# International Family Law, Policy and Practice

## Some Collected Papers from the Centre's July 2016 Conference Culture, Dispute Resolution and the Modernised Family Part 2

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# Contents

# Editor's Message

This issue is the second of the collected papers from the Centre's 2016 Conference on Culture, Dispute Resolution and the Modernised Family, which will be continued in the next issue. In this issue we have four papers highlighting topics of key international interest: one from New Zealand, one from Australia (jurisdictions which have together often led the development of English law) a key Dispute Resolution article from South Africa which seems to have much to contribute to the ongoing development of settling family disputes, and finally, as a home grown contribution, an article in respect of an unusual manifestation of child abuse from Susan Edwards, more usually known for her work on the pornography aspects of child abuse, on the impact in child abuse of witchcraft and supposed spirit possession.

The power points from these writers' 2016 conference sessions may be accessed through the Centre's new website, www.icflpp.com, but their more developed articles published here preserve the detail of their perspectives on topics which are of interest in comparison to English law, as indeed is the purpose of this journal.

First, Fiona Mackenzie, Nicola Taylor and Mark Henaghan shine new light on the interface between feminism and motherhood in family law. This is very much a new perspective, since at first glance the two concepts do not appear to be compatible at all, yet a deeper understanding indicates that there are strong links which are in fact mutually supportive and which probably have to find a way to co-exist in the modern family even if in the past they have not easily done so.

Next, there is an interesting analysis by Thos Hodgson from the Sydney NSW Bar of the Australian case law in relation to grandparents' claims to effective relationships with their grandchildren, following articulation in Australia's Family Law Amendment (Sharing Parental Responsibility) Act 2006. This is an Act in effect formally 'recognising' the potential value of the grandparental dimension in a child's life, but without (according to the enduring case law) displacing the overarching principle of the best interests of the child. This too appears at first sight to raise completely incompatible aims in the modern family where the generations no longer live together in an interdependent manner in the way that they did in the past. However, on closer examination of application in practice of the principle stated in the new Act, Australian law making seems to have trodden a fine line between legislatively articulating the value in the child's life of the extended family which s/he may come to value (and miss if that is shut off) and respecting both the unarguable principle of the child's best interests and the paramountcy of capable parents in their autonomy to safeguard those interests in whatever way seems appropriate to parents in bringing up their own child.

Thirdly, we have an absorbing article from Astrid Martalas in South Africa on family separation Dispute Resolution Methods in the Western Cape which uses a system of 'Parenting Coordination' with a view to keeping separating parents, whether married or not, out of court. It seems this is not specifically either mediation or arbitration, although its 'umbrella' approach to simply helping parents to agree arrangements for their children may either include mediation, or arise where mediation has failed;: alternatively the powers of the parenting co-ordinator to make more routine and short term directives has been likened by at least one South African judge to arbitration which could usurp the jurisdiction of the court but might still get minor irritations in the case settled. However, it seems to have most similarities with early conciliation methodology (famously most used in Bristol from the early 1980s) and to what might now be achieved in England and Wales through a Family Assistance Order - but in its formal place in the S African court system to have more teeth than either. In any event it is an interesting comparative insight into another jurisdiction's variant of Munby P's 'N-CDR', Non-Court Dispute Resolution and the Parenting Plans used in the Family Court in England and Wales.

Finally, there is Susan Edward's article on protecting children and vulnerable adults from witchcraft and spirit possession, an

alarming revelation about the potential for a 'tip of the iceberg' situation relating to recognition of the likely extent of these practices even in the United Kingdom; and from which children and vulnerable adults could perhaps be better protected if the authorities, through collation of all this information, could now have a better chance of being alerted to the role of such beliefs in the number of reported cases which have clearly involved them. It is also of concern that there is still such apparently widespread cultural belief in their existence in modern times that the police have to point out that they do in fact still exist. It is fair to say that probably everyone remembers the appalling case of Victoria Climbie where the abuse inflicted on her was claimed by her aunt and her aunt's partner to be because she suffered from demonic possession which needed to be violently exorcised. Whether or not there was ever a grain of truth in that belief, which in any event could hardly excuse most of the abuse, it is nevertheless highly concerning to read of the extent to which similar 'cultural' beliefs have been in evidence in the many reported cases that Dr Edwards has rounded up for this comprehensive account.

The themes from this second collection of the conference papers certainly provides further excellent inspiration from the international Family Law community which never disappoints when gathering so productively in London at a Centre conference every three years, so as to share these perspectives and insights from around the world, of which there are more in the next issue.

*Frances Burton*

Frances Burton, Editor

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# Feminist Theories and how they Relate to Motherhood and Family Law

**Fiona Mackenzie, Nicola Taylor and Mark Henaghan***

## Introduction

There are a number of theories, particularly in the social science field, that have relevance and application to the issue of motherhood and family law and these include the theoretical frameworks developed by feminism. They are important because of the contested ideas around gender equality, difference and power, and engagement in the study of what it means to be male and female living in a gendered society, including as a mother. With a focus on New Zealand family law, this article explores the competing feminist theories of the 1970s, seeking gender equality by either denying or embracing gender difference, and considers their impact upon the legislative introduction of gender neutrality into New Zealand's parenting laws in 1980. The effect upon the law's subsequent approach to breastfeeding within the context of separated parenting is examined, and an unresolved tension within judicial decision-making is identified. The article concludes with a consideration of law reform, together with a broader, redemptive approach by the law to enable a transformed equality jurisprudence to develop.

## The background to feminist theory

Feminism and feminist theory (including feminist legal theory)[1] focuses on the significance of gender and inequality, and can be found across many disciplines. Also known as the women's liberation movement, it refers loosely to campaigns for reforms on issues such as reproductive rights, domestic violence, maternity leave, equal pay, women's suffrage, sexual harassment, and sexual violence based in challenging gender inequality.

## The three waves of feminism

Feminism emerged in the western world in the late 19th century and has gone through three waves. First-wave feminism of the 19th and early 20th centuries focused on women's suffrage and political equality, and upon women's special rights to custody of their children. The origins and development of the welfare principle emerged out of the UK from this agitation, and was a mechanism to provide some protection to the mother-child relationship in a patriarchal society.[2]

The second-wave feminism of the 1960s, 1970s and 1980s sought to address social and cultural inequalities, and women's autonomy. In particular, it critiqued the influence of state systems, especially the law, on motherhood as a practice and a status. It identified that the prevailing view of motherhood inhibited women's financial self-sufficiency, career progression and independence from men.

The third-wave feminism[3] of the last twenty years, in intergenerational tension with second wave feminism, has become more personalised with storytelling focusing on a woman's journey towards motherhood as a new rite of passage, while also seeking to address the economic inequalities arising from this. Crawford[4] advocates a joining of third wave feminism with the law to develop an equality jurisprudence that, on the one hand, can acknowledge the uniqueness of a woman's reproductive capacity while, on the other, can neutralise the role this capacity has contributed to a woman's legal oppression.

Feminist theory, being about biology and gender equality, has therefore been significantly and paradoxically influential in family law challenges to motherhood. In 1974, Finer and McGregor wrote that all major developments in

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[1] For background to the origins of feminist thought, see such examples as the life of such first wave feminists as Mary Wollstonecraft (18th Century). See also such seminal texts such as Betty Friedan's The Feminine Mystique (Penguin, 1963), credited with starting the second wave feminism and discusses "the problem that has no name" and Simone de Beauvoir's The Second Sex (1949) in which she says that "one is not born a woman" and describes men having stereotyped women and organised society into a patriarchy around this stereotype.

[2] Stephen Cretney *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003); see also Susan Maidment *Child Custody and Divorce* (Croom Helm, 1984).

[3] Stacy Gillis and Rebecca Munford 'Introduction: Harvesting our Strengths: Third Wave Feminism and Women's Studies' (2003) *Journal of International Women's Studies*, 4(2), 1-6.

[4] Bridget J. Crawford 'Third Wave Feminism, Motherhood and the Future of Legal Theory' in *Gender, Sexualities and the Law* Jackie Jones, Anna Grear, Rachel Anne Fenton, Kim Stevenson (eds) (Routledge, 2011) at p227-240 describes men having stereotyped women and organised society into a patriarchy around that.

family law from the mid-19th century onwards had been directed to 'equality in the law for women [and] equality within the law for people of small means'[5] Subsequently, however, equality became a disputed theoretical concept. [6] As discussed, formal equality, or sameness of treatment, and the goal of first and some second wave feminists then shifted focus to recognise that sameness of treatment actually failed to recognise the reality of differences and also the norm of dominance, which may require differences in treatment to compensate for the disadvantages these dynamics created.

## The Three Approaches of Second Wave Feminism

Second wave feminism can therefore be described as having developed three broad theoretical approaches to the issue of gender and inequality: liberal feminist theory, cultural feminist theory and dominance feminist theory.[7] In general terms, liberal feminist theory emphasises equality of treatment while cultural and dominance theories focus on equality of results.[8] These theories are important contributors to how motherhood has been regarded by the law.

## Liberal feminist theory

Liberal feminist theory was understood to deny any significant natural difference between men and women, requiring that both be treated equally with respect to norms, rules and the law. It advocated the abolition of gender-based law. This had a profound effect on motherhood within family law, as the natural corollary was that any maternal preference in custody disputes was seen to discriminate on the basis of sex by treating individuals differently depending on whether they were men or women. This theory regarded law that treated men and women differently on the basis of their sex as contributing to, and reinforcing, sex stereotypes and roles.[9] Any difference between men and women should not be legally relevant. Women are workers just like men and, on this basis, women's rights could then be expanded. The purpose of the feminist liberal theory was to show that distinctions based on gender, denying women the same opportunity as men, were unlawful.[10]

## S23(A1) Guardianship Amendment Act 1980 (NZ)

In New Zealand, this move to gender neutrality was reinforced legislatively by s23 (A1) of the Guardianship Amendment Act (No 2) 1980, when the then Minister of Justice the Hon J K McLay, in supporting the introduction into the law of a provision that required that the gender of a parent not be taken into account when determining the welfare of a child, said:

> There are those who believe that fathers do not gain custody of their children more often because the judiciary discriminates in favour of mothers. If any lingering trace of the so-called mother principle does in fact survive, it will be eradicated by the proposed new subsection (1A) of section 23 [of the then Guardianship Act 1968]

Section 23 was the existing legislative embodiment of the welfare principle and its paramountcy.

This provision was carried through to New Zealand's Care of Children Act 2004 where it can still be found in s4(3) of COCA, which says:

> It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

## A limitation of liberal feminist theory

A major limitation with liberal feminist theory, or sameness doctrine as it has been called, is that it did not recognise that neutral laws in a gendered world do not operate neutrally. The reality of the differences between men and women, both biologically and in gender expectation, did not disappear, nor did gender become equal because legal language was written neutrally or because the law imposed gender neutrality. Legal reasoning was still seen to reflect the male bias, and for women to

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[5] M. Finer and O. McGregor 'History of the Obligation to Maintain' Appendix 5 in M. Finer *Report of the Committee of One Parent Families* (1974) London: HMSO Cmnd 5629 in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge: Cavendish, 2006).

[6] See also Elsje Bonthuys 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in Margaret Davies and Vanessa E. Munro (eds) *Ashgate Research Companion to Feminist Legal Theory* (Ashgate, October 2013), where Bonthuys discusses how difficult the notion of formal equality has been, both practically and theoretically. She asks, equal with whom and equal in what respects?

[7] It is beyond the scope of this article further to explore the development of these theories but see generally Ann C. Scales 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373; Christine A. Littleton 'Reconstructing Sexual Equality' (1987) 75 *Cal Law Review* 1279; Ruth Bader Ginsburg 'Sex Equality and the Constitution' (1991) 14 *Women's Rights Law Reports* 361; Carol Sanger 'M is for Many Things' (1992) 1 S Cal. Rev. Law & Women's Studies 15-67.

[8] Erika R. Schwarz 'When "Neutral" Doesn't Really Mean 'Neutral': Louisiana's Child Custody Laws – An Attempt to Erase Gender Bias in the Name of Neutrality" (1996-1997) *Loyola Law Review* 365-390 at 367.

[9] Schwarz, above note 8.

[10] Cass R. Sunstein 'Feminism and Legal Theory' (1988) 101 *Harvard Law Review* 826.

seek equality they needed to work with, and measure up, against male norms and interpretations, including that of neutrality, embedded in the law.

Advocating gender-neutral language and laws could, in fact, become a harmful tool in silencing mothers within family law by diminishing exploration of the ways of thinking and reasoning, values and roles, and the biological and physiological differences of parents that may be uniquely gender based. These second wave feminism difficulties became referred to as the problem of essentialism,'[11] because it would not go away.

Thus, the paradoxical difficulty with respect to motherhood within family law was identified but was not able to be addressed by liberal feminist theory.

## Cultural feminist theory

Cultural feminist theory, on the other hand, pursued equality through recognition of the difference between men and women (and was therefore able to distinguish motherhood and fatherhood). It considered that feminist legal theory could not be gender-neutral. It also considered that equality could not be its central goal in the traditional formal sense because gender, and therefore difference, was central to society. It promotes a feminist theory centred around women because it promotes women's experience, but stands in tension with liberal feminist theory, as it sees that equality between men and women can only be achieved by recognising the biological, social and cultural differences between men and women and by reflecting such differences in the law, rather than deeming them irrelevant or obstacles to be overcome.[12]

## The Work of Carol Gilligan

Carol Gilligan is regarded as one of the original proponents of cultural feminist theory[13] and is referred to by Herring as 'the grandmother of care ethics'.[14] She argued that given the differences in women's conceptions of self and morality, women bring a different point of view and priorities to the ordering of human experience and existence.[15] They therefore speak in a 'different voice'.[16] She regarded the female voice as one of caring and valuing of relationships, while the male focused more on autonomy and on the separation of self from others. Women were stereotypically portrayed as nurturers and defined by the relationship they have with others, while men were more often seen as abstract thinkers and defined by individual achievement.[17]

However, in attempting to assign to women the characteristics of nurturing, care and selflessness, it created a number of risks, one being that such a definition could not support women who worked outside the home. They would be seen as modelling the male stereotype, and would therefore be unsuitable as mothers as they did not possess the typical nurturing characteristics of a woman as defined by cultural feminist theory.

## A limitation of cultural feminist theory

The major limitation of the difference approach characterised by cultural feminist theory was considered to be its lack of recognition for the pre-existing discrimination upon which the law was already founded. For both liberal and cultural feminist theories, man was the norm by which equality for women was measured, and this was going to continue to present problems for the autonomy of motherhood within family law.

## Dominance feminist theory

During this same period of second wave feminism, Catherine MacKinnon proposed the dominance theory as an alternative to the above two theories.[18] She saw the important issue between men and women as being a difference in power and its distribution. This was based in Rich's work with respect to the experience and institution of motherhood, where she saw that we needed and were yet to 'fully to understand the power and powerlessness embodied in motherhood in a patriarchal culture'.[19] Sunstein described the dominance feminist theory in these

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[11] See paragraph below 'The Problem of Essentialism'.

[12] Schwarz, above note 8 at 370.

[13] Carol Gilligan *In a Different Voice* (Cambridge, UK: Harvard University Press, 1982).

[14] See Jonathan Herring 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary of others?' [1999] CFLQ 223; Jonathan Herring and Charles Foster 'Welfare Means Relationality, Virtue and Altruisim' *Legal Studies*, Vol 32 No 3 September 2012, 480-498; Jonathan Herring 'The Welfare Principle and the Children Act: presumably it's about Welfare?# *Journal of Social Welfare & Family Law*, 2014.

[15] Gilligan, above note13 at 22.

[16] Gilligan, above note 13.

[17] Schwarz, above note 8; see also Joan C. Williams 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797.

[18] Catharine A. MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1988); see also Andrea Dworkin *Intercourse* (Free Press, 1987). She said "What I think is that sex must not put women in a subordinate position. It must be reciprocal and not an act of aggression from a man looking only to satisfy himself"; see also Susan Moller Okin *Justice, Gender and the Family* (Basic Books Inc, 1989). Okin critiqued modern theories of justice, which she saw as written from a male perspective and which wrongly assumed that the institution of the family was just. She believed that the gender inequality within the family was perpetuated throughout society and no theory of justice could be complete unless it addressed such gender inequality.

[19] Adrienne Rich *Of Woman Born: Motherhood as Experience and Institution* (W W Norton and Company, 1976).

terms: '[T]he problem is not that those similarly situated have been treated differently; it is instead that one group has dominated the other'.[20] MacKinnon did not regard the law as neutral but as reinforcing, even in the name of neutrality, the legitimacy of the male point of view as the standard upon which the law was based, saying that '[t]he state is male in the feminist sense: the law sees and treats women the way men see and treat women'.[21]

## Liberal and cultural feminist theories different ends of the same spectrum

McKinnon criticised both the difference and sameness theories for distinguishing or aligning themselves with a male model. That is, under the sameness standard, women are measured according to their correspondence to man, and under the difference standard, women are measured according to their lack of correspondence to man.[22] She considered that gender neutrality, as liberal feminist theory's answer, was simply a male standard and that special protection, cultural feminist theory's answer, was simply a female standard and warned that maleness was nonetheless the reference point for both theories. She went further, in arguing that by liberal feminist theory demanding equality through sameness, women were achieving exactly the opposite result, saying somewhat prophetically with respect to the development of separated shared care parenting yet to come, that 'the sameness standard has mostly got for men the benefit of those few things women have historically had'[23] and that the argument for a sameness standard ignored the reality of women's lives.[24] McKinnon also outlined the problems inherent in the gender difference central to cultural feminist theory. By using men as the baseline upon which to measure difference, a false universalisation was created which risked being detrimental to women, when the opposite had been intended.

## Is it really about power?

McKinnon saw that viewing gender only as a matter of sameness or difference masked the reality of gender as a system of social hierarchy, a political system of male dominance and female subordination and one which sexualised power for men and powerlessness for women. James, in traversing gender-relations in Australia, points to evidence of this within their family law system, concluding that 'more than other areas of family law, child custody was about power'.[25]

## The problem of essentialism

Essentialism is a longstanding theoretical framework that holds to the view that objects possess certain essential properties that distinguish one from another. Speake [26] defines it as:

> A metaphysical view dating back to Aristotle … It maintains that some objects – no matter how described – have essences; that is, they have, essentially or necessarily, certain properties, without which they could not exist or be the things they are … there is also a related essentialist view, presented originally by Locke, that objects must have a 'real' – though as yet unknown – 'essence', which (causally) explains their more readily observable properties (or 'nominal essence').

