

**THE MOTHER AND CHILD REUNION: A RECONCEPTION OF CHILD CUSTODY  
LITIGATION AND MEDIATION**

by

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## ABSTRACT

### THE MOTHER AND CHILD REUNION: A RECONCEPTION OF CHILD CUSTODY LITIGATION AND MEDIATION

Many women have shared with family lawyers such as myself their stories about how the legal system marginalized their maternal connections and child caregiving experiences by imposing on them legal positions and constructs about mothering and caring that differed from the reality of their experiences. This thesis develops the argument that neither the litigation nor the mediation of child custody disputes in Canada address the systemic problems associated with the marginalization of women. Both processes reflect white, male, middle class, heterosexual expressions, productions and perpetuations of patriarchy.

I first define the dominant ideology of motherhood and present differing mothering experiences which more accurately reflect the realities of caregiving. I then deconstruct the legal and social methods used in both the litigation and mediation of child custody in order to demonstrate their use of dominant ideologies of motherhood and family to limit women's caregiving opportunities. From the context of two women's legal experiences, I explore the possibility of introducing feminist legal methods into mediation and litigation in recognition of the fact that women must engage with the legal system to address the practicalities of childcare, economics and shelter.

I respond to the popular argument that mediation is a panacea to the ills of litigation by taking the position that both are situated along a continuum perpetuating the same

ideological assumptions about mothers and family which oppress all women to some degree. I argue that mediation is ultimately more oppressive to women because unlike litigation, systemic problems in mediation are obscured by romanticism and rhetoric.

Finally, I attempt a *mother and child reunion* by trying to create a place for feminist conceptions of caregiving within child custody litigation and mediation which would empower women. I conclude that it will be difficult to create a space for feminist methodology in custody litigation and mediation without the continued efforts of lawyers to reconstruct the ideology of mother.

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To my mother, Maureen Bourbonnais



## CHAPTER 1

### INTRODUCTION

Over the course of my years practising family law,<sup>1</sup> many women have shared with me their stories and their experiences of child custody dispute resolution or non-resolution. At various points of their battle, women introduced me to the frustrations and anger they felt for and with the courts, judges, mediators and lawyers. Many women have told me stories of how their spouses, families, friends and children sometimes silenced their voices as mother. But sadly, even more told me that if their husbands silenced them, the legal system muzzled them; visibly ostracizing them in the public forum, often marginalizing their existing maternal connections and child caregiving relationships by imposing upon them different legal positions and constructs about caring. These impositions most often differed from the realities of their everyday child caregiving and motherwork experiences. In a significant number of experiences, women were shuttled between court litigation services and court mediation services, with very little real and substantive choice of venue to address their child custody concerns. It is from this privileged position of shared insights and perspectives that I begin the naming of my thesis.

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<sup>1</sup> I was an active practising family law lawyer in Manitoba from July, 1988 until April, 1994.

My argument is that neither the litigation nor the mediation<sup>2</sup> of child custody disputes in Canada address the systemic problems associated with the marginalization of women and children in Canadian society<sup>3</sup> and its manifestation in the child custody context.

Throughout my thesis, I will argue that Canadian custody litigation and mediation<sup>4</sup> are essentially white, male, middle class, heterosexual cultural expressions, productions and perpetuations of patriarchy.<sup>5</sup> They are sexist, racist, and class-biased. I will further argue that the rules, methods and procedures of custody litigation and mediation rely on dominant

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<sup>2</sup> Mediation, herein, will refer to any government sponsored or court-affiliated mediation and not private mediation. Private mediation has not formed any part of my experience of mediation. My position is that women entering into private mediation contracts do so from a position of greater financial power.

<sup>3</sup> I acknowledge that other groups, not just women, are marginalized in Canadian society and that the feminization of poverty is a systemic problem, attributed, in part, to separation and divorce; See Moge v. Moge [1992] 3 S.C.R. 813.

<sup>4</sup> I recognize that both formal and informal negotiations are also strong forces in the resolution of child custody disputes. See Hilary Astor and Christine Chinkin who support the position that lawyers are not the aggressive gladiators of battle that they often are portrayed to be. They present statistics that support that most child custody and other family disputes are settled before litigation or mediation arise. Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (Sydney: Butterworth, 1992) at 243 - 244. Kenneth Kressel has concluded, on the basis of his research on lawyers and mediators, that substantial or patterned differences were not observed on goal settlement, obstacles and attitudes about divorce mediation. He concludes that "mediation is an alternative form of dispute resolution no better or worse than the more traditional approaches used by lawyers in negotiation" Kenneth Kressel, The Process of Divorce (New York: Basic Books, 1985) at 178. It is beyond the scope of this thesis to study the area of negotiation.

<sup>5</sup> Throughout my thesis, the term patriarchy will be used to refer, "to this system of social relationships that privileges men while disadvantaging women, although the precise form of power inequities varies historically and cross-culturally." Gillian Creese and Veronica Strong-Boag, "Introduction: Taking Gender into Account in British Columbia", in Gillian Creese and Veronica Strong-Boag, eds., British Columbia Reconsidered, Essays on Women (Vancouver: Press Gang Publishers, 1992) 1-17 at 2.

legal and social constructions of the meaning of woman, mother and child within the family in ways that serve to limit the opportunities, experience and autonomy of women in this context. As well, courts and mediators use patriarchal definitions of mother and motherhood in an effort to keep the family functioning together even after separation and divorce. This thesis will explore the social constructs of mother, woman, child and family. My perspective will be feminist, but with a capital "F"<sup>6</sup> because I am not sure I align with any one theory, method or epistemology of feminism. I would like to work in reciprocity between different theories and practices of feminism and women to inform my work,<sup>7</sup> identifying these as I engage with them.<sup>8</sup>

The naming of mother, as both an ideology and a reality will be my beginning place. I begin, in Chapter 2, with an examination of "mother". I view the examination of "mother" as essential to an understanding of how both the litigation and mediation of child custody can sever the ties that bind the existing patterns of care between mother and child. If change is to take place, if mothers are to feel validated by the legal processes they engage with in child custody disputes, and if children are to continue to receive the care they depend upon,

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<sup>6</sup> See: Celina Romany, "Ain't I a Feminist?" (Fall 1991) 4:1 Yale Journal of Law and Feminism at 23 wherein she discusses feminism with a capital "F", "The feminism I see myself associated with has a capital F. That which aims at eradicating the various forms of oppression that affect all women...I am willing to risk being outside current theoretical trends by supporting capital letters. My capital letters connote expansion, breadth and inclusion. Far from claiming privileged access to the truth with a capital T, feminism with a capital F thrives in a room with a great view of narratives about intersections."

<sup>7</sup> See: bell hooks, "Theory of Libratory Practice" (Fall, 1991) 4:1 Yale Journal of Law and Feminism at 11 for a discussion of theory and practice working in reciprocity to capture women's voices.

<sup>8</sup> Shulamit Reinharz, Feminist Methods in Social Research (New York: Oxford University Press, 1992).

then the legal construct of mother must be flexible enough to embrace several definitions of mother, motherwork and caregiving. I am not a visionary. I cannot augur that this change is probable. I only make the argument that it may be possible. I take the position that part of the feminist agenda to combat the oppression of women and children obligates the inclusion of a constant review of child custody issues with a mandate to reunite mother and child.

In the modern Canadian nuclear family of small self-centred units, mother, father and child are each viewed as an axis in a triad of patriarchal familial relationships. The child within this conjugal unit is important as its product, the reason for its maintenance,<sup>9</sup> although less important as an economically productive unit. This triad of dependencies between father, mother and child is the structure that holds the modern family together and is encouraged by the Canadian socio-legal system to subsist even after the conjugal separation of mother and father.<sup>10</sup> The construct of the modern family is used by the legal system in child custody determination. Using post-structural analysis and deconstruction, feminists such as Carol Smart and Martha Fineman challenge the definitions assigned to mother and child in the triangular view of family. For example, Smart argues that we cannot assume that motherhood (as well as sexuality and reproduction) solely exists within the private sphere of family, but rather that at least since the mid-nineteenth century, it has been a matter of

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<sup>9</sup> Shulamith Firestone, The Dialectic of Sex. The Case For Feminist Revolution (New York: Quill, William Morrow, 1970) at 85

<sup>10</sup> In Thibaudeau v. Canada (Minister of National Revenue) [1995] 2 S.C.R. 627, two of the Supreme Court of Canada judges (both men) talk of the "post-divorce family unit" and the importance of using the tax system to benefit this unit versus the individual spouse.

public policy, concern and regulation.<sup>11</sup> Her point is that the definition of certain behaviors, e.g. motherhood, as private is itself part of the regulation of the behavior to produce a specifically gendered set of consequences.

Fineman's deconstruction of the modern family discerns that traditional placement of the child as one focal point or axis of the triadic family is a false placement which when deconstructed, can be exposed as a patriarchal artifice or ruse where,

...the child is an abstraction, significant for assessing the status of the adults...for measuring the dimensions of power and control lost or accumulated in the symbolic struggle between men and women, in which the family is a primary contemporary battleground.<sup>12</sup>

Fineman argues that a less oppressive arrangement for women and children would be diatomic. Children and mothers would be the focus. Paternity would be of little consequence.<sup>13</sup> I view Fineman's concept of the Mother/Child focus as a mother and child reunion. The original, substantive and functional relationship between mother and child would ideally be reaffirmed by our socio-legal system.

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<sup>11</sup> Carol Smart, ed., Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality (London & New York: Routledge, 1992) at 3

<sup>12</sup> Martha Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995) at 10

<sup>13</sup> IBID., at 10.

At this point, I think it necessary to clarify my position on men and in particular, father. Throughout my thesis, the term Mother and the term "mothering" will be used instead of or interchangeably with parenting as:

[W]ork in which child-tending men and women engage. This terminology acknowledges the "fact" that mothering has been - and still is - primarily the responsibility of women...Also, by the slight if passing frission of referring to men as mothers, I hope to jar a listener into reflecting...upon the heterosexist knot in which our ideas of mothering are told.<sup>14</sup>

The work of "mothering" can and is carried on by many people: men and women, straight and gay, single, coupled, or in many kinds of social arrangements. The Mother/Child metaphor is a symbolic embodiment of nurturing that does not mandate that all women be mothers or that "bad" mothers would not be deprived of their children. It is acknowledged that there are women who abuse, neglect and abandon their children. Fineman believes that men can and should be mothers in the sense of being engaged in caretaking.<sup>15</sup> She also states that Child in her dyad includes all forms of inevitable dependency - "the dependency of the ill, the elderly, the disabled, as well as actual children. The child is the embodied concept, exemplifying the need for physical caretaking."<sup>16</sup> What is important to hold in mind throughout my thesis is that the vast majority of maternal caregiving is done by women and for children and that this is why I focus on women and children, the Mother and Child Reunion.

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<sup>14</sup> Sara Ruddick, "Thinking About Fathers" in Barrie Thorne with Marilyn Yalom, eds. Rethinking the Family: Some Feminist Questions (Boston: Northeastern University Press) 176-190 at 185

<sup>15</sup> Fineman, supra note 12 at 234.

<sup>16</sup> IBID., at 235.

I have divided the second chapter into three sections: the first section will address the universalism, the ideologies and the myths of motherhood; the second section will address the construction and deconstruction of motherhood; and, the third section will address the realities of the diversity of mothering and caring experiences. Throughout this chapter and indeed my entire thesis, I will argue thematically that child custody decision making processes are laden in ideologies about motherhood that blind and silence women's voices, ethnic and racial diversity and class differences. My ultimate conclusion will be that mediation and litigation are born of the same western liberal philosophical origins and assumptions about law, gender and motherhood which oppress all women and children to varying degrees.

In the third chapter, following from the examination of mother in her many complexities, I address my concern that many women who are divorcing or separating must first deal with the day-to-day deliberations and economics of childcare, food and shelter, often having to protect themselves and their children from the frontline abuses of the nuclear family fallout: mental, physical, sexual and economic abuses. To survive today and into the early morrow, they must engage, out of practical considerations, with the patriarchal legal and social welfare institutions which promote the litigation and the mediation of child custody disputes. In Chapter 3,<sup>17</sup> an introduction to feminist legal research methods is presented and I begin to explore whether it is possible to dismantle or infiltrate any methods and procedures used in mediation and litigation of child custody issues without waiting for a revolution that eliminates and destroys both forms. Can feminist legal methods, aside from assisting in

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<sup>17</sup> Chapter 5 will continue the review of the possibilities for the introduction of change into the legal system.

reviewing existing formal socio-legal systems of child custody dispute, actually inform feminist practise in the system? Two stories about women's struggles with existing legal remedies to child custody determination that occurred in my practice will be told to provide a concrete context within which to base feminist inquiries.

The first story is about litigating a child custody dispute by way of affidavit evidence. I will introduce examples of the limitations of fact finding and story telling of affidavits and oral evidence in child custody disputes. The second story is about court-affiliated mediation. I will argue that the lines between the two primary methods of child custody dispute resolution (litigation and mediation) have become murky, both reproducing dominant ideologies. Perhaps they are not so very different after all, perpetuating, as some feminists have suggested, the same patriarchal norms and myths.<sup>18</sup>

In Chapter 4, I present a brief history of family mediation's rise to popularity. I then proceed with the deconstruction of child custody mediation, primarily at its methodological level. I characterize some of the methodologies used in family mediation in an attempt to show how they actually distort reality and therefore invalidate women's stories. I will conclude that family mediation, as a form of child custody dispute resolution, is inappropriate in all but the narrowest of family situations, as its assumptions and methods are saturated with normative ideals about family and motherhood rather than family realities. This chapter's emphasis on custody mediation and the deconstruction of its methods is very important because of the false sense of optimism and security many women initially place in mediation. In my

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<sup>18</sup> See: Elizabeth Pickett, "Family Ideology, Family Law and Mediation: Law Costs More Than A 'Shadow'" (1991) 3:11 *The Journal of Human Justice* 27.



practice, too often women would resort to and adopt the rhetoric of custody mediation as being cheaper, quicker, non-aggressive and “a way to finally stop all this fighting without lawyers.”<sup>19</sup> In my experience, mediation was not a panacea to lawyers and litigation. In Canada, only the affluent can afford private mediation.<sup>20</sup> In reality, mediation became one more time consuming step in the court process. Mediators were assigned, not chosen. Mediation may have been ostensibly voluntary but in reality, judges demanded it. Court appointed mediators try to fit the methods of private mediation into a court supported system. Most of my female clients felt it a disaster.

