist on his "right" to be involved with the child.



### B. Post-Separation: Mothers as “Default” Parents

Divisions of parental responsibility post-separation in New Zealand (and elsewhere) have tended to reflect the division of parenting responsibility pre-separation, with women taking on the role of primary caregivers of children post-separation in the majority of cases.<sup>25</sup> Certainly, of the twenty-one women we interviewed, only one was a contact parent and she was having supervised contact with her children (who resided with their father). Of the twenty resident parents in our study, two had 50:50 shared care arrangements with the father of the children. Of the remaining eighteen resident parents, the following divisions occurred (with the women having the majority of the parenting time in each division): 60:40 for three; 70:30 for six, 80:20 for two, and 85:15 for two. Of the remaining five mothers who were resident parents, two described their children having erratic and infrequent contact with their father (in both instances they said that this was because the father did not want regular or frequent contact due to his other commitments), one described the father having one supervised contact visit per week, and two said that the father did not have contact (in both instances because he had abandoned supervised contact arrangements).

What is interesting for our current purposes, however, is the fact that many of the women we interviewed indicated that they were the “default” or “bottom-line” parents for their children after separation, *regardless of the formal care arrangements that were in place with the fathers*. In other words, even those mothers we interviewed who experienced the father of their children as being actively involved post-separation, *including* those who had formal care arrangements that were either 50:50 or very close to shared day-to-day care, made such remarks. For example, they were the default carers when the children were sick, or when the father had unexpected work commitments, or when he didn’t want to have the child for other reasons, even when the children were scheduled to be in his care. They were the ones who had to organise and pay for the child’s dental, medical, optometrist, school fees and other expenses and, if they were able to, get the father to pay half, or otherwise bear the costs themselves, even when the issues that arose did so on the father’s “watch”.

25 In New Zealand in 2007, of those cases which ended up being processed in the Family Court, 58 percent of day-to-day care orders were awarded to mothers, 12 percent to fathers, 9 percent to other parties, whilst 21 percent were shared care orders. Of shared care orders, 11% were shared between mother and father, 2% with either mother or father and another party, and 8% were shared among other parties. These figures come from Roy Wyatt (with Su-Wuen Ong), *Family Court Statistics in New Zealand in 2006 and 2007*, Ministry of Justice, Wellington, April 2009, at 31. Most of these arrangements (68%) were arrived at by agreement between the parties, with only 8 percent being made at a defended hearing, and 23 percent at a formal proof hearing, “where only one parent attends, usually because the other parent chooses not to participate.” Roy Wyatt (with Su-Wuen Ong), *Family Court Statistics in New Zealand in 2006 and 2007*, at 30. We can speculate that the percentages of cases where mothers are the primary caregivers are likely to be higher in respect of those separating couples who do not apply for Family Court orders but come to their own private arrangements.

A classic example of the phenomenon of the mother being the bottom-line parent is provided by Ruth who had a 50:50 shared care arrangement with the father of the children. She took phone calls from her children frequently when they were with their father to deal with any issues that arose for them. She dropped clothes off to his place when he needed them. When the children were staying with their father she met them at school before school started with a hairbrush, checked they were dressed appropriately, oversaw their homework, and checked their lunchboxes (replacing lollies and sugary muffins with healthy food). She did this because her oldest daughter became distressed if she was not able to show up to school in a reasonable state. She bought all the birthday presents for parties that they were invited to, took them to the doctor, optician, hair dresser and dentist, and organised after school activities. She also did all the parent/teacher meetings and maintained the children's friendships when they were with her because their father did not, even though his house was in the same neighbourhood. She talked about having to parent more diligently when she had the children to make up for what she saw as the "neglect" they experienced when they were at their father's. Trish also parented to make up for the neglect her child experienced at his father's. In her case, for example, the child's kindy asked her to leave food for the child so that he could be fed on the days when the father dropped him off, as their son would come to kindy unfed and wearing the same clothes he had been in the day before.

As bottom-line parents the mothers in our study had come to expect that they would fill in the gaps left by the father's parenting and organised their work lives so that they could be there for their children unexpectedly if necessary. For example, Kate had made arrangements to work every weekend and then had to cancel half of her paid employment because the father decided that he did not want to look after the child on Sundays after all. The father in Trish's case would sometimes phone her at 10 past 3 to tell her that he would not be able to have the child after school after all. On one occasion, Trish was on the train going into the city when she received the phone call and had to quickly phone a friend to pick her son up from school. Subsequently, Trish has made an arrangement with neighbours to look after her child should he be dropped off unexpectedly by the father at her house when she is not there.

But it was not just mothers and fathers who had these expectations. For example, Hine described professionals in the family law system expecting her to drop or reorganise her work arrangements to accommodate the visitation arrangements that the father wanted. She was asked to bring her son to supervised contact visits a considerable distance from where they lived and at a time which clashed with the work hours of her new job. She was put under intense pressure by counsel for the child and *her own lawyer* to fit herself around the father's need to see both of his sons at the same time.

Support for these women's accounts is provided by the work of Carol Lacroix who interviewed ten separated and unrelated Australian co-parents (five men and five women) with 50:50 shared day-to-day care.<sup>26</sup> She found that, in spite of the equal division of time that the child/ren spent with each parent and the perception amongst the couples that their sharing of parenting responsibilities was equal and fair, a sexual division of childcare labour still existed, with the women doing significantly more of the work of caring for the children in respect of nine out of the ten couples studied. For example, as well as being "just in case" parents who organised their work lives to be able to drop everything and care for the children if they were sick or the father had to reschedule, the women tended to operate a "running wheel" in their heads that enabled them to manage their child's needs even when the children were with their father, whilst fathers tended to think of what the children needed only when they were in their care:<sup>27</sup>

... these women did not experience themselves as free from responsibility at any time. Their sense of responsibility continued not only when the mothers were at work or the child was at school, but also when the child was with the father. For these mothers, joint responsibility did not mean it was shared serially, in the sense of taking turns. They felt responsible all of the time and they prepared themselves in readiness to act in accordance with the responsibility that they felt.

Women also retained primary responsibility for certain dimensions of the child's wellbeing, such as their emotional care, for example.<sup>28</sup>

The most extreme examples of bottom-line parenting in our study were the women who were left to carry all the responsibility for parenting post-separation. Sara had returned to New Zealand from overseas (where her friends and family were) in order to foster the father's relationship with his child. However, the father largely lost interest in the child once it was clear that Sara was not going to resume a relationship with him. The mother was left in a financially desperate and isolated situation with a sickly child who needed all sorts of special equipment and food. In spite of the father's immense wealth, he gave her very little by way of financial assistance and almost no relief from the relentless care of the child. Sara described ringing him weeping, begging him to take their child for a while so that she could have a break. The father, however, had contact with their child sporadically and only when it suited him. Some of the mothers who were left to shoulder the responsibility for the children after separation in this way had a deep sense of unfairness when the father came back, sometimes years later, to ask for a large amount of contact and was given this by the courts.<sup>29</sup> For

26 Carol Lacroix, "Freedom, Desire and Power: Gender Processes and Presumptions of Shared Care and Responsibility After Parental Separation" (2006) 29 *Women's Studies International Forum* 184.

