

## The portrayal of post-separation parents in the speeches of the Principal Family Court Judge of New Zealand

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### Abstract

This article examines the ways in which parents negotiating care and contact arrangements for their children following separation are portrayed within speeches of the New Zealand Principal Family Court Judge (2005 to 2012). Our analysis finds the speeches to be marked by gender neutrality, and promote prescriptive normative 'ideals' of cooperation and an orientation to the future uncomplicated by the past. We suggest that these texts set out an informal philosophy surrounding the court, and that they construct parents in ways that may work against the interests of mothers, and do not necessarily align with achieving solutions that are in the best interests of children. Our findings suggest the need for professionals working in the area of family law to bring to their work a nuanced and contextual consideration of separating parents and their situations, including recognition of gendered power dynamics.

### Key words

*family law, custody disputes, gender, power, speeches*

### Introduction

The Family Court touches the lives of parents and their children in profound ways, beyond the letter of the law and the formal proceedings and judicial rulings within the courtroom. As scholars of governmentality would argue (e.g., Ewald, 1990; Rose & Valverde, 1998), the conduct of citizens in a country like New Zealand is governed not only by the law directly, but also by norms which co-exist with the law in interdependent ways. Thus, when mothers and fathers are faced with negotiating post-separation care and custody arrangements for their children they will be guided by the dominant norms of conduct within the society as much, or more than, they will be by the law directly. Such norms are, of course, formed and reproduced within broader cultural contexts, but they are also shaped directly and indirectly within specifically legal contexts.

If we think about a 'legal complex' as an 'assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgement' (Rose & Valverde, 1998, p. 542), we can see the many avenues that exist for influence. Through efforts to educate parents or to inform the public at large, for instance, agents of the Family Court (judges, lawyers, court officials and delegated professionals of various kinds) provide information and ideas about how separated mothers and fathers should be and act. Carried out in the shadow of the law, however, with the implicit backing of legal authority and supported by scientific truth claims from the psy disciplines (e.g., psychology), statements made in this context hold considerable power to influence commonsense ideas about what is right and wrong, and what is an appropriate resolution to conflict over the care of children following parental separation. The cost of flouting the norms promoted in these contexts is not merely the risk of being judged unconventional, eccentric, or odd; but rather the risk of having one's family life rearranged by a stranger, and possibly losing the care of children or even the ability to protect them from identified sources of emotional hurt and physical harm. Thus, even ostensibly benign or helpful interventions proffered in the service of 'education' or public

commentary in this context can have a harsher side to them. Bearing this in mind highlights the potentially coercive way in which the norms embedded within the legal complex can operate.

At the same time as the Court's 'voice' – enacted through its policies, patterns of practice, and proclamations – is influential in shaping cultural expectations and normalising particular social formations, that voice is itself shaped by the cultural values and assumptions of its key actors. Unlike laws which are explicit, forged through some degree of public consultation and debate, and documented with precision, the mundane non-legal underpinnings of the Family Court's operations are rarely acknowledged, let alone open to critical examination.

Several scholars in the United Kingdom have critically analysed the cultural underpinnings of family law. Research that examined constructions of divorce within the British Family Law Act (1996) and the parliamentary debates that preceded it (Reece, 2003; Collier, 1999), showed the way in which notions of the 'good divorce' and the 'good divorce subject' worked to idealise and regulate particular ways of being for separating parents (see also Eekelaar, 1999; Day Sclater, 1999; van Krieken, 2005). Day Sclater (1999), on the basis of her in-depth interviews with women and men about their experiences of divorce, described how these shifts in what might be deemed the 'moral etiquette' (Smart & May, 2004, p. 348) of post-separation parenting called for major cultural and normative transformations towards an expectation that separating parents would agree and cooperate in a 'civilised' manner over arrangements for their children.

In this paper we examine one domain of New Zealand Family Court discourse, through an analysis of the speeches of the Principal Family Court Judge from 2005 to 2012. These documents are, we suggest, an evolving source of the 'informal philosophy' of the Court, and offer a window into identifying some of the assumptions that guide its workings. In approaching the analysis we present here, we were interested in particular in how the 'post-separation parental subject' is imagined. That is, what are the implicit understandings within these texts as to *what people are like*? And what are the normative judgments they carry in regard to *how one should act*? Such informal theories of human nature and relational life are inextricably value-laden and culturally loaded even though they are rarely presented as such. Our analysis identifies key features of the imagined 'post-separation parental subject', and our discussion goes on to explore the implications of these particular, situated, and contestable assumptions for differential access and justice within the Family Court, in relation to gender in particular.