In the final chapter, I will review some of the research used by the B.C. government to introduce something new in the neighbourhood of family justice.<sup>21</sup> I will also explore whether it is possible to preserve and yet transform aspects of existing child custody dispute resolution discourses and practices by creating and/or identifying a space for feminism within litigation and mediation. Is it a contradiction to identify as a “feminist litigator” or a “feminist mediator”? Is it possible for women to passionately engage in these contradictions of their identity rather than be broken by them.<sup>22</sup> I believe so. Various feminist alternatives

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<sup>19</sup> I recall having heard this phrase or similar phrases quite often during my practise.

<sup>20</sup> I had only one client out of a few hundred use a private mediator. It failed.

<sup>21</sup> The Family Justice Centres are a project currently funded by the Ministries of Attorney General, Human Relations and Social Services designed to serve the community in which they are located as a one-stop shop for family justice services. More will be addressed in Chapter 5.

<sup>22</sup> Celia Kitzinger, “Resisting the Discipline”, in Erica Burman (ed.), The Practice of Psychology of Feminists (London: Sage, 1990) 26-27

to traditional familial caregiving and mothering will be presented to recognize the shifting demographics noted by Shelley Gavigan:

The ideology of the patriarchal nuclear family provides the prism through which relationships are examined and the measure against which they are judged, notwithstanding a shifting demography which indicates that the idealized nuclear family household may be becoming increasingly less typical.<sup>23</sup>

Any feminist method of child custody dispute resolution must recognize the difference between dominant norms and realities at all times. Shelley Gavigan describes this as, "the analysis of 'experience' through the concept of 'ideology' may illuminate significant dissonance between many (but not all) LIVED experiences in the DOMINANT ideology of the family".<sup>24</sup> My underlying argument against mediation and litigation is that they are based on the assumption that the family is white, nuclear, heterosexual and middle class. It will be essential to my argument that the reader acknowledge that, "all societies contain a multiplicity of family forms whose structural arrangements respond to complex conditions."<sup>25</sup>

Judith Stacey notes that,

Like postmodern culture, contemporary U.S. family arrangements are diverse, fluid, and unresolved. THE postmodern family is not a new model of family life equivalent to that of the modern family, not the next stage in an orderly

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<sup>23</sup> Shelley A. M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law" (1993) 31 Osgoode Hall L.J. 589 at 605

<sup>24</sup> IBID., at 604-605.

<sup>25</sup> Rayna Rapp, "Family and Class Contemporary America: Notes towards an Understanding of Ideology", in Barrie Thorne with Marilyn Yalom, eds., Rethinking The Family (Revised Edition) Some Feminist Questions (Boston: North Eastern University Press, 1992) 49 at 50

progression of family history, but the stage in that history when the belief in a logical progression of stages breaks down.<sup>26</sup>

Didi Herman has noted the lack of uniformity in the usage of 'family' because it is complicated by the personal experiences of some feminists versus its use as an ideological construct by others.<sup>27</sup> I plan to define the concept of family on the one hand as an ideological construct, as well as its use to denote a fluid, changing reality for "a group of people who love and care for each other".<sup>28</sup> I will attempt to move away from the triad of relationships between father, mother and child commonly associated with the term "family". My thesis that the socio/legal system in Canada is not responsive to the systemic problems of marginalization facing women will be reassessed in terms of whether the socio/legal system can be responsive with the introduction of feminist theory and methodology and what insights in particular inform the process of child custody dispute resolution in both mediation and litigation.

I ask that three important points be kept in mind throughout the reading of this thesis. My first point is that I am not trying to distinguish motherhood myths from motherhood realities

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<sup>26</sup> Judith Stacey, "Backward Towards The Post Modern Family: Reflections on Gender, Kinder and Class in the Silicone Valley", in Barrie Thorne with Marilyn Yalom, eds., Rethinking The Family (Revised Edition) Some Feminist Questions (Boston: North Eastern University Press, 1992) 91 at 94

<sup>27</sup> Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L.R. 789. Also see generally Susan Boyd, "Some Postmodernist Challenges in Feminist Analysis of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 C. J. of F. L. 79

<sup>28</sup> See the study by Albert Solnit quoted in "Most Regard Family Highly", New York Times 10 October, 1989. It is also cited in Stacey, supra note 26 at 109. It is arguable that "loving and caring for each other" are not always necessary for there to be "family".

for the purpose of identifying one motherhood truth amidst motherhood falsehoods. My purpose is to support the position that motherhood categorically “is constantly subject to differing constructions”<sup>29</sup> depending upon the most dominant discourse on family at any given time. As well, non-dominant discourses also define mother by producing different motherhoods as a challenge to dominant discourses or as a simple necessity of survival for that particular mother and child.

The second point I make is that any discussion of mother necessarily envelops child as well. The category of Mother can only be constructed as it relates to the category of Child.<sup>30</sup> The link between women and children AND the development of discourses on motherhood and caring is an important theme within this paper.

My third point is that I have not been able to resolve the dilemma inherent in advancing one method or procedure in child custody resolution over another. The perplexing problem is how not to fall into the trap of grand theorizing and rather, advance methodology of child custody determination that recognizes varying truths of childcare and motherwork. If I were to promote a particular methodology, even from a feminist perspective, would I not risk contributing to the social and legal construction of mother and child in such a way as to defeat my objective of acknowledging non-dominant discourses of mothering and how these non-dominant discourses affect the ways that mothers and children give and take care? I

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<sup>29</sup> Carol Smart, “Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the Nineteenth Century” in Carol Smart, ed., Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality (London and New York: Routledge, 1992) 7

<sup>30</sup> IBID., at 1.

believe my thesis will be successful if I can in some way challenge and raise consciousness about existing legal and social discourses of child custody determination and their resistance to change. Part of my conclusion will be that neither the litigation nor the mediation of child custody disputes in their present practise help women and children. I will argue that the current debates and research favouring one or the other are overstated in their claims and are more polemical than empirical. I will also conclude that of the two forms of dispute resolution, litigation appears more suitable to the introduction of feminist methodology and practise and therefore, I conclude that it is potentially less oppressive to women and children than mediation.

## CHAPTER 2

### CHALLENGING DOMINANT IDEOLOGIES OF MOTHERHOOD: THE IDEOLOGY OF UNIVERSALISM AND THE REALITY OF DIVERSITY

#### I. INTRODUCTION

In Canada, and indeed most of the western world, motherhood is largely defined in the context of the ideological norm of the nuclear family. As I will show later in this thesis, when a “family” breaks up, the litigation and mediation of child custody disputes perpetuate the dominant patriarchal ideologies about family, child, mother and father emulated by the idealized nuclear family. The form of this idealized family becomes an important standard of measurement used by litigators and mediators to encourage or dictate particular child care arrangements. The resulting child care arrangements may not reflect the existing or previous patterns of care for the child. In the introduction to this thesis, I stated that the original, substantive and functional relationship between mother and child should be reaffirmed and not invalidated by the Canadian socio-legal system. Child custody decision making should consider stories that do not fit into ideological constructs of mother and child in the family. It is from the perspective of motherhood that I wish to begin my analysis of the marginalization of women and children in the litigation and mediation of child custody decision making. In the Canadian socio-legal system, motherhood has stayed locked into prescribed, acceptable manifestations that prohibit its transformation within the system to better reflect everyday realities.

In this chapter, the ideology of the universal mother and family will be challenged and deconstructed and the reality of the diversity of mothering, child care giving and family experiences will be examined. By looking at the complexity of meanings and processes encompassed under the rubric of mothering, I will challenge some conventional notions about biology, gender and family which are present in the legal processes of mediation and litigation of child custody disputes.

In the first section of this chapter, I cannot address all the political, legal and cultural debates that surround the issues of mothering. I do, however, wish to look at connections between mothering and the reproduction of social inequality, and the dilemmas created by the simultaneous idealization of motherhood and the devaluation of caring work. Patriarchal control of mothering will be looked at in its inter-relationship with technological and capitalistic controls.<sup>31</sup>

Secondly, I will look at the ideology and construction of mothering in order to deconstruct it at two levels. At the first level, I will attempt to break motherhood down into some of the elements that fuse it so securely as "an undifferentiated and unchanging monolith".<sup>32</sup> At the second and broader level, I will deconstruct motherhood by attempting to reverse and displace the notion of dichotomy and binary opposition that western philosophical liberal

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<sup>31</sup> Barbara Katz Rothman, "Beyond Mothers and Fathers: Ideology in a Patriarchal Society" in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 139-151

<sup>32</sup> Evelyn Nakano Glenn, "Social Constructions of Mothering: A Thematic Overview" in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 1-29 @ 13

traditions rest on. Mothering has been defined by bipolarities such as male-female, mind-body, nature-culture, reason-emotion, public-private and labour-love with motherhood being assigned to the subordinate poles.<sup>33</sup>

In the third section of this chapter, I will present situations where women have already constructed their own ways of mothering that transcend constructed oppositions<sup>34</sup> and traditional bounds or dominant ideologies.<sup>35</sup> Finally, some motherhood experiences defy categorization within the constructs or constraints of patriarchal ideologies. I will ask the reader to look beyond the deconstruction of motherhood on the basis of patriarchal ideologies and bipolarity when factoring in the experiences of women of differing colours, class structures and sexual orientations. Rather than being dichotomous, some women of colour, working class women and lesbians see their experiences as interwoven, gender inequality working in tandem with racial domination, economic exploitation and homophobia. Some of these diverse experiences and some innovative forms of parenting and creating "family" will be addressed. Stories can be told, but each reality itself cannot be identified as the universal truth. It will vary with the individual, the group and society and their interaction with each other.

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<sup>33</sup> IBID., at 13 - 16.

<sup>34</sup> See: Eileen Boris, "Mothers Are Not Workers: Homework Regulation and the Construction of Motherhood, 1948-1953" 161-180; Margaret K. Nelson, "Family Day Care Providers: Dilemmas of Daily Practice" 181-210; and Denise A. Segura, "Working at Motherhood: Chicano and Mexican Immigrant Mothers and Employment" all in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency(New York: Routledge, 1994)211-236.

<sup>35</sup> Katz Rothman, supra note 31 at 139-151.



## II. MOTHERHOOD: THE IDEOLOGY OF UNIVERSALISM

Ideology can both let us see and blind us, give us language yet silence us.<sup>36</sup> Ideologies may be defined as,

Systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security, the basis of beliefs and guides for conduct.<sup>37</sup>

According to Douglas Hay,<sup>38</sup> an ideology will endure based on its elasticity (the degree to which people think it is a product of their own mind and experience) and its generality (its capacity as a general reservoir of belief, free from challenge). However, there is no universal definition of ideology nor do the definitions have equal sway. Postmodernists question its validity and instead speak of discourses.<sup>39</sup> In the context of this thesis, I will

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<sup>36</sup> IBID., at 139-140.

<sup>37</sup> R. Cotterrell, The Sociology of Law: An Introduction (London: Butterworths, 1984) at 12 and see Gavigan, supra note 23, Introduction.

<sup>38</sup> Douglas Hay, "Property, Authority and the Criminal Law" in D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson and C. Winstow, eds., Albions Fatal Tree: Crime and Society in Eighteenth-Century England (New York: Pantheon, 1975) at 55

<sup>39</sup> See: Susan Boyd, "Some Postmodernist Challenges to Feminist Analysis of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 C.J.F.L. at 95 and 96 wherein she comments on the post-modern concept of discourse which focuses on the production of power through the acquisition of knowledge through discursive practices. Power is constructed through language, whereas in theories of ideology, there remains an outer realm of truth. Susan Boyd notes that postmodern discourse theory may seem incompatible with feminism which relies on both the ideologies and the truths of women's experiences. In practice, she notes, there is often "slippage" between the two words (ideology and discourse) and, perhaps, they are not so far apart in the way each word is actually socially constructed.

adopt the definition of "ideology",<sup>40</sup> as it relates to motherhood, as a way a dominant group of people look at mother and the way it organizes their thinking about mother. I also acknowledge that ideology organizes the way non-dominant groups of people and individuals think about and adapt, resist or embrace dominant ideologies.

#### **A. THE UNIVERSAL ASSUMPTION OF THE WHITE HETEROSEXUAL MIDDLE CLASS MOTHER**

The place I will start to examine the ideology of motherhood is with my own white, middle class, heterosexual personal experience. My experience is paralleled, enriched and complicated by the work of white middle class feminists<sup>41</sup> concerned with the patriarchal control of male-dominated institutions over mothers and women. Feminist writers have been criticized for presenting a universalized definition of motherhood from their narrow positions within race and class relations.<sup>42</sup> However, I believe that white heterosexual middle class

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<sup>40</sup> Katz Rothman, supra note 31 at 139.

<sup>41</sup> See Adrienne Rich, Of Women Born: Motherhood as Experience and Institution (New York: W. W. Norton, 1976) reproduced and edited by Adrienne Rich, "Anger and Tenderness", in Juanita H. Williams, ed., Psychology of Women: Selected Readings (New York: W. W. Norton and Company, 1979) at 363-376; and Ann Oakley, "Feminism, Motherhood and Medicine - Who Cares?" in Juliet Mitchell and Ann Oakley, eds., What is Feminism? (Oxford: Basil Blackwell, 1986) 137.