Fuss examines whether essentialism has received 'a bad rap'.[27] She says that 'few other words in the vocabulary of contemporary critical theory are so persistently maligned, so little interrogated and so persistently summoned as a term of infallible critique' and comments on the 'the sheer rhetorical power of essentialism as a term of disapprobation and disparagement'.[28] She sees the essentialist/non-essentialist, or constructionist - the position that differences are constructed, not innate - debate as marking an impasse in feminist theory on the one hand, while on the other signifying 'the very condition and possibility of our theorising'.[29]

Fuss seeks to utilise John Locke's distinctions, that is, between real and nominal essences. Real essence is Aristotelian and refers to the irreducible, the unchanging thing. Nominal essence refers to a linguistic convenience, a

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[20] Sunstein, above note 10 (Sunstein reviewing MacKinnon's Feminism Unmodified, above note 18).
[21] MacKinnon, above note 34; see also Drucilla Cornell 'Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State' (1991) 100 *Yale Law Journal* 247.
[22] Schwarz, above note 8 at 373.
[23] MacKinnon, above note 18 at 35; see also Schwarz, above note 8.
[24] MacKinnon, above note 18.
[25] Dr Colin James 'Winners and Losers: The Father Factor in Australian Custody Law' [2005] ANZLH E-Journal http://www.anzlhsejournal.auckland.ac.nz/pdfs_2005/James.pdf searched 18 November 2015.
[26] J. Speake *A Dictionary of Philosophy* (London: Pan Books, 1979) at 112.
[27] Diana Fuss *Essentially Speaking: Feminism, Nature and Difference* (New York, Routledge, Chapman and Hall, Inc, 1989).
[28] Diana Fuss, above note 27.
[29] Diana Fuss, above note 27.

classification. Real essence is empirically observable. Nominal essence is ascribed by language.[30] Fuss saw these distinctions as not only describing in a general way the difference between essentialism (real essence) and constructionism (nominal essence) but also in seeking to break the tension between the two apparently apposite positions. Fuss suggests that both essentialism and constructivism share the classification of 'essence', [31] concluding that social constructionism cannot escape the pull of essentialism. In effect, constructionism operates merely as a more sophisticated form of essentialism and that the bar between the two is 'by no means unassailable'.[32]

Marshall refers to three types of essentialism within feminist theory. Biological essentialism is found in the works of Firestone, Rich and others, then philosophical essentialism as found in Simone de Beauvoir's and others. Thirdly, in the work of Nancy Chadorow and others, is a cultural essentialism identified by the emergence in early human development of the essentially different male and female natures reflected in different emerging practices, including mothering practices.[33] In common to all, however, is the connection between the female body and reproduction of humankind, and that the gender difference between men and women is found in what is known as the maternal essence. The maternal essence is understood to comprise a biological essence of reproductive functioning, a psychological essence of emotional drivers and cognitive abilities, and the social essence of mothering. On their own, each component cannot explain the maternal essence. For example, women assuming primary responsibility for mothering within families is as much a factor of external social conditions as it is a factor of their biological ability to bear a child. Crowley and Himmelweit[34] suggest that feminism, in its theorising about motherhood either as an institution that creates obstacles and limitations for women's self-realisation or as a positive experience that is a resource and strength for women, creates an insoluble tension. In addition, empirical studies and reviews of motherhood in attempting to analyse different conceptions and theories of motherhood have added to this tension.[35] However, they do identify how social, economic, cultural, historical and political factors have influenced mothering and, more particularly, how different definitions and theories of motherhood are located according to different historical periods. Snitow[36] refers to the writings about motherhood in the 1960s and 1970s as questioning motherhood as a destiny, and framing it as oppressive and a constraint to gender equality. The ideas of Simone de Beauvoir and Shulasmith Firestone resonate during this period. Then, in the late 1970s, feminists began exploring women's actual experience of motherhood, Chodorow referring to women as having a different voice. In the 1980s, such writers as Sara Ruddick reaffirmed and celebrated motherhood and explored mothers' work and feelings about their children.

## Third wave Feminism

Since then, the third wave of feminism has emphasised the unique experience of motherhood. In addition, in the wake of the influence of feminism and the development of feminist theories during the 1970s and 1980s, there are nonetheless signs that the notion of 'essential' gender

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[30] Diana Fuss, above note 27 at 4; see also John Locke *An Essay Concerning Human Understanding* (London: printed by Elizabeth Holt for Thomas Bassett, 1690).

[31] Diana Fuss, above note 27.

[32] Diana Fuss, above note 27.

[33] Nancy Chodorow *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Yale University Press, 1978). It is beyond the scope of this thesis to explore theories of essentialism beyond the notion of the maternal essence and whether this is a source of oppression and therefore should be erased, or whether it is something valuable to be celebrated and protected.

[34] Helen Crowley and Susan Himmelweit (eds) *Knowing Women: Feminism, Institutions and Gender Divisions* (Cambridge: Polity Press, 1992).

[35] Sandra Scarr and Judy Dunn *Mother Care, Other Care: The British Dilemma* (London: Penguin Books, 1987); Ann Phoenix and Anne Woolett 'Social Construction, Politics and Psychology: Psychological Views of Mothering' in A Phoenix, A Woolett and E *Lloyd (eds)* Motherhood: Meanings, Practices and Ideologies (London: Sage, 1991); Ann Snitow 'Feminism and Motherhood: An American Reading' (1992) 40 *Feminist Review* 32-51; Ellen Ross 'New Thoughts on "the oldest vocation": Mothers and Motherhood in Recent Feminist Scholarship'20 Signs (1995) 397-413; Martha McMahon *Engendering Motherhood; Identity and Self-Transformation in Womens' Lives* (New York: The Guildford Press, 1995); Jane Ribbens *Mothers and Their Children: A Feminist Sociology of Childrearing* (London: Sage, 1994); Carol Sanger 'Leaving Children for Work' in Julia E Hanigsberg and Sara Ruddick (eds) *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Beacon Press,1999); Terry Arendell 'Conceiving and Investigating Motherhood' 2000 *Journal of Marriage and the Family* 62(4) 1192-1207; Venitha Pillay *Academic Mothers* (London: Trentham Books, 2007).

[36] Ann Snitow above note 35.

differences may now be undergoing something of a revival. This can be seen in such disciplines as genetics, evolutionary psychology and neurology.[37] In popular culture, self-help manuals seeking to explain the differences between men's and women's behaviours, have become bestsellers.[38]

## Impact on the development of family law and motherhood

The feminist theories described have had a major impact upon motherhood within the law, and arguably created an inconsistent, flawed and as yet unresolved foundation for the development of family law and the subsequently developed models of separated shared care parenting.

Removing any reference in the legislation to a gender classification in the area of child custody and the care arrangements for children upon parental separation, has arguably worked to the detriment of the people such attempts at formal equality in the law were designed to protect. This is because motherhood and fatherhood are the obvious gender references that have been abolished.

Gender-neutral family law and a welfare principle no longer about the protection of the mother-child relationship have also had to confront the problem of essentialism, and nowhere more clearly than in the area of breastfeeding.

## Breastfeeding

Breastfeeding is an example of one of the challenges faced by motherhood in New Zealand in its relationship to contemporary family law. Such challenge has broad application across all forms of separated parenting. This is because separated parenting laws in New Zealand are based upon gender neutrality when parenting is not gender neutral and breastfeeding, being a gendered role, is uniquely motherhood's domain. The tensions in the law and differing judicial approaches with respect to the breastfeeding mother, created by the application of a gender-neutral welfare and best interests principle, are highlighted below.

## Breastfeeding as a public policy issue

A mother breastfeeding her baby is regarded by the World Health Organisation (WHO) as a relationship of critical importance to the health and wellbeing of both mother and child. WHO and UNICEF together say:[39]

> Breastfeeding is an unequalled way of providing ideal food for the healthy growth and development of infants; it is also an integral part of the reproductive process with important implications for the health of mothers. As a global health recommendation, infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health. Thereafter, to meet their evolving nutritional requirements, infants should receive nutritionally adequate and safe complementary foods while breastfeeding continues for up to two years of age or beyond.[40]

New Zealand's health care policies are consistent with this international approach, supporting and encouraging breastfeeding by mothers.[41] The Ministry of Health's 2008 Background Report 'Protecting, Supporting and Promoting Breastfeeding in New Zealand' confirms the adoption of a national health policy endorsing solely breastfeeding for the first six months of a baby's life, and also beyond that after the introduction of solid food. It refers with approval to WHO as supporting breastfeeding into the second year of life. In discussing legislative support for such policies, it suggests considering the protection of breastfeeding in custody decisions as an innovative legislative measure that could be introduced[42] Both the Children's Commissioner and the Family Court are listed as key governmental stakeholders with respect to the encouragement and

[37] While beyond the scope of this article, see for example, see the work of Simon Baron-Cohen in systemising-empathising which lead him to investigate whether higher levels of foetal testosterone were responsible for an increased prevalence of autism spectrum disorders amongst males. His theory is known as the 'extreme male brain' theory of autism. He discusses his work in *The Essential Difference: Men, Women and the Extreme Male Brain* (Penguin, 2003) and based on his research in this area, essentially proposes that the male brain is programmed to systemise and the female brain to empathise; See also Madhura Ingalhalikar et al 'Sex Differences in the Structural Connectome of the Human Brain' Proceedings of the National Academy of Sciences Vol 111 Jan 2014. The brains of 428 males and 521 females aged eight to 22 years were studied. It was found that on average, women's brains were more highly connected across the left and right hemispheres, in contrast to men's brains, where the connections were typically stronger between the front and back regions. The findings pointed to men's brains apparently wired more for perception and co-ordinated actions, and women's for social skills and memory, making them better equipped for multitasking, intuitive thinking, and higher levels of emotional engagement.

[38] For example, see John Gray's *Men are From Mars, Women are From Venus* (Harper,2002); Steve Harvey's *Act Like a Lady, Think Like a Man* (Amistad, 2011); Sheryl Sandberg's *Leaning In: Women, Work and the Will to Lead* (Knopf, 2013).

[39] World Health Organisation and UNICEF 2003, *Global Strategy for Infant and Young Child Feeding,* p8.

[40] Research by Dr Katherine Dettwyler suggests the natural age for weaning for humans falls between 2.5 and 7 years of age; see Katherine Dettwyler and Patricia Stuart-Macadam (eds) *Breastfeeding: Biocultural Perspectives* (1995) ISBN 0-202-01192-5; Katherine Dettwyler and Patricia Stuart-Macadam (eds) *Breastfeeding: A Mother's Gift* (New York: Aldine de Gruyter, 1999).

[41] http://www.health.govt.nz/publication/national-strategic-plan-action-breastfeeding-2008-2012 Searched 10 May 2017; Code of Practice for Health Workers in Implementing and Monitoring the *International Code of Marketing Breast Milk Substitutes* in New Zealand also refers to 'breastfeeding as the best and safest way to feed infants'.

[42] Above note 41 at para 4.1.

protection of breastfeeding.[43] The report quotes from a 2005 Human Rights Commission report, The Right to Breastfeed, in response to questions about breastfeeding at work, and calls for stronger protection of breastfeeding mothers and babies in New Zealand. It records the report as noting that 'although there is no specific law in New Zealand on the right to breastfeed apart from anti-discrimination measures, the right is given meaning in a variety of ways through measures to respect, protect and promote the right to breastfeed'.[44] It also points to one of the barriers to the support and protection of breastfeeding for mother and child as being a partner belief that artificial feeding will enhance the opportunities for the father to bond with the child.[45]

## Tension between public policy and New Zealand's family law

The law's apparent compromise of a unique and gendered aspect of a parent-child relationship, one that can only arise through breastfeeding by a mother towards her child, would seem to place the law in tension with the clear policy direction. This is in circumstances where it should be expected that legislation be consistent with, and reflective of, policy.

As a result, New Zealand Family Court decisions addressing the issue of breastfeeding are mixed, as judges grapple with the issue. In *SAQ v LRER*[46] the judge described events where the father manipulated the mother and retained the children in his care as ;an unscheduled interruption in the children's natural development with their mother and the progression in their developmental move away from an infant attachment to her and towards a more independent life with their father'.[47] He went on to say:[48]

> That is a perfectly natural progression in any child's life, commencing from the most intimate attachment with the mother and the womb, through the processes of fundamental, maternal bonding and breastfeeding and then toddling towards dad and beginning to explore the world outside with him. These are perfectly natural processes which need, for the best interests of the children, to be achieved, to be supported, nurtured and carefully managed by the parents.

Although section 4(3) of the Care of Children Act appears to preclude him from doing so, the judge was commenting that there are gender differences that should be recognised between mother and father roles and functions. Notwithstanding that the children had been in the care of the father, the judge went on to say: 'I do not describe this as a very finely balanced judgment. I am clear in my view, that there must be a parenting order in favour of the mother and I do make that order now'.[49]

The uniquely gendered nature of breastfeeding by a mother was addressed squarely by the same judge in the 2012 decision of *LJJ v RAF*,[50] where the father's position was that the welfare and best interests of a not quite two-year-old child would be served by an equal time shared care arrangement. The judge prefaced his comments by saying: 'Lest it be thought, as it is in some quarters, that the Family Court has a preference for women or mothers, I emphasise again that the law makes it clear there is to be no presumption or preference on the basis of gender'.[51] He then went on to say:[52]

> It is a fact that the child was breastfed. That is not a matter of presumption or of preference. It is simply a biological fact; some children are, some children are not. The benefits of breastfeeding are certainly well known in the literature and the evidence most commonly heard in this Court is that it is generally regarded as beneficial for children that breastfeeding should continue for at least the first three months and up to the first six months of a child's life. There is no hard-and-fast rule, but that is a common approach, and I accept on the evidence that I have heard that it is an approach that was followed here. I am told that the mother's feeding of the child was not without difficulty and that early breastfeeding was supplemented by bottle; that is not uncommon. Why do I comment on this at all? Because very obviously there is a naturally strong biological attachment formed between infant and feeding mother in that early stage. This is not a discrimination against fathers, or if it is, it was designed by a power greater than this Court.

He further commented that it was also well understood that a child at this age will frequently show signs of separation anxiety if they are separated from the person with whom they have the most stable and close attachment, and that 'the parents may not have appreciated that what

[43] Above note 41 at 39.
[44] Above note 41 at 31.
[45] Above note 41 at 42.
[46] *SAQ v LRER* FAM-2009-091-000618, 12 November 2010, Family Court Wellington.
[47] *SAQ v LRER* above note 46 at para [69].
[48] *SAQ v LRER* above note 46 at para [69].
[49] *SAQ v LRER* above note 46 at para [75].
[50] *LJJ v RAF* [2012] NZFC 5867.
[51] *LJJ v RAF* above note 50 at para [10].
[52] *LJJ v RAF* above note 50 at para [12].

they were telling me was altogether familiar and describes … the behaviour of an infant who is insecure and anxious about being parted from his mother'.[53] The judge went on to direct a one home care model for the child, with the mother. He then directed contact with the father, to whom the child was acknowledged to have a close attachment, three times a week for up to three hours at a time.

These decisions reflect cultural feminist theory, with its central understanding of gender difference, in this case with respect to parenting. They therefore affirm, respect and support breastfeeding by a mother towards her child and take this gender-specific aspect of a mother-child relationship into account in the care arrangements between the parents.

## Family Court decisions involving breastfeeding which do not recognise gender difference

Other Family Court decisions, however, involve judicial attitudes derived from liberal feminist theory, that is, that in a pursuing equality between the parents, there should be no appreciable difference between mothers and fathers to be recognised with respect to the care arrangements.

*MT v AK* [54] was a case about a nearly five month old baby who was breastfed on demand by the mother, which entailed at that time feeding approximately every one and half hours. The father was seeking to commence, through contact, his own care of the baby, which he regarded as his right. The mother opposed the introduction of such contact, seeking uninterrupted stability to care for the child in this early period without pressure from the father. The baby was breastfed and the mother wanted to continue to breastfeed, as she had done with her other four children. Evidence was provided for the mother by a trained midwife that 'during breastfeeding the attachment between mother and baby is strengthened and significant brain development occurs'.[55] The judge, in response, said: 'That may or may not be correct but in the absence of any literature, any peer-reviewed research or any medical evidence I cannot give that statement any more weight than simply the personal view of [the midwife]'.[56] The midwife had also offered evidence that 'it is widely accepted that breastfeeding results in significant health benefits for babies and mothers. Formula does not provide the same health benefits'[57] In response to this, the judge said:[58]

> Again, there is no evidence to back up those assertions … It seems to me to be no more than a wide-ranging statement which may indicate a particular bias on the part of [the midwife]. Indeed the Court is aware of significant debate as to whether breastfeeding in fact provides better health benefits for children than formula, and that opinion is squarely divided on the issue.

The judge went on to determine by way of interlocutory hearing that the evidence of the midwife as to these matters could not be considered as the evidence of an expert witness, as she had clearly stated in her affidavit that she was giving evidence in support of the mother and was therefore not neutral, and further that 'the fact she is qualified as a midwife does not make her an expert in midwifery'.[59] Therefore, he considered any opinions she expressed as 'simply her personal opinions and those then become an issue of weight for me'.[60] He struck out those paragraphs of the midwife's affidavit evidence which he regarded as simply her opinion, and then proceeded to hear the matter without the evidence of the midwife as to her view of the value of breastfeeding to mother and child. In his final judgment, he acknowledged that the mother was breastfeeding and wanted to continue to do so, and confirmed that he had had his attention drawn to WHO's support for breastfeeding and Article 24(2)(d) of UNCROC that the state shall support access to education by parents and children of the advantages of breastfeeding. However, he said 'to argue … that Article 24 supports the use of breastfeeding, in my view elevates that article to a level which is not consistent with what is in fact stated in Article 24(2)(b)'[61] He further recorded that the mother's 'desire to maintain breastfeeding is laudable but must be subservient to the welfare and best interests of A',[62] that is, breastfeeding must not be a barrier to contact between A and her father and that 'if there is not a willingness by Mrs

[53] *LJJ v RAF* above note 50 at para [22].
[54] *MT v AK* CRI-2009-012-000413, 22 September 2009; [2010] NZFLR 613.
[55] Above note 54.This discussion is in relation to the oral judgment with respect to an application by counsel for father to strike out the affidavit of the midwife, being a witness for the mother. Paragraph 12 of the midwife's application refers.
[56] Above note 54 at para [12].
[57] Above note 54 at para 14 of the affidavit of midwife, referred to in para [12] of the oral judgment.
[58] Above note 54 at paras [12]-[13].
[59] Above note 54 at para [6].
[60] Above note 54 at para [10].
[61] Above note 54 at para [19].
[62] Above note 54 at para [26].

H to work with Mr T to ensure that A is able to be breastfed when she is in her father's care, then bottle-feeding will be the only option and if Mrs H continues in her view that she refuses to express breast milk then Mr T has no option but to use formula'.[63] The judge also considered that the mother was 'using the breastfeeding issue to keep Mr T at arm's length'.[64]

Echoes of a similar approach can be found in the 2013 decision of *Thomsen v O'Leary*,[65] where the judge declined the mother's application to relocate the parties' twenty-month-old child from Timaru to Thames. The child was breastfed and it was the mother's position that she wanted the child to self-wean. The judge said:[66]

> … further, I question if perhaps this is a strategy designed to control the nature and quality of the father's contact with T to thwart overnight contact.