## Method and data

All 69 speeches by the Principal Judge available on the Family Court website from 2005 (after the introduction of the Care of Children Act 2004) to December 2012 were collected (see Family Court of New Zealand, 2013). Of these, 66 were presented by His Honour Peter Boshier, who held the position of Principal Family Court Judge from March 2004 until December 2012, while the remaining three were presented by Judge Paul von Dadelszen as Acting Principal Family Court Judge (all in August 2009).

All of the speeches were read and reread by the first author, to identify all extracts in which mothers, fathers, or parents were discussed or otherwise depicted, and to begin to determine key features of the speeches as a corpus. We were particularly interested in looking at how the post-separation parental subject was imagined through the portrayals of mothers, fathers, or parents. These extracts were then coded more systematically according to our main points of interest. We initially collated all references to or markers of the salience of gender (including noticing its absence). We then coded for dominant discursive patterns relating to the depiction of ideal

(and undesirable) parental dispositions and behaviours. Other prominent features of the data, which we did not code for, concerned issues less directly related to parental characteristics, such as references to natural justice, and constructions of children in relation to parents.

The extracts presented in the final analysis were chosen because they provided the clearest examples of the characteristic or pattern being described. Ten speeches, all presented by Judge Boshier, are cited in the final analysis. Many of the other speeches did not explicitly discuss separating parents, and were therefore not drawn upon directly in the analysis. It is also important to note that speeches presented within a close time period often repeated in verbatim large parts, meaning that some of the extracts cited in the analysis recurred in more than one speech (as noted beside the extracts in the analysis). While there were some counter-examples to the characteristics of the data that we identify in the analysis, they were few in number and did not undermine the prominence of the characteristics identified. Citation details for the speeches quoted in the analysis are provided in the Appendix.

### **Analysis: The imagined post-separation parental subject**

Overall, three key features of the speeches are relevant to our analysis. First, we draw attention to the pervasive gender neutrality of the language, which is a recurrent background feature across the texts (with one notable exception, in Speech 2, 2011, which we discuss further on in the article). Next, we show in greater detail two key discursive patterns within the speeches that each construct prescriptive normative ‘ideals’ for how parents should act in the course of settling disagreements over the care of children. These discursive patterns are (1) the valorisation of the future as the only relevant temporal point of reference in considerations over child care and contact arrangements; and (2) the necessity for parental cooperation and agreement above all other considerations. These ideals are framed in the speeches as aligned with contemporary dominant family law notions of children’s best interests and welfare (see Smart & Neale, 1999; Tolmie, Elizabeth & Gavey, 2009, 2010), and are therefore promoted as ‘ideal’ in relation to parents’ post-separation care negotiations. Both the temporal references and the regard for cooperative parental relations are cast within binary formulations. The ideals of a future-focus and cooperation are set in contrast to corresponding yet polarised ‘undesirable’ qualities of a focus on the past, and conflict, respectively. These latter attributes are framed unquestioningly as obstructive of children’s best interests and welfare, and are strongly disparaged.

### **The ‘non-gendered’ post-separation parental subject**

Explicit consideration of gender in the speeches is largely conspicuous by its absence. Throughout the speeches, women as mothers and men as fathers rarely feature. Instead, this distinction is recurrently collapsed into the gender neutral category of either ‘parents’ or ‘parties’. This is demonstrated in the quotes presented in the following section, with reference to ‘parents’ shown in Extracts 4, 5, 7, 8, and 9, and with reference to ‘parties’ shown in Extracts 1, 2 and 3. In this regard, mothers and fathers are portrayed as implicitly ‘equal and potentially interchangeable parents’ (Elizabeth, Gavey & Tolmie, 2012a, p. 242). The post-separation parental subject imagined in the speeches can therefore be seen as ‘non-gendered’. In the analytic discussion that follows, our own language unavoidably reiterates the gender undifferentiated ‘parents’.

### **The ideal post-separation parental subject**

As noted, two key patterns were prominent in the portrayal of ‘ideal’ separating/separated parents – an orientation to the future and a cooperative disposition.