27 *Ibid.*, at 187.

28 *Ibid.*, at 186.

29 Mothers were also surprised that fathers who had been fairly absent as parents when the relationship was intact were suddenly wanting large amounts of contact or care. For example, Ruth who, as noted above, was the primary caregiver of the children when the relationship was intact remarked: "much to my surprise their father who really was hardly ever there during the years that we were together insisted that he wanted to have them under what is called nowadays the shared custody." He was successful in this request.

example, Kate had a sense of injustice that after the father left her she more or less had to parent alone for five years, whilst he showed up whenever he wanted. When he then decided he wanted 50:50 shared care the judge presiding over the case said he would have been granted it if it had not been for his geographical distance from the mother and child.

As is evident in Sara's account, women took on the primary role of caring for their children whether or not they received child support or adequate child support from the father. This is not atypical as statistics on payment of child support suggest that less than half of non-residential parents, usually fathers, contribute child support to their children.<sup>30</sup>

### *C. The Social Construction of "Mothering" and "Fathering"*

The fact that parenting responsibilities tend to remain unevenly divided in intact families, even when both parents work full-time or mothers are the primary income earners, and the fact that women remain the default or bottom-line parents post-separation, even in those cases when their formal parenting arrangements are equal, indicates the need to look beyond simple practicalities to come to an understanding of the gendered division of parenting labour.

One of the factors that appears to perpetuate and normalise gender inequality in parenting is that what it means to be a "mother" and a "father" have been historically and socially constructed along different lines. Involved physical caring for the children is assumed to be a part of what it means to be a good mother, whilst it is not for a father.<sup>31</sup> These expectations manifest in what has been described as a "culture of gratitude" in relation to men's parenting.<sup>32</sup> Care-giving is what a mother does and is therefore taken for granted, whilst a father's care-giving, even if it is only a portion of hers, demonstrates what a good father he is because he has given more than is expected of him. In

30 For the situation in Australia see, Maggie Walter, "Parental Involvement of Unwed Non-Resident Fathers" (2000) 57 Family Matters 34. Although New Zealand does not have data directly on point, a comparison of child support schemes in Australia, New Zealand and the UK notes the following annualised debt levels per case in each jurisdiction in Australian dollars: Australia \$1,231, New Zealand \$1,370, UK \$3,837: Child Support Schemes: Australia and Comparisons 2006, <[www.cas.gov.au/publications/schemes/06.aspx](http://www.cas.gov.au/publications/schemes/06.aspx)>. These figures are likely to be an underestimate of the failure of non-residential parents to pay child support, as many residential parents do not register their cases with child support agencies.

31 Some support for this proposition is to be found in the work of Terry Arendell, who interviewed 75 fathers in the US in 1992 and found that after separation the overwhelming majority of men saw absence as an option for them, even those who continued close involvement with their children: Terry Arendell, "After Divorce: Investigations into Father Absence" (1992) 6:4 Gender and Society 562. It is also to be found in the work of those scholars who make the point that "intimate fathering is compatible with a restricted investment in caring labour." Esther Dermott argues that "intimate fathering" is not linked in any simple fashion to parenting tasks and a large time commitment to children." In other words, that it is possible to view a father-child bond as close even though a father does not spend much time with a child or put much work into them. See, Dermott, above n 8, at 9.2, 10.1, 11.3. Phyllis Chesler, "Mothers on Trial: The Custodial Vulnerability of Women." (1991) 1:3 Feminism & Psychology 409, at 411, 416.

32 Hochschild and Machung, above n 11. Berit Brandth and Elin Kvannd, "Masculinity and Care: The Reconstruction of Fathering" (1998) The Sociological Review 293. Laura Sanchez and Elizabeth Thomson, "Becoming Mothers and Fathers: Parenthood, Gender and the Division of Labour" (1997) 11:6 Gender and Society 747, at 766.

other words, gender roles are constructed to value the hands-on contribution that fathers make more than that of mothers because his contribution remains optional and, hence, noteworthy. Thus Carol Lacroix,<sup>33</sup> in her study involving ten Australian couples with 50:50 shared parenting arrangements, observed that the men had greater power in negotiating care arrangements because the “mothers’ participation was guaranteed in ways that the fathers’ was not,”<sup>34</sup> yet fathers were constructed as vital to the wellbeing of children in ways that mothers were not. As a consequence the mothers had an investment in the fathers’ participation, which the fathers did not have in the mothers’ participation. Hence the women in Lacroix’s study tended to avoid conflict with, and complaints to, their co-parents about gendered inequities in the division of child care labour: “Silence is the price the women paid for ensuring the father’s participation in the face of his choice, and her desire for his participation.”<sup>35</sup> In this way Lacroix was able to make sense of the fact that in nine of the ten couples in her study women were doing more of the work of parenting, and had to structure their lives accordingly, and yet both parties said that the arrangements were equal.

There are those who have suggested that the reason why fathers are not more involved in doing the work of caring for their children is that mothers act as “gatekeepers”<sup>36</sup> to limit fathers involvement.<sup>37</sup> These suggestions have been made about both intact families and families post-separation (in the form of allegations about “obstructive” custodial parents).<sup>38</sup> Some academics have proposed that this is because mothers have an investment in their

33 Lacroix, above n 26.

34 Ibid, at 191.

35 Ibid, at 194.

36 Yoshie Sano, Leslie N Richards and Anisa M Zvonkovic, “Are Mothers Really ‘Gatekeepers’ of Children? Rural Mothers Perceptions of Non-Resident Fathers’ Involvement in Low Income Families” (2008) 29:12 *Journal of Family Issues*, at 1702, 1918 point out that the concept of maternal gate keeping is biased towards fathers’ perspectives and does not include mothers’ viewpoints.

37 Randall Leite and Patrick McKenry, “Aspect of Father Status and Post-divorce Father Involvement with Children” (2002) 23:5 *Journal of Family Issues* 601, at 618-619, 620; Jay Fagan and Marina Barnett, “The Relationship Between Maternal Gate Keeping, Paternal Competence, Mothers Attitudes About the Father Role and Father Involvement” (2003) 24:8 *Journal of Family Law Issues* 1020; Liz Trinder, “Maternal Gate Closing and Gate Opening in Postdivorce Families” (2008) 29:10 *Journal of Family Issues* 1298. Dermott, above n 7, at 9.2; Sandra Danziger and Norma Radin, “Absent Does Not Equal Uninvolved: Predictors Of Fathering In Teen Mother Families” (1990) 52 *Journal of Marriage and the Family* 636. Another explanation which has been proffered for the failure of fathers to be more involved in the work of caring for their children is employers refusing to accommodate family life.