<sup>42</sup> Nancy Chodorow uses psychoanalytic object relations theory to argue that nurturance and care become part of a woman's personality due to a girl's continuous attachment and identification with her mother, Nancy Chodorow, The Reproduction of Mothering (Berkeley: University Press, 1978) at 245; Feminism and Psychoanalytic Theory (Berkeley, University of California Press, 1989). Sara Ruddick argues that motherhood involves higher philosophical thought, as opposed to instinct, with focus on survival in the preserving and fostering of life which can be learned by anyone, Sara Ruddick, "Maternal Thinking" (Summer 1980) 2:6 Feminist Studies 342-367; Both theorists have been challenged by women of colour for universalization of motherhood from their narrow classed and raced perspective.

feminist experience is an integral and important part of the collective of experiences of motherhood. Arguably, the feminist experience as it has emerged as part of western culture has influenced dominant ideology too. Dorothy E. Roberts notes that, "perhaps women who occupy different social positions possess differing abilities to identify particular aspects of oppression in each instance of domination."<sup>43</sup> My position as part of the dominant group in Canadian society is that white women should shoulder more responsibility in ensuring that the complexity and multiplicity of mothers' voices are heard. Feminist writers who come from this dominant group, even as oppressed women, have arguably more power than the men and women in less dominant groups and positions in society. And yet, despite the fact that white middle class women may in some ways be privileged, relative to other groups of men and women, their experience of the ideology of motherhood is not privileged. Living up to the expectations of the ideology is restricting and oppressive and it is very easy for "Mother" to fall from grace.<sup>44</sup>

My own experience as a mother, despite my being a woman whose experience meets some of the expectations of the dominant ideology of motherhood, has not been in accordance with the expectations of the ideology of motherhood. As a first-time mother, I recall an ambivalence towards my son that was both overwhelming and unexpected and did not accord with the expectations of the ideology of motherhood. During my labour, my confusion and terror were dismissed as hysteria. I was strapped down flat on my back, my

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<sup>43</sup> Dorothy E. Roberts, "Racism and Patriarchy in the Meaning of Motherhood" (1993) 1:1 *Journal of Gender and the Law* 1-39 at 36

<sup>44</sup> This insight has been developed from the helpful comments of my thesis advisor, Susan Boyd, Chair of Feminist Legal Studies and Professor of Law, University of British Columbia. Examples of the "good" and "bad" mother will be integrated throughout my thesis.

body penetrated with an antipsychotic drug. In this position, my inverted uterus could not offer me deliverance of my child. Due to my body and mind's stubborn unwillingness to cooperate, they cut him out of me like a paper doll. When I emerged from the unconscious, I did not feel love; only anger, guilt and pain. I was appalled when my uterus further contracted in pain as he first nursed at my breast. I associated him with pain. I impatiently awaited the time when I would bond with him. He demanded my constant attention with his cries and his incessant hunger. We were both fighting for our survival at that time. Neither one of us talked about mother love.

Adrienne Rich recalls,

...the times, when suckling each of my children, I saw his eyes open full to mine, and realized each of us was fastened to the other, not only by mouth and breast, but through our mutual gaze: the depth, calm, passion, of that dark blue, maturely focused look.<sup>45</sup>

I believe this to describe what eventually occurred between my son and I, but I cannot be sure or exact on this point. The good and bad moments seem to have merged. I do know that I love my children with a commitment that, at times, I think, borders on insanity and I know I learned to love this way. Adrienne Rich further remarks that this interpretation of the pain and the pleasure, the frustration and the fulfillment of motherhood is sometimes mistaken for the human condition, correcting this by saying that it is patriarchal and not natural:

...the patriarchal institution of motherhood is not the "human condition" any more than rape, prostitution, and slavery are.... Motherhood has a history, it has an ideology... My individual, seemingly private pains as a mother, the individual seemingly private pains of the mothers around me and before me,

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<sup>45</sup> Rich, supra note 41 at 370.

whatever our class or colour, the regulation of women's reproductive power by men in every totalitarian system and every socialist revolution, the legal and technical control by men of contraception, fertility, abortion, obstetrics, gynecology, and extrauterine reproductive experiments- are all essential to the patriarchal system, as is the negative or suspect status of women who are not mothers...<sup>46</sup>

Adrienne Rich is describing alienation from her body and spirit by the institution - not the fact - of motherhood, which allows only certain patriarchal views and expectations.

The interactions of mothers with the social institutions that reproduce patriarchal ideologies of motherhood must be appreciated in order to understand the ideology itself. Shelley Gavigan states that in conditions of subordination, women (and men) are active moral agents who participate in the construction of their experiences and their world, and in changing both.<sup>47</sup> From both Adrienne Rich and Shelley Gavigan, I understand that the pain and confusion of my childbirth experience resulted from a patriarchal medical system that shaped my own self construction as an inadequate mother; a woman to be controlled, sedated and invaded with a technology superior to my own body's ability to expel my child. I was the patriarchal embodiment of the woman who complicates childbirth by being there. (Without my body the baby's delivery would have been so much easier!) I was a flower pot

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<sup>46</sup> IBID., at 375.

<sup>47</sup> Shelley Gavigan, supra note 23 at 596; Shelley Gavigan is speaking of historical materialism methodology, cultural and historical specificity and the changing and different forms of women's oppression and resistance. She speaks of women's involvement as active and not passive agents in their social construction.

growing the seed of a patriarchal liberal society.<sup>48</sup> Over the years, I have wrestled with my identity as a mother and still do not know what part of my self-concept as “mother” is biological, and what part is socially constructed. This is an example of my active moral agency in constructing my experience and my world. No doubt, it would be easier for me to simply dismiss my birthing experience as a complicated birth that required aggressive medical intervention to save our lives and that my tears and fears of afterbirth were only hormonal imbalance. This construction of my experience was the acceptable white middle class encounter with the ideology of motherhood, even though it complicated my reality.

## **B. MOTHERHOOD AND THE IDEOLOGIES OF PATRIARCHY, TECHNOLOGY AND CAPITALISM**

A more diverse look into the societal controls over mothering is necessary because, to some degree, these controls have oppressed all women, regardless of race, culture, class, disability, sexual orientation or the fact of motherhood itself. I find the work of Barbara Katz Rothman<sup>49</sup> helpful in understanding the powers exerted over motherhood. She identifies three deeply rooted ideologies that frame and construct our views of motherhood: patriarchy, technology and capitalism.

### **PATRIARCHY**

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<sup>48</sup> See: Caroline Whitbeck, “Theories of Sex Difference” (1973) 5 *The Philosophical Forum* 1 at 2 wherein she defines the “flower pot theory of pregnancy” as the concept of liberalism that children are born to men out of women.

<sup>49</sup> Katz Rothman, *supra* note 31 at 139-157.

One example of the patriarchal ideology of motherhood is the "flower pot theory of pregnancy."<sup>50</sup> This is Caroline Whitbeck's metaphoric explanation of the liberal theory that children are born to man out of woman's body. Many of us have heard the baby question being explained as, "Daddy plants a seed in Mommy!" Initially in the patriarchal system, women were considered the soil in which men's seeds grew.<sup>51</sup> However, with the advent of scientific genetic discoveries and advanced technology, women's "eggs" could not continue to be overlooked. In our present patriarchal society, the answer to preserving the value of the seed is to simply extend patriarchal seed rights to women by confronting their eggs as seeds, as well. Women then have some privileges of patriarchy. Women can own their children, as men do. They have "rights" to their babies; as men have always had rights to their children: "...children are, based on the seed, presumptively half his, half hers - and might as well have been grown in the back yard."<sup>52</sup> This modified patriarchal system can be contrasted to mother-based systems where the relationship between mother and child is based on nurturance and not on motherhood per se.<sup>53</sup> Caring and nurturance is devalued in patriarchal societies. But now, since men cannot gain and maintain control over women and children exclusively by their seed anymore, more importance must be placed on men's economic superiority in capitalism and their other patriarchal social based privileges. For

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<sup>50</sup> Whitbeck, supra note 48 at 2.

<sup>51</sup> For an example think of the verses in the Old Testament that dwell on male lineage ie. "such and such a man beget such and such a son" and so on.

<sup>52</sup> Katz Rothman, supra note 31 at 143 where she notes that the "growing in the backyard" theory displaces the "flower pot" theory in the typical largesse of capitalistic thought.

<sup>53</sup> IBID., at 142.

example, men can gain control over women in a patriarchal society by using women to have their babies. Katz Rothman states,

A man can use this woman or that woman to have HIS children. He can hire this woman or that woman to substitute for one or another aspect (biological, social, or psychological) of the mothering his child needs. From the view of the man, his seed is irreplaceable; the mothering, the nurturance, is substitutable.<sup>54</sup>

Katz Rothman<sup>55</sup> argues that what makes the child ours, as women, is nurturance, the work of our bodies and not the seed.

I find that her nurturance argument becomes complicated in issues of adoption or surrogacy where the initial nurturance and work of the female body is not done by the eventual "mother" of the child. I would suggest that a patriarchal society would classify adoption and surrogacy as importing seedlings (adoption) and cross-pollination (surrogacy), still maintaining the use of women's bodies to have their babies, extending patriarchal rights to women of privilege who can afford to choose their pseudowombs. In a patriarchal and capitalistic society, a metaphorical umbilical cord is pumped by money invested to beget a legitimate offspring. Some women and men have argued that surrogacy can be seen as a freely chosen occupation based on rational, informed market choices. In response to the "freedom of women to contract out their bodies" argument, Katz Rothman notes the patent absurdity of claiming fairness of opportunity to contract because although both well-

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<sup>54</sup> IBID., at 143.

<sup>55</sup> IBID., at 143.



educated women and poor women have the same rights to be surrogates, only the wealthy have the means to hire surrogates.<sup>56</sup>

Theories of motherhood are also informed by the liberal assumptions of the atomized individual. This assumption is rooted to a larger western construct of the relationship between the individual and the community.<sup>57</sup> The process between freely choosing rational individuals engaged in bargaining assumes that in an exchange based, white, male, middle class market place, all economic decisions are rational. It stresses individual rights regardless of the effect on the collective. It therefore legitimizes domination because, in reality, there is competition for scarce resources. Those who are non-dominant are denied existence or treated as unimportant and are less able to bargain freely.

Susan Boyd<sup>58</sup> notes that the ideology of equality can complicate the ideology of motherhood, creating tension between the two. One example is that men have an equal right (though not necessarily equal responsibility) to children. This can create an unequal bargaining power between fathers and mothers because, ostensibly, men's rights are more often symbolic of control than actual increased caregiving to children. The father assumes

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<sup>56</sup> IBID., at 149.

<sup>57</sup> Nancy Harstock, Money, Sex and Power (Boston: Northeastern University Press, 1983)

<sup>58</sup> Boyd, Susan, "Child Custody, Ideologies and Employment" (1989) 3 C.J.W.L. 111 at 113 and 123-125; Also see Zillah Eisenstein, "The State, the Patriarchal Family, and Working Mothers" in Irene Diamond, ed., Families, Politics and Public Policy: A Feminist Dialogue on Women and the State (New York: Longman Inc., 1983)

an equal bargain based on the children being chattels.<sup>59</sup> This exchange presumably takes place in the male dominated market. These assumptions of contractual ownership contradict and do not represent the realities of mothering and the roles most mothers and fathers play in their children's care.

Pat and Hugh Armstrong,<sup>60</sup> have researched and written about Canadian women's paid and unpaid work for over 25 years. They note that when a child is born, although demands may change with age and numbers, child care becomes constant, compulsory and full-time.<sup>61</sup> Mothers continue to feed, clothe and worry about their offspring, often long after they leave home.<sup>62</sup> They most significantly note that,

Women may take on paid work, get help from relatives and other children or from paid substitutes, but asleep or awake, in sickness and in health, in the labour force or at home, most women still retain the primary responsibility for the children.<sup>63</sup>

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<sup>59</sup> See for a discussion on male ownership of women and children based on Katz Rothman, supra note 31 at 140-144.

<sup>60</sup> Pat and Hugh Armstrong, The Double Ghetto: Canadian Women and Their Segregated Work, 3rd Ed. (Canada, McClelland and Stewart Inc. 1994)

<sup>61</sup> IBID., at 114.

<sup>62</sup> IBID., at 115.

<sup>63</sup> IBID., at 114 and see Ann Oakley, The Sociology of Housework, (New York: Pantheon, 1974) and Meg Luxton More Than a Labour of Love: Three Generations of Women's Work in the Home (Toronto: The Women's Press, 1980)

Their research also supports that most women with paid jobs outside the home take primary responsibility for domestic work.<sup>64</sup> To sum it up neatly, "...[t]he house work, the child care, and the emotional work are all mainly women's responsibility"<sup>65</sup> and it clearly displaces any assumptions of equality of child care rights between male and female in a patriarchal and capitalistic society.

### TECHNOLOGY

The ideology of technology in the context of child care is best summarized as "when we think of our relationships with our children as a job to be done well".<sup>66</sup> This approach involves systemizing, rationalizing, ordering our day, programming out our lives and budgeting our time, all in the name of efficiency.<sup>67</sup> Katz Rothman claims that this approach harms the human spirit because not everything is best viewed as an economic resource.<sup>68</sup> She uses the medicalization of pregnancy and childbirth as the most obvious application of the technological ideology of motherhood, which results in a focus on the mechanics of production and not a social transformation of motherhood.<sup>69</sup> The social order is also seen

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<sup>64</sup> IBID., at 114; More comment on the "double shift" women take on as mothers and wives which results in more work for woman (and unpaid) in child care and domestic work will be discussed throughout this paper.

<sup>65</sup> IBID., at 126.

<sup>66</sup> Katz Rothman, supra note 31 at 144.