He went on to say:[67]

> T has undoubtedly benefitted from breastfeeding. I recommend, however, that the mother after having come to terms with my decision could perhaps consider bringing forward T's weaning, and T could be transitioned into overnight stays in his father's care.

If breastfeeding was not a continuing issue, there would then be no presenting impediment to the achieving of equality between the parents, any gendered difference no longer needing to be acknowledged or overcome.

The *MT v AK* and *Thomsen v O'Leary*[68] decisions also appear to frame breastfeeding as a utility. Such an approach assists in neutralising its naturally gendered nature. However, it also then appears to diminish the significance and value of the intimate relationship between mother and child which the welfare principle was originally designed to protect, and which breastfeeding secures.[69] It also arguably challenges the human dignity of a breastfeeding mother in proposing such a utilitarian approach, where the mother's breasts should be available within a separated parenting context. For example, in *C v W*,[70] to enable and prioritise the development of a separated shared care arrangement for an infant between the mother and the father, the child remained in the home with the parents taking turns to vacate. Because the child was being breastfed, the mother would regularly visit to feed the child when in the father's care. Then in *MT v AK*[71], while the judge said that he hoped 'that once orders are made, Mrs H and Mr T will work together to discuss … how [A] can continue to be breastfed while in her father's care …', he also chided the mother if she refused to express breast milk that the father could then bottle-feed to the child while in his care through his court-directed contact, such contact requiring the child to be away from the mother when breastfeeding would ordinarily have occurred.[72]

## The tension between breastfeeding as a gendered issue, and welfare and best interests as a non-gendered principle

Breastfeeding remains a welfare and best interests issue,[73] yet is determined by the sex of the parent. As a result, section 4(3) of New Zealand's Care of Children Act 2004 would appear to be in an inappropriate tension with this fact of nature. At times, breastfeeding is seen to be supported by the Family Court as an important aspect of motherhood and significant to the development of the intimacy of the mother-child relationship, as the decisions by some judges demonstrate. At other times, the Family Court does not support breastfeeding to this extent, and the contested nature of the issue is evident. The Court may regard it as a utility, whereby the mother makes herself available to both the father and child during his care time to

[63] Above note 54 at para [31]; earlier in his decision, the judge recorded that 'A being breastfed is extremely important from Mrs H's perspective. I record that in her evidence she has refused to express breast milk for the purpose of facilitating Mr T's care of A but instead indicated a willingness to breastfeed A while she is in her father's care'. Para [26].

[64] Above note 54 at para [27].

[65] *Thomsen v O'Leary* [2013] NZFC 5373.

[66] Above note 65 para [97].

[67] Above note 65 at paras [114] and [115].

[68] *MT v AK* CRI-2009-012-000413 22 September 2009; *Thomsen v O'Leary* [2013] NZFC 5375.

[69] See Jonathan Herring "The Welfare Principle and the Children Act: presumably it's about Welfare" *Journal of Social Science & Family Law*, 2014.

[70] *C v W* (2005) 24 FRNZ 872, [2005] NZFLR 953.

[71] *MT v AK* above note 54 at para [31].

[72] Above note 54 at para [31].

[73] *MT v AK*, above note 54 at para [26], the judge said 'Central to this case is the issue of breastfeeding. The fact that A is breastfed is a relevant matter which I need to consider as well as the s5 principles'.

enable breastfeeding to continue, or the mother may be judicially encouraged to wean the child to enable contact with the father to more easily take place.

The courts, in supporting breastfeeding on some occasions but not others, also appears to be in tension with New Zealand's health care policies to support, encourage and facilitate breastfeeding. If breastfeeding is accepted as a matter of gender and is in a child's welfare and best interests, a further issue to therefore be addressed is whether breastfeeding should be proactively protected, encouraged and facilitated by the courts in determining separated parenting arrangements. The pursuit of equality through recognition of the differences between men and women, can accommodate the value to a child of a breastfeeding mother without diminishing the equal value of a father who cannot breastfeed. However, this does not sit comfortably with section 4(3) of the Care of Children Act. That is because it is a provision which requires that the gender of the parent not be taken into account in determining a welfare and best interests matter. Therefore, while the existence of breastfeeding may be recognised as a relevant factor in a welfare and best interests enquiry for a particular child, it appears that it cannot be recognised more broadly as a self-evident gender difference that should be taken into account in determining the best care arrangements for a child in a pro-active, provisioning manner. As a result, there appears to be an inherent tension within the welfare principle itself created by the presence of section 4(3) within the legislation.

Breastfeeding, as an example of gendered care provided by motherhood to a very young child, is not easily accommodated within the gender-neutral legislation of New Zealand's Care of Children Act. Judges have addressed the tension between breastfeeding and separated parenting, including the development of overnight shared care, in different ways. Some have recognised its reality and the importance of the intimacy of the mother-child relationship being developed through breastfeeding; others have addressed breastfeeding as a utility, arguably diminishing the value of motherhood in the process. Still others have suggested that a mother may use continued breastfeeding so as negatively to 'gate keep' a child's relationship with the other parent, usually the father, which should be resisted.

Restoring dignity to the participants in contested court matters, and re-integrating the purpose and process of family law with the people involved, may re-humanise motherhood and fatherhood, and thereby provide increased protection to a child of both relationships. It may also address the disconnect that appears to have occurred in some of these circumstances, where the law appears to have taken on a life of its own.

## A remodelled judgment

It was on this basis that as a part of my doctoral thesis, I fictitiously rewrote the *MT v AK* judgment,[74] on the assumption that s4(3) of the Care of Children Act 2004 had been repealed and that consideration and respect was able to be given in an unconstrained way to the gendered yet equal value of each of motherhood and fatherhood. This was a particularly good decision to use, because it was dealing with a five-month-old, breastfed baby. The key differences found in the fictitiously remodelled judgment include a recognition of the unique strengths that each of mothering and fathering bring to parenting and, in particular, the need to protect and dignify the intimacy and value of the breastfeeding relationship between mother and child in a welfare and best interests consideration.

For example, part of the real decision reads:

> [28] [Mrs H's] desire to maintain breastfeeding is laudable but must be subservient to the welfare and best interests of A. … I hope that once orders are made, Mrs H and Mr T will work together to discuss

[74] *MT v AK* [2010] NZFLR 613.

> A and her needs and how she can continue to be breastfed while in her father's care. That may involve Mrs H going to Mr T's home or vice versa, but I want to record that if there is not a willingness by Mrs H to work with Mr T to ensure that A is able to be breastfed when she is in her father's care, then bottle-feeding will be the only option and if Mrs H continues with her view that she refuses to express breast milk then Mr T has no option but to use formula.

A remodelled, fictitious judgment with respect to this paragraph, could read as follows:

[28] [Mrs H's] desire to maintain a breastfeeding relationship with A is laudable and must be supported. It is central to A's welfare and best interests and Mr B's contact with A must be subservient to this reality. Mr B is not excluded; it is his role to encourage and support Mrs C in her present provision of breastfeeding to A. It will be Mrs C's role to engage in facilitative gatekeeping practices, opening up to Mr B opportunities for relationship by him with A for the future, as A becomes less dependent on her and is encouraged and able to develop other healthy, secure and significant relationships.

## Conclusion

In conclusion, while further examination of feminist theories is beyond the scope of this article, it is clear that the diversity of thinking found within its framework is vast, and contributes to the foundational layers of complexity, power struggle and paradox found with respect to motherhood's relationship with family law.

This article's discussion of feminism's approaches to gender, motherhood and the maternal essence (as distinct from the paternal), while only able to offer a partial understanding of the complexities of human behaviour and experience, draws attention not only to the significance of motherhood as an individual gendered experience, but also to its significance within the broader historical and contemporary social contexts, institutions and the law. The issue may be further complicated, as evidenced by the discussion with respect to breastfeeding, by the law's encouragement to ignore any gender difference between mothering and fathering in determining what the welfare and best interests of a child might require. The following questions therefore arise:

Are gendered parental differences, as well as non-gendered parental similarities, relevant in a welfare and best interests consideration; and

Does gender neutrality constrain the application of the welfare principle?

If the answer to these questions could be 'yes', then a repeal of legislative provisions such as s4(3) of New Zealand's Care of Children Act 2004 could be considered, to address the restraint that the requirement of such gender neutrality brings to parenting law.

Currently, third wave feminism (the reclaiming and personalisation of motherhood as a rite of passage, as reflected in the last twenty years) offers the hope of acceptance, not denial, of the maternal essence, as women integrate the achievements of second wave feminism (the political movement of the 1960s, 1970s and 1980s which sought to address gender inequality by critiquing the effect of state systems, particularly the law, on motherhood as a status and practice), while also clarifying the confusion it created.[75]

A redemptive approach by the law could enable a transformed equality jurisprudence, recognising that 'mothers are special'[76] without diminishing fatherhood. This could also provide for a recovery within New Zealand's parenting law of respect for motherhood in all its uncompromised fullness, dignity and value, not only to a child but also to society as a whole, a matter that may have application to other jurisdictions as well.

[75] See a discussion of third wave feminism in Bridget J Crawford, above note 533; see also Emily Jeremiah "Motherhood to Mothering and Beyond: Maternity in Recent Feminist Thought" *Journal for the Association for Research on Mothering*, Vol 8, Nos 1 and 2, 21-33, where the problems with a shift from essentialism to poststructuralism, expressed as a change from motherhood to mothering, are discussed, concluding that 'maternal performativity' needs to continue to be associated with maternal ethics, characterised by 'relationality' and 'bodiliness'.

[76] 'Mothers are special' is the often quoted comment found in the 2006 House of Lords decision in Re G (children) (FC) [2006] UKHL 43 per Lord Scott of Foscote, at para [3].

# The Rights of Grandparents in Parenting Matters: An Australian Perspective

**Thos Hodgson***

The *Family Law Amendment (Shared Parenting Responsibility) Act 2006* amended various sections of the *Family Law Act 1975* in relation to parenting orders and specifically provided for a grandparent to apply for a parenting order.

Section 65C of the Act states (emphasis added):-

> *A parenting order in relation to a child may be applied for by:-*
>
> *(a) either or both of the child's parents; or*
>
> *(b) the child; or*
>
> ***(ba) a grandparent of the child; or***
>
> *any other person concerned with the care, welfare or development of the child.*

Section 60B(2)(b) of the Act states that ;children have a right to spend time on a regular basis with and communicate on a regular basis with both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)'. Grandparents are included with 'other relatives' as a specific class of person, who may be able to establish that they are significant to a child's care, welfare and development. If that is the case and it is in the best interests of the child, the child has a right to spend time with that grandparent.

The Explanatory Memorandum[1] accompanying the 2006 amendments explained Section 60B(2)(b) of the Act as follows:-

*Paragraph 60B(2)(b) is amended to specifically refer to children having a right to spend time on a regular basis with grandparents and other relatives who are significant to their care, welfare and development. This amendment recognises the important role that grandparents and other relatives play in a child's life. It implements recommendation 43 of the LACA Report and is consistent with the other amendments in the Bill to facilitate greater involvement of extended family members in the lives of children.*

The Explanatory Memorandum stated in respect of Sections 60CC(3)(d) and 60CC(3)(f) of the Act:-

*Paragraph 60CC(3)(d) replaces existing paragraph 68F(2)(c) with a modification. Subparagraph 68F(2)C(ii) has been modified to make an explicit reference to grandparents or other relatives. The existing provision provides that, in determining what is in the best interests of a child, the court should consider the likely effect of any change of the child's circumstances, particularly in relation to separation from his or her parents and other persons with whom the child has a relationship. New subparagraph 60CC(3)(d)(ii) makes an explicit reference to grandparents or other relatives. This change ensures that the court recognises the importance of the relationships that the child has with wider family and in particular grandparents.*

*Paragraph 60CC(3)(f) replaces existing paragraph 68F(2)(e) with a modification. Paragraph 68F(2)(e) has been modified to make an explicit reference to grandparents or other relatives. This provision provides that in determining the best interests of the child, the court should consider the capacity of the parent or of any other person to provide for the needs of the child, including emotional and intellectual needs. The amended paragraph 60CC(3)(f) recognises the importance of the relationships that the child has with wider family, in particular grandparents."*

In his second reading speech to the Bill in the House of Representatives on 8 December 2005, the then Attorney General, the Honorable Phillip Ruddock said:-

> *"The bill contains changes to better recognise the interests of children in spending time with grandparents and other relatives, who also play an important role in the raising of children."*

Section 64B of the Act which deals with the meaning of 'parenting order' and related terms uses the word 'person' in subsection (2). The 'person' referred to in this subsection may include either a parent of the child or a person other than the parent of the child (including a grandparent or other relative of the child).

Grandparents are also referred to Section 65G of the Act, in which the legislature imposes conditions upon a court if a parenting order is to be made otherwise than in favour of a 'parent, grandparent or other relative of the child. In particular, this deals with an order for residence or the allocation of parental responsibility for a child.

The 2006 amendments to the Act, which specifically refer to grandparents relate to community awareness of the role and importance of grandparents in children's lives. The importance to a child of 'knowing' their family background, especially where the grandparent has the capacity and is willing and able to provide that connection and care, should not be lightly disregarded. It appears to be the legislative intent that grandparents should be specifically considered and recognised when determining the nature of orders which should be made in the best interests of children. Grandparents are therefore afforded some special significance in terms of parenting, which in some circumstances is hardly surprising as often grandparents are

*Edmunc Barton Chambers, Level 44, MLC Centre, Sydney, NSW.2000.

[1] Commonwealth of Australia Explanatory Memoranda, www.austlii.edu.au, Family Law Amendment (Shared Parental Responsibility) Bill 2006.

the sole stable feature in the lives of many children.

The *Family Law Act* confers upon parents the primary powers and responsibilities relating to the care of their children. These parental responsibilities provide parents with the legal authority to determine for example, the schools which the children will attend, the religious faith which the children will follow and matters relating to children's medical treatment, health and wellbeing, as well as the country in which the children shall live. These parental powers and responsibilities are exercised equally by both parents, subject to any Court order. There is also of course an obligation upon parents to provide for the financial support of their children.

Grandparents are not entitled to exercise the above powers and responsibilities. The law does not empower them to make decisions about or oblige them to assume any responsibility to provide financial support for their grandchildren. In a practical sense however, parents' may consent to delegate parental powers and responsibilities to grandparents, who may become very much involved in caring for their grandchildren, sometimes even on a daily basis. Frequently grandparents provide assistance for their grandchildren by providing financial support and perhaps in even meeting their school fees.

Children should be entitled to have a relationship with their grandparents provided it is in 'the children's best interests'. This remains the 'overarching' consideration. Any determination as to the best interests of the child or children should be informed by the family dynamics between the children's parents and grandparents. In that regard, the views of the parents are significant but not necessarily determinative.

## A Review of Relevant Cases

In ***Sampson & Jacks***[2], Justice O'Ryan dealt with an application by the maternal grandparents to spend time with two children of the marriage aged nine years and seven years respectively. The grandparents had not seen the children for many years. The children's mother had a very poor relationship with her parents. The children's parents, who remained married, were totally opposed to the grandparents spending any time with the children. There was no middle ground or possibility of a compromise.

The expert evidence before His Honour was that whilst it would be beneficial for the children to have a relationship with their grandparents, this potential benefit was outweighed by the fact that contact between the children and the grandparents would be profoundly disruptive to the mother, causing her emotional distress and having the potential to contaminate the relationship between the mother and the children as well as the paternal relationship.

His Honour stated, 'In my opinion the importance of children having a relationship with extended family including grandparents was recognised even prior to the amendments made by the *Family Law Amendment (Shared Parental Responsibility) Act*'. His Honour referred to the decision of Justice Kay in ***Stevens and Lee***[3]. Justice Kay had stated that the legislature made it clear that grandparents are significant in children's lives, or can be significant in children's lives. Where a child has a long established relationship with a grandparent, if the Court is satisfied that the relationship is of significance to the child, that a bond exists and that the child will suffer detriment if the bond is severed, the degree of suffering then has to be weighed against the degree of hostility which exists to the custodial parent. If the Court is satisfied that the welfare of the child will best be served by the continuing association the child has with the person who the parent does not desire to associate with any longer, the Court will not hesitate but to continue the relationship. As a consequence of Justice Kay's concern however that the mother's hostility towards the maternal grandmother would impact badly on her own relationship with the child, he did not make any orders for the grandmother to have any physical contact with the child.

In ***M & T***[4], the Full Court held that ***Stevens (supra)*** should be viewed in the light of the fact that it was decided before the amendments which had been made to the Act in 1995 which included Section 60B and the principles espoused therein, which had elevated the importance of the role of grandparents at that time.

Justice O'Ryan ultimately held that the children should have some contact with their grandparents on a graduated basis, initially supervised notwithstanding the expert evidence that the potential benefit for the children to have a relationship with the grandparents was outweighed by the fact that such contact would be profoundly disruptive to the mother, causing her emotional distress and having the potential to contaminate the relationship between the mother and the children. His Honour's decision was upheld by the Full Court.

In ***Church and T Overton & Anor***[5], Justice Benjamin stated as follows:-

> *58 The law is that parents are entitled to parent children. If there is an assertion that parenting duties ought to be usurped, it is for the person asserting that fact to establish that parents are not carrying out those duties in the best interests of the child.*

[2] *[2008] FamCA 176*
[3] *(1992) FLC 92-201.*
[4] *[2003] FamCA 602.*
[5] *[2008] FamCA 965.*

*If a court is satisfied that an approach to the upbringing of a child by a parent or parents in whatever way is contrary to that child's best interests, then the court should interfere by putting in place appropriate orders. In the absence of substantive issues as to the child's best interests, it is not the role of a court to peer over the shoulders of functional parents and second guess the decisions they make regarding the upbringing of their children. A court should only intervene in such decision-making in a cautious, careful and thoughtful manner and consider whether a better approach is to make no order at all.*

*That is not to say that a parent who acts capriciously in isolating a child from a grandparent with whom the child had a meaningful relationship ought not be the subject of orders, nor should this derogate from the role of the many grandparents and relatives who have taken up the care of children in circumstances where the parents were unable or unwilling to care for them.*

In ***Bemert v Swallow***[6], Justice Watts cited with approval Justice Benjamin's above statements. This matter involved a maternal grandfather who sought orders to spend time with his four grandchildren aged between eleven years and two years. The children's parents were vehemently opposed to this occurring and there was in existence an Apprehended Violence Order, made for a period of five years which prevented any contact between the grandfather and the parents and the children.