38 See Trinder, above n 37. Chesler, above n 31, at 413. Robert Emery, Randy Otto and William O’Donohue, “A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System” (2005) 6:1 *American Psychological Society* 1; Carol Bruch “Sound Research or Wishful Thinking in Child Custody Cases: Lessons from Relocation Law” (2006) 40:2 *Family Law Quarterly* 281; Helen Rhoades, “The ‘No Contact Mother’: Reconstructions of Motherhood in the Era of the New Father” (2002) 16 *International Journal of Law, Policy and the Family* 71; Julie Wallbank, “Castigating Mothers: The Judicial Response to ‘Wilful’ Women in Disputes Over Paternal Contact in English Law” (1998) 20:4 *Journal of Social Welfare and Family Law*, at 359-361.

traditional role as primary caregivers and are not willing to share<sup>39</sup> although some studies have found that, in fact, the relationship between mothers' traditional gender ideology and paternal involvement is not strong.<sup>40</sup> Others have proposed that in cases where mothers might attempt to limit father involvement their actions are generally dictated by how competent they view the father as being.<sup>41</sup> In other words, these studies suggest that mothers only attempt to limit father's involvement when they experience genuine concern about the ability of fathers as parents. Yet other studies have found that mothers desire for fathers to be more involved are not at all determinate of father's involvement.<sup>42</sup> In other words, fathers are involved with their children or not for reasons that have little to do with mothers desires or opinions and more to do with the father's desire to be involved and his geographical distance from the mother and child. A final suggestion, made in the context of separated families, is that it is not that mothers stand in the way of father involvement as gatekeepers per se, but that mothers in intact families work to actively promote fathers relationships with their children.<sup>43</sup> When mothers withdraw the labour usually expended in "underwriting" the father child relationship, for example at the point of separation, fathers can view this as mothers undermining their involvement with the children, as opposed to mothers simply withdrawing their mediating labour.<sup>44</sup>

39 See Gatrell, above n 14, at 365-367. But see Joan Aldous, Gail Mulligan and Thoroddur Bjarnason, "Fathering over Time: What Makes the Difference?" (1998) 60:4 *Journal of Marriage and the Family* 809, at 819. Barbara Pocock, "Youthful Aspirations Meet Unbending Cultures? How Young Australians Plan to Organise their Jobs, Care and Housework" (2005) 20:46 *Australian Feminist Studies* 91.

40 Trinder, above n 37, at 1302. However, traditional fathers' gender ideology has been shown to predict paternal involvement (ibid).

41 Fagan and Barnett, above n 37, at 1036, concluded that mothers play a significant role in determining how much time a father spends with the child depending on how competent the mother views the father as being. However, father involvement was not related to mother's attitudes about the importance of fathers, the residential status of the father or whether or not the father paid child support.

42 Trinder, above n 37. More egalitarian fathers have greater involvement in childcare but mothers attitudes make no difference to the level of childcare fathers provide: Ronald Bulanda, "Paternal Involvement with Children: The Influence of Gender Ideologies" (2004) 66 *Journal of Marriage and Family* 40. The amount of contact fathers had with children was dictated primarily by the father's interest in contact and geographical distance from the child: Dr Elspeth McInnes, "The Attitudes of Separated Resident Mothers in Australia to Children Spending Time with Fathers" (2007) 21 *Australian Journal of Family Law* 20.

43 Fagan and Barnett, above n 37.

44 Arendell, above n 31, at 579-580. "That the former wife had refused to continue serving as family mediator as she had during marriage was interpreted by these fathers as evidence of her misuse of power, intended deliberately to undermine or push him outside the bounds of post-divorce family relationships." Trinder, above n 37 both supports and contests this argument. On the basis of qualitative interviews with 76 parents (44 of whom form mother-father dyads), Trinder argues that some mothers do engage in active gate closing, usually on the basis of child welfare grounds (at 1311), whilst others simply withdraw their supporting labour (at 1310).



The women we interviewed were generally supportive of father child contact, some very strongly so.<sup>45</sup> A number of women had, in fact, gone out of their way to maintain or initiate a relationship between the father and the child at a time when they could have walked away from his involvement. For example, Elaine had a protection order against the father of her child lifted so that he could stay in the country and have a relationship with their child. Petra had supported a continuing relationship between her child and the father post-separation, even though the father was not the child's biological parent or legal guardian and the child was young enough to prefer being with her. Anne went to enormous lengths to initiate a relationship between the father and the child, in spite of his threats to her wellbeing when told of the pregnancy and his subsequent disinterest in the baby. The father refused all contact with the child until the mother did a DNA test that established paternity and by the time this was done the child was one.

In fact, most of the mothers in this study talked about the amount of work they had done to maintain the child's relationship with the father post-separation, including "badgering" the father to have contact, preparing the child psychologically for it (telling them how much fun it was going to be or making it seem like an adventure), giving the child objects that they could hang on to for emotional strength when away from the mother, teaching the child coping skills, cajoling the child to physically leave the house, enter the car or leave the car, fielding phone calls from the child whilst on access to process the experience for them and encourage them to stay, supplying clothes, sports equipment, toys and entertainment, chasing up clothes, toys and entertainment that were not returned, replacing clothes that did not come back or came back damaged, supplying clean nappies and receiving back soiled ones to wash, briefing the father on the child's sports or other planned activities, supplying birthday presents and responding to invitations, as well as giving the father the addresses of events so that the child could be taken to them when they coincided with contact times, managing the child's safety whilst on contact by monitoring the father's behaviour and his home environment for safety issues, supplying the child with safety equipment, ferrying the child to and from contact if the father didn't have transport, leaving work to pick up the child from kindy and drop them off

45 As were the women who participated in Sano, Richards and Zvonkovic, above n 36, at 1701-1723. Carolyn Tubbs and Oliver Williams, "Shared Parenting After Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship" 19 in Jeffrey Edleson and Oliver Williams (eds), *Parenting by Men Who Batter: New Directions for Assessment and Intervention* (Oxford University Press, NY, 2007) at 26-27, 39-41, found that battered mothers assumed the need for fathers to access their children, as well as assuming the need for safety – primarily for their children but also for themselves. "Respondents did not struggle with the question of 'if' contact should take place but, rather 'how' and 'when'." The authors point out that mothers' beliefs that children's "developmental and mental-health needs dictated some form of contact with their fathers" were predicated on "popularised or outdated notions of child-development theory, or cultural mores" because, in fact, research suggests that "children benefit less, rather than more, from contact with abusive or neglectful parents." Betsey Groves, Patricia Van Hern and Alicia Lieberman, "Deciding on Fathers Involvement in Their Children's Treatment After Domestic Violence" 65 in Jeffrey Edleson and Oliver Williams (eds), *Parenting by Men Who Batter: New Directions for Assessment and Intervention* (Oxford University Press, NY, 2007) at 68.

at the father's mother's place because he did not have transport, providing special food which the father was not prepared to pay for but which the child needed because of allergies, dealing with the child's disappointment if the father was late or did not show up, having to come up with valid reasons why the father may not have called the child on their birthday to make it okay for the child, telling the child that it is okay to love the father's new partner, and persuading the child to phone and maintain contact with the father. In spite of the lengths to which many of these mothers went to maintain the child's relationship with their fathers, some still described being blamed by the father for the child's reluctance to go on contact visits, their lateness in showing up (because of the time it took to cajole the child to go on the visit) or the child's discomfort or distress during those visits.