<sup>67</sup> Fitting a baby's feedings into our schedules is one example. Pushing for a baby to "sleep through the night" is another. Toilet Training In One Day is the ultimate example of constipated efficiency (and I admit to reading this treatise despite my knowledge that I know very few adults who didn't eventually become 'toilet trained').

<sup>68</sup> Katz Rothman, supra note 31 at 144-145.

<sup>69</sup> IBID., at 144-145.

as mechanical in liberal philosophy. Society is not seen as an organic deeply connected whole but rather a collection of parts.<sup>70</sup>

Alison Jagger<sup>71</sup> further informs our understanding of the ideology of technology by defining decontextualization as the liberal, positivist process by which researchers become detached observers, eliminating values, vested interests and emotions generated by their class, sex, race or unique experiences. They also try to remove the object of study from its context, supposedly in order to create scientific descriptions of reality in a rational liberal society. Feminists such as Zillah Eisenstein, do not argue against impartiality or reason, but rather take a middle ground approach.<sup>72</sup>

The implications for motherhood raised in the works on technology by Katz Rothman, Jagger and Eisenstein are problematic for the everyday realities of child care. Motherhood contradicts the concept of technology and liberal positivist processes. The physical embodiment of connectedness and pregnancy is the living proof that we were not begotten into this patriarchal world as atomized individuals.<sup>73</sup> The implication is that a society committed to liberal philosophical principles cannot deal well with motherhood.<sup>74</sup>

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<sup>70</sup> IBID., at 146.

<sup>71</sup> Alison M. Jagger, Feminist Politics and Human Nature (Towa NJ: Roman and Allenheld, 1983) at 186 wherein the theory of liberalism, the body is not seen as an essential part of oneself.

<sup>72</sup> Zillah Eisenstein, The Female Body and the Law (Berkeley Calif.: University of California Press, 1989) 221

<sup>73</sup> Katz Rothman, supra note 31 at 146.

<sup>74</sup> IBID., at 146.

Consequently the valuation of rational work results in the devaluation of the physical work of the child bearing body and the child caring body. An example of this devaluation was given earlier in this chapter when I referred to my personal experience of being strapped down during childbirth, my body's natural ability to give birth being preempted by the rational, efficient, technological child birth processes that men had mastered. I was treated with utter disdain and then ignored, put under a general anesthetic probably to spare my deliverers from the loud, aggressive and creative verbiage I had construed to capture my feelings about my birth work.

### **CAPITALISM**

The ideology of capitalism conceives motherhood as work. Children are produced by the labour of mothering.<sup>75</sup> Workers do not own or control the products of their labour, nor are all workers or products equally valued. And though mothering is conceived by capitalism as work, it is perceived as work not to be valued as paid work.<sup>76</sup> This approach has deceived many women into undervaluing their own mother caring work. Capitalism is the accumulation and investment of capital (wealth), by people who are in a position to control others.<sup>77</sup> It assumes women's freely chosen and informed consent to perform the unpaid and undervalued work of child care. Pat and Hugh Armstrong state that, "it is simply assumed that because women love their children, they will also love looking after them and

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<sup>75</sup> IBID., at 149.

<sup>76</sup> Pat and Hugh Armstrong, supra note 60.

<sup>77</sup> Katz Rothman, supra note 31 at 149.

love all the other tasks that go along with child care.”<sup>78</sup> They state that the above assumptions stem from the linking of caring for and caring about.<sup>79</sup> The assumption of self-sacrificing motherhood does not consider that many motherhood choices result from poverty or need and are not freely chosen, liked or based on full information.

The ideologies of motherhood do not exist in isolation but rather “...as part of complex ideologies that buttress male dominance (patriarchy), the economic system of exploitation (capitalism), and the privileging of mind over body (technology)”.<sup>80</sup> Pat and Hugh Armstrong<sup>81</sup> note how the dominant class is concerned with establishing and maintaining the legitimacy of the social structure by selectively reinforcing both conscious and unconscious ideas through ideological institutions. They note a “but”: “but the ideas presented through the institutions are limited by the 'real life processes' by the 'real existence' of individuals in their daily lives.”<sup>82</sup> And so the task becomes how to reflect the 'real life processes' and the 'real existence' of mothers in our socio- legal institutions and ideologies. Katz Rothman's solution is to value the motherwork of intimacy and nurturance and to view motherhood as an intellectual pursuit, an activity moving beyond a paternity standard and towards a nurturance standard.<sup>83</sup> Sara Ruddick<sup>84</sup> defines this intellectual

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<sup>78</sup> Pat and Hugh Armstrong, supra note 60 at 117.

<sup>79</sup> IBID., at 117.

<sup>80</sup> Nakano Glenn, supra note 32 at 12.

<sup>81</sup> Pat and Hugh Armstrong, supra note 60 at 181.

<sup>82</sup> IBID., at 181.

<sup>83</sup> Katz Rothman, supra note 31 at 154.

pursuit as “maternal thought”. She defines maternal thought as a unity of reflection, judgement and emotion. A shifting of focus occurs. We look at what mother is doing; not who she is, and this “doing” need not be gender based. The discipline of mothering requires a social, not a genetic base. Social relationships, not sexual, would give rise to obligations to care for children.<sup>85</sup>

Similarly, Carol Smart presents support for “caring for” versus “caring about” in what is called the moral discourse of care.<sup>86</sup> Joan Tronto also contributes to the moral discourse of care:

Caring suggests an alternative moral attitude. From the prospective of caring, what is important is not arriving at a fair decision, understood as how the abstract individual in this situation would want to be treated, but at meeting the needs of particular others or preserving the relationships of care that exist. In this way, moral theory becomes much more closely connected to the concrete needs of others.<sup>87</sup>

Using this analysis, mothering would be the **WORK** of caring for rather than the **ABSTRACT** of caring about. In child custody determination “caring for”, typically performed

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<sup>84</sup> Ruddick, supra note 42 at 342-367.

<sup>85</sup> Fineman discusses at length the concept of family not being based on sexual relationships; Martha Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995) 23

<sup>86</sup> Carol Smart “The Legal and Moral Ordering of Child Custody”(1991) 8:4 Journal of Law and Society 485-500 at 486-7

<sup>87</sup> IBID., at 487 citing J. Tronto, “Women and Caring: What Can Feminists Learn About Morality From Caring?” A. Jaggar and S. Bordo, eds., in Gender/Body/Knowledge (1984).The concepts of caring as a moral discourse will be expanded upon in Chapter 5. Methods will be attempted to be extracted from this theory to create a space for feminism within existing mediation and litigation paradigms. The issue of “caring for” in motherwork ties in with evaluating the needs of children in child custody disputes.

by women, would be considered at least as important as "caring about", a terrain more typically claimed by men.<sup>88</sup>

The effects of patriarchy, technology and capitalism on motherhood as an ideology permeate the undervaluing of women's work generally. It is an understatement that both motherwork and caregiving and those who perform it have been undervalued in our society. This statement applies, as well, to women's work performed outside the home. This oppression of women has been well researched and documented by feminists<sup>89</sup> even though the effect of motherwork on women's lives has largely gone unscrutinized because of its invisibility and the low value assigned to it.<sup>90</sup>

### C. THE MYTH OF THE NATURAL MOTHER

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<sup>88</sup> *IBID.*, at 491; Pat & Hugh Armstrong, *supra* note 60 at 115-116.

<sup>89</sup> See for examples Luxton, *supra* note 63, Pat & Hugh Armstrong, *supra* note 60; "Women, Family and Economy" in Nancy Mandell and Ann Duffy, eds., Reconstructing the Canadian Family (Toronto and Vancouver: Butterworths, 1988); "Theorizing Women's Work" (Toronto: Garamond, 1990); Margaret Eichler, Families In Canada Today: Recent Changes and Their Policy Considerations 2nd Ed. (Toronto: Gage Publishing, 1988); Judy Fudge and Patricia McDermott, eds., Just Wages: A Feminist Assessment of Pay Equity (Toronto: University of Toronto Press, 1991); Donna S. Lero and Karen L. Johnson, Canadian Statistics on Work and Families (Ottawa: Canadian Advisory Council on the Status of Women, 1994); Susan A. McDaniel, "The Changing Canadian Family: Women's Roles and the Impact of Feminism" in Burt, S., Code, L., Dorney, L., eds., Changing Patterns. Women in Canada, Second Edition (Toronto: McClelland and Stewart Inc, 1993) 422-451, 427-432; Roxana Ng, "Racism, Sexism, and Immigrant Women" in Sandra Burt, Lorraine Code and Lindsay Dorney, eds., Changing Patterns: Women in Canada, Second Edition 279-308 at 288-300.

<sup>90</sup> Kathryn F. McCannell and Barbara M. Herringer, "Changing Terms of Endearment: Women and Families " in Joan Turner, ed., Living the Changes (Winnipeg: The University of Manitoba Press, 1990) 57-67



More than any other single description of motherhood, the word "natural" encapsulates patriarchal ideologies locking women into reproductive roles and denying women an existence outside of mothering. This myth of natural has been studied by Ann Oakley as perpetuating three beliefs: "that all women need to be mothers; that all mothers need their children; and, that all children need their mothers."<sup>91</sup> Arguments have been put forth that a mother needs to bond with her child for the child's healthy development.<sup>92</sup>

Meg Luxton states that,

[a]s for the vast majority of women in advanced capitalistic countries, the two aspects of having children - bearing them and raising them - are inseparably linked. It is important to note that such association is by no means natural. It is fostered by a lack of alternatives and by a powerful social belief that having children is "natural" for women, that the essential responsibility for bearing and rearing children is located within the nuclear family, and that mothers make the best rearers of their children.<sup>93</sup>

Further to Douglas Hay's analysis of an ideology's elasticity and generality,<sup>94</sup> E. Ann Kaplan<sup>95</sup> finds that the power of an ideology rests in its ability to accommodate complex and

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<sup>91</sup> Oakley, supra note 63 at 186.

<sup>92</sup> See: Diane E. Eyer, Mother Infant Bonding: A Scientific Fiction (New Haven, CT: Yale University Press, 1993) wherein she notes that in actuality, the evidence for bonding was minimal, based only on the research of 28 human subjects and studies of infant-mother rejection in nonhuman subjects.

<sup>93</sup> Luxton, supra note 63 at 81.

<sup>94</sup> Hay, supra note 38 at 55.

<sup>95</sup> E. Ann Kaplan, "Look Who's Talking, Indeed: Fetal Images in Recent North American Visual Culture" in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 121-138 at 123-124.

often contradictory elements. The ideology of motherhood encompasses multiple contradictions. Mothers are romanticized as life-giving, self-sacrificing and forgiving. Mothers are also demonized as smothering, overly involved and destructive.<sup>96</sup> In "The Fantasy of the Perfect Mother", Nancy Chodorow and Susan Contratto<sup>97</sup> note that both blame and idealization of mothers have become part of our cultural identity.<sup>98</sup> They further note that the tendency of some feminists to blame "the mother" fits into this cultural patterning.<sup>99</sup> "[w]e deny mothers a place in a two-way relationship with their children, manifold relationships with the rest of the world; and we deny ourselves as mothers."<sup>100</sup> To some extent, it would seem that all women, feminists included, are themselves affected by the dominant ideologies and fantasies about motherhood and child development. Throughout her book, My Mother, Myself,<sup>101</sup> Nancy Friday notes that we are raised to believe that mother love is different from other kinds of love in that it is not open to error, doubt, or to the ambivalence of ordinary affections. She notes that: "[t]his is an illusion. Mothers may love their children, but they sometimes do not like them."<sup>102</sup> She also notes

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<sup>96</sup> Nakano Glenn, supra note 32 at 11. Also note that this sets up yet another dichotomy within liberal ideology-virgin/vamp.

<sup>97</sup> Nancy Chodorow and Susan Contratto, "The Fantasy of the Perfect Mother" in Barrie Thorne with Marilyn Yalom, eds., Rethinking the Family (Revised Edition) Some Feminist Questions (Boston: Northeastern University Press: 1992) 191-214 at 203

<sup>98</sup> IBID., at 203. Both blame and idealization are two sides of the same coin: the belief in the all-powerful mother.

<sup>99</sup> IBID., at 203-204.

<sup>100</sup> IBID., at 206.

<sup>101</sup> Nancy Friday, My Mother, Myself: The Daughter's Search for Identity (NY, NY: Laurel, 1977)

<sup>102</sup> IBID., at 21.

that when our own mothers try to tell us or teach us of “her own anxiety and lack of belief in over-idealized notions of womanhood/motherhood”,<sup>103</sup> we often perceive them as unauthentic or bad mothers.<sup>104</sup> The tyranny of the patriarchal ideologies of maternal instinct idealizes motherhood beyond human capacity, making it oppressive to women, as no woman can live (or love) up to its ideal, and yet, no woman can afford not to. And so a gap is created: “Mother FEELS the mixture of love and resentment, affection and anger she has for her child, but she cannot afford to KNOW it.”<sup>105</sup> This discussion is important to feminists, mediators, lawyers and judges in as much as they should examine their relationships to their own mothers and the social constructs they identify with mother as an ideology.

### III. THE DECONSTRUCTION OF THE IDEOLOGY OF MOTHERHOOD

#### The Autobiography of My Mother

I'm an I.  
 Sometimes I'm a she.  
 Sometimes I'm even a he.  
 Sometimes I'm veryvery I.  
 Sometimes I'm my mother.

Joanna Russ<sup>106</sup>

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<sup>103</sup> IBID., at 21.

<sup>104</sup> IBID., at 21.

<sup>105</sup> IBID., at 35.

<sup>106</sup> Joanna Russ, “Old Thoughts, Old Presences” in The Hidden Side of the Moon (New York: St. Marten's Press, 1987) at 206

The dominant ideology of motherhood will be deconstructed at two levels. Firstly, it will be broken down into its essential elements. Secondly, its dichotomous roots will be reversed and displaced.