From early 1998, apart from chance meetings, there had been no contact between the grandfather and the parents. As such the children had no relationship with the grandfather. None of the children had established a meaningful attachment or relationship with him. He had never been their primary care giver.

Justice Watts found that as there was no evidence of any significant issues about how the children were being parented by the mother and father and as the children's parents opposed them spending time with the maternal grandfather, the parents were entitled to make that decision without having to justify it through litigation.

His Honour stated that given the paramount consideration in determining any parenting application as to what is in the best interests of the children, it would make no sense to embark upon a course of litigation which he considered:-

(a) would be difficult to contain and be protracted;
(b) would be a source of high stress for a parent to whom the children were primarily attached;
(c) might psychologically injure or disable that parent and consequently put the children at psychological risk; and
(d) was without any realistic prospect of success.

In these circumstances, His Honour summarily dismissed the grandfather's application. His Honour also canvassed issues relating to abuse of process, frivolous and vexatious proceedings, permanent stay and security for costs.

The grandfather had been described as a 'veteran' and 'serial' litigant and had been found by the Supreme Court of New South Wales to be a vexatious litigant. He believed there was an Australian judicial conspiracy against him in several jurisdictions and he had, it appeared, proudly told Justice Watts that he had reported twenty corrupt Australian judicial officers to the ICC. He had also sought to have Blanch CJ (the Chief Justice of the District Court of New South Wales) removed from office. These may also have been factors in the exercise of Justice Watt's discretion that caused him to consider that it would not be in the children's best interests to have contact with the grandfather.

In ***Gaffney v Erikson BC 2011 08782***, Federal Magistrate Foster summarily dismissed the maternal grandfather's application to spend time with a child aged 22 months. The grandfather had never met the child, who had no relationship with him at all. The mother had terminated her relationship with the grandfather prior to the birth of the child. She asserted that it was a considered and sound decision that neither she nor the child should have any relationship with the grandfather. The father was supportive of the mother's decision and had also chosen not to have any further involvement with the grandfather.

Federal Magistrate Foster also cited with approval the comments of Justice Benjamin in ***Church and T Overton and Anor (supra).*** His Honour had stated that the Family Law Act places parents in a special position in respect of their children and that the objects and principles set out in Section 60B clearly set out their importance. The primary considerations in Section 60CC(2) weigh the importance of a meaningful relationship between child and parent against the need to protect the child from harm.

His Honour further stated that on face value, the amended Act does not invest grandparents with a special category of rights or position over and above other people who might be significant to a child's care, welfare and development. The only people in such a special category are parents.

His Honour also stated on the literal reading of Section 60B, if the particular grandparent is not significant to the child's care, welfare and development it seems the child has no 'statutorily enshrined right' to spend time with them on a regular basis. Given the paramountcy of the child's best interests, however, regular time might be ordered. Reading the totality of the amendments in the context of the explanatory memorandum, it is clear that the legislature was endeavouring to acknowledge the importance of grandparents and other relatives in the lives of children.

Federal Magistrate Foster stated that the grandfather

[6] *[2009] FamCA 5.*

had no meaningful attachment or relationship with the child and the parents were absolutely opposed to the grandfather having a relationship with the child. Further, there were no significant issues as to how the child was being parented. He considered that the grandfather's application was promulgated not in the context of the best interests of the child but in an endeavour to improve the grandfather's relationship with the mother. He further considered that litigation would be stressful for the parents, particularly the mother, who was the child's primary carer. Such stress may of necessity impact on the child, which could not be said to be in the child's best interests. He stated that it is primarily a matter for the child's parents, whilst the child is of tender years, to make decisions they perceive to be in the child's best interests.

In ***Valentine & Lacerra and Anor***[7], the proceedings involved a maternal aunt and grandmother (aged eighty-five years) who sought to spend time with a child aged some eight years. The child's mother had died when the child was around six years old and the father, (from whom the mother had been separated for some two years before her death), harboured a significant distrust against the maternal aunt and grandmother. He was only prepared to agree for them to spend limited time with the child on his terms, notwithstanding that prior to the mother's death, the child had spent periods of her life living in the same household as the maternal aunt and grandmother. There were occasions when he refused to allow the child to spend any time at all with her maternal family.

Federal Magistrate Harman was satisfied that the maternal aunt and grandmother were 'significant' persons to the child, as the child had lived in their household and had at times daily interaction with them.

The Federal Magistrate found that in relation to parental responsibility, the presumption of equal shared parental responsibility applies only between parents and as a consequence, the sole surviving parent, namely the father was entitled to the benefit of the presumption of parental responsibility in his favour alone. The Federal Magistrate then considered the primary and secondary considerations formulated in Section 60CC of the Act and determined amongst other things that:-

*(i) The child enjoyed an excellent relationship with her father, maternal aunt and maternal grandmother;*

*(ii) The father's lack of willingness and ability to facilitate the child's relationship with her maternal family was 'highly regrettable' and did the father 'no credit';*

*(iii) There would be a positive change for the child if she had precise and predictable periods of time with her maternal family, so as to have an 'appreciation and understanding of that half of her make-up';*

*(iv) There was some concern about the father's capacity to recognse the impact of his past actions upon the child's ability to grieve and continue to experience her mother's memory by spending regular time with her maternal family;*

*(v) Both parties' proposals would meet the child's present level of cognizance and understanding and that any interferences with the father's parenting (as the sole surviving parent) were 'matters of degree rather than matters of fundamental jurisprudence'.*

Accordingly, the Federal Magistrate ultimately determined that the child should spend every third Sunday during school terms with the maternal aunt and grandmother as well as for periods of seven days during school holidays at the end of terms 1, 2 and 3 and for a two week period during the Christmas school holiday period.

The father appealed the Federal Magistrate's decision and in particular contended that he had failed to take account of or give sufficient weight to the fact that the father was the sole surviving parent and the only person with parental responsibilities, which also included a failure by the Federal Magistrate to take into account the views of the father in relation to the parenting issues before the Court.

It was submitted on the father's behalf that where a natural parent has sole parental responsibility, that parent must have a level of primacy when the Court comes to consider what parenting orders are to be made. As such, the burden of the duties and responsibilities of a parent must be given some precedence. Further, it was submitted that there must be a fundamental distinction between those on whom parental responsibility falls and others who seek less involvement in the life of a child by way of 'spending time'. As such, a non parent who has no parental responsibility and who spends time with the child only by virtue of a Court order, does not stand in an equal position to the parent of a child.

The Full Court did not accept these submissions and stated that the fact that one party has sole parental responsibility does not create primacy in relation to the making of other parenting orders. Certainly that party has the duties, powers, responsibilities and authority as set out in the definition but it does not dictate what other orders might be made in accordance with the best interests of the child. As such, the parental responsibility that a parent has is always subject to any parenting orders.

The Full Court also referred to the decision of Justice Benjamin in ***Church v T. Overton & Anor (supra)***. The Full Court stated that in that case, Justice Benjamin was faced with an argument by the applicant grandfather that a grandparent has a 'special position under the legislation which entitles him or her to spend time and communicate with grandchildren. That proposition is clearly not correct

[7] *[2013] FamCAFC 53 (9 April 2013).*

but it seems that in dispelling it, His Honour went too far the other way and in effect accepted that it was the role of parents to determine with whom their children should have a relationship and that this determination should shape whatever order is to be made. Further, the Full Court stated that the comments of Justice Benjamin, which tended to suggest that the commencement of the decision-making process is a presumption that a parent knows best and the onus is on a non parent to persuade the Court that the role of a parent should be usurped and their views disregarded, are not supported by authority and departed from Full Court authority.

The Full Court referred to the decision of ***Aldridge & Keaton***[8] in which the Full Court had considered the effect of the 2006 amendments to the Act. The Full Court stated that whilst the amending Act had placed greater emphasis on the role of both parents in the upbringing of their children, all applications for parenting orders remain to be determined with the particular child's best interests as the paramount but not the sole determinant. The Full Court stated that the basis for upholding this view included:-

*(i) The unaltered provision dealing with best interests (Section 60CA) and the positioning of the section in the Act;*

*(ii) The recognition in Section 65D(1) that ultimately a Court should make such parenting order as it thinks proper; and*

*(iii) That no provision was included in the Act suggesting greater or lesser weight should be given to any particular applicant.*

The Full Court in summary determined that in dealing with any parenting application a Court must determine whether making a parenting order would be in the child's best interests. There are no presumptions or preferential positions that apply as between a parent and a non parent and an application for a parenting order by a non parent is to be determined in the same way as an application by a parent, namely according to its own facts and having regard to the best interests of the child as the paramount consideration (Section 60CA of the Act). The overarching imperative is to achieve an outcome which would most likely promote the child's best interests.

*In* ***Hill v Misiti***[9] the maternal grandmother and maternal step grandfather sought that they be permitted to spend time with the children, aged eight years and four years respectively. There were longstanding difficulties in the relationship between the mother and the grandmother. The mother had stopped the grandmother spending time with the children for some two years.

Federal Magistrate Foster considered that the grandmother's evidence clearly demonstrated her efforts, whether they be subconscious or otherwise, to enmesh the children in the conflict between herself and her daughter. The Single Expert expressed a strong view that the children's best interests were going to be optimally met by protecting the parenting capacity of the parents in preserving the strong marital bond between them. She was particularly concerned about the negative emotional impact on the mother of ongoing conflict with the grandmother.

The Federal Magistrate stated that it was clear that the children were part of a caring and loving household and had appropriate and strong relationships with both their parents. It was important to note that these relationships were contained within an intact and supportive parental relationship. The parents had demonstrated an appropriate attitude to the children and to their responsibilities of parenthood. They had resolved to cease the children's time with the grandparents which on the evidence was appropriate. If there was a resumption of the relationship between the children and the grandparents, this may have a significant adverse impact upon the parental household in particular in relation to the mother and the children, both emotionally and psychologically. The mother's parenting capacity will suffer and as a consequence the children will suffer.

The Federal Magistrate also considered that there was a need to protect the children from a risk to their psychological wellbeing, particularly as the eldest child had been subjected to improper influence by the grandmother which was adverse to that child's best interests.

In ***Lowy v Lindgren***[10], the maternal grandparents sought orders to spend time with their granddaughter aged nine years. The mother and father had ceased their relationship several months prior to the birth of the child and the mother had subsequently married and was now in a stable relationship. The father played no part in the proceedings.

The mother had a troubled history in her relationship with the grandparents, which had developed during the mother's early teenage years when she had increasingly used illicit drugs and engaged in binge drinking. Whilst the mother loved her parents, she resented and rejected the control which she perceived they were seeking to impose on her. It was a complex relationship.

Justice Rose determined that the mother had the capacity to provide for the emotional needs of the child, except from shielding the child from her antagonistic attitude towards the grandparents, who she referred to as

[8] *(2009) FLC 93-421.*
[9] *[2012] FMCA Fam 1222,*
[10] *[2008] FamCA 1010.*

'them'. The mother's husband also had the capacity to provide for all of the child's emotional needs.

The child had been significantly influenced in her negative views towards the grandparents due to the admitted strong antipathy that the mother had towards the grandparents, particularly as the child had a close attachment with the mother.

Justice Rose further stated at paragraph 88:-

*The reality must be faced that the child is in the primary care of the mother and her husband. The child has progressed well. The mother in turn has also progressed well. The mother has the anxiety and resentment to which I have referred. There is no reasonable basis for assuming that once periods of time have commenced with the maternal grandparents that this anxiety and resentment with consequent pressure upon the child would dissipate. It would amount to experimenting with the child's emotional reactions by ordering that periods of time be spent by her with the maternal grandparents. In my view, that cannot be in the child's best interests.*

In these circumstances, His Honour, whilst expressing some reluctance, determined that it was not in the best interests of the child to spend any periods of time with the grandparents.

In ***Sykes v Agnes-BC201200768,*** the maternal grandmother sought to have contact with a child aged six years, who lived with the father. The mother had not had any form of relationship with the child for some time.

Federal Magistrate McGuire stated that it remained to the Court to consider all of the surrounding circumstances and dynamics of a child's life and relationships and as such, a grandparent holds no particular priority, special position or right in respect of a child. As always, it is the child's best interests which is the paramount concern.

The Family Consultant had observed that there was a historical and continuing conflict and animosity between the father and the maternal family and in these circumstances she considered it may not be in the child's best interests to have any relationship with an adult member of the maternal family. Federal Magistrate McGuire expressed real doubts as to the ability of the grandmother to desist from her criticism of the father and stated that whilst mindful of the benefit of connection and identity with the maternal family, he did not intend to order direct time between the child and the grandmother.

In ***Oldfield v Oldfield***[11], the paternal grandparents sought to spend time with their grandchildren aged ten years and six years respectively. Whilst the relationship between the grandparents and the grandchildren had been positive until more recent times, thereafter the relationship between the parents and grandparents had deteriorated which had led to the institution of proceedings. The elements of trust and respect had broken down between the grandparents and the mother, which gave rise to a concern in respect of the likelihood of a future relationship being fostered. There had also been a significant period of time when the grandparents had not spent any time with the children.

The Federal Magistrate referred to the decision of Justice Lindenmayer in ***Hodak and Newman BR 3374 of 1992*** in which His Honour had stated that, *'Parenthood is to be regarded as an important and significant factor in considering which proposals advance the welfare of children'.*

The Federal Magistrate stated that this dispute could most conveniently be summarised by saying that the parents considered they were making a responsible parental decision in relation to their children, whereas the grandparents contended that this decision was compromised and that there should be intervention by the Court.

In essence, the Federal Magistrate considered that if parents in the exercise of their parental responsibility made a decision that a child will not have a relationship with grandparents that in the absence of evidence that the ability of the parents to make such decisions was compromised, they should not have to justify their decision making through litigation.

The Federal Magistrate ultimately determined that the grandparent's application should be dismissed. He stated that whilst it was acknowledged that the grandparents had a significant and substantial role to play in the lives of their grandchildren, the mother and father have the primary responsibility and it is not one that should be usurped by order of the a Court.

This decision was made prior to the decision of the Full Court in ***Valentine & Lacerra and Anor (supra)***.

In ***Berryman v Jones & Davis***[12], the paternal grandmother sought that her granddaughter, who was nearly five years old, should live with her. Justice Bell had considerable doubts about the ability of the mother, and to a lesser extent the biological father, to promote the welfare of the child adequately. It would appear that both the mother and the father consumed alcohol to excess and took illicit drugs.

The mother had subsequently re-partnered with a certain 'Mr A', who was described by the Judge as having 'little anger control', and as being either 'ill-educated or a foul mouthed coward'. He had been physically violent

[11] *[2012] FMCAfam 22.*
[12] *[2010] FamCA 235.*

towards the mother and the child had complained to her grandmother about his hitting her. The Judge also determined that 'Mr A' was a drug addict and an alcoholic. The father apparently had little knowledge of 'Mr A' or the nature of the relationship between him and the mother.

The mother and 'Mr A' had separated when he had apparently 'kicked out' the mother and the child from the house they shared and they had nowhere to live. As a consequence, the mother placed the child in the care of the paternal grandmother.

The evidence before the Judge was that the child 'felt safe' with her grandmother and the Judge was satisfied that the child had been exposed to an inordinate amount of family violence both physical and emotional.

The Judge considered that the mother would in all probability not advance or facilitate and/or encourage a relationship between the child and the paternal grandmother. The father had not played a particularly significant part in the child's care during her life.

It would appear that upon the basis of the mother's prior conduct whereby the Judge considered that she had placed the child at risk and created a need to protect the child from physical or psychological harm, that the Judge therefore determined that it was in the child's best interests to live with the paternal grandmother and that she be solely responsible for decision making in respect of the child. Orders were made for the parents to each spend limited time with the child and to have telephone communication with her.

## Conclusions

(i) The paramountcy principle always applies as to what is in the best interests of the child.

(ii) Parents should primarily be entitled to parent their children.

(iii) Grandparents hold no particular priority, special position or right in respect of a grandchild.

(iv) If parents are part of an intact family and demonstrate an appropriate parenting capacity and have made a decision to terminate a relationship between their children and the grandparents, this decision should be respected unless it can be regarded as compromised or capricious and not in the best interests of the children.

(v) If a grandparent is not significant to a grandchild's care, welfare and development and has not had any real relationship with the grandchild, it is improbable that any order will be made in the grandparent's favour.

(vi) If the resumption of a relationship between a child and grandparents may cause stress and anxiety to the parent, who is the primary carer, this may in turn adversely impact upon the welfare of the children if an order permitting the grandparent to spend time with the children is made.

(vii) The existence of a hostile or toxic relationship between a parent and grandparent, irrespective of who may be at fault, may be such that the best interests of the child cannot be served if there is the prospect that the child's relationship with the primary carer may be undermined by requiring the child to spend time with a grandparent.

It also appears to be the opinion of a number of expert witnesses, that children in functional families should only spend time with grandparents by agreement with the parents and if the parents do not agree, then no time should be spent with grandparents pursuant to orders. In essence, applications should only really involve grandparents in circumstances where for example one parent has died or there are genuine concerns in relation to parenting capacity because of family physical violence, sexual abuse or drug and alcohol addiction. If parents and grandparents have fallen out for whatever reason, the grandparents have the more difficult task in persuading the Court that the parent's decision not to permit them to spend time with the grandchildren should be overturned.

It would appear that the more recent decisions of the Courts in relation to the interpretation and implementation of the amended legislation in which express references have been made to grandparents has not elevated the status of grandparents in parenting proceedings and orders made for grandparents to spend time with children, when opposed by parents, would seem to be more the exception than the rule.

# Dispute resolution in South Africa: parenting coordination keeps families out of court

**Astrid Martalas***

## Introduction

This article discusses an alternative dispute resolution (ADR) process aimed at resolving post-divorce or post-family separation disputes, referred to as parenting coordination. With reference to a case heard in the UK in 2013,[1] the question is posed whether consideration should be given to introducing parenting coordination into the UK in order to alleviate the burden on the family courts.[2]

Parenting coordination was first introduced as an ADR process in the USA in the late 1980s[3] and in South Africa in the early 2000s. In describing the origins of parenting coordination in the USA, Fieldstone *et al* state that parenting coordination evolved 'in response to the needs of family courts overburdened by high conflict parents … who take advantage of the legal system to resolve their non-legal child related issues'.[4] Parenting coordination can be defined as a 'child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned private forum'.[5] In a paper delivered in 2014, retired judge Goldstein describes the case manager as a 'third parent clothed with the additional power of being able to make a binding decision when the other two parents are in disagreement'.[6]

## A case study from the UK

On 25 July 2013 judgment was handed down by the President of the Family Division of the High Court of Justice, Sir James Munby, in the case of *T v S*.[7] It concerned several disputes between the divorced parents of a six-year-old boy. For some four and a half years there had been incessant litigation involving the boy and his parents. There had been a previous judgment, given some eight months earlier, in December 2012, in response to a request to alter contact and care arrangements. The judge had stated the following in the December judgment:

> '*I am not prepared to make any significant changes to the division of time arrangements, either way, not least because, the moment I do, it is inviting the parties to continue to chip away at the arrangements….I do not believe that the interests of the boy are remotely served by any such approach*'.