The lengths some women went to are illustrated by Debra who, in addition to many of the behaviours described above, chose not to file for a protection order after separating from the father of her child because she did not want this to impact on his relationship with the child. She also tolerated a house swapping arrangement for many months after the separation (the father would move back into the family home and she would move into his apartment on weekends during which he had contact) so that the father had suitable premises to have the child in, even though this meant that she had to deal with the used condoms and soiled sheets associated with her ex-partner's new relationship, and his destruction of photos of her whilst in her house.

The fact that the women were in a position, and needed, to underwrite the father's relationship with the children in the fashion that many of them described is a further indication that in most instances the mothers were the "bottom-line" parents for their children. Many of the children needed encouragement and support to leave their mothers to go on contact, the father needed support to maintain the child's schedule during contact, and in cases did not have a home that was properly set up for the children.

A few of the women that we interviewed said that they had, however, tried to limit or manage the father's contact with their children at some point. All of these women were the child's primary caregiver and had sought to alter contact for child-centred reasons, primarily because of their concerns about the impact of the father's parenting on their child.<sup>46</sup> In many of these cases there was a history of violence. Most of these women had started out being supportive of contact but had changed their position after seeing the effect it was having on their child. Some of these women had managed to secure limited or supervised contact, although none had sought an end to contact altogether. Other women had not been successful in containing contact and were struggling with contact arrangements that they saw as unhelpful or damaging for their children.

For example, Moira had initially bent over backwards to cultivate a relationship with the child's father, "for the sake of our child." Initially she allowed the father, who had been violent towards her during the pregnancy, to come into her house and look after the child there. However, she became concerned about the wellbeing of their son when he was in his father's care:

46 See also Sano, Richards and Zvonkovic, above n 36, at 1717.

for example, when she left the father with the child she would come back and find that the child was sleeping in the bouncer with no blanket on him, was cold and had not had his bottle. The father would spend his time with the child watching television or standing outside smoking. At one point, she tried to go into her bedroom whilst he was there with the child and read a book but would hear the child crying. When she went in to tell him to attend to the child he would say, “yes but if I pick him up he just cries louder in my ear.” Eventually Moira realised that he was drinking whilst he had the child. This discovery, in conjunction with the father’s neglect and history of violence, prompted Moira to seek a supervised contact arrangement. Because the father was open with the lawyer for the child about his violence, supervised contact arrangements were put in place; however, he rarely exercised contact. The most recent supervised contact arrangements were through Barnardos, but the father showed up once, then cancelled and then did not show even though she had gone to Barnardos with their son to meet him. Moira then heard that the father had left the city without telling her, and recently has been informed by his lawyer that he will be leaving the country for some time. She remarked that it does terrible things to a child’s esteem and self confidence if they are set up to be available to a parent who generally does not show up for them. She has finally arrived at the position that the father has no real commitment to the child. As she does not want the child to be hurt by that she no longer goes out of her way to facilitate contact.

When Trish’s son returned terrified from having witnessed “physical fighting” between his father and his father’s new wife on several occasions, Trish also “put her foot down” and told the father that he was not having their son overnight until he had sorted the situation out. Trish took this action on her child’s behalf in spite of being “petrified” that the father would take her back to court to enforce their court order. The child remains stressed about going on contact with his father and does not want to go at all, but she insists he must go because she is afraid that if she pushes the father too much they will end up back in court and he will get more contact. In addition to the physical fighting, the father is an extremely neglectful parent. He often did not show up for contact, did not interact with the child when he had him so that the child spent all day playing by himself. He also failed to feed him properly (when he dropped the child off he sometimes asked the mother for food for the child’s half sister as he had nothing in the house), failed to change the child’s clothes, or to clean him properly and used to send him back unwiped with faeces up his back or, once, unchanged with urine on his clothes. The child has had his duvet taken off him on cold nights for his father and his new wife so that he had to get up and dress himself to try and keep warm, had been lost by the father at a park and in a shopping centre and has been locked in a car with his small sister while his dad goes shopping at the mall.

In other instances the women we interviewed were only resistant to contact that they viewed as “premature” for the child. These women had a vision of the contact with the father increasing as the child developed and became capable of more and more separation from their mother, or as the father developed a relationship with the child that made it comfortable or natural

for the child to go with them. For example, Louise did not always like the parenting practiced by the father of her child but she was philosophical about the quality of care her child receives whilst in her father's company. The issue for her was matching the amount of contact the father had with their child and the child's developmental capacities. Louise described being under tremendous pressure to always allow more contact than she felt comfortable with:

I breastfed her through to six months and there was pressure on me to [let him] have her weekends and she was being breastfed, no you can't do that until she's older. There was always pressure on me to just do a lot more than I felt comfortable with. There were things that I may have been happier with when she was two or three that he was asking me when she was a year or 18 months. I tried to explain to him that three months or six months makes a big difference with a baby. He found that really hard to accept.

Although the fathers of the children of Louise, Moira and Trish may have experienced the women concerned as "obstructive," the women's accounts are in keeping with research that has suggested that when women do try to limit or manage the contact between children and their fathers they tend to do so because they are genuinely concerned about the welfare of their children. Child safety and health are key issues for women according to this research.<sup>47</sup> For example, Helen Rhoades<sup>48</sup> studied 100 Australian Family Court files in which an enforcement application was listed for hearing in 1999. She found that the "hostile mother" was absent – only two files fit the "no contact mother" stereotype and in neither case did the court find that the mother had deliberately fabricated the allegations. In other words, both women were genuinely, albeit mistakenly in these cases, attempting to protect their children. The most common conflict in these cases was around the contact parent's parenting ability and in the overwhelming majority of cases the mother was vindicated in her concerns.

As well as struggling with actual or possible contact arrangements that are unhelpful or damaging for their children, a significant issue for women in many instances were the problems presented by fathers not showing up for contact they were scheduled to have. In fact, Australian research suggests that fathers are twice as likely not to show up for contact as mothers are to deny contact.<sup>49</sup> Consistent with this research, half of the women in our study talked about the father not showing up for contact he was entitled to have. Kate went into family court mediation because the father was consistently renegeing on contact and she wanted to make him show up. To her disappointment no one was prepared to tell him that he had to turn up. Trish said the father missed 18 of his first 36 scheduled visits. He was also continuously late. At the time of interview he was meant to pick the child up at 9 am but often did not until 11 or 11.30 am. Slowly over the years the

47 McInnes, above n 42 found that one in four mothers had denied contact but for child centred reasons. Child safety and health were the main reasons mothers gave for stopping contact on those occasions when they did deny contact. See also Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Research report no. 15* 2007, at 23. Sano, Richards and Zvonkovic, above n 36, at 1717.

48 Rhoades, above n 38, at 71, 72.

49 See Moloney, Smyth, Weston, Richardson, Qu and Gray, above n 47, at 23; McInnes, above n 42.

father had exercised less and less contact, although he has kept going to court to ask for more contact and has been given it. It would seem that for some of these fathers the main issue in negotiating their formal care arrangements was the reduction of child support payments and once this was achieved they were casual about the actual amount of contact that they ended up exercising.