Evelyn Nakano Glenn<sup>107</sup> speaks of elements that are fused with the definition of mother. One element is that both the actor and the activity are conflated with the word "mother". This results in women being seen in only one role, whereas men are seen as having many. A second element is that women are recognized as the main nurturers and caregivers. The second fusion of maternal care excludes people other than mothers from taking any responsibility for nurturing roles. Thirdly, mother and child are conflated as one entity which effectively denies either one separate agency. The act of naming these fusions potentially allows the diffusion of them to occur. It depends on our ability to be open minded. Our view of who can perform the roles of motherhood, motherwork and caregiving should potentially enlarge. Our view of motherhood as just one aspect of womanly identity is potentially secured. Seeing the child in more than his or her identity as "only a child" also occurs.<sup>108</sup>

At a broader level of analysis, the binary opposites of male-female, mind-body, culture-nature, reason-emotion, public-private and labour-love (and I would add control-care),<sup>109</sup> which have defined mothering in Western culture, must be deconstructed. Motherhood has

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<sup>107</sup> Nakano Glenn, supra note 32 at 13.

<sup>108</sup> For a study of the area of feminism, the child and the nuclear family see: Lee MacKay, Children and Feminism (Vancouver, B.C.: The Lesbian and Feminist Mothers Political Action Group, 1987)

<sup>109</sup> These oppositions will be examined in the discussion of the Cartesian dialogue in detail in Chapter 3.

always been assigned to the subordinate poles of the dichotomized paradigm. Yet, polarities are interdependent upon each other, because as well as being hierarchal, they derive their meaning from their contrast.<sup>110</sup>

It is helpful to the deconstruction of the dichotomous nature of motherhood in dominant ideology to acknowledge that its polarized position may have arisen from motherhood as portrayed by 19th and 20th century European and American bourgeoisie. This recognition limits the origins of the ideology to an historically specific time frame.<sup>111</sup> The oppositions, if valid at all, only applied to a very limited subgroup within a narrow period of time. This is the first step to breaking down the ideology's validity. Its narrow application to both class and time leads to the conclusion that it never reflected the reality of the majority of working class white and native North Americans, African-Americans, and other racial and ethnic minorities. I would submit that the dichotomies between the public-private and labour-love and full-time motherhood for women and full-time employment for men did not exist for most of these people. The work of mothering must be viewed as not simply taking place in the private realm of the household, but also outside and at the boundaries of the two. These boundaries have been transended by even white, nuclear family mothers. An example is charity work in the community. Mothers often work both inside and outside the home. And finally, mothers must often mediate the private and public in co-ordinating family schedules, in negotiating needed resources and in political involvement to better children's lives. By continuing to see mothering as distinct from and in opposition to economics and politics,

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<sup>110</sup> Nakano Glenn, supra note 32 at 13.

<sup>111</sup> IBID., at 14.

patriarchal institutions reinforce that mothering is all love and altruism, endlessly self-sacrificing and in need of no reward.

Patricia Hill Collins,<sup>112</sup> a feminist and woman of colour, has contributed to the process of deconstructing the dominant ideology of motherhood by noting that work and family do not always function as dichotomous spheres for women of colour. They are interwoven. Gender inequality has worked in tandem with racial domination and economic exploitation to oppress women of colour as mothers. She claims that looking at women only in terms of gender inequality distorts the experiences of women in alternate family forms.<sup>113</sup> The experiences of women of colour, for example, must be shifted from focusing only on gender inequality, allowing us entry into the diverse experiences of mothering that represent the reality for many mothers and caregivers.

#### IV. MOTHERHOOD: THE REALITY OF DIVERSITY

The following section of my paper will be presented as a sampling and is by no means intended to be a comprehensive representation of different forms of mothering. I will refer to some feminist works and retell stories of mothering that span a few centuries and an ocean. My purpose is to raise consciousness to the roles that historical specificity, class, gender,

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<sup>112</sup> Patricia Hill Collins, "Shifting the Centre: Race, Class and Feminist Theorizing About Motherhood" in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency ( New York: Routledge, 1994) 45 and 48.

<sup>113</sup> IBID., at 61 and 62, and see Patricia Hill Collins, "Black Women and Motherhood" in Barrie Thorne and Marilyn Yalom, eds., Rethinking The Family: Some Feminist Questions (Rev. ed.) (Boston: North Eastern University Press: 1992) 215-245. Her thesis is that white feminist theories have limited utility for African American women at 216.

race and sexual preference play in shaping our concept of mother. Hopefully, raised consciousness will help to transcend viewing mother in only dominant ideological constructs as she relates and engages with Canadian socio-legal systems. My purpose is also to move away from viewing mothers as 'good' or 'bad', where the mother of the modern nuclear family is used as the standard of measurement in social and legal arenas.

As a Canadian white middle class, heterosexual mother and woman living in the last decade of the second millennium in a Western capitalistic society founded on liberal philosophical premises, I cannot, without great difficulty and effort, really imagine what it is like to be any other variety of woman and mother than what I am narrowly defined to be. And yet, few women are as privileged as I am with the time and the resources and the choice to indulge in an inquiry into a variety of perspectives on mothering as socially-constructed relationships. I do not apologize for who I am. My intention is to champion the various stories of mother to provide thought about the devaluation of caring work and the meaning of mother in social and legal arenas as they relate to child custody determination.

Feminist writers have been concerned primarily with patriarchal control of mothering, referring not only to individual husbands and fathers controlling their wives and daughters reproduction, but also to male-dominated institutions controlling women as a group.<sup>114</sup> Patricia Hill Collins' concern is that the patriarchal control of the individual woman and with women as a group does not capture the unique problems that women of colour have as mothers. She describes,

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<sup>114</sup> Nakano Glenn, *supra* note 32 at 17.

...the existing dichotomies in feminist theorizing about motherhood that posit rigid distinctions between private and public, family and work, the individual and the collective, identity as individual autonomy and identity growing from the collective self-determination of one's group. Racial ethnic women's mothering and work experiences occur at the boundaries demarking these dualities.<sup>115</sup>

Hill Collins is referring to the position that mothers and women of colour have taken that concern themselves with their power and powerlessness within an array of social institutions that frame their lives as mothers.<sup>116</sup> She notes that much feminist theorizing about motherhood has failed to recognize the diversity in mothering and is based on two assumptions of white, middle class experience: that women have the luxury of a search for personal autonomy instead of some realities where women are members of a community fighting for survival, and second, that mothers and children enjoy a degree of economic security, which is laughable to many mothers of non-dominant ethnicity and all poor mothers. Instead of emphasizing maternal power in dealing with male dominance in general, their issue is:

Racial ethnic women's struggles for maternal empowerment have revolved around three main themes. First is the struggle for control over their bodies in order to preserve choice over whether to become mothers at all...A second dimension...for maternal empowerment concerns the process of keeping children that are wanted, whether they were planned for or not....a third dimension...concerns the pervasive efforts by the dominant group to control the children's minds.<sup>117</sup>

The boundary that frames "motherwork" is identified by Nakano Glenn as existing in many Asian American households, as well. Asian American women were valued as cheap labour

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<sup>115</sup> Hill Collins, supra note 112 at 47 and 48.

<sup>116</sup> Nakano Glenn, supra note 32 at 53.

<sup>117</sup> IBID., at 53 and 54.



and domestic workers and this took precedence in society over their value as mothers. They moved back and forth over the public and private divide. Mothering responsibility was shared within their families and communities and their work was seen as benefitting the entire family.<sup>118</sup>

Marilou Awiakta, a Native North American, also places "motherwork" at the boundary between public and private,

But from the presence of her arms I also feel the stern, beautiful power that flows from all the Grandmothers, as it flows from our mountains themselves. It says, "Dry your tears. Get up. Do for yourselves or do without. Work for the day to come."<sup>119</sup>

It appears that "work for the day to come" is part of the essence of "motherwork". The locus of conflict is often outside the household for many mothers from nondominant nuclear families, although admittedly there are issues of gender within these families too. Individual survival for these people often requires group survival. The best interests of the group can take priority over the best interests of the child in some situations. This theme and the moral dilemmas that it presents are found in Barbara Kingsolver's novel, Pigs In Heaven,<sup>120</sup> wherein the survival of the Navajo Indian tribe is seen as an important consideration to an individual child's "best" custody arrangement with an adoptive white mother.

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<sup>118</sup> Evelyn Nakano Glenn, Issei, Nisei, War Bride: Three Generations of Japanese American Women in Domestic Service (Philadelphia: Temple University Press, 1988) 192

<sup>119</sup> Marilou Awiakta, "Amazons in Appalachia" in Beth Brant, ed., A Gathering of Spirit: A Collection of North American Indian Women (Ithica N.Y.: Firebrand, 1988) 125-130

<sup>120</sup> Barbara Kingsolver, Pigs In Heaven (New York: Harper Collins Publishers, 1993) at 76 and 227.

I have reviewed concerns that women of colour express when they feel that white feminist writers essentialize mother to a construction which reflects white women's perceived truths of mothering and gender oppression. Now I wish to move on to two stories reflecting the diversity of mothering experiences of both white women's and Black African American women's ancestral mothers.

It would shock many of us to learn that in 18th century France, infanticide was not frowned upon as a violation of any moral or social code. Not poverty nor ignorance but rather the indifference of a mother to her child was given as the explanation for this lack of concern about infanticide.<sup>121</sup> Elisabeth Badinter, a French feminist, has examined the relationship between mother and child during 17th and 18th century France.<sup>122</sup> She concludes that mothers exhibited maternal indifference in consistent ways regardless of wealth and class.<sup>123</sup> She notes three pervasive signs of maternal indifference during this historical period: first, children's deaths were perceived as routine, and were not grieved;<sup>124</sup> second, mothers showed selective love by an incredible inequality of treatment from one child to another according to sex and order of birth;<sup>125</sup> and third, within days or even hours of their

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<sup>121</sup> Elisabeth Badinter, "Maternal Indifference" in Toril Moi, ed., French Feminist Thought: A Reader (Oxford: Basil Blackwell, 1987) 150 at 151

<sup>122</sup> IBID., at 150-178.

<sup>123</sup> IBID., at 174.

<sup>124</sup> IBID., at 152-154; It is debatable that given the fact that infant mortality was much higher in the 18th century than it is today, mothers learned not to grieve.

<sup>125</sup> IBID., at 154-157.

births, babies were farmed out to nurses. Depending upon the financial resources of the family, this could mean a hired nurse or it could mean abandonment to a hospital where babies were kept until resources could be gathered. The babies were then loaded into wagons and sent to wet nurses who were often sick and diseased themselves.<sup>126</sup> Only one-third to one-half of the babies survived and those who returned home two to five years later, often were ill or deformed.<sup>127</sup> Children were then taken charge of by a guardian or tutor and by the age of nine years, they were sent to boarding schools.<sup>128</sup> Badinter, somewhat facetiously, states that one explanation for the maternal indifference could be that mothers would surely die of sorrow if they allowed themselves grief comparable to infant mortality rates. She notes that this glib justification would preserve and reinforce belief in an ideology of the marvellous continuity of motherhood throughout the ages, reinforcing our conceptions of that unique feeling, motherlove. Motherlove could therefore vary in intensity dependent upon the external difficulties of the epoch and still maintain itself as a constant.

But closer to the truth, Badinter argues, was a complicity between father and mother to adopt specific forms of behaviour such as a joint indifference to children because they restricted their social lifestyles.<sup>129</sup> The woman of this period had the means to strive to define herself free from the role of mother because society had not yet accorded the child

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<sup>126</sup> IBID., at 161-167.

<sup>127</sup> IBID., at 170-173.

<sup>128</sup> IBID., at 167-170.

<sup>129</sup> IBID., at 174.

the importance that we do today.<sup>130</sup> The acts of abandonment of child to nurse, tutor and boarding school or to the hospitals or streets were supported by the fathers, as well as mothers, for social and/or economic reasons. Men objected to their wives nursing as a threat to male sexuality and a restriction of men's pleasure:<sup>131</sup> "Clearly some men found nursing women repulsive, with their strong smell of milk and continually sweating breasts. For them nursing was synonymous with filth - a real antidote to love."<sup>132</sup> Badinter argues that we are less shocked at the father's response to his children because no one has ever claimed that fatherlove confirms a universal law of nature. She concludes that rather than to blame the mother of 17th and 18th century France for not caring for her children, we should accept that there are various qualities of motherlove, and that motherlove is not a natural law of nature.<sup>133</sup>

Across an ocean, in the mid 1800s, an African-American slave woman walks twelve long miles at the end of a long day of field work to cradle her son to sleep. Her son recalls this happening on four or five occasions. He stated that when his mother died, he did not grieve her death anymore than he would grieve the death of a stranger. She was gone each morning before he woke. He said that he did not know her and was never able to enjoy her tender and watchful care. bell hooks<sup>134</sup> notes that this black slave, Fredrick Douglass,<sup>135</sup> in

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<sup>130</sup> IBID., at 161.

<sup>131</sup> IBID., at 158.

<sup>132</sup> Louis Joubert, cited in Jacques Gelis, Mireille Maget, Marie-France Morel (eds), Entre dans la Vie (Paris: Coll. Archives, 1978) at 160

<sup>133</sup> Badinter, supra note 121 at 174.