In response to what the court referred to as a 'litany of complaints', the judge had the following to say:

> '*I am satisfied that the court will, for the most part, simply never get at the truth of those allegations and counter-allegations…and I see no merit whatever in the court expending yet further time in what, I am satisfied, would be a wholly futile quest*'.

There were three issues before Sir James Munby

i Where on Clapham Junction railway station should the handover take place? Quoting from the December 2012 judgment:

> *'This is their child and nobody else's, and if they want to inflict that on the child, they answer for it in due course. I suppose, if common sense were to have any part to play in this, one might draw attention to the fact that there is a Brighton-bound platform at Clapham Junction (which is [platform] 13, I think) which may even have a small café on it, and that might make an altogether admirable place at which to effect the handover, but if the parties have other ideas and*

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[1] *T v S*, neutral citation number: (2013)EWHC 2521 (Fam), Case No.: FD08P02341.

[2] See in this regard Lord Justice Briggs' final report on the Civil Courts Structure Review published on 27 July 2016, available at www.judiciary.gov.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/, accessed on 8 May 2017.

[3] Kelly JB, 'Origins and Development of Parenting Coordination' in Higuchi SA and Lally SJ (eds), *Parenting Coordination in Postseparation Disputes: A Comprehensive Guide for Practitioners* APA (2014) 13.

[4] Fieldstone L, Lee MC, Baker JK and McHale JP, 'perspectives on Parenting Coordination: Views of Parenting Coordinators, Attorneys and Judiciary Members' *Family Court Review* (2012) 50(3) 441.

[5] De Jong M, 'Is Parenting Coordination Arbitration?' *De Rebus* (2013) 38.

[6] Goldsten E 'Facilitation – Diddo Children any Favours?' in Clark Attorneys 1st Annual Johannesburg Conference – Excellence in Family Law: Delivering Clients the Service they Deserve (unpublished conference proceedings 2014) 66-67.

[7] *T v S*, [2013] EWHC 2521 (Fam), Case No.: FD08P02341.

*want to handover on some empty platform or disused siding, that is a matter for them'.*

The court held that it simply cannot 'micro manage' the relationship between the parents and their handling of the child; this would disempower the parents and add to the stresses on the child.

ii Planned medical and dental treatment:

The parents were required to 'inform and consult' the other parent before such arrangements were made. Consent was not required. It was common ground between the parents that the child needed dental treatment. Each parent had selected a treatment procedure and had informed the other parent. The parents did not agree with each other's proposed treatment and required the court to make an order. Sir James stated that the parents needed to:

'*…get on with the task of deciding what is to happen to their son. The court cannot continue to be engaged in a process of micro-managing or, as in this case, ruling on specific issues which may arise throughout this child's life*'.

Accordingly, the judge declined to make an order.

iii The third dispute concerned a section of the December 2012 order which read as follows:

'The father shall collect the ward from school on a Friday and deliver him to the mother at Clapham Junction on Sunday'.

The father wanted to know whether the phrase 'the father' meant the father and no-one else or whether it meant the father or his agent. The judge declined to amend the order and commented that, should he have done so, it would be a 'fruitful source of future controversy and dispute between the parents'.

From the above it is clear that these parents, and there are many such as these, appear to be unable to reach agreement on issues regarding their child and that their relationship is highly acrimonious. It is by now a well-accepted fact that ongoing parental acrimony post-divorce is a more potent indicator for child maladjustment than the divorce *per se*.[8] It can furthermore be argued whether approaching the court is the most appropriate way to resolve the disputes referred to in the above case. It is generally accepted that litigation is not only costly and time consuming[9] but litigation in these matters is not always regarded as appropriate in that children's best interests are often not served through litigation.[10]

## The Children's Act

With the introduction in South Africa of the Children's Act in 2005,[11] parents who were co-holders of parental responsibilities and rights post-divorce or post-family separation, were obliged to give due consideration to the views and wishes expressed not only by the child,[12] but also to the views and wishes expressed by the other co-holder of parental responsibilities and rights[13] before decisions could be made which could affect, amongst other things, the child's contact with that other co-holder of parental responsibilities and rights, the child's education and the child's well-being.[14] Once due consideration to the views and wishes of the co-holder of parental responsibilities and rights had been given, the parent could act independently and was not bound to give effect to the co-holder's views and wishes.[15]

Furthermore, section 30(2) of the Children's Act provides that

'*When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise*'.

This section has been interpreted as meaning that co-holders have equal concurrent responsibilities and rights

[8] Kelly JB, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' (2000) 39(8) *Journal of the American Academy of Child and Adolescent Psychiatry* , 964.

[9] See *Brownlee v Brownlee* (SGJ) unreported case no 2008/25274 of 22 August 2009 paragraph 48 which indicated that the legal fees amounted to more than R500 000.00 (□ 28 500 as at 8 May 2017).

[10] Fidler BJ & Epstein P, 'Parenting Coordination in Canada: An Overview of Legal and Practice Issues' (2008) 5(1/2) *Journal of Child Custody* 56.

[11] Act 38 of 2005 which came into effect on 1 April 2010, hereafter referred to as 'the Children's Act', available at www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf , accessed on 8 May 2017.

[12] Sections 10 and 31(1)(a) of Act 38 of 2005.

[13] Section 31(2)(a) of Act 38 of 2005.

[14] Sections 31(1)(b)(ii) and (iv) of Act 38 of 2005.

[15] *J v J* 2008(6) SA 30(C) paragraph 35.

which they may exercise independently.[16] The Children's Act, however, does emphasise the continued involvement of both parents in the lives of their child or children post-divorce or separation as was stated by Goosen J in *PD v MD*:

> '*A reading of the Act indicates that it seeks to accord to parents equal responsibility for the care and wellbeing of their children and that it seeks to ensure that, as far as may be reasonably possible, parental responsibilities and rights are exercised jointly, in the best interests of the children*'. [17]

These stipulations in the Children's Act have therefore created the expectation that parents may remain involved in all aspects of their children's lives, not dissimilar to the position they were in prior to their divorce or separation.

In addition to providing a legal framework for parents to remain involved in their children's lives post-divorce or separation, the Children's Act also makes provision for the co-holders of parental responsibilities and rights to enter into a parenting plan.[18] The scope of what can be included in a parenting plan is wide and can include where and with whom the child lives, the maintenance of the child, contact between the child and any of the parties and any other person, the schooling and religious upbringing of the child.[19] It is a requirement in the Children's Act that a parenting plan must comply with the best interest of the child standard.[20] In practice, most parenting plans include extensive detail regarding contact arrangements, including regular weekly contact, holiday contact and contact on special occasions. Furthermore, decisions around medical and related treatments, schooling and education, decisions regarding extra-mural activities, the type of sporting activity the child may participate in and the type of school the child will attend are frequently listed in a parenting plan.

Despite the wide scope of the parenting plan, no plan is likely to foresee and make allowances for every eventuality of a child's life post-divorce.[21] Whereas many parenting plans make provision for possible changes to current contact arrangements to be applicable when the children are older, and, even where these parenting plans are clear what these changes should entail, no parenting plan can accurately predict in each instance the future contact arrangements best suited to a specific child. It is possible that the provisions of sections 30(2) and 31 of the Children's Act together with the inherent lack of any parenting plan to anticipate each and every possible area of difference of opinion between co-parents may result in disputes between co-holders of parental responsibilities and rights.[22] Certain of the words used in the Children's Act, such as the words 'significant, "significantly" and "adverse"[23] are open to interpretation and may well give rise to disputes between parents.[24]

It is to be expected that parents post-divorce or post-separation will not always be able to come to agreement around issues that require joint decision making, resulting in disputes, some of which - such as a decision regarding contact during a specific week-end - require almost immediate resolution. The extensive research conducted into the negative effects on children subjected to ongoing parental discord and acrimony post-divorce or -separation[25] further supports a quick, non-adversarial dispute resolution mechanism. One of the general principles of the Children's Act requires that in any matter concerning the child:

> ' … *an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and a delay in any action or decision to be taken must be avoided as far as possible*'.[26]

[16] Heaton J, 'Parental responsibilities and Rights' in Davel CJ and Skelton AM (eds), *Commentary on the Children's Act* revision service 2012, 3-31.
[17] *PD v MD* 2013 1 SA 366 (ECP) paragraph 12.
[18] Sections 33 – 35 of Act 38 of 2005.
[19] Sections 33(3)(a), (b), (c) and (d) of Act 38 of 2005, see also Skelton A 'Parental Responsibilities and Rights' in Boezaart T (ed) *Child Law in South Africa* (2013) 90.
[20] Section 33(4) of Act 38 of 2005. For the best interests of the child standard see section 7 of Act 38 of 2005.
[21] De Jong M, 'Suggested Safeguards and Limitations for Effective and Permissible parenting Coordination (Facilitation or Case Management) in South Africa' *Potchefstroom Electronic Law Journal* (2015) 18(2) 151.
[22] De Jong M, 'Suggested Safeguards and Limitations for Effective and Permissible parenting Coordination (Facilitation or Case Management) in South Africa' *Potchefstroom Electronic Law Journal* (2015) 18(2) 151.
[23] Sections 31(1)(b)(iv) and 31(2)(b) of Act 38 of 2005.
[24] Heaton J, 'Parental responsibilities and Rights' in Davel CJ and Skelton AM (eds), *Commentary on the Children's Act* revision service 2012 3-33 and 3-34.
[25] Kelly JB, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' *Journal of the American Academy of Child and Adolescent Psychiatry* (2000) 39(8) 964, Goodman M, Bonds D, Sandler I and Braver S, 'Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce' (2004) 42 *Family Court Review* 264, Elrod LD (conference organiser), 'Wingspread Report and Action Plan' (2001) 39(2*Family Court Review*) 146.
[26] Section 6(4)(a) and (b) of Act 38 of 2005.

Prior to the introduction of parenting coordination and in instances where mediation did not result in agreement, parents had no other option but to litigate in order to resolve their disputes.[27] It is proposed that parenting coordination provides an appropriate alternative to litigation and mediation in the resolution of disputes between co-holders of parental responsibilities and rights.

## Parenting coordination in South Africa

Whereas there is no legislation regarding parenting coordination in South Africa,[28] parenting coordination as an ADR mechanism has grown in the Western Cape from around one third of all divorces involving minor children issued in the Western Cape High Court in 2008 to almost 70% in 2012 and 2013.[29] By 2012, more than half of divorced couples who had minor children at the time of their divorce chose to include a parenting coordination clause in their divorce order. It is therefore possible that parenting coordinators (PCs) have been appointed as a matter of course in the Western Cape and not only in difficult or chronically litigious cases. The inclusion of a parenting coordination clause is a choice that parents make and it involves the appointment of a PC by agreement between the parents which agreement is included in their divorce order.[30] Once parents have decided to include a parenting coordination clause, they need to determine the parameters of the authority and decision-making powers granted to the PC.

Typically, a parenting coordination clause authorises the PC to:

- Mediate joint decisions in respect of a child/children having regard to their best interests;
- Regulate, facilitate and review the contact arrangements in respect of the child/children having regard to their best interests;
- Issue directives binding on the parties on any issue concerning the child/children's welfare and/or affecting their best interests which directive shall be binding on the parties unless or until a court of competent jurisdiction holds that such directive is not in the child/children's best interests;
- Resolve conflicts relating to the clarification, implementation and adaptation of this agreement or any subsequent parental responsibilities and rights agreement having regard to the child/children's best interests; and
- Require the parties and/or the child/children to participate in psychological or other evaluations or assessments.[31]

The parenting coordination process is inquisitorial rather than adversarial and the PC does not merely have to make a choice between the different viewpoints offered by each parent, but has to make a decision that will be in the best interests of the child or children concerned.[32] The PC is therefore impartial with regards to the views and opinions of the parents, but not neutral with regards to his or her decision.[33] Parenting coordination as practised in the Western Cape is essentially a reactive process: if there is no dispute on the table, the PC has no role to play. The PC is not mandated to follow up of his or her own accord, or in any way to investigate what is happening in a matter where he or she has been appointed. The PC is also not mandated to find out whether directives have been adhered to nor is the PC able to enforce directives. As can be seen from the results of a research questionnaire,[34] the majority of disputes raised by parents post-divorce were settled in the mediation phase of parenting coordination, suggesting that where the parties were able to come to agreement on an issue, it was not likely that there was a high degree of conflict between them.

## Case law involving parenting coordination in South Africa

The changes brought about by the Children's Act, specifically with regard to parenting plans, joint decision-

[27] *Schneider NO and others v AA and Another* 2010 (5) SA 203 WCC.

[28] In the USA parenting coordination is legislated for in 15 states, see McKinney MJ, Delaney LA and Nessman L, 'Legal Standards and Issues Associated with Parenting Coordination', in Higuchi SA and Lally SJ (eds), *Parenting Coordination in Postseparation Disputes: A Comprehensive Guide for Practitioners* APA (2014) 36.

[29] Research conducted by the author on the prevalence of parenting coordination in the Western Cape Province of South Africa. Approximately 3000 divorce orders issued from 2008-2013 included a parenting coordination clause. The Western Cape High Court issues on average 800 divorce orders where minor children are involved per year.

[30] See para 5.3 for case law where the courts appointed a PC.

[31] The Family and Mediation Association of the Cape (FAMAC) developed a model parenting coordination clause in 2008, extracts of which are referred to above.

[32] Sections 7 and 9 of Act 38 of 2005.

[33] De Jong M, 'Is Parenting Coordination Arbitration?' *De Rebus* July 2013, 40.

[34] The questionnaire forms part of the author's research project into parenting coordination in the Western Cape.

making post-divorce and co-parental responsibilities and rights have been discussed in paragraph 3. It is in the context of these changes, which resulted in the need for parenting coordination, that the cases below are discussed.

## Case law challenging the appointment of a PC by the court

The appointment of a PC by the court (as opposed to an appointment by agreement between the parents) has been challenged in court.[35] In *Hummel v Hummel*, an unreported case heard in 2012 in the South Gauteng High Court, Sutherland J found that no court is competent to appoint a third party such as a case manager[36] (or a parenting coordinator for that matter) to make decisions about parenting for parents who have parental powers as contemplated in sections 30 and 31 of the Children's Act.[37] The appointment of a decision maker to break deadlocks was regarded by the judge as 'a delegation of the court's power; itself an impermissible act'[38] and amounted to 'an arbitration of sorts'.[39] The judge found further that the concept of a case manager was the same as the 'suitably qualified person',[40] as referred to in the Children's Act, whose role was to assist parents in preparing a parenting plan and not to make decisions for them.[41] In instances where case managers were appointed by agreement between the parties and this appointment was included in the divorce order, Sutherland J was of the view that that was a 'self-imposed restraint'[42] and not an exercise of judicial power. Sutherland J was also of the view that section 7(1)(n) of the Children's Act[43] did not justify the appointment of a decision maker to reduce potential litigation, because that would be a delegation of the court's power.[44]

In her comment on this case, De Jong argues that, until the Supreme Court of Appeal delivers judgment, the position of parenting coordination remains uncertain.[45] Unfortunately, despite the fact that the judgment was taken on appeal and the application to take the matter on appeal was granted, the appeal was never heard and the case was withdrawn after it was settled privately between the parties. The crux of the appeal was that a case manager did not usurp the court's powers since the court has the power to set aside any decision made by a case manager.[46] It was also argued in the appeal that a case manager, already familiar with the case could be in a better position to make decisions in respect of a minor child than a judge who hears the case for the first time.[47] In a discussion of this case, Goldstein concurs with this last statement.[48] He is furthermore of the view that in the same way that a decision made by a parent does not constitute any delegation by the court, a decision made by a case manager does not do so.[49] In addition Goldstein is of the opinion that section 23(1)(b) of the

[35] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported.
[36] The terms 'case manager' and 'facilitator' are used in Gauteng and the Western Cape respectively. However, a recently established task force has developed draft guidelines for the practice of parenting coordination in South Africa. One of the recommendations made by the task force is to standardize the current nomenclature and use the internationally accepted term 'parenting coordination'. A copy of the draft guidelines is available at www.famac.co.za/facilitation, accessed on 8 May 2017.
[37] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, para 6.
[38] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, para 13.
[39] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, para 10.2.2. Arbitration in family law matters is not permitted in terms of section 2 of Act 42 of 1965, available at www.environment.gov.za/sites/default/files/legislations/arbitration_act42of1965.pdf, accessed on 8 May 2017.
[40] Section 33(5)(b) of Act 38 of 2005.
[41] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, para 8.
[42] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, para 10.1.
[43] Section 7(1)(n) of Act 38 of 2005 provides that a court must weigh 'which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child' when determining the best interests of a child.
[44] *Hummel v Hummel*, South Gauteng High Court, Case No.: 2012/06274, unreported, paragraph 13.
[45] De Jong M, 'Is Parenting Coordination Arbitration?' *De Rebus* (2013) 41.
[46] Appeal paragraph 11.
[47] Appeal paragraph 15.
[48] Goldstein E, 'Facilitation – Did *Hummel v Hummel* do Children any Favours?' in Clark Attorneys *1st Annual Johannesburg Conference – Excellence in Family Law: Delivering Clients the Service they Deserve* (unpublished conference proceedings 2014) 66.
[49] Goldstein E, 'Facilitation – Did *Hummel v Hummel* do Children any Favours?' in Clark Attorneys *1st Annual Johannesburg Conference – Excellence in Family Law: Delivering Clients the Service they Deserve* (unpublished conference proceedings 2014) 67. See also section C para 5.2 above.

Children's Act which makes provision for a person other than a parent to apply to the court for an order granting him or her care[50] of a child could be applicable to a case manager and that the provisions of sections 28(1)(a) and (b) of the Children's Act might enable a case manager to apply for the suspension or restriction of the parental responsibilities and rights of a parent.[51]

In *Wright v Wright*, an unreported case heard in the Western Cape High Court in 2014,[52] which involved parents whose post-divorce relationship was extremely acrimonious,[53] the court held that it could not order the parents to refer their disputes to 'mediation, facilitation or case management against their will'.[54] In reaching its decision, the court relied on the *Hummel* judgment.[55] The court found that, whilst the applicant was not in favour of the appointment of another facilitator, the respondent was not satisfied with certain decisions made by previous facilitators.[56] The court held that the parents had to normalise their co-parenting relationship and agree to accept the 'reasonable determination of a facilitator as final' before facilitation would be a practical option.[57] In other words, whilst the court in this instance did not appoint a PC against the will of the parents, it appears that the court did not outright reject the appointment of a facilitator by the court either, and adopted a practical approach by encouraging the parents to improve their relationship to the extent where they could accept the assistance of a PC.