In conclusion, the interviews we conducted provide some support for the suggestion that mothers tend to be bottom-line or default parents both before and after separation, whether or not that is reflected in their formal care arrangements post-separation, and that this may be at least partially an expression of gendered expectations and understandings of what it means to be a mother. We found that mothers are involved in a ‘bidirectional negotiation’<sup>50</sup> with fathers about their involvement in children’s lives: that is, both supporting the father child relationship and attempting (successfully or unsuccessfully) to limit or manage it depending on how they see that relationship impacting on the wellbeing of their children. In all of the instances that we documented, however, the mother’s attempts at “gate keeping” were an expression of concerned mothering, and a reflection of their role as bottom-line or default parents in relation to their children, rather than an expression of “ownership,” as it is sometimes pejoratively framed, of the children or “vindictiveness” towards the father.<sup>51</sup>

#### IV. GENDER NEUTRAL PARENTING ARRANGEMENTS IN THE CONTEXT OF GENDERED PARENTING PRACTISES.

The *Care of Children Act 2004* appears to contemplate that under normal circumstances a child should have the involvement of both their parents after separation, but it does not dictate, or even suggest, what those levels of involvement should be.<sup>52</sup> Nonetheless we have documented elsewhere the claims by a number of the women we interviewed that some New Zealand family law professionals appear to view lots of father contact to be indispensable to children’s wellbeing,<sup>53</sup> with some even viewing 50:50 shared parenting as an appropriate post-separation “norm.”<sup>54</sup> In families in which fathers were equally involved parents prior to separation such an approach would be unremarkable. However, women talked about family law professionals displaying these attitudes in circumstances where fathers were not active parents prior to separation and regardless of the history, circumstances or quality of the contact with the children post-separation.<sup>55</sup>

50 Sano, Richards and Zvonkovic, above n 36, at 1721. Trinder, above n 37, at 1320.

51 See Vivienne Elizabeth, Nicola Gavey and Julia Tolmie, “Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas They Face During Custody Disputes” forthcoming in *Feminist Legal Studies*.

52 *are of Children Act 2004* s 5, 15, 17, 52.

53 Tolmie, Elizabeth and Gavey, “Raising Questions about the Importance of Father Contact Within Current Family Law Practices,” above n 1.

54 Tolmie, Elizabeth and Gavey, “Is 50:50 Shared Care a Desirable “Norm” Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand”, above n 1.

55 Tolmie, Elizabeth and Gavey, “Raising Questions about the Importance of Father Contact Within Current Family Law Practices”, above n 1.

Such views reflect an approach to the resolution of parenting issues at the point of family separation that is formally “gender neutral” – it is assumed that both parents are equally capable of contributing to the parenting role, whilst the fact that the contributions of each parent might have been in actuality substantially different prior to separation is ignored. Commentators have observed this approach being taken in the family law of a number of other jurisdictions.<sup>56</sup> For example, Colin James talks about the Australian legislation emphasising the “‘equal’ responsibility of both biological parents, regardless of who was more suited, had the skills or had performed the bulk of parenting duties prior to separation.”<sup>57</sup> Such an approach can be contrasted with the “approximation rule”, which suggests that the appropriate approach when parenting arrangements are in dispute post-separation is to put in place arrangements that most closely approximate the division of parenting responsibilities that existed prior to separation.<sup>58</sup> This approach has the advantage of reflecting egalitarian parenting practices to the extent that they already operate in any particular family.

We have described above one of the consequences of treating the parenting contributions of men and women as equal in the context of family separation when they were not equal pre-separation: a disparity between the formal parenting arrangements for the care of children that often get put in place at the point of separation and the actual continued realities of who is doing more of the parenting post-separation. Women who have been the primary caregivers prior to separation will often continue to carry a disproportionate share of the actual responsibility for parenting afterwards, regardless of the formal arrangements that they have negotiated with the father. This disparity can result in women bearing a disproportionate share of the cost of children’s health care and their educational and leisure activities, as well as the difficulty mothers may have in financially surviving when they need to be available on a full time or default basis to care of their children but do not receive adequate levels of financial support because their Domestic Purposes Benefit and child support payments reflect the formal rather than the actual care arrangements that they have in place<sup>59</sup>

- 56 Sally Sheldon, “Unmarried Fathers and Parental Responsibility: A Case for Reform?”(2001) 9 *Feminist Legal Studies* 93, commenting in the context of reforms in England to give unmarried fathers automatic parental responsibility if they register the birth with the mother, says: “Men’s successful inversion of feminist arguments for gender equality is particularly worrying where intended to achieve an equalisation of formal status which will conceal substantive inequality, here masking the very different contributions that mothers and fathers make to childcare.”
- 57 James, at n 6, at 238. Rhoades, above n 38, at 73. In the Canadian context Susan Boyd, “Child Custody, Ideologies and Female Employment” (1988) 3 *Canadian Journal of Women and the Law* 1, has found that, “an assumption of equal parenting between mother and father has obscured the facts of female parenting.” Susan Boyd, *Child Custody, Law and Women’s Work* (Oxford University Press, New York, 2003).
- 58 See Emery, Otto and O’Donohue, above n 38. Reprinted in R Roesch and K McLachlan, (eds) *Clinical Forensic Psychology And Law* (Ashgate, Hampshire, UK, 2007).
- 59 Tolmie, Elizabeth and Gavey, “Is 50:50 Shared Care a Desirable “Norm” Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand”, above n 1.



In the remainder of this article we want to mention some of the additional consequences for women and children of taking a gender-neutral “egalitarian” approach to parenting arrangements at the point of separation, when the gendered realities of parenting are not egalitarian in practice prior to that point in time. These include, the danger that children’s parenting arrangements will be altered during a period of instability and will not reflect the realities of who is best able to care for them, the devaluing of women’s labour based knowledge and expertise in respect of children, a tendency to construct women who resist egalitarian arrangements with fathers as “obstructive”, the devaluing of “mothering”, the creation of an inequality of power in the negotiating processes between men and women at the point of separation (with the consequence that women may struggle to protect themselves and their children should they need to), and the creation of a “perverse affirmative action program” between men and women.

#### *A. Less than ideal parenting arrangements for children*

The consequence for children of treating parenting as an egalitarian project at the point of separation, even when the division of childcare has not been egalitarian until that point in time, is that the parenting structures in their lives may be substantially altered during a time of great instability, and thus at a point in time where continuity of care may be preferable. Children may also end up spending significant periods of time after separation with a parent who has shown no aptitude or inclination for parenting up until that point in time. If there are serious deficiencies in that persons parenting then it will be up to the other parent (usually the mother) to try to protect the child, either through attempts to limit the child’s time with that parent or attempts to ensure that their contact is supervised. If, as some of our participants experienced,<sup>60</sup> women’s concerns about a father’s parenting skills are misconstrued or disregarded by family law dispute resolution professionals during the negotiation of childcare arrangements then their capacity to protect their children may be severely curtailed.<sup>61</sup>

#### *B. The devaluing of labour based “expertise” and knowledge about children*

Carol Smart draws “a distinction between the labour of ‘caring for’ children’s everyday needs and the more abstract concern embodied in the notion of ‘caring about.’”<sup>62</sup> As noted above, Annette Lareau<sup>63</sup> found that the fathers she interviewed did not generally have a detailed knowledge of their children’s day-to-day lives because they did not do the intimate work of “caring for” their children that would have enabled them to acquire such

60 Tolmie, Elizabeth and Gavey, above n 1.

61 We have discussed elsewhere some women’s struggles with generous contact arrangements that they experienced as being unhelpful and/or damaging for their children and which had been put into place by courts that did not listen to what the mother had to say about the father’s quality of parenting, or the child’s distress about going on contact, and did not monitor the arrangements to see whether they worked, in fact, for the children: Tolmie, Elizabeth and Gavey, above n 1.