### **Future versus past**

Disparagement of parents' focus on past events and behaviours forms a recurrent theme in the speeches. This undesirable engagement with the past is framed in contrast to a corresponding, yet polarised ideal of a focus on the future, as reflected in the following three extracts:

1. Too often we see parties focusing on what has happened in the past, rather than working to a solution for the future. (Speech 5, 2007; see also Speeches 7, 8, 9)
2. Allegations made in affidavits can be provocative and draw the parties into a battle against each other, focusing on trying to prove past events, rather than looking forward to a solution for the future. (Speech 6, 2007)
3. The CCP [Children's Cases Programme] also focused on what would be best for children in the future rather than focusing on the past behaviour of the parties. Too much reflection on past behaviour can have the effect of creating delay and frustration rather than coming to a solution. (Speech 10, 2006)

These extracts illustrate the way in which a focus on the past by parents during post-separation care negotiations is depicted as counter-productive, and held up against a constructed ideal of an ever-present focus on the future. Extracts 1 and 2 provide clear examples of this 'undesirable-ideal' binary, with a focus on the past depicted as an obstacle to achieving a 'solution' in the future. In Extract 2, this focus on past events is contrasted with the generally desirable stance of 'looking forward', and is further framed negatively as it is associated with allegations and conflict. Extract 3, meanwhile, in disparaging 'too much reflection on past behaviour', further develops the theme by pointing to possible negative implications of 'creating delay and frustration'. This time, the undesirable focus on 'the past behaviour of parties' is held in opposition to a favourable focus on 'what would be best for the children in the future'. Here we see the dominant family law notion of children's best interests enveloped within the favoured future-focused orientation.

The framing of the past and future as discrete and polarised entities in these extracts is suggestive of an assumption that consideration of the past is entirely irrelevant to, or even at odds with, any consideration of the future. This binary, through its positioning of a focus on the past as 'undesirable' and a focus on the future as 'ideal', aligns with Smart and May's (2004) assertion that parental disputes centred squarely on the children are deemed within family law to be 'legitimate' concerns, while all other matters are deemed 'illegitimate' concerns. The turn in recent decades to 'the paramountcy of the welfare of children' in UK family law, they propose, has reduced custody issues to 'practical decisions' in which parents' past interpersonal issues and the associated emotional ramifications such as fear, jealousy, and hurt are resolutely deflected (Smart & May, 2004, p. 348). The emotional lives of parents are thus treated as amenable to rational containment. From what we see in Extracts 1-3, it seems likely that a similar reductive logic is espoused within the informal philosophy of the Family Court in New Zealand.

### **Cooperation versus conflict**

Intertwined with the lack of tolerance for any consideration of past issues, as discussed above, is criticism in the speeches of interpersonal conflict between parents. Cooperation is framed as the corresponding, polarised ideal characteristic. As with the future-past binary, this idealisation of cooperation against conflict can also be seen to align with Smart and May's (2004) characterisation of 'legitimate' versus 'illegitimate' considerations relating to post-separation care negotiations.

'Parents', as a generic and homogenous category, are negatively framed in the speeches as engaged in 'competition' or 'war' with each other, demonstrated by the reference to parties

being drawn 'into a battle against each other' in Extract 2. Elsewhere, parents are portrayed as partaking in a 'slagging match' (Speech 7, 2006; see also Speeches 8, 9), involved in 'warfare' (Speech 1, 2012; see also Speech 6), 'caught in a deadly game of chess', 'striking a blow' at each other, and having a 'wish to injure each other through the Court process' (Speech 9, 2006).

Strong terms used in the speeches in relation to conflict, such as 'warfare' and 'deadly' seen in the quotes above, are deployed with a tone that is sweeping and generalising, implicitly suggesting that they could apply to 'any parent' involved in the wider Family Court system, rather than to particular dynamics, or perhaps extreme cases. This generalising tone is also apparent in the following extract, in which the construction of parents as engaged in 'competition' with each other is made more explicit:

4. Many affidavits contain evidence that has little impact on the key issues to be determined... [This]... has the effect of turning the process into a competition to see who can make the other parent look worse. This can create animosity between the parents meaning that future agreements will be very hard to reach due to the atmosphere of competition, rather than working together for the child. (Speech 10, 2006)

The animosity arising from an 'atmosphere of competition' between parents is framed as obstructing the conjoined ideals of 'future agreements' and 'working together for the child'. This implied framing of parental conflict as petty and exasperating 'game playing' in this extract has a tone of condescension, aligning with the oft-cited relegation of post-separation disagreements in family law circles as reflecting 'private squabbles' demanding of parental education (Smart, 2003). The possibility that a degree of disagreement between parents could ultimately prove facilitative of children's best interests is obscured. As we later discuss, Smart and May (2004) assert that parents' disagreements are often intertwined with, rather than entirely separate from, issues pertaining to children's welfare. It seems feasible, therefore, that children's best interests may sometimes need 'arguing for' or 'defending', in turn suggesting that cooperation, compromise and agreement may not always necessarily pave the way towards achievement of children's best interests. This is especially likely to be the case when negotiations are taking place on an uneven playing field where power relations, associated with gender, race, class or other forms of systemic privilege and disadvantage, are skewed in favour of one parent over the other.