<sup>134</sup> bell hooks, Yearning: Race, Gender, Culture (Boston: South End Press, 1990) at 4

his 1845 narrative, nonintentionally devalues black womanhood by not recognizing that his mother chose to travel those twelve miles to hold him: "In the midst of a brutal racist system, which did not value black life, she valued the life of her child enough to resist that system, to come to him in the night, just to hold him."<sup>136</sup> She speaks of the "homeplace" black women created as a powerful place of resistance to racism and preservation of the continuity of race and life.<sup>137</sup> Dorothy Roberts states that, "Black women historically experienced work outside the home as an aspect of racial subordination and the family as a site of solace and resistance to white oppression."<sup>138</sup> It has been suggested by Hill Collins that the public-private split for Black women is the line separating the Black community from whites rather than that separating their homes from the community.<sup>139</sup>

Another story is told, one hundred and forty-four years later. In Canada, a woman of colour, Clarita Roja, a Filipina revolutionary and one of the most distinguished militant writers in the Phillipines, writes a poem:

Are you my mother?  
 We have not much in common.  
 You strut around  
 Boasting of the riches of your sons and daughters,  
 Priding yourself in their careers.  
 Your World is of marble and parquet floors

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<sup>135</sup> Fredrick Douglass, Narrative of the Life of Fredrick Douglass: An American Slave (Houston: A.Baker, 1982) at 49

<sup>136</sup> hooks, supra note 134 at 4.

<sup>137</sup> IBID., at 5.

<sup>138</sup> Roberts, supra note 43 at 20-21.

<sup>139</sup> Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment (New York: Unwin Hyman // Routledge, 1991) 91-113

Polished and scrubbed day after day  
 By a retinue of meekened maids.  
 And the cushions  
 The thick abominable cushions,  
 That slitheringly whisper your treacherous language of  
 Surrender, surrender to the heathen god.

You are not my mother.  
 My vision is not your vision.  
 My lingo is not creams that banish scars  
 But of scars that banish bourgeois dreams.  
 My mother is she  
 Who waits in a hut by the hills  
 With a cup of *malunggay* soup  
 And urges me always to  
 Fight on, daughter, fight on.  
 The hills are filled with huts  
 Inside of which are mothers  
 And so everywhere I go  
 The atmosphere reverberates with the warmth  
 Of soup and revolutionary understanding.  
 And always, the eternal echoing call:  
 FIGHT ON, DAUGHTER, FIGHT ON!

ARE YOU MY MOTHER?  
 Clarita Roja<sup>140</sup>

The medium of film presents another story of mothering:

In 1940s Atlanta, an old black chauffeur serves a peevish, stubborn Jewish widow with endless patience; over the decades, weathering the racial tensions of the Civil Rights era, they develop a friendship. The white woman's son, well-to-do but weary of meeting her emotional and physical demands, eventually puts her in a rest home. Now accepted as her "best friend", the chauffeur visits his former employer and spoonfeeds her like a baby.<sup>141</sup>

<sup>140</sup> Clarita Roja, "Are You My Mother?" in Fireweed's Issue 16, The Issue is 'Ism: Women of Colour Speak Out (Toronto: Sister Vision Black Women and Women of Colour Press, 1989) 32

<sup>141</sup> Sau-ling C. Wong, "Diverted Mothering: Representations of Caregivers of Colour in the Age of Multiculturalism" in Evelyn Nakano Glenn, Grace Chang and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 67-91, describes Driving Miss Daisy (directed by Bruce Beresford, 1990)

Sau-ling Wong examines a number of late 1980s and early 1990s films which vary in genre and tenor, and span from romance to thriller, to illustrate examples of men or women of colour who nurture and even rescue white patrons with selfless devotion and qualities often associated with exemplifying motherhood. Where the caregiver's family is located in his or her life is most often left a mystery, relegating it to a secondary position or dismissing it altogether. Sau-ling Wong calls this diverted mothering and claims that people of colour have been providing this mothering to white men, women and children since slavery. She views the recent trend in film as one example of active multicultural enrichment of the lives of whites to replace their own cultural decline and to provide them with "psychological mothering", as well.<sup>142</sup> I would offer this as an example of how mothering goes beyond gender and becomes racialized.

Another example of mothering, which illustrates that mothering intersects with class, as well as gender and race, is the number of immigrant women who are currently locked into caretaking jobs such as working in hospitals, nursing homes and child daycares.<sup>143</sup> In North America, the jobs of maids, child care workers, nurses aides, seamstress and food preparation are filled mostly by women of colour.<sup>144</sup>

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<sup>142</sup> IBID., at 70.

<sup>143</sup> Ng, supra note 89 at 288-300.

<sup>144</sup> Roberts, supra note 43 at 20.

Finally, heterosexual privilege has forced lesbian mothers to struggle against dominant constructions of mothering and construct their own identities as mothers in the face of cultural denial of their existence.<sup>145</sup> Ellen Lewin has conducted a study based on interviews with lesbian mothers which revealed that lesbian mothers challenged the cultural or dichotomous opposition between "mother-lesbian" by demanding rights to be mothers.<sup>146</sup> These women's demands to be seen as mother should have blown apart the dichotomy that perceives lesbians as women seeking pleasure for themselves versus the selfless, altruistic non-lesbian mother. But in reality, Lewin notes that many lesbian mothers, in order to survive in the realities of the world, often require a separation of "lesbian" and "mother" into the very opposition that should be subverted.<sup>147</sup> Lesbian mothers who find themselves in these situations are denied the experience of their mothering being valued in society.

## V. CONCLUSION

Motherhood, the most essentialized aspect of woman's experience, has been examined in some of its complexity of meanings and practices. The dominant ideology of motherhood and its universalism have been identified, constructed and deconstructed. Motherwork has been explored as an expanding concept of motherhood. Some of the diversity of mothering

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<sup>145</sup> Nakano Glenn, supra note 32 at 21.

<sup>146</sup> Ellen Lewin, "Negotiating Lesbian Motherhood: The Dialectics of Resistance and Accommodation" in Evelyn Nakano Glenn, Grace Change, and Linda Rennie Forcey, eds., Mothering: Ideology, Experience and Agency (New York: Routledge, 1994) 333-353

<sup>147</sup> IBID., at 350.



experiences has been illustrated through the telling of stories. These stories provide only a small picture of the complexity and diversity of motherhood. Looking at the historical and social specificity of mothering draws our attention to the importance of social contexts and human agency within those contexts.

We can recognize both differences and commonalities arising from people's actions within similar and dissimilar contexts. We do not have to suppress or minimize differences among women and/or mothers to develop a sense of community, or to engage in collective action to nurture growth and preserve human life...Community is built on difference as well as sameness.<sup>148</sup>

The purpose of story telling and consciousness raising has been to provoke thought that will filter down to judges, lawyers, mediators and the public and provide insight that mothering takes on different meanings to different people and that there exists a vast range of options for child care giving in custody litigation and mediation.

Finally, I wish to share the prose of Adrienne Rich which first inspired me to explore motherhood in its multiplicity,

Slowly, I came to understand the paradox contained in "my" experience of motherhood; that although different from many other women's experiences, it was not unique; and that only in shedding the illusion of my uniqueness could I hope, as a woman, to have any authentic life at all.<sup>149</sup>

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<sup>148</sup> Nakano Glenn, *supra* note 32 at 26.

<sup>149</sup> Rich, *supra* note 41 at 376.

## CHAPTER 3

### FROM FEMINIST LEGAL THEORY TO FEMINIST LEGAL PRACTICE IN CHILD CUSTODY DISPUTE RESOLUTION

"Our search leads us back to where it all began, to that moment when a woman or child, who may have thought she was all alone began feminist uprising, began to name her practice, began to formulate theory from experience."

bell hooks<sup>150</sup>

#### I. INTRODUCTION

In this third chapter I begin a search to name a feminist practice of child custody dispute resolution. I continue to formulate theory from my experience and those of others. This leads me to ask the perplexing question as to whether or not feminist legal methods<sup>151</sup> can inform and ultimately be integrated into the legal and social processes with which women as mothers attempt to engage. The focus of my search is on both the litigation and mediation processes used in Canadian child custody dispute resolution. In my legal practice, I often heard the voices of women telling me that their stories as women and mothers were not being heard in the courtrooms or in mediation.<sup>152</sup> Yet, a breakdown of the traditional

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<sup>150</sup> bell hooks, supra note 7 at 11.

<sup>151</sup> Throughout this chapter and the remaining chapters the term "feminist methodology" is used to define the sum of "feminist methods", Reinharz, supra note 8 at 240. As a working definition Reinharz defines "methods" as what an author calls 'method' at 9. She defines "feminist research" (as opposed to other research) as the researcher's self-identification as feminist. She acknowledges that this definition may exclude feminists who have not self-identified but who are considered by feminists to have contributed to feminist research, at 6 and 7. "Method" will be used to refer to a specific effort and "methodology" to the collective.

<sup>152</sup> These stories were told to me as a legal practitioner in the province of Manitoba from July, 1988 to April, 1994.

systems of litigation and mediation is not imminent. For many women, pragmatically, it continues to be necessary to engage with existing legal and social systems. But, women's engagement with these systems is fraught with difficulties. In both the Introduction and Chapter 2 of this thesis, I have argued that child custody decision-making processes are laden in ideologies about motherhood that blind and silence women's voices, ethnic and racial diversity and class differences. I argue that all women and children who are compelled to engage with these processes are oppressed to some degree. In an attempt to confront some of the difficulties described, this chapter will explore whether feminist legal methodology can be reconciled with more traditional legal methodology and be jointly applied to mitigate traditional courtroom and mediation processes used in child custody disputes. One goal is to promote thought about socio/legal systems capable of listening to women naming their experiences as mothers. I will attempt to identify what work needs to be done to shift women's experiences as mothers from the margins to the center of child custody dispute resolution.

I will first identify feminist legal methods and theories of knowledge which arguably better capture women's child custody experiences than traditional legal methods. Second, two women's experiences in child custody litigation and court-affiliated mediation will be recounted. Some of the ideological assumptions underlying each form of dispute resolution will also be introduced although a more thorough discussion of ideological assumptions and origins of mediation will be offered in Chapter 4. Finally, I will plant seeds which consider whether feminist legal methods as contrasted to the traditional methods presented in the

examples, could have made the experiences of women more audible and visible. This discussion will be more fully developed in Chapter 5.

## II. FEMINIST LEGAL METHODOLOGY

I have chosen to focus my review of feminist legal methodology on the representative work of Katharine Bartlett.<sup>153</sup> She presents a clear summary of the area. Bartlett<sup>154</sup> identifies feminist legal methods as basic tools used to challenge and develop alternatives to traditional legal methods which take better account of women's experiences and needs. She argues that feminist legal methods, grounded in women's experiences of exclusion,

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<sup>153</sup> See: Katharine T. Bartlett, "Feminist Legal Methods" (1990) 103 Harv. Law Rev. 829-832. I also find her work less laden in the rhetoric of a specific stance or focus of theory. For example, I find Catherine MacKinnon's work on the feminist legal method of consciousness-raising to be too focused on women's sexual oppression. This is not to say that what she argues is wrong or unimportant; just that by following her rhetoric, I have trouble seeing how her method can be used in other situations. See: Catharine A. MacKinnon, "Feminism, Marxism and the State: Toward a Feminist Jurisprudence" in Sandra Harding, ed., Feminism and Methodology (Indiana: Indiana University Press, 1987); Toward a Feminist Theory of the State, (Cambridge, Mass.: Harvard University Press, 1987); "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4:1 Yale Journal of Law and Feminism 13. Also see: Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" (1986) 3 Australian Journal of Law and Society at 30 for a discussion of whether feminism has the ability to transform legal method, concluding that they may be mutually exclusive at 31; and see Carol Smart, "Law's Power, The Sexed Body and Feminist Discourse" (1990) 17 Journal of Law and Society 194 at 197-8 where she cautions us not to overlook the mundane aspects of law and how women must interact with the law on a daily basis. Finally, for a current examination in feminist legal theory and research and a beginning point in an effort to expand legal methodology to include the mundane and mechanical details of law practise, See: Lori Beaman-Hall, "Abused Women and Legal Discourse: The Exclusionary Power of Legal Method" (Spring 1996) 11:1 Canadian Journal of Law and Society 125 at 125-127.

<sup>154</sup> IBID., Bartlett at 829-832.

reveal features of legal issues that more traditional legal methods overlook or suppress.<sup>155</sup> In addition, she states that each method reflects the status of, "women as 'outsiders,' who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions".<sup>156</sup> She examines the place of feminist legal methods within the general context of legal method and rejects that there is a dichotomy between abstract, deductive (male) reasoning and concrete, contextualized (female) reasoning:

The differences between the two methodologies, I argue, relate less to differences in principles of logic than to differences in emphasis and in underlying ideals about rules. Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules over-represent existing power structures, value rule-flexibility and the ability to identify missing points of view.<sup>157</sup>

The following is a synopsis of the feminist legal methods which Bartlett identifies:

- 1) Asking the woman question: "identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups"<sup>158</sup>
- 2) Feminist practical reasoning: "reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives"<sup>159</sup>
- 3) Consciousness raising: "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative"<sup>160</sup>

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<sup>155</sup> IBID., at 829.

<sup>156</sup> IBID., at 831.

<sup>157</sup> IBID., at 832.

<sup>158</sup> IBID., at 831.

<sup>159</sup> IBID., at 831.

<sup>160</sup> IBID., at 831.

Bartlett also addresses the nature, basis, limits, and validity of feminist legal methods by examining "the claims to truth that they generate."<sup>161</sup> For example, what do feminists mean when they say that they have "done law right"?<sup>162</sup> She addresses the epistemological implications of four theories of knowledge reflected in feminist legal writing<sup>163</sup> and

...evaluates them on how that position can help feminists, using feminist methods, to generate the kind of insights, values, and self-knowledge that feminism needs to maintain its critical challenge to existing structures of power and to reconstruct new, and better structures in their place.<sup>164</sup>

These four theories of knowledge<sup>165</sup> are: (1)Rational empiricism, (2)Standpoint epistemology, (3)Postmodernism, and, (4) Positionality.

The rational/empirical position is adopted when,

Feminists challenge assumptions about women that underlie numerous laws and demonstrate how laws based upon these assumptions are not rational and neutral, but rather irrational and discriminatory...feminists operate from a rational/empirical position that assumes that the law is not objective, but that identifying and correcting its mistaken assumptions can make it more than objective.<sup>166</sup>

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<sup>161</sup> IBID., at 829.