62 Carol Smart, “The Legal and Moral Ordering of Child Custody” (1991) 18 *Journal of Law and Society* 485.

63 Lareau, above n 10, at 408.

knowledge, although they may have “cared about” their children very much. Mothers, by way of contrast, did the “invisible labour” which meant that they had acquired this close knowledge of their children.<sup>64</sup>

Under a gender blind approach to the allocation of parenting responsibilities at separation, the caring that women have actually done over the years, and the expertise about the children that they have acquired in consequence of doing that caring work, as well as the bond they have created with the children, is treated as being equal to the biological father’s assumed *capacity* to care.<sup>65</sup> For example, Briar described the unique relationship she had with her daughter not being acknowledged by the family court counsellor whom she and the father of her child were working with. The counsellor suggested that the same relationship would develop between the father and the child post-separation when he was given the chance to develop it, and accused Briar of thinking that she “owned” the child. In fact the child’s father had had ample opportunity to develop such a relationship prior to the point of separation but had not done so, with the consequence, as noted above, that the child was distressed by extended separations from her mother but, whilst loving her father, was content to see him come and go.

*C. Mothers are heard as “obstructive,” rather than “protective” or “experts”.*

If women who have been primary caregivers are not understood as being uniquely qualified to assess what their particular children might need because of their labour based knowledge of those children, then women who are attempting to manage their child’s welfare post-separation are vulnerable to being unfairly interpreted as “obstructive” on the basis that they are interfering with the father’s “rights” to equal parenting.

Certainly there were numerous instances described by the women we interviewed where fathers (and their families) blamed the mother for being “obstructive,” rather than accepting her concerns and actions as being motivated by what she saw as the best interests of the child (and/or her own wellbeing when the child depended on her and she was struggling to manage stressful circumstances). For example, as noted above, the father of

64 This is not an argument for the biological superiority of mothers to care for children at the point of separation. It is an argument that will apply to any parent who has been the primary caregiver in respect of a child up until the point of separation, although at this point in time those people are likely to overwhelmingly be mothers. It is worth noting, however, that women and children’s interests are inextricably linked through the process of pregnancy and early breast-feeding. A woman’s bodily boundaries encompass the baby during pregnancy and afterwards the process of separation can be gradual, particularly if she breast feeds and seamlessly becomes the child’s primary caregiver. So when women experienced being unsupported by the father of their child whilst pregnant, when they were recovering from birth, and whilst the baby was a newborn, when they are physically and emotionally dependant upon external support in order to be able to care for their child, the reality is that that lack of support is experienced as a lack of support for the baby. For some women it can be hard to move beyond this experience and trust that the father is subsequently able to be there for the baby.

65 Martha Fineman, “Fatherhood, Feminism and Family Law” 32 *McGeorge Law Review* 1031, at 1040; C Smart and B Neal talk about the English family law system containing “an idealised vision of the symmetrical family where power and roles are equal.”; C Smart and B Neal, “Arguments Against Virtue: Must Contact be Enforced?” (1997) *Family Law* 332, at 336.

the child in Moira's case accused her of being "obstructive" and "controlling" because of her insistence that he address his violence and drinking before she would agree to unsupervised contact with their infant. Marama wept when describing her pain and anxiety about her baby going off to spend half of his time with a father whom she knew suffered from severe depression and used mind-altering substances. When she tried to discuss this with the father he refused to reassure her and instead positioned her as trying to control him. Similarly, when she tried to get support from his mother, she felt that raising these concerns was interpreted as her trying to take away the father's contact with his child.

But it was not just fathers and their families who took this stance. Mothers who attempted to raise concerns about the fathers parenting in counselling, mediation, court or with the child's lawyer sometimes said that they found themselves being viewed by the family law professionals that they were working with as obstructive, bitter or over-anxious.<sup>66</sup> Instead of having their concerns heard, they described being put under pressure to increase the father's involvement against their better judgement. For example, Isabella remarked that she was constantly having to counter the stereotype that every woman interferes with contact for no better reason than to get at their ex-husband. That stereotype put her and her son at risk because it meant that her concerns about the father's parenting were not heard and no consideration was given to possibility that she and her child were not safe. In Australia scholars<sup>67</sup> have also noted that there are stock stories of hostile and possessive mothers and frustrated men that inform public debate about family law issues and the response of family law professionals to the resolution of child care disputes.<sup>68</sup> For example, Rae Kaspiew<sup>69</sup> has found that the current "pro-father contact culture in the Family Court" in Australia has made it difficult for mothers to problematise paternal involvement "even in cases of violence, except where the violence was very clear cut."<sup>70</sup>

66 Tolmie, Elizabeth and Gavey, "Raising Questions about the Importance of Father Contact Within Current Family Law Practices", above n 1.

67 See Rhoades, above n 38, at 71, 72. Juliet Behrens "Shared Parenting: Possibilities... and Realities" (1996) 21:5 *Alternative Law Journal* 213, at 215.

68 An example of such a stereotype based on anecdote and impression being recounted in a professional publication as though it is a common fact is provided by: Claire Sturge, "Commentary" (2006) 11:1 *Child and Adolescent Mental Health* at 46. In New Zealand see also Judge Jan Doogue and Suzanne Blackwell, "How Do We Best Serve Children in Proceedings in the Family Court?" (2000) 3 *BFLJ* 193.

69 Rae Kaspiew, "Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation" [2007] *Syd L Rev* 4.

70 Kaspiew found that the stereotype of the "alienating mother," which was a minor presence in her sample of 40 Australian Family court cases involving children's matters, nonetheless dominated "reported decisions on children's wishes and parental attitudes." The stereotype appeared to have skewed both the strategies available to mothers and fathers in their legal disputes, as well as the lens through which the courts determined what was going on. For example, Kaspiew found that where there was a history of violence one of the tactics commonly used by violent men was to attempt to damage the relationship that the children had with their mother. When the father's violence caused the children to become ambivalent towards father contact these fathers commonly claimed that the mother had "alienated" the children from him. This strategy shifted the focus from the practices of the father to the attitudes and behaviour of the mother. The courts in such cases, however, did not analyse the father's behaviour in terms of "alienation" or link it to the history of violence. Instead:

One of the possibilities raised in some of the women's interviews was that children, especially when they were very young, were able to share information and views with their mothers, because of the intimate nature of that relationship, that they were not able to share with their fathers or family law professionals. Sometimes the views children privately expressed to their mothers were at odds with the views they were expressing elsewhere. When women tried to share their children's views in family law proceedings they were often treated with a great deal of distrust or suspicion.<sup>71</sup> It was assumed that if the child was not expressing opinions favourable to father contact then the mother was prompting the child's opinions. For example, Isabella said that if she tried to relay the child's distress at having contact, instead of the father's parenting being scrutinised, she was accused of "pumping" the child. In fact, the child had very good reasons for not wanting to go with his father who was reportedly an abusive and neglectful parent.