The polarised construction of parents' conflict as entirely obstructive of, or at odds with, children's best interests, is demonstrated more explicitly in the extracts below:

5. In the Family Court our most difficult cases are those where inter-parental conflict is so heightened that the parents have often completely lost sight of the welfare of the children. (Speech 3, 2010)
6. Animosity between [parents] can completely obscure their view of what is in the children's best interests. (Speech 9, 2006)

These statements appear to treat 'conflict' and 'animosity' as existing within an undifferentiated category, which might vary only in degree ('is so heightened') rather than kind. This can thus work to paper over crucial differences in the contexts and conditions underlying what is bluntly, and perhaps misleadingly, described simply as 'inter-parental conflict'. Even though one person's part may conceivably be driven by a legitimate and necessary defence of children, or an attempt to preserve autonomy and dignity against hurtful and vexatious actions, and another's might be aggressive, coercive, and deliberately hurtful, both are captured on equal terms within the language of 'animosity' and 'conflict'. Both are, implicitly at least, equally disparaged. Crucially, the role of power in the playing out of 'conflict' is ignored.

Extracts 5 and 6 also carry undertones of a perceived 'selfishness' motivating parents' conflictual behaviour. This notion is made more explicit in the extract below:

7. We also see the sadness that occurs when parents fight over children and so patently put their own interests first. When marriages or relationships finish, children born out of those relationships need to retain their attachment and nurturing with both parents. We all know this. And yet it can be so very difficult to achieve because of the sometimes astonishingly selfish posturing that occurs by parents. (Speech 4, 2008)

Although such claims may be intended to apply only to a small proportion of parents, insufficient qualification and contextualisation leaves it open for this anti-conflict sentiment to be extrapolated as a more general principle. Without sufficient care, it could be taken up to delegitimise even the kind of 'fighting for' children that would be expected of parents in other situations where they perceive (or would be expected to notice) that a child could be at risk of neglect or abuse by another adult (including their own partner and the child's other parent, when the parents are not separated). These are cases which in any other circumstance, parents (often mothers) would almost certainly be accused of abuse or neglect if they did not fight to protect their child from the possibility of harm. Implying that fighting between separated parents is self-serving, leading to the obstruction of children's care and attachment, thus highlights the extent to which discourses of shared care and non-custodial parent contact have become privileged within New Zealand family law (see Tolmie et al., 2009).

As well as presenting a double bind for protective parents, the way in which conflict and selfishness are framed has implications for recognising coercive control and violence against women and children within the home. Generalising references to parents' conflict, in the absence of qualifiers that recognise the very different forms this can take and the different contexts that mothers and fathers might find themselves in, allows it to seem as if all parents' engagement in conflict is the same. In the absence of emphases to the contrary, it implicitly buys into a model that assumes gender symmetry in conflict (and violence as mutually caused) even though this is not explicitly stated. As a number of authors have noted, the failure of this kind of gender blind 'conflict model' to recognise gendered power dynamics can end up obscuring coercive control and violence against women (e.g., Dragiewicz & DeKeseredy, 2012; Stark 2006, 2007).

The 'ideal' dispositions presented in the speeches, in contrast to conflict, centre on notions of cooperation and agreement. The speeches advise, for example, that the focus of parents should be on 'working together' (Extract 4) and on 'reaching a solution through agreement' (Speech 6, 2007; see also Speeches 7, 8, 9). Such ideals are further reflected in the following extract:

8. Parents are parents for life. They separate from each other, not from their children. It is for the Court to encourage an ongoing relationship, as required by the Care of Children Act, by creating processes that are conducive to agreement, rather than the process itself becoming a hindrance to co-operation. (Speech 10, 2006)

This 'logic of durability' (Smart & Neale, 1999; Collier, 1999; Thèry, 1989) is pervasive throughout the speeches and can be seen to engender imperatives of cooperation and agreement. As we see in Extract 8, parents are framed as bound together 'for life' through the need for both to retain an ongoing relationship with their children.