## Case law challenging the powers of the PC

In a case heard in the Gauteng Local Division, Johannesburg in 2016, *LM v Goldstein NO and others*,[58] the PCs issued two directives which granted the father full parental responsibilities and rights and which first restricted and then completely suspended the mother's parental responsibilities and rights by allowing her only supervised contact and later no contact with her children.[59] In delivering judgment, the court held that the mandate of the PCs extended to the mediation and investigation of joint parental responsibilities and rights and not to the suspension or termination of these responsibilities and rights.[60] The court held further that the PCs had acted outside their mandate, since the suspension of parental responsibilities and rights could only take place in terms of a court order as provided for in section 28(1) of the Children's Act.[61] The court therefore held that the suspension of the mother's responsibilities and rights by the PCs was a nullity and had to be set aside.[62] The court thereupon tasked the family advocate with an investigation into the contact and residence arrangements as well as the effect of the suspension of the mother's parental responsibilities and rights on the well-being of the children concerned.[63]

In *Scheepers v Scheepers*, an unreported case heard in the Eastern Cape High Court, the court held that the directive issued by the facilitator that the children should move their primary residence from that of the mother to that of the father, exceeded the mandate of the facilitator.[64] However, the directive was deemed by the court to be in the best interests of the children involved and the court did not overturn the directive pending an investigation by the office of the Family Advocate.[65]

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[50] Section 1(1) of the Children's Act offers a definition of care.
[51] Goldstein E, 'Facilitation – Did Hummel v Hummel do Children any Favours?' in Clark Attorneys *1st Annual Johannesburg Conference – Excellence in Family Law: Delivering Clients the Service they Deserve* (unpublished conference proceedings 2014) 68.
[52] *Wright v Wright* Western Cape High Court, Case No.: 20370/2014, unreported.
[53] Two facilitators (parenting coordinators) had already been appointed, both had resigned and FAMAC declined to appoint a third facilitator.
[54] *Wright v Wright* Western Cape High Court, Case No.: 20370/2014, unreported para 17.3.
[55] *Wright v Wright* Western Cape High Court, Case No.: 20370/2014, unreported para 18.
[56] *Wright v Wright* Western Cape High Court, Case No.: 20370/2014, unreported para 19.
[57] *Wright v Wright* Western Cape High Court, Case No.: 20370/2014, unreported para 19.
[58] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ).
[59] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ) 470G-471B.
[60] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ) 471C-E.
[61] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ) 471D-F.
[62] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ) 471E-F
[63] *LM v Goldstein NO and Others* 2016 (1) SA 465 (GJ) 471F-H.
[64] *Scheepers v Scheepers* High Court of South Africa Eastern Cape Division, Grahamstown, Case No.: 5449/2016 para 48.
[65] *Scheepers v Scheepers* High Court of South Africa Eastern Cape Division, Grahamstown, Case No.: 5449/2016 para 95.

## Case law supporting the appointment of a PC by the court

De Jong writes that *Scheider NO v Aspeling*[66] is the first reported case in South Africa where reference has been made to facilitation.[67] The case was heard in the Western Cape High Court and concerned two minor children of an unmarried couple. Their father had died and disputes around schooling, maintenance, contact between the children and the paternal family were brought to the court for adjudication. In his judgment, Davis, J made the following ruling regarding disputes around maintenance:

> 'Any dispute in regard to the payment of any medical expenses defined herein shall be referred to a FAMAC-appointed facilitator [PC] who shall be entitled to facilitate the dispute and make a ruling that is binding on both parties, unless it is varied by a court of competent jurisdiction, alternatively, varied by the facilitator following a separate review. The costs of the facilitator shall be shared equally between the parties unless directed to the contrary by the facilitator'.[68]

Further on in his judgment Davis J also made provision for contact disputes to be decided by a PC.[69]

In a later judgment in the Western Cape High Court, Gangen AJ in *CM v NG*[70] emphasised the role of the PC as integral to the dispute resolution process by ordering that:

> 'In order to facilitate joint decision making and the parental plan, a facilitator shall be appointed by the parties […] If the parties are unable to reach agreement on any issue concerning the children's best interests or any issue where a joint decision is required in respect of the children, the dispute shall be referred to the facilitator'.[71]

Gangen AJ ordered further that disputes shall be referred to the facilitator in writing[72] and the costs of the PC should be shared unless the PC directed otherwise.[73] The order stated that the PC's recommendations would be binding on the parties in the absence of any Court order overriding such recommendations.[74]

Since no reference is made to an agreement between the parties regarding the appointment of a PC, it would appear that both orders support the appointment of a PC by the court in contradiction with the judgment in the *Hummel* matter.[75]

*Centre for Child Law v NN and NS*, an unreported case heard in the Gauteng Division Pretoria,[76] involved two babies born on the same day in 2010 and who were given to the wrong mothers. The court ruled in November 2015 that, through the operation of the principle of *de facto* adoption, the children would remain in the care of the families who had raised them and that their biological parents were allowed reasonable contact.[77] The court furthermore ordered the appointment of a PC to manage the exercise of the contact.[78] In addition, the powers of the PC included the development of a parenting plan and the resolution of any conflicts that may arise through a 'facilitation process' and, should that process fail, the PC was empowered to issue directives which would be binding on the parties until a court directs otherwise or until the parties jointly agree otherwise.[79] Interestingly, in this particular case, the court ordered that the fees of the PC were to be paid by the MEC of Health in Gauteng and not by the parties.[80] It is presumed that this decision was made because the Department of Health was ultimately responsible for the fact that the services of a PC might be required in the first place.

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[66] *Schneider NO and others v AA and Another* 2010 (5) SA 203 WCC

[67] De Jong M, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution Upon Divorce' in Heaton J (ed), The Law of Divorce and Dissolution of Life Partnerships in South Africa (2014) 622.

[68] *Schneider NO and others v AA and Another* 2010(5) SA 203 (WCC) 222I-223B.

[69] *Schneider NO and others v AA and Another* 2010(5) SA 203 (WCC) 223D-E.

[70] *CM v NG* 2012 (4) SA 452 (WCC)

[71] *CM v NG* 2012 (4) SA 452 (WCC) 464C-E.

[72] *CM v NG* 2012 (4) SA 452 (WCC) 464F-G.

[73] *CM v NG* 2012 (4) SA 452 (WCC) 464G-I.

[74] *CM v NG* 2012 (4) SA 452 (WCC) 464H-I.

[75] See para 5.1.

[76] *Centre for Child Law v NN and NS* (GP) (unreported case no 32053/2014, 16-11-2015).

[77] Manyathi-Jele N, 'Court Orders Swapped Babies to Remain with Families Raising them' *De Rebus* (2016) 8.

[78] *Centre for Child Law v NN and NS* (GP) (unreported case no 32053/2014, 16-11-2015) paragraph 13.

[79] Manyathi-Jele N, 'Court Orders Swapped Babies to Remain with Families Raising them' *De Rebus* (2016) 8

Since no reference is made to an agreement between the parties regarding the appointment of a PC, it would appear that all three orders support the appointment of a PC by the court in contradiction of the judgment in the *Hummel* matter.[81]

An interesting comment on the suitability of the practice of facilitation in South Africa was made by the judges in an appeal hearing heard in 2013 in the High Court of Delhi in New Delhi, India.[82] The case involved two South African parents who were married and divorced in South Africa and had chosen to include a facilitation clause in their parenting plan. The mother had obtained permission to travel with their child to the United Kingdom and from there travelled to India and refused to return with the child to South Africa. The judges commented as follows:

> 'And we must confess that the system in place in the Republic of South Africa on future custody issues, in the form of an agreed facilitator being appointed to find a solution firstly by mediation and lastly by a directive for which he has to obtain assistance of a Child Psychologist is far better than what we have in India, in the form of Court adjudications.'[83]

## Conclusions

It is clear from the cases discussed in the previous paragraph that the introduction of the Children's Act brought with it the need for a relatively quick dispute resolution mechanism post-divorce or post-family separation, such as parenting coordination. The steady increase in the use of parenting coordination clauses in divorce orders since 2008 is an indication that in South Africa PCs are not only appointed in high conflict cases. Certain aspects of parenting coordination have been challenged in court. However, the courts have not been unanimous regarding several aspects of parenting coordination such as whether a court can appoint a PC without the agreement of the parties involved and what the permissible powers of a PC should be.

I return to the matter of *T v S* and the disputes that faced Sir James Munby. A questionnaire sent out to facilitators in the Western Cape[84] revealed that almost all of the PCs surveyed had responded that they had been tasked with the resolution of disputes regarding contact arrangements, which included holiday contact, contact on special occasions and regular weekly contact. About a quarter of all respondents had to address disputes around medical care. These are the types of disputes that parents struggle with post-divorce or post-family separation. I am completely in agreement with Sir James Munby that these disputes do not belong in court. With respect, however, it is my experience that there are some parents who simply cannot 'get on with the task of deciding what is to happen to their [child]' post-divorce. Often, there are psychological disorders of one sort or another that stand in the way of rational mature decision making and often there are unresolved feelings of hurt, anger and betrayal, and it is for these parents and their long suffering children that parenting coordination offers not only a solution, but also a way of keeping them out of court.

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[80] *Centre for Child Law v NN and NS* (GP) (unreported case no 32053/2014, 16-11-2015) paragraph 15.2.

[81] See para 5.1.

[82] *PDD v State NCT of Delhi (Delhi) and Another (D.B.)* 2013 (135) DRJ537.

[83] *PDD v State NCT of Delhi (Delhi) and Another (D.B.)* 2013(135) DRJ537 para 65.

[84] The questionnaire forms part of the author's research project into parenting coordination in the Western Cape.

# Protecting children and vulnerable adults from witchcraft and spirit possession: related violence, victimisation and other harms

**Susan S M Edwards***

## A mere historic relic

Detective Superintendent Terry Sharpe of the Metropolitan Police Sexual Offences & Child Abuse Command on Child Abuse linked to faith, says of witchcraft accusation and persecution

> 'It's here, it's a hidden crime, we need to be able to recognise the signs and deal with it, otherwise children will be abused.[1]

In 2012, the government issued guidance in the National Action Plan to Tackle Child Abuse Linked to Faith or Belief. This action plan is intended to help raise awareness of the issue of child abuse linked to faith or belief and to encourage practical steps to be taken to prevent it. [2]

Accusations of witchcraft, spirit possession and victimisation of those so accused clearly is not exclusively a relic of historical gendered prejudice nor, as the ethnocentric alleges, an idiosyncrasy of the "underdeveloped" world.[3] However it is true that the study of witchcraft and spirit possession and witchcraft accusation and persecution has been a preoccupation of orientalist anthropologists[4] in the study of the subaltern.[5] Legal regulation of witchcraft has frequently been regarded as an attack on culture and custom, with specific reference to Nigeria. Nwauche writes,

> The proibition of the practice of the occult and paranormal in the Criminal Code has a colonial origin … well over two centuries before Nigeria was colonized, it seemed inevitable and natural for the English to be hostile to the notion of the occult and paranormal.[6]

Considering the Western context *The* Malleus *Malificarum,*[7] written in Germany in 1487 by the Dominican friars Sprenger and Kramer, provided the definitive jurisprudential text, setting out the orthodoxy regarding the evidential basis of proof where imagination, dreams and nightmares were accepted as sufficient proof of the 'craft', and also the procedures to be observed for the investigation, prosecution and sentencing of those convicted. In 1563, both the English and the Scottish Witchcraft Acts demanded death for those who through witchcraft had allegedly killed others or in some way brought about their demise. Once suspected and accused of witchcraft, guilt followed *ipso facto*. For those accused as witches their credibility was automatically impugned. The possibility that they were victims of libel or persecution was rarely considered.[8] In societies, medieval or modern, where the belief in witchcraft is manufactured, what follows then are purges of the old, the poor, the sick, the different, the powerless, who are scapegoated by the community. Indeed, in medieval Britain there were purges, of mainly women,

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[1] Child Abuse Linked to Faith or Belief Working together to safeguard children more effectively. http://www.met.police.uk/project-violet/transcript.pdf then see http://www.met.police.uk/project-violet/ (for film) at 05.55 mins.

[2] Guidance Child abuse linked to faith or belief: national action plan Department for Education, 14 August 2012. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175437/Action_Plan_-_Abuse_linked_to_Faith_or_Belief.pdf

[3] Jean La Fontaine, *Witches and Demons: A Comparative Perspective on Witchcraft and Satanism* (Studies in Public and Applied Anthropology) Berghahn, 2016. p. 1.

[4] C. Levi-Strauss, *The Savage Mind* (Weidenfeld & Nicolson, new edn, 1994), see also E E Evans-Pritchard, 'Witchcraft' (1955) 8(4) *Africa* 1955, pp 418–419. E E Evans-Pritchard *Witchcraft, Oracles and Magic among the Azande* (Clarendon Press, 1937).

[5] C. Levi-Strauss, *The Savage Mind* (Weidenfeld & Nicolson, new edn, 1994); see also E E Evans-Pritchard, 'Witchcraft' (1955) 8(4) *Africa* 1955, pp 418–419). (*Witchcraft, Oracles and Magic among the Azande* (Clarendon Press, 1937), p. 64.

[6] E. S. Nwauche, 'The right to freedom of religion and the search for justice through the occult and paranormal in Nigeria' [2008] *African Journal of International and Comparative Law* Vol 16, p. 35-55, 41.

[7] J. Sprenger and H. Kramer, *The Malleus Maleficarum* 1487, Dover Publications, 1971.

[8] T. Szasz, *The Manufacture of Madness. A Comparative Study of the Inquisition and Mental Health,* Open Society Publishers, 2015, Kindle edition available from Amazon.

(and some men).[9] Most notably perhaps in 1664, the trial[10] of two elderly widows convicted and executed for 'witchcraft' in Bury St Edmunds assumed a particular significance. This particular trial was the subject of much contemporary writing and comment.[11] The accused were tried before Sir Matthew Hale, Lord Chief Baron of the Exchequer, later Lord Chief Justice of England and Wales, (no friend of women)[12] whose fervent belief in the reality of witchcraft was said to have tainted his judgement. However, it is to be noted that Lord Campbell some two centuries later, whilst proclaiming the greatness of Lord Hale, also said,

> I wish to God that I could successfully defend the conduct of Sir Matthew Hale in a case to which I most reluctantly refer, but which I dare not, like Bishop Burnet, pass over unnoticed - I mean the famous trial before him, at Bury St. Edmunds, for witchcraft… a careful perusal of the proceedings and of the evidence shows that upon this occasion he was not only under the influence of the most vulgar credulity, but that he violated the plainest rules of justice, and that he really was 'the murderer of two women.[13]

By 1735 in England the Witchcraft Act of 1563 and 1604 was repealed it no longer being a capital offence.

The more recent prosecutions in the UK and in Anglo-American jurisdictions have centred on fraudulent misrepresentation. Mrs Duncan[14] was tried and convicted at the Central Criminal Court in 1944 under s. 4 of the Witchcraft Act, 1735 of 'fraudulent conjuration' in that she claimed to be a professional spiritualist 'medium'.[15] This was followed by the introduction of the 1951 Fraudulent Misrepresentations Act. Further examples elsewhere are provided in s.365 of the *Canadian Criminal Code*, R.S. 1985, and c. C-46 is one of a group of five offences which deal with false pretences. 'Everyone who fraudulently (a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration, (b) undertakes, for a consideration, to tell fortunes, or (c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found, is guilty of an offence punishable on summary conviction.' In the UK, the Consumer Protection from Unfair Trading Regulations 2008 (reg 1 sch. 3 para 3 and sch 4 part 1), brought the 1951 Fraudulent Misrepresentations Act to an end.

**Are all beliefs protected?**

The right to freedom of thought, conscience, religion and belief is protected by international and regional conventions (and is a qualified right 'unless prohibited by domestic law'). The Universal Declaration on Human Rights (1948), Art 18 establishes, 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practise, worship and observance.'[16] This protection is extended at a regional level, for example, in

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[9] See King James *Daemonologie* (1597) Dodo Press, United Kingdom, 2008.
See also for example, in Bury St Edmunds, in 1599, Oliffe Bartham of Shadbrook was executed for 'sending three toads to destroy the rest (sleep) of Joan Jordan' cited in W. Notestein, *History of Witchcraft in England from 1558 to 1718* (1911) Baltimore Press, p.393, http://www.astroccult.net/HistoryOfWitchcraftInEngland_by_WallaceNotestein.pdf
see also T.Wright, *Witchcraft and Magic in England During the Age of the Reformation* (2005) Kessinger Publishing p.13.
As to the Lancashire witch trials see also J. Lumby, *The Lancashire Witch Craze: Jennet Preston and the Lancashire Witches*, (1612) (1995) Carnegie Publishing Ltd.

[10] State Trials vol vi 13-30, Charles 2 1661-1678, 647,1664.

[11] G. Geis and I. Bunn, *A Trial of Witches: A Seventeenth Century Witchcraft Prosecution* Routledge 1997;
G. Geis, 'Lord Hale Witches and Rape' *British Journal of Law and Society* 1978, 90.

[12] In *The History of the Pleas of the Crown*: In Two Volumes, Volume 1, Lord Chief Justice Hale wrote 'But the husband could not be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife had given herself in this kind unto her husband which she cannot retract', p.628.
Cited in Susan Edwards *Female sexuality, the law and society: changing socio-legal conceptions of the rape victim in Britain since 1800-1978* Ph.D thesis, University of Manchester 1979.

[13] *The lives of the Chief Justices of England* 1849 vol 1 London, John Murray, p 561-562.

[14] *Rex v Duncan and Others* [1944] K.B. 713. DPP 2/1204, Public records office Kew. See also *C E Bechhofer Roberts(* ed) *Trial of Helen Duncan Old Bailey Trial Series* London, Jarrolds, 1945.

[15] *Stonehouse v Masson* KBD 1921 found offence proven even if no intent to deceive.. In Stonehouse the trial judge had said 'I cannot satisfy myself that a man can exhibit an intention to deceive by stating a thing in which he genuinely believes'. Darling J. Appeal allowed contra *Davis*, *Appellant v Curry, Respondent* [1918] 1 K.B. 109, where intention was required.

[16] See also as does the International Covenant on Civil and Political Rights (1966), Art 18, and the International Covenant on Economic Social and Cultural Rights (1966), Art 27. This protection is extended at a regional level for example, Art 8 of the African Charter (1981), Art 30 of the Arab Charter (2004), and Art 9 of the European Convention (1951) whilst the Optional Protocols provide a remedy.

Art 8 of the African Charter (1981), Art 30 of the Arab Charter (2004), and Art 9 of the European Convention (1951). "'[R]eligion" has been defined as belief in a supernatural being, thing or principle [and] acceptance of canons of conduct in order to give effect to that belief' ((*Church of New Faith v Commissioner for Payroll Tax* (1983).[17] The broad construction is also demonstrated in *Dettmer v Landon (*1985)*[18]*, where the United States District Court for the Eastern District of Virginia held that Wicca was a religion and those who believed in Wicca were entitled to constitutional protection.