*D. "Mothering" is overly scrutinised when compared to the practise of "fathering"*

If "fathering" is constructed as being equally essential to children's wellbeing, even though "mothering" as a gendered practice involves doing more of the work of parenting, then this could result in women being expected to meet higher standards of parenting, whilst fathers' lesser contributions to children are comparatively over-valued. Certainly some of the mothers we interviewed commented that they thought their mothering was devalued, or placed under a degree of scrutiny that the father's parenting was not.<sup>72</sup> Isabella described the unevenness in the way that Family Court professionals regarded her and the father. For instance, if the father did not show up for contact, even though it was clear that he was meant to, she would be told that he had made a mistake. But if she accidentally made a mistake about contact arrangements she felt it was treated as a gross breach of contract, as though she was wilfully preventing contact. Furthermore, when she separated from the child's father she was breast-feeding and asked if contact could work around this, in much the same way as contact arrangements work around a father's paid work commitments. Nevertheless, Isabella was treated in every mediation session as if she was "using" breast-feeding to stop contact completely.<sup>73</sup>

"the mothers attitudes to the fathers ... received scrutiny to establish whether they had been sufficiently supportive of the father-child relationship, notwithstanding the fact they had been subjected to violence and/or control, denigration and vilification in the litigation."

- 71 Children also shared information with mothers that mothers did not feel at liberty to publicly disclose for fear that there would be repercussions for the child in their relationship with their father.
- 72 Chesler, above n 31, at 409, argues that: "Fathers often win custody even when they are parentally uninvolved or abusive; mothers lose it for any departure from an idealised stereotypes." In other words, mothers are expected to meet more stringent standards of parenting. Sandra Burns, "Parents Behaving Badly: Parental Alienation Syndrome in the Family Court – Magic Bullet or Poisoned Chalice" (2001) 15 Australian Journal of Family Law 191.
- 73 The judge presiding over her mediation said that he disagreed that breast-feeding was relevant in delaying overnight contact with a father because mothers can express breast milk for fathers to feed babies. On this subject see Linda Sweet and Charmaine Power, "Family

The worst example of mothering being placed under a degree of scrutiny that fathering is not is provided by the account of Jade, whose concerns about the father's violence and abuse towards the children were not only over-ridden, but who found that her efforts to safeguard the children resulted in her own parenting being called into question.<sup>74</sup> Jade said that she was accused of neglecting her children because the house was unkempt, she was not able to organise childcare when the family court psychologist visited and so used videos to occupy the children during the visit, and she let her youngest child play with a Wet Wipe. Her contact with her children was then restricted to weekly supervised access visits. Yet, she described how, prior to the separation, the father had thrown their oldest son so hard that he had gone flying across the room "like a rag doll". She noted that he continued to hit the son after the separation, to the point that the boy would come back from contact visits with his father with bruises all over his legs and arms, which the boy said were caused by his father when he hit him. Jade also had serious concerns about the possibility of sexual abuse. The child had been sexually aggressive with other children in age incongruent ways, such as putting his hand down another five year old's pants and masturbating himself. When questioned, the boy said that he thought it was okay because his Daddy did it to him. CYFS interviewed the child and had a video record of him talking about his father's sexually inappropriate behaviour towards him. Despite this the Police decided that there was insufficient evidence to go ahead with a prosecution against the father and so the children were released into his day-to-day care.

*E. Creating discrepancy in the balance of power in post-separation negotiations*

To treat parenting as an equal project at the point of separation in circumstances in which women are obliged to, and do, perform a major share of the responsibility for parenting prior to separation, and are assumed to be the back up labour post-separation when men do not wish to exercise their rights to parent, is to introduce a discrepancy in the balance of power between mothers and fathers post-separation. For example, mothers are able to be held accountable by fathers – should fathers choose to hold them so or not – and yet fathers cannot be held to account by mothers. This is because whilst one can force residential parents to make the children available for contact, it is clearly deleterious to children to force an absent or reluctant parent to spend time with or be in relationship with them.<sup>75</sup> In the words of Helen Rhoades:<sup>76</sup>

Law as a Determinant of Child Health and Welfare: Shared Parenting, Breastfeeding and the Best Interests of the Child" (2009) 18 Health Sociology Review 108.

74 Jade's experience resonates with some of the cases of 'protective mothers' documented by Amy Neustein and Michael Lesher, *From Madness to Mutiny: Why Mothers are Running from the Family Courts and What Can be Done About it* (Northeastern University Press, USA, 2005).

75 Rhoades, above n 38, at 77-78.

76 Rhoades, above n 38, at 71, 78. See also Ruth Charlton, "Shared Parenting Laws See Subtle Changes in Mediation Dynamics" (2007) Law Society Journal 30, at 31, for a clear sense of the choice that non-resident fathers have about their involvement with their children.

... it seems that non-resident parents can and do breach the terms of contact orders with impunity, and are permitted a capacity of ambivalence in relation to their parenting that is not equally available to the primary caregiver.

Moira made this point when she commented that the current system is weighted in favour of fathers. The father of her child saw the child at his sister's house four times over the eight months they had supervised contact arrangements in place. He never saw the arrangement as a commitment. However, on the rare occasion when she said she was not coming he would accuse her of breaching the court order and his lawyer would ring her lawyer:

... he's not seen his son for the last four weeks because it didn't suit him but now it does suit him I'm basically being threatened and forced with this court order to show up and present son for the visit and if I don't I get hauled up in front of the court because my lawyer was like unfortunately the court see you not showing up as far more serious and far more of the breach of the order than the fact that he's not exercising his right and he's not turning up because I'm the one with the child and the day-to-day care and the care order, it's seen as far more bad that I've not provided the child.

Juliet Behrens,<sup>77</sup> commenting in the Australian context on reforms which placed increased significance on the child's right to be parented by both parents after separation, speaks of the power this gives to fathers in negotiations with mothers post-separation:<sup>78</sup>

The amendments will put more power into the hands of those fathers who do not assume real responsibility, but who take advantage of the notion of joint parental responsibility post-separation to exercise continuing control over the mother and children. Yet fathers cannot be required to cooperate and provide the child with the "right to contact" that the legislation so lauds. Thus, assuming that women will continue to be the primary caregiver of children after separation, the language of cooperation has gendered impacts. Mothers can be required to cooperate with fathers, but the obligation is not reciprocal.