<sup>162</sup> IBID., at 830.

<sup>163</sup> For a review of "feminist knowing in law" see Bartlett, IBID., at 867-887. It will not be critically addressed in this thesis except where it has specific application.

<sup>164</sup> IBID., at 868-869.

<sup>165</sup> IBID., at 867-887.

<sup>166</sup> IBID., at 869. An example of the rational/empirical position in child custody law would be when feminists argue that particular reforms would better meet the law's express purpose of meeting the best interests of the child.

The adoption by feminists of standpoint epistemology occurred because of their concern that women's ways of 'knowing' were being overdetermined by male culture. According to Bartlett, standpoint epistemology identifies women's status as a victim,<sup>167</sup> privileging it by saying only the victim can understand her oppression: "The experience of being a victim reveals truths about reality non-victims cannot see."<sup>168</sup> It provides feminists a claim to their own legal methods, legal reasoning and proposals for substantive legal reform.

Postmodernism or post-structural critique rejects the essentialist thinking of there being only one right truth or way of thinking.<sup>169</sup> In postmodernism the subject has "no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect and contradict each other."<sup>170</sup> Reality is particular and fluctuates within complex sets of social contexts. Feminists can use the method of deconstruction to reveal the hidden gender bias of laws and legal assumptions which are seen as socially constructed.<sup>171</sup>

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<sup>167</sup> It is arguably more empowering to not refer to women as victims, as Bartlett's wording does, but rather as "women's stance or position on the oppressed side of a power relationship". This alternative was suggested to me by Susan Boyd, Chair in Feminist Legal Studies, Faculty of Law, University of British Columbia

<sup>168</sup> *IBID.*, at 872.

<sup>169</sup> *IBID.*, at 834. Bartlett defines 'essentialism' as it refers to feminism, as the tendency to treat woman as a single analytic category and a standard for women's experience that is "fixed, exclusionary, homogenizing, and oppositional". Standpoint epistemology would be more on the side of essentialism.

<sup>170</sup> *IBID.*, at 877.

<sup>171</sup> *IBID.*, at 878.

In the fourth stance on feminist knowledge, positionality, Bartlett embraces parts of the three previous stances. She views it as a position that is capable of reconciling some of the inconsistencies noted among the previous three positions:

The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency. It thereby provides a basis for feminist commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision...Like standpoint epistemology, positionality retains a concept of knowledge based on experience...Like the postmodern position, however, positionality rejects the perfectability, externality, or objectivity of truth. Instead, the positional knower conceives of truth as situated and partial...Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's own limited experience.<sup>172</sup>

A child custody example which illustrates how positionality works is, "when feminists debate the legal alternative of joint custody, positionality compels appreciation of the desire by some fathers to be responsible, co-equal parents."<sup>173</sup> Whatever resolutions finally emerge from a positional stance are the social product of what is considered to be better. In this respect, positionality is neither essentialist or relativistic.<sup>174</sup>

The final point I wish to make about feminist methodology and epistemology is that the lines between the three methods and the four theories of knowledge described can and do intersect. My analysis is by no means limited to these methods or theories. The challenge is for feminists to continually find new methods and to create opportunities to transform both individual and collective expression from the theory to the practice of law. Each of the four

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<sup>172</sup> IBID., at 880-881.

<sup>173</sup> IBID., at 882.

<sup>174</sup> IBID., at 884.



feminist theories of knowledge can use each of the three feminist legal methods in any combination to make the legal system less oppressive to women. In the next section, I will attempt to give examples of how the feminist legal methods of feminist practical reasoning, asking the women question and consciousness-raising could have been used to make a woman's story more audible in the legal system.

### **III. FROM THE THEORY TO THE PRACTICE OF CHILD CUSTODY DISPUTE RESOLUTION: TWO STORIES OF JANE**

When a woman wishes to engage with Canadian socio-legal systems to facilitate the resolution of child custody disputes, her options are largely limited to litigation or the government supported mediation of the dispute. It is my position that the procedures currently promoted marginalize women, children and caregiving. In the following section I will retell two stories of women who each followed a traditional legal procedure of child custody resolution. One filed affidavit evidence in a motion for interim child custody and the other attended court-affiliated mediation services.<sup>175</sup> Both stories end in tragic results, marginalizing the women and their children. By retelling their stories, I hope to be able to explore and confront whether each woman would have been better served by feminist methodology being used in the litigation and mediation of their child custody disputes. And

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<sup>175</sup> I name each woman anonymously as Jane. The universal Jane represents the oppression of all women engaging in the system while at the same time acknowledging her unique story. Both stories take place in Manitoba. I was the acting lawyer for each woman.

if so, would it even have been feasible to think about the possibility of the integration of feminist legal methodology into the existing system of child custody dispute resolution.

#### A. Litigation - Affidavit Drafting

The first story I will retell is about one woman's efforts to secure custody of her children on an interim motion using the interim corollary relief provisions of ss. 15(3) and 16(2) in the Divorce Act R.S.C. 1985, Chapter 3 (2nd Supp.) and provincial legislation.<sup>176</sup> Determination of custody can be heard on an interim basis upon the separation of parents without a final disposition of their rights. Evidence is presented by affidavit.<sup>177</sup> A decision about custody is delivered on an interim basis until the trial or settlement of issues.

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<sup>176</sup> The relevant jurisdiction in this story was The Manitoba Court of Queen Bench's Bench - Family Division. The legislative provision for custody was found in The Family Maintenance Act R.S.M. 1987 and amendments thereto (hereinafter the "FMA") at subsections 39(1), 39(2), 39(3), and 39(4) which state that rights of parents to custody and control are joint (unless they have never cohabited after the birth of the child and then it vests solely with the parent that the child resides with). A court or an agreement may specify sole or joint custody. Conduct is not to be considered unless the court is satisfied that the evidence bears directly on the parent's ability to care properly for the child. The Queen's Bench Rules (The Court of Queen's Bench Act (C.C.S.M. c.C280) - R.M. 553/88) (hereinafter the "Rules"), Rule 70 allows for interim motions for custody. All provincial legislation provides for interim custody relief. There are some variations as to which court, federal or provincial, a provincial government will confer jurisdiction. For example, except in jurisdictions where there are Unified Family Court Systems (New Brunswick, P.E.I., Manitoba & Ontario), there is quite a fragmented court system which arguably causes confusion, greater expense, conflicts between provincial orders, and conflicts between provincial and extraprovincial orders, and uncertainty in the choice of remedy. These debates will not be covered in my thesis. For the purposes of this thesis, only the federal and provincial laws that provide for interim custody matters proceeding by way of motion in court or chambers supported only by affidavit evidence are considered. Each province provides this avenue in their superior court with inherent jurisdiction. The considerations for determining custody vary negligibly. The principle is the best interests of the child.

<sup>177</sup> An affidavit is a written statement of evidence sworn by the person giving the evidence before a person authorized to take affidavits.

An interim custody order will often have a profound effect upon the final outcome of a custody trial because it is very difficult to alter the status quo of custody.<sup>178</sup> Courts are loathe to upset the status quo without very strong evidence that the child care arrangement is clearly and unequivocally not in the "best interests" of the child. The significance of the affidavit is that it is the first and often the only means of presenting evidence in a child custody determination which likely will never be overturned. Effectively, the history of child care before the granting of the interim order is crystallized in the judge's decision. At trial, the evidence of child care is largely confined to a consideration of the period between the making of the interim order and the trial date. The skill used in the drafting of the affidavit is therefore very important. Lawyers are taught that the affidavit should be complete, accurate and coherent.<sup>179</sup>

Women must be concerned with both the quality of the affidavit and the reception it receives in court. It is my position that the instruction provided to assist in the drafting of affidavits, the minimal rules which govern its content and the brevity of the judicial consideration of the affidavit, along with inadequate legislation and statutory interpretation which reinforce patriarchal ideologies, all play a role in marginalizing women in their caregiving and child caring.

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<sup>178</sup> Professional Legal Training Course 1996-1997, Practice Material: Family Law The Continuing Legal Education Society of British Columbia, May, 1996 at 42.

<sup>179</sup> IBID., at 42.

The amount, degree and quality of judicial preparation for interim custody matters varies but we are advised that in motion's practice, "always assume a judge or master has not read it".<sup>180</sup> The length of time allotted to the hearing of an interim custody matter averages one-half hour; sometimes less, seldom more. To summarize, a child's life and patterns of care are considered in approximately thirty minutes of adversarial posturing and argument based on evidence presented in an affidavit which the judge or master has most probably not read. The Rules<sup>181</sup> provide only a minimal amount of direction for the drafting of affidavits.<sup>182</sup> They state that an affidavit may be struck out or expunged in whole or in part on the grounds that it is scandalous, frivolous or vexatious. We are cautioned that extraneous or irrelevant matters should not appear in an affidavit because they only serve to distract the master's or judge's attention from the issue at hand.<sup>183</sup> Rule 39.01(4) states that affidavits may contain statements based on the deponent's information and belief with respect to facts which are not contentious if the source is stated. Courts are afforded a wide degree of discretion in interpreting what are necessary or unnecessary, scandalous, frivolous or vexatious facts or statements. As well, the common law rules of evidence come into play.

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<sup>180</sup> Professional Legal Training Course 1996-1997, Practice Material: Civil Litigation, The Continuing Legal Education Society of British Columbia, May, 1996 at 61. Generally, a typical Chambers day involves potential preparation for 60 - 70 civil cases and 30 - 40 family files. The justification given for not reading affidavit materials is that 33% to 50% of the cases are adjourned and therefore reading them in advance would be a waste of time. A judge will usually opt to write reserved judgments rather than read cases for the following day.

<sup>181</sup> The Rules, supra note 176 , Rule 25.11.

<sup>182</sup> The court rules of procedure are more similar than dissimilar in all Canadian jurisdictions.

<sup>183</sup> Bar Admission: Civil Litigation, supra note at 180 .

Affidavits are not supposed to contain hearsay, opinion, irrelevant material, and information and belief except as stated in Rule 39.01(4).

For women seeking custody of their children, one troublesome aspect of the rules for drafting affidavits is the emphasis upon factual information. This information must be non-emotive, rational and based on a liberal interpretation of the court rules and rules of evidence. But the experiences of family law custody disputes invite a contradiction to the demands of the legislation and common law. Family law evidence often cannot be considered as anything but opinion-based and highly emotive. It is difficult to make an allegation of sexual or physical abuse without having scandal, opinion or inflammation alleged. Hence, a war of affidavits often begins in which women's experiences become lost or masked in legal warfare.<sup>184</sup> The theory behind the common law rules of evidence and the procedural rules of court in the drafting of affidavits is based on the ideological assumptions of rational, factual, nonemotive information.<sup>185</sup> It assumes that truth is provable only by this method of fact finding and that the certainty demanded by law cannot contain experience as it relates to opinion or feelings.

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<sup>184</sup> See Lori Beaman-Hall, supra note 153 at 129, 132, 135, 138 and Nicholas Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 Canadian Journal of Family Law 215 at 217, 242, 243, 245. Both articles review the difficulties of putting evidence of abuse into court but Bala is less open to the evidentiary problems that women have in getting their stories told.

<sup>185</sup> Ngaire Naffine, "The Community of Strangers," and, "Keeping Women in Their Place (Rewarding the Good Woman, Enshrining Motherhood and Punishing the Bad)", in Ngaire Naffine, Law and the Sexes: Explorations in Feminist Jurisprudence, (Sydney: Allen and Unwin, 1990) 48-83 at 54

At first glance, both federal and provincial legislation appear to exclude any evidence of parental conduct in determining the best interests of the child and custody. In the Divorce Act, Subsection 16(9), an injunction on consideration of conduct is only partial ie. "...[t]he court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child". Similarly, Section 39(3) of the FMA states that conduct is only to be considered if the court is satisfied that, "evidence bears directly on the parent's ability to care properly for the child". Therefore, in both federal and provincial legislation, if a connection can be made to "best interests" or if the material can be tailored to fit the question of the "ability of that person to act as a parent of a child" then it would not be excluded. Len Fishman<sup>186</sup> states that:

Virtually anything that might be considered as "misconduct" can be characterized, or would be subject to attempts by determined counsel to so characterize, as relating to the question of "parenting" skills. One can readily imagine the courtroom colloquy.

There are many mothers who do not meet the dominant cultural and middle class expectations that constitute the ideology of motherhood.<sup>187</sup> These mothers are often made

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<sup>186</sup> Len Fishman, The Divorce Act 1985: Preliminary Thoughts On The Custody, Access and Child Support Provisions (unpublished) for review by Family Law students at the University of Manitoba, 1985-1986 at 11. Another question arises as to whether or not Fishman's prediction has born fruit. Could the finding of misconduct be a gendered exercise? This might explain why the courts have not taken spousal abuse seriously under Subsection 16(a) of the Divorce Act. Although Bala, supra note 184 claims that there is now strong Canadian jurisprudence allowing spousal abuse to be considered. But are the courts still more apt to apply the section to incidences of "bad" mothering? These questions are considered by Susan Boyd in "W(h)ither Feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12(2) CJ of FL 331 at 336-7.