Extract 8 further portrays the Family Court as playing a vital role in producing its cooperative ideals. This focus on the Court's role in facilitating cooperation is developed in Extract 9 below, and furthermore infused with the earlier discussed ideal of a future-focused orientation:

9. The Court will encourage co-operation between the parents so that they can settle future

matters that will inevitably crop up, without recourse to the Court. This can in part be achieved by Judges playing a more active role in steering the course of proceedings, deciding what the key issues are, and what evidence is required. This will create a swifter process, meaning less opportunity for issues and attitudes to become intractable. (Speech 9, 2006)

This extract further illustrates the imperative of parental cooperation, and is notable for the way it highlights the ironic tension that exists when the Court invites people to take responsibility for settling their own disagreements and conflict. As the Judge notes, the Court itself should perhaps have a role in micro-managing the ways in which settling such ‘matters’ should take shape. The effect is that parents are solicited (or coerced) into maintaining the promulgated ideal through their own self-regulation (see Dean, 1994; Rose, 1996) within parameters that are actually or potentially closely guided, or restricted, by state authority.

### **Implications of the imagined post-separation parental subject**

As our analysis demonstrates, the post-separation parental subject imagined within the speeches of the Principal Family Court Judge is consistent with a decontextualised ‘non-gendered’ subject characterised by future-focused and cooperative ideals. As a source of informal philosophy arguably informing and influencing the Family Court and wider norms, the speeches reveal not only the ideal characteristics and behaviours that parents are expected to achieve, but also those from which they are expected to abstain. Indeed, that these ideals are posed as binaries in stark opposition to corresponding undesirable characteristics works to reinforce the moral dimension of these attributes, especially given the extreme case formulation and pejorative framing of the alternatives. We argue that there are pertinent gendered dimensions to the future-past and cooperation-conflict binary constructions which, when unrecognised or obscured through depictions of the post-separation parent as non-gendered, work in ways that discriminate against women. In this section we discuss the implications of these forms of the idealised subject in relation to the wider literature.

#### **Future versus past**

The increased emphasis of family courts in recent years on efficiency and reduction of delay and cost (see Trinder & Kellett, 2007) provides a plausible rationale for the prescriptive idealisation within the speeches towards a focus on the future and away from (the likely time-consuming) consideration of the past. The suggestion that consideration of the past is irrelevant to consideration of the future is nevertheless problematic on a number of fronts. Firstly, it disregards the possibility that issues from the past may sometimes, even frequently, be relevant to the future welfare of children. Smart and May’s (2004) examination of UK court records, for instance, showed that a range of concerns deemed ‘illegitimate’ by family courts, including parents’ past interpersonal issues that were regarded as simply reflecting parents’ spite or vindictiveness, were in fact often interlinked in complex ways with ‘legitimate’ concerns pertaining to children’s welfare (see also Elizabeth, Gavey & Tolmie, 2010). For example, they cited cases in which parental conflict and court decisions over financial settlement and child support had palpable implications in terms of the resident parent’s ability to provide continuity and care for the children. These examples highlight the degree to which the welfare of children and conflicts between parents are complexly interwoven, rather than discrete entities.

Smart and May (2004) further contended that in many cases the degree of anger and resentment in relation to past concerns (such as financial problems or infidelity, for example), in conjunction with a lack of space for ‘emotional ventilation’ within the current family law environment, means that it is almost impossible for such past difficulties not to become embedded in current concerns relating to children. This suggests it is likely to be unhelpful for

family courts to ignore or punish parents for focusing on past (or 'illegitimate') concerns. They propose it might instead be sensible to find ways of acknowledging and dealing with ethical and emotional conflicts between parents, as this may help resolve them to the benefit of the children (Smart & May, 2004). The proposition that a parent's contemplation of the past may actually be linked with children's future welfare, and should therefore be recognised rather than rebuffed within family law processes, lies in stark contrast to the framing of these two considerations in the speeches as entirely discrete entities.

Secondly, the suggestion that consideration of the past is irrelevant to consideration of the future can be seen to occlude attention to gendered dynamics in relation to the care of children, and to contexts of violence. Here we discuss two issues: the first concerning decisions aimed at establishing stable and secure parenting arrangements, and the second relating to appropriate responses to concerns around preventing violence and abuse.