77 Behrens, above n 67, at 215. The differential freedom and power of mothers and fathers also finds expression in the context of relocation. Carol Bruch comments on this in the US when she says: "For non-custodial parents the choice is theirs. So long as they are prepared to adjust when or where they will see the children, relocation is always possible. Their reasons are irrelevant. So are the custodial parents possible objections. It does not matter if the custodial parent fears that the children will suffer, that parent-child relationships will change, that revised visitation arrangements will be more inconvenient or costly, or that more child care will be necessary. No court will punish that moving parent. The child's needs will be legally relevant only if there is litigation concerning visitation or support in light of the new circumstances. For moves by custodial parents it is another story. Although relocation law differs from state to state in almost every area that is legally irrelevant when a noncustodial parent moves is now open to close examination.": above n 38, at 283-284. Joseph Goldstein, "In Whose Best Interest?" in Jay Folberg (ed) *Joint Custody and Shared Parenting* (2<sup>nd</sup> edn, The Guildford Press, New York) 16, at 24 also describes this imbalance of power when discussing his proposal to give control about whether or not the child sees the contact parent to the parent who is entrusted with the day-to-day care of that child.

78 The strong presumption in favour of father contact, and the possibility of an ad hoc presumption of shared parenting, combined with stereotypes about obstructive mothers which prevent women from effectively raising their concerns or limiting the fathers involvement, also, as noted by Juliet Behrens, give men who are abusive numerous opportunities to continue to control and harass their ex-partner by maximising the involvement they can continue to have in their ex-partners lives. Katherine Bartlett and Carol Stack, "Joint Custody, Feminism, and the Dependency Dilemma" in Jay Folberg, *Joint Custody and Shared Parenting* (2<sup>nd</sup> edn, The Guildford Press, New York) 63 at 70-71.



The high priority placed on father contact regardless of the quality of that contact (except where it is especially egregious), and the suggestion that there may be an ad hoc presumption of shared contact amongst some professionals, places tremendous pressure on women who do not believe the father is a skilled parent, or who have experienced him as abusive, to compromise in negotiations in ways that they do not believe are best for their child, and which are potentially undermining or dangerous for themselves, in order to bargain down contact hours. Women therefore find themselves making concessions that they can ill afford – like entitlements to child support – to preserve their children’s wellbeing.<sup>79</sup> Several of the women that we interviewed had relinquished child support entitlements in order to retain day-to-day care of their children.

#### *F. A “perverse” affirmative action scheme*

Promoting formal equality in a situation of substantive and gendered inequality of labour produces a:<sup>80</sup>

... perverse affirmative action scheme in which men are excused from nurturing and caretaking norms and are permitted to devote their major energy and attention to their careers and extra-familial activities, without risking adverse consequences when they decide they want to assert claims to control their children post divorce.

To say that men and women in relationships involving a traditional gendered division of labour have made an equal contribution to their children because men may have financially supported the family until the point of separation is to deny the penalties in the market place paid by the primary caregiver, who will have forgone career and pension opportunities if she has been a full or part time mother.<sup>81</sup> In the case of working women it is to deny the double load that they may have carried and the inherent career limitations involved in simultaneously shouldering the majority of the childcare responsibilities.<sup>82</sup> What this means is that men have no repercussions for not doing the work of parenting until the point of separation but women have career repercussions for the parenting they have done until that point

79 Elspeth McInnes and Kathleen Swinbourne, “Shared Parenting Presumption is a Risk” (2003) *Impact* 4, at 5; Behrens, above n 67, at 215.

80 Fineman, above n 65, at 1040.

81 “My point is that provision of economic benefits to the family does not have the same implications and consequences in the postdivorce world, as does the provision of caretaking. A caretaker may compromise or forgo altogether skill development that will add to their resumes, culminate in enhanced marketable skills and improved economic position. Economic contribution to children’s welfare, by contrast, results from market activity that improves one’s skills and stature in the market; this self investment is not the equivalent of the investment by others involved in caretaking. The tradeoffs are not the same.” Fineman, above n 65, at 1041.

82 Craig, above n 9. See “A Career Woman’s Work is Never Done: Females with Jobs Still Do the Bulk of Household Chores” *The New Zealand Herald* (New Zealand, Dec 10 2007) at A10.

in time.<sup>83</sup> It is worth noting that there were a number of instances in our study where fathers had reportedly not contributed either financial support or nurturing in respect of their children.

Some have gone so far as to argue that what we are currently witnessing is a reinstatement of the old patriarchal model of the family under the guise of equality.<sup>84</sup> In particular, “the re-establishment of paternal rights in the absence of changed paternal behaviour.”<sup>85</sup> What this means is that fathers are able to be absent and not do the work of caring, whilst getting to express their views and assert their control over children at the point of separation.<sup>86</sup> In the meantime women – mothers and new partners – are obligated to continue to do the facilitating labour that is required to underwrite fathers’ “equal” parenting.<sup>87</sup>

## V. CONCLUSION

Whilst egalitarian parenting practices may be an admirable social goal, it is not one that the New Zealand government has explicitly pursued through social policy initiatives, nor is it one that is endorsed by many New Zealand mothers and fathers. Hence, we suggest that if social change towards this goal is to occur it needs to have received widespread public support, which is accompanied by changes in parenting practices prior to separation, rather than being imposed at the point of separation. Reforms need to occur in cultural norms and practises rather than simply in the enactment and application of laws. Without such deeper changes the move towards formal arrangements involving equal or substantially equal parenting post-separation may simply mean that women informally continue to assume a major share of the physical, emotional and financial parenting responsibilities without any formal recognition of that fact and without the legal authority or financial support to do their job properly.<sup>88</sup>

Although the Care of Children Act 2004 is not prescriptive about the post-separation relationship that children should have with each of their parents, we have noted elsewhere that it contains a number of provisions that favour the equal involvement of both parents in a child’s life post-separation.<sup>89</sup> We would suggest that the Act also needs to articulate the importance of acknowledging and accommodating the allocation of parenting responsibilities, as well as the parent child relationships, that actually exist at the point of separation when determining what arrangements are appropriate post-separation. In addition we would suggest that family

83 Fineman, above n 65, at 1034. The cost for women is poignantly captured by Carol Smart, “Losing the Struggle for Another Voice: The Case of Family Law” (1995) *The Dalhousie Law Journal* 173, at 193.

84 Janice Drakich, “In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood” (1989-1990) 69:3 *Canadian Journal of Women and Law* 69.

85 Fineman, above n 65, at 1039.

86 *Ibid*, at 1040.

87 *Ibid*, at 1042.

88 Behrens, above n 67, at 214.

89 See Tolmie, Elizabeth and Gavey, “Raising Questions about the Importance of Father Contact Within Current Family Law Practices”, above n 1, at 683-689. See, for example, section 5(a) and (b), *Care of Children Act 2004*.

law professionals (counsellors, mediators, lawyers and judges) need to be sensitive to the manner in which gender expectations shape parenting roles and responsibilities, as well as becoming aware of the way their interventions with separated parents can operate, by undermining a child's primary parent, to undermine the establishment of supportive, stable and safe arrangements for children.<sup>90</sup>

90 Elizabeth, Gavey and Tolmie, above n 51; Vivienne Elizabeth, Nicola Gavey and Julia Tolmie, "The Gendered Dynamics of Power in Disputes over the Post-Separation Care of Children" forthcoming in *Violence Against Women*.