The right to religious belief is a qualified right. So, for example the International Covenant on Civil and Political Rights 1966 (ICCPR), Art 18 specifies 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Other conventions express the limitation in similar terms. Clearly witchcraft accusation, persecution and victimisation threatens public safety, order and health, and conflicts with other protected rights as for instance, the Universal Declaration of Human Rights 1948, Art 1 which protects the inherent dignity and the equal and inalienable rights of people. Beyond the right to dignity is the right to be free from torture, inhuman and degrading treatment European Convention on Human Rights Art 3. Additionally, international instruments assert the importance of equality e.g. Convention on the Elimination of Discrimination against women (CEDAW) and the United Nations Convention on the Rights of the Child (UNCRC). Both of these assume a special significance as women and children are the principal targets of witch craft accusation, persecution and victimisation across Africa[19] and South Asia.

Indeed child protection was at the forefront of a concern of the Witchcraft and Human Rights Information Network (WHRIN)[20], the Bar Human Rights Committee of England and Wales and the International Humanist and Ethical Union (IHEU) who together wrote to the UK government requesting the Home Secretary to prevent[21] the Nigerian Pastor, Helen Ukpabio, from coming to the UK because in her 'preaching' she said that children were possessed and recommended their 'deliverance' through the use of physical abuse. Theresa May banned her from entry on child protection grounds. About this case Professor Wole Soyinka was reported as saying 'The activities of self-styled exorcists who stigmatize children as witches, vampires or whatever, and subject them to sadistic rites of demonic expulsion, are criminal, and constitute a deep embarrassment to the nation. That their activities are carried out under a religious banner expose them as heartless cynics, playing on the irrational fears of the gullible'.[22]

Witchcraft belief and accusation and persecution is then not a relic of past worlds but prevalent across every region of the world and whilst the law and human rights instruments need to protect the vulnerable[23]; the issue is complex and there is resistance as attempts to supress witchcraft are often seen as ethnocentric assaults on local custom or resistance. For example, attempts to supress voodoo in the Caribbean are regarded by some as colonial attempts to supress what are subversive political acts. [24] There is for many a genuine belief that supernatural forces

[17]57 ALJR 785 High Court of Australia. See also G Robertson, *Crimes Against Humanity* (Penguin, 4th edn, 2012) p. 147.
[18] 617 F Supp 592.
[19] See http://www.independent.co.uk/news/world/africa/witch-hunt-africas-hidden-war-on-women-1642907.html; M. Quarmyne, 'Witchcraft: a human rights conflict between customary/traditional laws and the legal protection of women in contemporary sub-saharan Africa' (2011) 17 *Journal of Women and the Law* 475; J. A. Cohan, 'The problem of witchcraft violence in Africa' (2011) 44(4) *Suffolk University Law Review* 803; C. A. Mgbako,and K. Glenn, 'Witchcraft accusations and human rights: case studies from Malawi' (2011) 43(3) *George Washington International Law Review* 389.
[20] http://www.whrin.org/.
[21] The Home Secretary also has personal powers to exclude individuals for public good, national security or unacceptable behaviour reasons. See M.Gower (2016) *Visa 'bans' powers to refuse or revoke immigration permissions for reasons of character, conduct or associations* http://researchbriefings.files.parliament.uk/documents/SN07035/SN07035.pdf
[22] Cited in the Independent
http://www.independent.co.uk/news/uk/home-news/nigerian-witch-finder-helen-ukpabio-threatens-legal-action-against-human-rights-organisations-9704754.html
[23]Using the law to tackle accusations of witchcraft: HelpAge International's position 2011.See
http://www.helpage.org/helpageusa/what-we-do/older-women/older-womens-rights/fighting-witchcraft-accusations-/
See also *Witchcraft Accusation and Persecution in Nepal 2014 Country Report*
http://www.whrin.org/wp-content/uploads/2014/04/2480903_nepal_report_FINAL.pdf
See also *Child witchcraft accusations and human rights* (2013) European Parliament Report
http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433714/EXPO-DROI_NT(2013)433714_EN.pdf
[24] A. Trefzer, 'Possessing the Self: Caribbean Identities in Zora Neale Hurston's Tell My Horse'
*African American Review* Vol. 34, No. 2 (Summer, 2000), pp. 299-312.
Roland Pierre, 'Caribbean Religion: The Voodoo Case' *Sociology of Religion* (1977) 38 (1): 25-36.

direct every aspect of social and personal life. In African countries attempts to supress witchcraft have been provided for in the Witchcraft Suppression Act 1957. Adinkrah writes

> In January 1998 the circumstances of a young man's death in Kumbungu, Ghana, were seen as unnatural, and an act of bewitchment was invoked to explain [his] death.

Three days later, about eight masked vigilantes 'avenged' his death by bludgeoning and stoning to death two women, aged 55 and 60, on suspicion that the pair were witches and had caused the man's death by supernatural means. Unfortunately, this same witchcraft belief system runs across most of sub-Saharan Africa, such that 'every evil and misfortune that is incapable of rational explanation is attributed to witchcraft'.[25]

In South America, it is believed that Shamans assert that they have the power to enter into the spirit world.[26] In the Middle and Near East witchcraft belief is also prevalent infecting every

level of society. For example in Saudi Arabia in 2006, Fawza Falih Muhammad Ali, was condemned by a court in Quraiyat, on April 2, 2006 which sentenced her to death by beheading for the alleged crimes of 'witchcraft, recourse to jinn [supernatural beings], and slaughter of animals'. It is reported that she was sentenced on the basis of one man's testimony of causing him impotence. She confessed under duress - a confession she later retracted claiming that it was extracted under duress. She asserted in her appeal that she was beaten during her interrogation, naming one official of the governorate. She died in jail in 2010 after purportedly choking on food.[27]

Beliefs in witchcraft are manufactured and promulgated to control and supress many ethnic and powerless groups and exonerate the powerful, the trope of the female seductress as witch is redolent. Female domestic workers are particularly vulnerable to this kind of accusation and persecution; for example, when the Shura Council in Saudi Arabia in 2011 granted permission for Moroccan women to work as maids in Saudi households. Some of the resistance against this was brought by women themselves who feared their husband's infidelity some of whom attributed it to Moroccan women casting spells on their husbands and bewitching them.[28] There are similar allegations made against women migrant domestic workers who have displeased their 'masters'.[29]

Witchcraft accusation and persecution has attracted the attention and support of many human rights organisations. Amnesty International recently launched a petition calling on the President of the Republic of Malawi to protect people with albinism from being abducted and killed for their body parts.[30]In parts of Uganda there is evidence that children are mutilated for their body parts.[31] Help Age has directed attention to the treatment of elderly women in Tanzania who are accused of witchcraft and persecuted.[32] End Child Prostitution and Trafficking (ECPAT)[33] has focused on the violence against children in witchcraft accusation. The UK Bar Human Rights Committee (BHRC) has over several years of its work been concerned about the problem of witchcraft accusation and persecution. In 2011 it made a submission to the Malawi Law Commission's Special commission established to Review the Witchcraft Act CAP. 7:02.[34] The BHRC supported the Witchcraft Human Rights International

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[25] M. Adinkrah, 'Witchcraft Accusations and Female Homicide Victimization in Contemporary Ghana', 10 VIOLENCE AGAINST WOMEN 325, 343 (2004)
Cited in M. Quarmyne, '*Witchcraft: A Human Rights Conflict Between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa*', 17 Wm. & Mary J. Women & L. 475' (2011), http://scholarship.law.wm.edu/wmjowl/vol17/iss2/7. See Liberia 2016 http://s.telegraph.co.uk/graphics/projects/child-abuse-witches/index.html

[26] J. Achterberg, *Imagery in Healing: Shamanism and Modern Medicine Shambhala,* Boston and London (2013).

[27] See Human Rights Watch https://www.hrw.org/legacy/english/docs/2008/02/13/saudia18046.htm.

[28] Shura Council (Consultative Assembly) http://www.arabnews.com/node/391047 .

29See http://edition.cnn.com/2014/02/21/world/meast/saudi-arabia-indonesia-domestic-worker-agreement. See also Qatar 'Maids divide men and their wives with sorcery and witchcraft' (Al Arab, January 2012).See also bitch witches B. Ndjio, 'Magic body' and 'cursed sex': Chinese sex workers as 'bitch-witches' in Cameroon**.** *African Affairs* (2014) 113 (452): 370-386.

[30] See https://www.amnesty.org.uk/actions/malawi-stop-ritual-murder-abduction-albinism-witchcraft

[31] Droplets in the stream is a charity which is set up in Australia to bring children mutilated in Uganda for urgent medical treatment to rebuild their lives. See https://www.dias.asn.au/australia-surgery/

[32] See http://www.helpage.org/what-we-do/rights/womens-rights-in-tanzania/womens-rights-in-tanzania/

[33] See http://www.ecpat.org.uk/media/ecpat-uk-features-bbc-%E2%80%98witchcraft%E2%80%99-
See also documentary - *Our World, the Witchdoctors' Children* – Saturday 15 October http://www.bbc.co.uk/programmes/b016c23d.

[34]See also http://www.barhumanrights.org.uk/sites/default/files/documents/biblio/Malawi_Witchcraft_Legislation_Review_BHRC_submission_June_2011.pdf.

Network (WHRIN) in researching and writing a country report on 'Witchcraft accusation and persecution in Nepal'.[35]

## Witchcraft accusation and persecution in the UK

Patterns of migration, asylum and human trafficking have resulted in witch craft belief, persecution and victimisation coming in various ways before the UK courts.[36] In 2006, Eleanor Stobart was commissioned by the Department of Education and Skills to review the extent of witchcraft accusation. In her study[37] of police and social service records she found that since 2000 seventy-four cases of abuse involved accusations of 'possession' and 'witchcraft'. Of the 38 cases analysed, 47 involved children. Victims tended to be children in the age range of 8 – 14 years, who were vulnerable, often suffering disabilities, including epilepsy, autism, mental health problems and learning disabilities. The majority of the families perpetrating the abuse described themselves as Christians and were also families suffering hardship. The abuse included starvation, beatings, being burned, isolation and prayer sessions all perpetrated to achieve deliverance and make the evil spirit leave the child. By 2012, the government issued guidance and a national plan of action[38] intended to raise awareness of the issue of child abuse linked to faith or belief and to encourage practical steps to be taken to prevent such abuse. The Metropolitan Police in London set up 'Project Violet' to deal with child abuse linked to faith or belief.[39]

Cases involving the persecution of children and adults are being tried in the criminal courts where violence against the person, fraud and also human trafficking is involved and where frequently the defendant relies on a defence of genuine belief in spirit possession and witchcraft to justify and/or mitigate non-fatal and fatal violence against those whom s/he allege are 'witches'. Human traffickers are using 'juju' curses to compel their victims to 'co-operate', where fear controls and coerces victims of trafficking where children are especially vulnerable.[40] Immigration tribunal hearings are presented with evidence from applicants who are fleeing witch craft persecution and seek asylum. Witchcraft also presents in wardship and care proceedings applications where such persecution constitutes evidence of significant harm under s 31 of the Children Act 1989.

The courts and practitioners need training and greater awareness to deal with this emerging problem and risk to the vulnerable, especially children.

## Witchcraft accusation and persecution in the Criminal Courts

Such cases have presented in fraud, assault, murder, rape[41] and human trafficking.

### i Child Murder and Torture

The criminal courts have dealt with several cases where a belief in witchcraft has been used as a defence for inflicting violence against the victim, including death, where the defendant claims a genuine intention of performing an exorcism. [42] Victoria Climbie aged seven, died at the hands

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[35] BHRC Nepal http://www.barhumanrights.org.uk/witchcraft-accusations-persecution-nepal April 2014 – 2014 Country Report: Witchcraft Accusations and Persecution of Women in Nepal – Joint report with Bar Human Rights Committee of England and Wales and Forum for Protection of People's Rights (PPR Nepal). Launched at National Women's Commission in Kathmandu, Nepal.

[36] A. Topping, 'Children, kindoki and human rights' I.F.L. 2009, 174-180 . 'Witchcraft trial: couple found guilty of boy's murder in London', The Guardian March 1, 2012, http://www.theguardian.com/uk/2012/mar/01/couple-guilty-boy-murder-witchcraft [Accessed September 3, 2015]; A. Topping, 'Accusations of witchcraft are part of growing pattern of child abuse in UK', The Guardian March 1, 2012, see http://www.theguardian.com/uk/2012/mar/01/accusations-witchcraft-pattern-child-abuse 'Rise in "witchcraft" child abuse cases', (October 8, 2014), BBC News http://www.bbc.co.uk/news/uk-29531396 .

Susan S.M. Edwards,'The genocide and terror of witchcraft accusation, persecution and related violence: an emergency situation for international human rights and domestic law'. (2013) IFL, 322-330.

[37] Child Abuse Linked to Accusations of "Possession" and "Witchcraft" Eleanor Stobart research report no 750 DES http://dera.ioe.ac.uk/6416/1/RR750.pdf.

[38] Guidance: Child abuse linked to faith or belief: national action plan Department for Education,14 August 2012. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/175437/Action_Plan_-_Abuse_linked_to_Faith_or_Belief.pdf

[39] see the documentary http://www.met.police.uk/project-violet/

[40] See Child witchcraft accusations and human rights 2013 European Parliament http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433714/EXPO-DROI_NT(2013)433714_EN.pdf

[41] Most recently Syed Shah was convicted of rape by fraud in deceiving his victim into submitting because he said it would solve her marriage problem. Shah, a so called 'faith healer' duped his gullible victim.

Syed Shah http://www.birminghammail.co.uk/news/midlands-news/spiritual-healer-told-woman-could-12220689 http://www.itv.com/news/central/2016-11-24/spiritual-healer-denies-rape-and-fraud-charges/

of Marie Therese Kouao and her partner. They were convicted of her murder in January 2001.[43] The Climbie Inquiry were to hear evidence that Kouao believed Victoria to be possessed and had taken her to several pastors.[44]

On September 21 2001 the torso of a black child was found in the Thames. The police called the child Adam. The police have not been able to discover who murdered this child. They have said that the condition of the body indicated that he had suffered ritualistic assault.[45]

In *R v Sebastian Pinto and Others*,[46] an Angolan refugee, Child B, aged eight, was cut, terrorised, threatened, beaten, eyes rubbed with chillies, by Sita Kissanga, Adelina Muanzo and Sebastian Pinto in order to exorcise witchcraft. The judge said in his sentencing remarks:

> [23] On 24th November 2003, Child B, then aged eight years, was found by Mr Kwami Agbo, a Hackney street crime warden, sitting alone, shivering and afraid, on the cold stairs of a block of flats, Bewdley House, on the Woodberry Down Estate in Hackney. She was eventually taken by that gentleman to her school, where the Social Services became involved, and she was examined in less than ideal conditions by a doctor later in the day. In the meantime, the headmaster, Mr Wallis, arranged for you, Sita Kisanga, and you, Adelina Muanza, to attend the school. Child B was plainly frightened of you, Sita Kisanga. In the presence of both of you, the child claimed that she had inflicted her apparent injuries upon herself. Child B said that she was a witch. Mr Wallis had never seen anyone so distraught, he said, as that child. Over the weeks that followed, the truth, as the jury found it to be, emerged. Thanks in large measure to the careful and skilful professionalism of, in particular, Detective Constable Jason Morgan. The story told by that little girl, and accepted by the jury, was one that must have horrified all who heard it. It was an account of cruelty to a child, so awful that it is almost beyond belief". Muanza and Kisanga received a reduced sentence from ten to eight years on appeal where the Appeal court said, '[38] We accept that Muanza and Kisanga were not acting maliciously and inflicting harm gratuitously; they were acting in the deluded belief that B was possessed by spirits. But, as against that, it is necessary to make it clear that such motivation provides no mitigation and, in our judgment, does little to reduce the culpability of the offenders.

In 2010, Shayma Ali, was convicted of stabbing a girl of 4 years 40 times and removing her liver. Ali believed that spirits or a jinn had entered the bodies of members of her family. Her defence was one of diminished responsibility.[47]

In 2011, at the Central Criminal Court, Magalie Bamu and her partner, Eric Bikubi, were convicted of murder through beatings and torture Magalie's brother, Kristy, who was 15 years of age. In their defence they said they were performing an exorcism based on their belief that he had used witchcraft against them. Judge David Paget QC said

> The intention, I have no doubt, was to rid Kristy Bamu of witchcraft but to do that, both defendants brutalised and abused him until he died, The belief in witchcraft, however genuine, cannot excuse an assault to another person, let alone the killing of another human being.

They were sentenced to life imprisonment.[48]

In *Regina v Sukhwinder Singh* [49] (a renewed application for leave to appeal, following refusal by the single judge) the defendant had been convicted of rape, buggery and other forms of sexual abuse on his step children, GK, a girl born in 1991, RK, a girl born in 1996 and NS, a boy born in 1997. One of the grounds of appeal was that the judge in summing up to the jury had used the term 'satanic abuse'. '[25] The defendant told the children that he was a holy man and they were filled with evil spirits and to rid their bodies of those evil spirits and black magic he had to massage them each on their own, using an oil, otherwise their mother would be killed.' Given that the abuse had occurred whilst they were being massaged the Court of Appeal did not consider that the word 'satanic' was misplaced (at para [26]).

**ii Children and Women in Sex Trafficking**

Witchcraft curses characterize the coercion some traffickers exercise over their victims. In 2001, Tim Loughton MP reported to the House of Commons in a debate on Child Sex Trafficking that

> 'Girls as young as 12 are taken from Nigeria and flown in to Gatwick Airport, where they

[42] R. *v Edes* (*Zoltan Tibor*) (1990-91) 12 Cr. App. R. (S.) 658;
*R. v McLoughlin (Deborah Vanessa)* [2001] EWCA Crim 754; *R. v Barrett (Tracey Marie)* [2001] EWCA Crim 2708.
[43] January 12, 2001, sentence handed down following the trial of Manning and Kouao at the Central Criminal Court.
[44] http://news.bbc.co.uk/1/hi/uk/1586816.stm
[45] *Witches and Demons* p 59. See also https://www.theguardian.com/uk/2002/jun/02/ukcrime.paulharris
[46] [2006]EWCA Crim 749, [2006] 2 Cr App R (S) 87.
[47] *The Times*, 2 March 2012.
[48] http://www.bbc.co.uk/news/uk-england-london-17255470.
[49] [2013 ]EWCA Crim 698.