Elizabeth et al. (2012a) contend that a future-focused orientation intersects problematically with the notion of gender neutrality in a way that is blind to, or sometimes reverses, the 'traditional gender contract' still pervasive in the majority of heterosexual households prior to separation. Mothers are typically seen to bear more responsibility for their children, both before and after separation, even when they work full time outside the home (see also Boyd, 2003; Fineman, 2000; Andenæs, 2005; Smart & Neale, 1999; Collier, 1999; Lacroix, 2006). The imperative for a focus on the future is therefore seen to devalue mothers' labour, expertise, and knowledge with regard to their children. It also fails to account for the ways in which women often suffer career consequences for the caring work they have done pre-separation, while men typically have no such adverse repercussions (Fineman, 2000).

The other pertinent issue in relation to an exclusive emphasis on the future is violence and abuse. As Trinder and Kellett (2007) have noted, in the English context, family courts' inclination towards a 'quick fix' approach focused narrowly on consideration of future plans gives rise to difficulties in effective risk assessment and management. These difficulties, they argue, induced as they are by the courts' ignoring or deflecting of past parental behaviours and issues, may be seen to endanger the safety of women and children in relation to contexts of men's violence and control. A poignant case example, and one that New Zealand risks forgetting in the face of current reforms, is the deaths of Tiffany, Holly and Claudia Bristol in 1994, at the hands of their father, Alan Bristol. The deaths of the three Bristol children followed Family Court proceedings that were deemed to have minimised, trivialised and rendered invisible numerous earlier acts of violence by Alan Bristol towards his wife and mother of the children, Christine Bristol (discussed in Busch & Robertson, 1994). Our previous research provides other examples of women with histories of violence committed by their partners who were constructed as obstructive when they attempted to limit or manage the father's contact with their children due to concerns for their safety (see Elizabeth, Gavey & Tolmie, 2011).

It is clear then that family law's idealisation of a focus on the future and away from the past 'demands from mothers a willingness to forget (if not forgive) in the name of the child, and legitimates a collective amnesia among legal actors' (Elizabeth et al., 2012a, p. 249). We have shown elsewhere how the designation of an undesirable-ideal binary onto past-future temporality implicates family law in playing a role in the reproduction of unjust gendered power relations (see Elizabeth et al., 2012a).

### **Cooperation versus conflict**

It is important to acknowledge the extent to which criticism of parental conflict seems reasonable; indeed 'commonsense'. As we argue, however, at another level it fails to consider the complexity of people's lives – psychologically, relationally and socially. Moreover, the

reductionist approach to parental conflict in the speeches, as demonstrated in our analysis, can be seen to paper over important gendered dimensions in relation to the serious and gendered nature of conflict, control and violence not uncommon in separation contexts (see Elizabeth et al., 2011, 2012b, Smart, 2003; May & Smart, 2007; Neale & Smart, 1997; Stark, 2009). It is particularly problematic when family law is observed to privilege the appearance of cooperation in contexts where women's and children's safety is at risk. In some jurisdictions such a blinkered emphasis on cooperation is formalised in so-called 'friendly parent' provisions that require a court to consider which parent is likely to be most willing to support the other parent's relationship with a child or children as a determining factor in judgments over care and contact arrangements (see Wallbank, 2001). Contact provisions demanding cooperation, particularly in relation to 'handovers', can in some cases function as opportunities for the continuation of men's violence from which women have tried to escape (Tolmie et al., 2009, 2010; see also Stark, 2009; Smart & Neale, 1999). Our New Zealand research with women experiencing disputes over the post-separation care of their children has drawn attention to the constraints on women's ability to escape oppressive and controlling tactics exerted by their former partners, and the role of New Zealand's Family Court in enabling such dynamics through a decontextualised commitment to cooperative ideals, and its minimisation of the grave and gendered nature of such tactics.

Smart and colleagues' UK research emphasises the degree to which the ideal of cooperation flies in the face of the hard work, complexities, juggling acts and sacrifices often involved in shared parenting (Smart, 2004, 2006; Smart & Neale, 1999; Neale & Smart, 1997). That is, the promotion of cooperation as the desirable way for parents to behave during and after separation fails to acknowledge (and indeed empathise with) the raw and difficult reality of separation. Their research challenges the assumptions underpinning the logic of durability; that is, that parents can, should, and will parent effectively together post-separation (Smart & Neale, 1999). Rather, they highlight how likely it is that parents will lack the resources, both material and emotional, required to maintain cooperative relationships post-separation. Day Sclater and colleagues have also highlighted the extent to which imperatives for cooperative negotiations jar with the heated and emotionally fraught nature of separation experienced by women and men interviewed in their UK research (Day Sclater, 1999; Brown & Day Sclater, 1999; Day Sclater & Yates, 1999; Kaganas & Day Sclater, 2004). They emphasise that struggling with messy and conflicting emotions during divorce would be more normal and reasonable than accomplishing a rational, fully conscious state of being in which feelings of loss and anger are denied or repressed (Day Sclater, 1999). In failing to acknowledge the 'psychologically complex subject', they argue that the assumption of parental cooperation post-separation rests on an inadequate vision of subjectivity.