> are told to claim asylum. In fear for their lives after being subjected to voodoo rituals, they are then abducted from care homes and foster families and taken abroad to 'work'.[50]

Since 1994, up to 64 girls had disappeared from care in West Sussex. By 2011-12 the Government had identified nearly 500 children and more than 2,000 adults trafficked to the UK, yet there were only eight convictions under human trafficking legislation. Significantly in 2016 in guidance to the Modern Slavery Act 2016[51] which provides a defence of compulsion for those trafficked the role played by witch craft in trafficking is acknowledged,

> Psychological coercion refers to the threat or the perceived threat to the victim's relationships with other people' including, ritual oaths - there is evidence to suggest witchcraft or ritual oaths can also be used to make children fearful and compliant.[52]

In the last few years a number of cases of trafficking involving the use of witchcraft to terrorize and coerce are being heard in the Crown Court or on appeal. In *R v Anthony Harrison* [53] a sentence of 20 years was upheld. The accused was found guilty of trafficking young women in and then out of the UK to work as prostitutes in Spain and Greece. One of the victims described the terror to which she was subjected in the course of a 'witch craft' ritual. She was stripped, shaved, slashed with a razor, tied up, bound, closed in a coffin and told by the 'juju priest' that he could access her soul at any time and kill her from within. Similarly in *R v C (hh) and ors* [54] the victim/defendants was told

> [27]… that she would be given to work as a prostitute and ….threatened … with Juju magic, saying that if she said anything other than what she had been told to say she would become very ill and would die.

Before the Crown Court *Osezua Osolase* [55] who operated a child sex trafficking ring used 'juju rituals' to force their compliance. [56] Gloria Benjamin was convicted of forcing a young girl into prostitution by using a juju ritual [57] during which the girl was cut on her back and chest and had black powder rubbed into her wounds. Lizzy Idahosa convicted of trafficking and sentenced to eight years imprisonment coerced young girls in juju ceremonies where they were stripped, cut, forced to eat raw snails and drink foul water[58].

The vulnerability of women and children to witchcraft belief and the fear that through witchcraft harm may come to them ensures their compliance with those who traffick them. It is significant that the Modern Slavery Act 2016 specifically recognises this particular form of duress or compulsion.[59]

## Escaping Witchcraft and Seeking Asylum[60]

Witchcraft and spirit possession related accusation and victimisation also provides part of the factual basis for asylum claims. The UN Refugee Convention of 1951 requires a well-founded fear of persecution. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985 is construed to apply where agents of the state have tortured suspects with the intention of extracting confessions (see Pt I Art 1)is also relevant. With reference to the Refugee Convention persecution must fall within one of the five grounds: race, religion, political, national, or membership of a particular social group. Witchcraft persecution was recognised and constituted a sufficient ground. In *RG (Ethiopia) and Secretary of State for the Home Department* [61] the Appellant, who was at that time 15 years of age, sought asylum to escape black magic rituals. The court considered whether she was a member of a particular social group. The persecution amounted to:

> [H]er older sister had been married at the age of 13 to a much older man, known as Amana. He ill-treated her and used her in black magic rituals. She became ill and eventually died while trying to escape from him. [5]He then sought to insist upon the appellant marrying him, according to local custom. She was then aged 14. Her mother refused to let this happen, but in December 2000 he abducted her from school, took her to his house, beat her and raped her. She became very ill because of this mistreatment. She too was used in his black magic rituals and was repeatedly raped by him. Eventually she escaped, and she and her mother fled to another town. He pursued her there, and so they fled to another town. (paras [4]–[5])

The adjudicator had determined that the appellant has a well-founded fear of persecution on ground that she is a member of a particular social group. The Secretary of State appealed that decision to the Immigration Appeal Tribunal (IAT) who found that women and young girls in Ethiopia

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[50] 25 Apr 2001 : Column 92WH Child Sex Trafficking (West Sussex Social Services)11 am Mr. Tim Loughton (East Worthing and Shoreham).

[51] Statute Law Rev (2016) 37 (1): 33 The Modern Slavery Act (2015): A Legislative Commentary Jason Haynes

[52]See Victims of modern slavery – frontline staff guidance Version 3.0 Published for Home Office staff on 18 March 2016.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509326/victims-of-modern-slavery-frontline-staff-guidance-v3.pdf p 26.

were not a particular social group and that the adjudicator's conclusion was flawed and could not be sustained. The Court of Appeal held that women in Ethiopia were members of a 'particular social group' and fell within the Convention.

Witchcraft accusation has also been used to scapegoat and control. In *Oco*,[62] the plaintiff sought asylum on the basis of claims of witchcraft persecution. She had been the victim of domestic violence inflicted by her husband and was labelled as a witch by him. The court recognised that witch hunting was prevalent in the applicant's home state of Edo and that she was at great risk of persecution. On appeal it was held that relocation would be unduly harsh.[63]

## Public Law – Care Proceedings

### i. Children physical and psychological abuse and significant harm

Cases involving children said by their carers to be possessed, and where physical abuse of children has followed, have resulted in care proceedings as have cases where parents have held inappropriate beliefs about black magic or the spirit world adversely affecting their ability to care for children resulted in care orders an adoption.

In 1998, Jean la Fontaine in investigating the abuse of children discovered that in respect of both the Rochdale and Orkney cases and also in the Broxtowe case in Nottingham there was a willingness to believe in the reality of organized satanic abuse. [64] For example in *Re P and B (Minors)*[65], three children in one family were taken into care with no further

[53] [2015]EWCA Crim 225, [2013] EWCA Crim 744.

[54] [2015]EWCA Crim 1483.

[55] October 29 2012, http://www.theguardian.com/uk/2012/oct/29/sex-trafficker-jailed-nigerian-orphans.

[56] Independent.co.uk October 29, 2012, Medway Messenger November 2, 2012.

[57] Daily Mirror April 10, 2013.

[58] The Argus (Newsquest Regional Press) March 10, 2016.

[59] See Susan S.M.Edwards 'Coercion and compulsion – re-imagining crimes and defences', *Criminal Law Review* Crim L.R. 2016, 12, 876-899.

[60] See the factual background of juju and witchcraft in the following asylum cases. *J O and another v Minister for Justice, Equality and Law Reform others* - [2015] IEHC 451, (Transcript) *R (on the application of G & H) v Upper Tribunal* (2016) [2016] EWHC 239; *R (on the application of K) v Secretary of State for the Home Department* [2015] EWHC 3668; *NB and another v Minister for Justice Equality and Law Reform and others The High Court Faherty J; R (on the application of EO and others) v Secretary of State for the Home Department* [2013] EWHC 1236; *ST (Sierra Leone) v Secretary of State for the Home Department* (2010) [2010] EWCA 1369; *PO (Traff NB and another v Minister for Justice Equality and Law Reform and others* [2015] IEHC 267; *Trafficked Women Nigeria CG* [2009] UKIAT 00046; *JB (AP) Petitioner* [2014] CSOH 126; *A v Public Prosecutor for Oldenburg, Germany* [2014] EWHC 2517 CO/10917/2013; *MA (a minor suing by her mother and next friend FA) v Refugee Appeals Tribunal and others* [2014] IEHC 28, *Atamewan* [2013] EWHC 2727; *SBH and others v Refugee Appeals Tribunal and another* [2013] IEHC 164; *PA (Nigeria) v Secretary of State for the Home Department* (2012) [2012] EWCA 1801; *ST (Sierra Leone) v Secretary of State for the Home Department* (2010) [2010] EWCA 1369; *OA v Refugee Appeals Tribunal and another* [2009] IEHC 296; *A v Refugee Appeals Tribunal and another* [2009] IEHC 296*; Okedairo v Refugee Appeals Tribunal (Cronin Member) and another* [2005] IEHC 470; *AO v The Refugee Appeals Tribunal and another* HC 239/04; *O v Minister for Justice, Equality and Law Reform* [2008] IEHC 328l; *Adeybayo v Minister for Justice, Equality and Law Reform and another* [2008] IEHC 222.

[61] [2006] EWCA Civ 339.

[62] [2012] CSIH 65XA41/11.

[63] There are numerous cases where witchcraft related harms have formed part of the application and the factual matrix. Judicial review- *R (on the application of Mehari) v Secretary of State for the Home Department* [2009] EWHC 3464 (Admin), [2010] All ER (D) 154. *JA v Refugee Applications Comr (Human Rights Commission, notice party)*[2008] IEHC 440, [2009] 2 IR 231. Appeals against deportation - *R v O Case 2. R. (on the application of G) v Upper Tribunal* Queen's Bench Division (Administrative Court) [2016] EWHC 239 (Admin) [2016] A.C.D. 52.
*R. (on the application of MD (Gambia)) v Secretary of State for the Home Department* Court of Appeal (Civil Division), [2011] EWCA Civ 121. *E v DPP* Divisional Court, [2011] EWHC 1465 (Admin); [2012] 1 Cr. App. R. 6; [2012] Crim. L.R. 39; (2011) 155(24) S.J.L.B. 43;
*R. (on the application of HA (Nigeria)) v Secretary of State for the Home Department* Queen's Bench Division (Administrative Court), [2012] EWHC 979 (Admin); [2012] Med. L.R. 353;
*R (Atamewan) v Secretary of State for the Home Department* [2014] 1 W.L.R. 1959 Queen's Bench Division [2013] EWHC 2727 (Admin).
*R (on the application of Obasi) v Secretary of State for the Home Department Immigration* [2007] EWHC 381 (Admin), CO/1232/2006, [2007] All ER (D) 214 (Feb).
*RT v SM* [2008] IEHC 212, *N and others v Minister for Justice, Equality and Law Reform and another* [2008] IEHC 215. *Ireland AO v The Refugee Appeals Tribunal and another HC 239/04.*

[64] J. LaFontaine, *Speak of the Devil: Tales of Satanic Abuse in Contemporary England* 1998 Cambridge University Press.

contact with the mother or the father of the younger two children. Witchcraft and occult practices of the parents was of the factual matrix of bruising, failure to thrive and underachieving.

In *Haringey Council, Haringey London Borough Council v S* [66] ('the Pinto case') (serious ritual abuse) the first child arrived in the UK from Angola when she was 8 years old, accompanied by her maternal aunt (who claimed to be her mother), and moved in with the second child, aged 7, and his mother. Shortly afterwards, the first child was accused of witchcraft, and the two women together with the father of the third and fourth children assaulted the first child, cut her with a knife, kicked and hit her. They said they believed her to have 'ndoki' or 'kindoki' (witchcraft).

'[21] B also alleged that Mrs S had rubbed chilli pepper into her eyes. [22] He described going to church and how they prayed, saying:

> the pastor dropped her on the floor and she dropped on the floor, she started shaking, and when you shake, that means you're witchcraft. They pulled her up and said, 'Are you witchcraft?' And she says she is witchcraft, so that's how we knew that she was witchcraft.

The first child was to remain with foster parents. The second child was placed with the father and stepmother. The case of *Re Y, J and I (Children)* [2014][67] involved inadequate parenting and multiple call outs by police and issues of black magic [32]. In *R (Mother) v Milton Keynes Council and others* [2014][68] Dr. Sarkar the expert addressed the mother's belief that she had been forced to behave in certain ways (including fathering two of her children by a man who is not her husband) due to black magic. Owing to the mother's psychological state the court refused to discharge care orders and ordered a further care order in respect of one of the children.[69]

**ii. Psychological harm - phantom pregnancy and miracle birth belief**

Not only is the fear of witchcraft used to exercise duress over its victims in trafficking cases but the belief in the power of witchcraft over life results in many of those who so believe being duped and exploited.

The belief in the power of the supernatural world to determine fertility has resulted in care proceedings and the removal of vulnerable children. In *London Borough of Haringey v Mrs E* [2004][70], Mr and Mrs E believed that the child they returned from Africa to the UK with was a miracle child that Mrs E had given birth to. The husband and wife unable to have children joined a spiritual group that claimed they could perform miracle births. The wife said she had given birth to two children in this way and that the first child had died and the present child C had been born in October 2003 DNA tests established that child C was not the biological child of either of its parents. An Emergency Protection Order was granted in favour of C. The wife then went back to Kenya and gave birth to another child G (in this way) who remained in Kenya. Mr and Mrs E were the victims of fraudulent practices which rely on exploiting supernatural beliefs where women undergo what they think is natural birth and are given a child they believe to be their own.[71] The court found a deception that involved the trafficking of children. C was subsequently freed for adoption.[72]

In *A Local Authority v S and Others* [73] the mother lost her baby in 2009. Desperate to have another child, she visited a clinic in Nigeria and returned with a baby following bogus fertility treatment, for which she paid £6,000. In *Re D* [74] a couple were similarly duped into believing that the wife was pregnant and that the wife, following fertility treatment in a clinic in Nigeria, gave birth to a child. The presiding judge remarked

> [37] I only conclude by saying at this point, that this appalling process which exploits the overwhelming desire of childless parents to have children has got to be brought to an end. As I say, it involves the desperate plight of the childless with the most horrible exploitation of people in this situation and the fraudulent removal from them of large amounts of money.

This case concluded with the parents officially adopting the child (*Royal Borough of Greenwich v O*.[75]

In both the above cases the court found the parents to be

[65] [1991] 1 FLR 402.
[66] [2006] EWHC 2001 (Fam), [2007] 1 FLR 387.
[67] [2014] Lexis Citation 274.
[68] [2014] Lexis Citation 97.
[69] Other cases in the family courts have involved witchcraft belief arising in private hearings for child arrangement orders/contact *Contact A-T (Children), Re* [2008] EWCA Civ 652; and *Re J (Child Giving Evidence)* [2010] EWHC 962, [2010] 2 FLR 1080, considered whether the child should be permitted to give evidence in respect of a care proceedings matter where the abuse included ritual cutting in association with witchcraft [10].
[70] EWHC 2580; [2005] 2 FLR 47
[71] H. Egede, 'Reproductive Rights Issues in Child Protection Proceedings – Revisiting *London Borough of Haringey v Mrs E*' (2011) 23 *Denning Law Journal* 202.
[72] *Re Haringey London Borough Council v C, E and Another Intervening* [2006] EWHC 1620, [2006] 1 FLR 1035).See also *Northumberland County Council v Z, Y, X (By Her Children's Guardian) and the Government of the Republic of Kenya* [2009] EWHC 498 (Fam)[2009] 2 FLR 696.
[73] [2012]EWHC 3764 (Fam ).
[74] [2012]EWHC 4231 (Fam).
[75] [2012]EWHC 4231 (Fam)). See also *London Borough of Hillingdon v AO* [2014] EWHC 75 (FAM) (Family Division; Hogg J; 23 January 2014) where a childless couple travelled to Nigeria this time to undergo 'herbal' treatment.

responsible loving intelligent people. In the latter case the parents were successfully duped into believing that the wife had had a silicone womb implanted as part of the 'treatment' and that this resulted in doctors in England being unable to detect her pregnancy in negative pregnancy tests .

**iii. Wardship/Inherent Jurisdiction**

In wardship the court has jurisdiction over children outside the jurisdiction and at risk of harm. Wardship was sought in relation to adolescents who left the UK for Syria.[76] Wardship allows for return orders under certain circumstances. In *Lewisham London Borough Council v D*[77], the local authority sought leave to invoke the inherent jurisdiction of the High Court (wardship) to seek an order for the return to the UK of a child aged 22 months from the Gambia. The child was one of five children. The parents held beliefs about voodoo and witchcraft being practised against the family. They also believed that if the child swam in alligator infested water then it might be cured. The family came to the attention of the social services in 2005, when it became known that the parents were the subject of delusional beliefs, whereby they (primarily the mother) believed that members of the extended family were working voodoo or black magic on the family. This belief in the supernatural impacted on the family in a number of ways: for example, through a belief that there were flying rats in the home which turned into human beings; through a belief that one member of the extended family believed to practise black magic came up through the floorboards of their kitchen; through a belief that the faeces of one of the children were made of powder; through a belief that the same child had snakes in her stomach; and through a belief that members of the extended family were wanting body parts from T to sacrifice.

This is a summary of a larger number of objectively bizarre beliefs held primarily by the mother and to a greater or lesser extent by the father. The mother had taken the child to Africa for an extended holiday and left the child with a friend or possibly a relative. On discovering that the father was about to go out to the Gambia, the authority obtained emergency protection orders in respect of all five children, believing that he might take the other children with him.

Criteria for habitual residence were relevant and the judge ruled:

> 34] In these circumstances, I am persuaded that s 100(4) (b) of the Act is made out. It follows that s 100 is satisfied in full, thus enabling me to give the local authority leave, which I do, to invoke the inherent jurisdiction of the High Court to seek a 'return order'

## Conclusion

British courts will continue to be presented with witchcraft accusations and persecution in its several and diverse forms with its range of harms to adults and also children, given our multi- cultural demography and patterns of immigration. Witchcraft accusation and persecution involves systematic campaigns of terror, such that domestic laws in the UK (and also worldwide) should recognise that this as an aggravated factor in assault and violence against the person. Already UK law has, within the sentencing provisions of the Protection from Harassment Act 1997, the element of aggravated assault that involves racially or religiously motivated action. The sentencing regime of the Criminal Justice Act 2003 s 269 provides for a harsher sentence for sadistic and also religiously or ideologically motivated murder.

The harms that flow from witchcraft accusation and persecution must not be underestimated.

Leethen Bartholomew, a Community Partnership Adviser with the City & Hackney Safeguarding Children Board, identifies the complexity of the problem, at least with regard to those who genuinely believe that children can be possessed:

> I think that they are aware that they're abusing a child. But I think that with some individuals, the view is, is that the child no longer exists. So what they're actually doing is not harming the child. It's about trying to rid that child of an evil spirit. It's probably something really difficult to get your head around, for someone to view that, and saying that the child isn't there, when you're seeing the child. But for some people, that's exactly how it is, that they don't actually see the child any longer.

However it is also clear that many people deliberately exploit the belief in witchcraft to traffic their victims and provide a defence for their actions. In *The Queen on the application of G, H v Upper Tribunal v Secretary of State for the Home Department* the judge summarised the experts' evidence in these terms:

> 25] Ms Olateru-Olagbegi … describes in detail the use of 'juju' oaths to control victims of trafficking; the fact that victims are fearful of the repercussions of breaking this oath and thus do not report their traffickers; and that as a result there is a 'culture of silence' and a failure by victims to cooperate with authoritie'.[78]

Understanding the signs of witchcraft abuse is crucial to safeguarding children.

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[76] *London Borough of Tower Hamlets v B* [2015] EWHC 2491 (Fam).

[77] [2008] 2 FLR 1449.

[78] *The Queen on the application of G, H v Upper Tribunal v Secretary of State for the Home Department* Case No: CO/2123/2014, High Court of Justice Queen's Bench Division Administrative Court11 February 2016[, 2016] EWHC 239 (Admin).

# International Famiy Law, Policy and Practice

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Schedule 1 to the Children Act 1989
rule 4.1 of the Family Proceedings Rules 1991
Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1
Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

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