The supposedly 'gender neutral' logic of durability and its associated ideal of cooperation, as reflected in the speeches and discussed above, actually works in highly gendered ways due to the persistently gendered ways in which care and responsibility are divided between most resident (typically mother) and non-resident (typically father) parents (Smart, 2006). More specifically, given that the choices of non-resident parents are often upheld through the family courts, the logic works to enable fathers to intrude in and regulate the lives of mothers by calling upon (or threatening to call upon) family law processes (discussed in Elizabeth et al., 2012a). Mothers, as resident parents, meanwhile, are not discursively located in this esteemed position of 'holders of rights' to be demanded through the legal system (Smart, 2006). This unevenness is illustrated for instance, when fathers who recurrently fail to initiate or fulfil contact provisions with their children leave resident mothers in the position of managing the difficulties and hurt this poses for their children, without recourse to the courts to enforce

fathers to fulfil any contact obligations (as impractical and undesirable as that would be) (Elizabeth et al., 2012a).

That the imperative for cooperation is in tension with autonomy (Boyd, 2010; Diduck & O'Donovan, 2006; Smart & Neale, 1999) is seemingly overlooked by the Family Court. Boyd (2010) highlights how mothers must often sacrifice their personal autonomy to a much greater degree than fathers. As an illustration of this, Smart and Neale's (1999) study bears witness to family law's enabling of the frequent imposition of fathers on mothers' homes and personal space, and of its invalidation of mothers' capacity to make important life decisions that may well be in the child's best interest (see also Boyd, 2010). Moreover, Day Sclater and Yates (1999) describe an 'independence discourse' through which mothers interviewed in their study spoke of their need to entirely distance themselves from the relationship post-separation, and the difficulties they encountered when they were prevented from doing so (see also Smart & Neale, 1999). A woman's incapacity to 'reconstitute' herself at a time when this need is particularly salient can result in a sense of powerlessness that can be seen as problematic not only for her, but also potentially for her children (Diduck, 2003; Smart & Neale, 1999).

Our analysis and our discussion in relation to the wider literature point to ways in which the commitment to gender neutrality, cooperation and a future uncomplicated by the past could lead the Family Court (and those acting independently according to the values it promotes) on a path that is too straight and narrow to always support the best interests and welfare of children. It could also be asked whether the mood of the speeches, in which conflict is implicitly assumed to be negative and is decontextualised and generalised across all parents within the wider family law system, reflects a failure to recognise how the routine modus operandi of the court may in fact perversely encourage actions that fuel that conflict (see Extract 4 which chides parents for 'playing the game' as the rules allow it to be played). It is possible, perhaps, that family law ultimately ends up actively producing more of what it sits in judgement of, and attempts to contain, through the ways in which its actors (judges, lawyers, psychologists, counsellors, and other court officials) consider, speak about, and treat separating parents.

There indeed appears to be an unspoken assumption in the speeches that conflict is the reason for, rather than the consequence of, the structures that the Family Court system sets up. It could be argued, however, that family law's deflection of existing conflict and inducement towards cooperation, may itself actually *increase* or intensify conflict through the increased room such imperatives provide for values to clash, and through failure to accommodate realistic needs to separate and emotionally process a separation.

### **Relevance to professionals working in family law contexts**

As we have already noted, the corpus of speeches of the Principal Family Court Judge constitute part of what we are referring to as the informal philosophy of the court. In focussing on these texts, our analysis identifies the ways in which separating parents are imagined in public statements by the head of the Court. As such the speeches do not articulate a formal legal position or necessarily claim to represent policies or practices of the Family Court. Yet, we argue that our analysis of these texts helps to illuminate some of the implicit values and assumptions that the Chief Judge holds. We make no claims about what actually happens in the courts, or how court actors (professionals as well as parents) take up these discursive and affective norms. However, our interest in this material is guided by the assumption that this informal philosophy has a constitutive role, one that is likely, given his position, to influence the commonsense ethos of the court, professional practices within it, and help shape norms within the wider discursive field in which the court is located (that is, post-separation disputes over the care of children, including those who never come into contact with the Family Court).

The complexities and gendered dynamics of parenting and separation that we have discussed suggest a need for those working in the area of family law (including psychologists, counsellors, lawyers, judges and other Court officials) to bring to their work a nuanced and contextual consideration of separating parents and their situations. On this front, Leckey (2008) points to recent Canadian family case law examples (primarily associated with Justice Claire L'Heureux-Dubé) as demonstrating ways in which Canadian judicial officials have sought to account for broad cultural, social, and political contexts, and more immediate, fact-specific, relational contexts. Leckey maintains that this recent shift towards an understanding of a new 'contextual subject' in Canadian family law has brought with it greater recognition of women's overrepresentation in caring work and their need for the pursuit of personal autonomy post-separation. Our analysis and the implications we have discussed underscore the importance of family law professionals accounting for gendered power dynamics in post-separation contexts. In particular, it would suggest that children's interests may better be served by responding to 'parental conflict' in a more differentiated way. At the same time, it suggests that it would be wise not to promote a future-focused orientation when this means failure to recognise past hurtful and dangerous acts, and consequent hurt and ongoing risk and danger. It also suggests a more cautious approach to the promotion of cooperation, in recognition that in some cases it comes at the expense of one parent's autonomy and potentially their and their children's safety.

In relation to this more contextual approach, a shift in register is evident with regard to gender in a speech presented by the Principal Judge in June 2011, entitled 'What's gender got to do with it in New Zealand family law?' (see Speech 2). In striking contrast to the otherwise pervasive gender neutrality across the corpus of speeches, gender issues are framed as 'often pivotal to resolving family law issues' (Speech 2, 2011; see also Boshier & Spelman, 2011). The speech goes on to acknowledge women's continued overrepresentation as victims of domestic violence and in the day-to-day care of children. The speech also discusses the importance of recognising the gendered dimensions pertaining to men's perpetration of power and control by way of 'intimate terrorism' (or coercive controlling violence, citing Johnson, 2006), forming a salient exception to the lack of such recognition elsewhere in the corpus. These points represent a significant shift, possibly echoing the Canadian examples that Leckey (2008) discusses, towards recognising a new contextual subject that more fully encapsulates the complexities and gendered dimensions of separation. For such a move to gain traction, ongoing critical reflection is required on the ways in which idealised and universalised constructions of post-separation parental subjects allow implicit assumptions, values and norms to shape legal and extra-legal practice in ways that sometimes inadvertently bolster gendered inequalities that do not serve children well.

### **Acknowledgements**

We thank anonymous reviewers and Paulette Benton-Greig for helpful comments on earlier drafts, and Jo Schmidt for helpful editorial input.

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## Appendix

### Index of cited speeches

1. Achieving equity: Our children's right to opportunity. Speech of the Principal Family Court Judge Peter Boshier, Public Health Conference, Wellington, 5 September 2012.
2. What's gender got to do with it in New Zealand family law? Speech of the Principal Family Court Judge Peter Boshier, Association of Family and Conciliation Courts, Florida, 2 June 2011.
3. Family violence and crime: Breaking the cycle, Speech of the Principal Family Court Judge Peter Boshier, Rotary District Conference, Hastings, 17 April 2010.
4. Why shining eyes and not sad eyes are our children's greatest right, Speech of the Principal Family Court Judge Peter Boshier, Napier Family Centre, Napier, 30 October 2008.
5. Family Court Matters Bill – How the Family Court can improve its approach to resolving disputes of those that come before it, Speech of Principal Family Court Judge Peter Boshier, Dispute Resolution in the Family Court – LEADR Conference, 21 September 2007.
6. New trends in the Family Court – How psychologists can best help children, Speech of Principal Family Court Judge Peter Boshier, New Zealand Psychological Society Annual Conference, Hamilton, 25 August 2007.
7. The Family Court 25 years on – has the vision been realised? Speech of Principal Family Court Judge Peter Boshier, Roy McKenzie Centre for the Study of Families, Wellington, 17 October 2006.
8. The Family Court 25 years on. Speech of Principal Family Court Judge Peter Boshier, Family Law Section –

New Zealand Law Society, Christchurch, 13 October 2006.

9. Parenting hearings programme: Less adversarial children's hearings, Speech of Principal Family Court Judge Peter Boshier, Auckland Family Courts Association, Auckland, 14 September 2006.
10. A vision for the future: Dispute resolution in the new era of child law, Speech of Principal Family Court Judge Peter Boshier, LexisNexis Child Law 2006, Auckland, 25 May 2006.