<sup>187</sup> Chapter 2 dealt extensively with both the predominant ideology of motherhood as the self-sacrificing, all giving, white, middle class, heterosexual woman in a nuclear marriage and alternate forms of mothering. For a review of the dominant ideology of motherhood and

the subject of an inquiry into the acceptable conduct of a mother. As was discussed in Chapter Two, the "acceptability" of a mother's care is judged predominantly by only one standard in the courts and in mediation. This standard is the white, middle class, heterosexual mother in the nuclear family and any deviation from this standard is often deemed misconduct. This is the standard that a judge uses to inquire as to whether conduct compromises the best interests of the child. Appropriate conduct can easily be construed according to societal norms and the judge's own values and attitudes. Conduct becomes an important issue to meet in custody litigation and mediation if a mother differs from the perfect ideal of mother that the court measures them against. Marlee Kline notes that, "[i]mportantly, the construction of First Nation women as "bad mothers" is mediated by the dominant ideology of motherhood."<sup>188</sup> Susan Boyd notes that women may be penalized when they do not play traditional maternal roles, as when they work outside the home or make "personal lifestyle choices".<sup>189</sup> Bad conduct becomes equated to any difference from acceptable dominant idealized patterns of child care. As Shelley Gavigan notes:

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and alternate forms of mothering. For a review of the dominant ideology of motherhood and the social construction of good mothers and bad mothers, see: Chapter 2 and see: Susan B. Boyd, "Investigating Gender Bias in Canadian Child Custody Law: Reflections on Questions and Methods" in J. Brockman and D. Chunn, eds., Investigating Gender Bias: Law, Courts and the Legal Profession (Toronto: Thompson Educational Publishing, 1993) 169-190; Fineman, supra note 12 ; Gavigan, supra note 23 at 310-315; Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306-342 and Ngaire Naffine supra note 185 at 48-83.

<sup>188</sup> Kline, IBID., at 308.

<sup>189</sup> See Boyd, supra note 186 at 337- 8 wherein she notes that the Discussion paper raises the possibility that courts are influenced by the differential expectations of mothers and fathers that operate to the disadvantage of mothers and see Susan B. Boyd, "Child Custody and Working Mothers" in S. Martin and K. Mahoney (eds.), Equality and Judicial Neutrality (Toronto: Carswell, 1987) 168 and "Child Custody, Ideologies and Employment" (1989) 3(1) Canadian Journal of Women and the Law 111.

The family is presented in law and popular culture as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self-evident and the ideology of the ideal family is taken to mean a social relationship sanctioned by law and preferably church, comprising male adult, female adult and their biological or adopted children.<sup>190</sup>

The judging of the “good” or “bad” mother will be illustrated in the story that follows. It illustrates how affidavit material is interpreted by the court to create a legal “bad mother” and how this conclusion by the judge affects his custody decision.

It is now time for me to introduce you to Jane. She has asked that I tell you her story. At the time of her story, Jane was 38 years old, Metis, had a grade 11 education and did not affiliate with any particular church. She loved to laugh and read historical romances. She was the mother of a 6 year old boy and a 4 year old girl. She had been married for five years to a white man with whom she had had a relationship with for twenty years. Jane worked part-time evenings outside the home as a paid government homemaker. During the days, she cared for her own children. Jane was a recovering alcoholic. Her husband still drank every day but said he could “handle it”. Jane used to drink with him. Jane says his drinking sometimes brought out a “nasty streak” in him. Sometimes, Jane's husband hit her and forced her to have sex with him. He would tease and punish the children until they cried. She cried too. She says her husband was a “new age” man. He was very articulate and had freely discussed her (and not his) alcoholism with family, friends and neighbours. She was not so articulate, she said. Jane had never told anyone that her husband hit her or her children.

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<sup>190</sup> Shelley Gavigan, “Law, Gender and Ideology” in Anne Bayefsky, ed., Legal Theory Meets Legal Practice (Edmonton: Academic Printing and Publishing, 1988) 283 at 292



One day, her husband physically threw her out of the house. She went to the local women's shelter (hereinafter the "Shelter"). She sought out a lawyer.<sup>191</sup> With the help of her lawyer and workers from the Shelter, she removed her children from the house while a babysitter was looking after them. She then petitioned the court for interim custody of her children and told her story, as drafted by me, in an affidavit. The parts of her affidavit which alleged that her husband drank and teased and punished the children were struck by the judge as being scandalous. The part of her affidavit wherein she stated that she had never told anyone that her husband hit her was struck as being irrelevant. The part where she alleged he had hit her was struck as being inflammatory. The part of her affidavit where she admitted that she had problems with alcohol was left in because it corroborated her husband's allegations. Her affidavit stated that her husband had never had any involvement in the children's care. He had not wanted children and always made it clear that they were her responsibility. Her husband did not dispute this. In his affidavit, he said that the children had now become his responsibility because of his wife's irresponsibility and he would now meet the future challenge of child care with the help of his mother to look after the children. He denied the part of her affidavit where she claimed that he sometimes hit her and forced her to have sex. He said that he had had to restrain her because she became irrational and violent when she was drinking. He said she had hurt herself attacking him. This statement was not struck from her husband's affidavit because Jane had admitted she was an alcoholic. By contrast, the parts of her affidavit outlining forced sex were struck.

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<sup>191</sup> Jane was a real woman. She was my client. I have changed some of the facts and details of her story to preserve her anonymity, but I believe that the integrity of her story has not been compromised.

Much of Jane's story was invalidated by being struck from the affidavit as either being scandalous, inflammatory, irrelevant or opinion. The judge said that she should be ashamed to have made her marital disagreement and her foul language open to the public. What if her children should read this one day, he asked. This concern seemed to be his reason for using a broad brush to wipe out Jane's concerns. The affidavit now read differently and Jane took on a new persona with her dominant feature being that of an alcoholic and a "bad" mother. So too, her husband took on a new persona. When his affidavit was read in conjunction with hers, he was now a struggling, valiant, confused father and husband who had expressed concerns to neighbours. The judge said that he hoped Jane's husband would not harm her in any way because there was a zero tolerance to wife abuse. He said he hoped that her allegations of abuse were just reactive and designed to hurt her husband. The judge said that if any evidence of abuse ever came before him he would be very unhappy (Jane thought she had given him the evidence of abuse). Jane was chastised: firstly, for leaving her children and secondly, for taking them. The judge advised that she join Alcoholics Anonymous as her husband suggested. Her husband was given interim primary care and control of the children. She was given specified care and control periods. No order was made as to custody per se.

Some months later, Jane and her husband reconciled. Jane told me she had no choice. She said she needed to be with her children. Within two months I visited Jane in the hospital. Her face was black and blue. Her mouth was swollen shut; her jaw wired. She could not give voice. Her husband was charged with assault and once again argued that he

had only used reasonable restraint in silencing her. Jane could no longer tell her story. Lying there, she reminded me of the poem "Uniform of the Dispossessed" by Emma La Rocque,<sup>192</sup>

I know  
 the sorrow of the poor  
 the sorrow of the woman  
 the sorrow of the Native  
 the sorrow of the earth  
 the world that is with me  
 in me  
 of me.

The final part of my analysis of Jane's story is whether the feminist legal methods introduced in the first part of this chapter could have helped to inform the court as to who Jane was and therefore arrive at a custody decision that did not marginalize Jane or her caregiving. Without this information about Jane, any standard applied to determine custody (whether it be the best interests of the child, primary caregiver presumption or any other conceivable standard or test) is meaningless, as a child can have no legal relationship to a caregiver who has no identity, who has no voice and who is not known. And even in a custody decisions most normative inquiry, mother is a key player. By any standard, Jane must be identified.

If we ask the women question, can we identify any gender implications in the rules and practises of Jane's court experience that might otherwise appear neutral or objective? I believe so. The traditional idea that law is certain, predictable and dispassionately

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<sup>192</sup> Emma La Rocque, "The Uniform of the Dispossessed", excerpt taken from La Rocque, Emma, "Tides, Towns and Trains" in Joan Turner ed., Living The Changes (Winnipeg: The University of Manitoba Press, 1990) 88.

evenhanded in its dealings with people, on closer look appears to be dependent on the exclusion of other competing voices and experiences? Jane's voice and story were competition with her spouse's voice. She did not fit into the traditional role of woman and mother in the legal ideology of family. Only the voice of the "man of law" can be heard. Jane's husband, with some editing of his story, was the "man of law", rational and reasonable. It has been pointed out that certainty is achievable in an uncertain world only if the group of key thinkers, who invoke and thus perpetuate the dominant paradigm, are sufficiently like minded.<sup>193</sup> In other words, it is vital to the maintenance of the appearance of law as an essentially fair and impartial institution that the members of the legal world remain "necessarily out of touch".<sup>194</sup> Yet at the same time, it would seem a paradox takes place. Because of the highly normative inquiry the judge makes in custody dispute litigation, he is anything but evenhanded. It becomes impossible to tell which parts of Jane the judge used to strike her out; the woman, the Metis, the alcoholic, the romantic, the mother? I would submit that Jane cannot be identified in this system. No part of her is the "man of law" and she therefore has no place in the affidavit. The rules and procedures that the affidavit reproduces are deeply rooted in and perpetuate ideological assumptions of family, women and children as white, middle class, heterosexual and nuclear. Ultimately they practically and metaphorically silence Jane.

Two practical concerns that I have about identifying Jane where asking the woman question has value are that, first, what gendered assumptions about alcoholism were held by the

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<sup>193</sup> M. Cain, "Realism, Feminism, Methodology and the Law" (1986) 14 *International Journal of the Sociology of Law* 255

<sup>194</sup> *IBID.* , at 255.

court (and which most probably reflected societal values). Second, what were the gendered implications that the court may have made about a parent using their mother to assist with child care.

On the first question, would there have been a corresponding custody result if it had been the husband who had admitted to being an alcoholic (would he have been denied custody)? My experience has taught me that when a man puts in his affidavit that he is attending Alcoholics Anonymous (hereinafter "A.A.") the court treats this as a positive step and his future ability to care for his children is seen as improved. By contrast, Jane's admission of alcoholism was taken to be a negative comment on her past and future ability to care for her children. It no doubt affected the decision. The judge patronizes her by telling her to go to A.A. despite that her evidence states that she is a recovering alcoholic. Another issue to think about is the effect that Jane being Metis and an alcoholic had on the decision. When multiple issues need to be considered, the positionality stance works well to plot them out and consider where they intersect.

I also ask the woman question when I consider the differences between how a court views a father using his mother to help with the child care versus a mother who uses her mother to help with the care of her children. Often, I have heard the argument made on a motion for interim custody that the father will have his mother move in or come over daily to mind the kids while he is working. The courts seem to particularly like this arrangement and many orders for joint custody are made upon this premise. On the other hand, it tends to be used more as an accusation of inadequacy if evidence is presented that a mother relies on

her mother to care for the children. In Jane's case, she felt that if she told the court that her mother helped her with the kids when she had been working nights, the inference might have been made that she was "just another drunk Indian" who couldn't look after her kids. It may sound draconian but I am sure that when the woman question is asked many uncomfortable assumptions and opinions that underlie societal norms will surface. I suggest that the woman question be asked and answered in the courtroom. The feminist lawyer should present evidence in the affidavit that will prove capable of supporting an argument that will logically and succinctly show which women's viewpoints are being subordinated. Women and their lawyers must creatively work together to inject feminism into affidavit drafting despite the probability that judges, husbands and their lawyers will use the rules of affidavit drafting to dissect mothers' carefully drafted affidavits.

Feminist practical reasoning could have been used in formulating a child care plan from the context of Jane's story putting Jane at the centre.<sup>195</sup> It could form part of the body of the affidavit or be attached as a schedule to the affidavit. The care plan should be used both as a sword and a shield and not as parenting plans have been anticipated by certain legislation and mediation schemes where their drafting is mandatory, agreed upon by both parties and then ratified by the court.<sup>196</sup> Parenting plans have been criticized as being a design of the

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<sup>195</sup> Child care plans will be addressed in Chapter 5. Briefly, I define a care plan as a written or oral history, profile and identification of how major needs considered to be common to all dependent children have been met and will continue to be met.

<sup>196</sup> Parenting plans have been popularized by the helping professions as gender neutral contracts between parents as to the care of the children. See: John Haynes, Alternative Dispute Resolution: The Fundamentals of Family Mediation (Great Britain: Old Bailey Press, 1993) for a discussion of parenting agreements in mediation and also see, Report of the Family Review Working Group, Breaking Up Is Hard To Do: Rethinking the Family Justice Systems in British Columbia (British Columbia: The Ministry of the Attorney General, 1992)

well educated middle and upper classes.<sup>197</sup> They should not by their design incur greater legal expense because attention to the content of the affidavit must be addressed in any event. The care plan is not designed to address the concerns of only well educated and affluent parents because it addresses common needs of children which can and have been met by varying lifestyles and types of care giving.

Besides a paradox, there also is an irony to Jane's story. In her affidavit, she actually attempted to follow the legislation when she spoke of the health and emotional well being of her children and their views. She spoke of the love, affection and ties that existed between the children and herself. She felt the conduct of her husband was a factor as enunciated in Section 39(3) of the FMA. But the information was not presented in a clear, concise and easily referred to manner. In proposing a plan for the children, I should have spoken of her past involvement with the children as it would influence their future care. By Jane initiating the suggestion of a specific child care plan, the seed may have been planted in the judge's mind as to a care and control arrangement. The lawyer, in oral argument, could work with

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99-100, for a discussion of the use of parenting plans in the jurisdiction of Washington State, where The Parenting Act 1987 Wash. Laws 2015-42 (codified at Wash. Rev. Code 5626.09.002-.004...(1989)) (effective January, 1988) and a list of the presumptions and limitations on which it is based have been legislated; also see Jane Ellis, "Plans, Protections and Professional Intervention: Innovations in Divorce Custody Reform and The Role of Legal Professionals" (1990) 24 U. of Michigan J. of Law Reform 65-188 at 72; 75 et seq.. See: Susan Boyd, "W(h)ither Feminism", supra note 186. Both note that parenting plans can be more expensive than completing a standard separation agreement and are for relatively educated and affluent parents; Also see: The National Association of Women and the Law, Response to Custody and Access: Public Discussion Paper (Ottawa: NAWL, January, 1994) at 8; and See: Canadian Advisory Council on the Status of Women, Child Custody and Access Policy: A Brief to the Federal / Provincial / Territorial Family Law Committee (February 4, 1994) at 2, 5-6 (CACSW brief) for policy and legislative requirements for parenting plans.

<sup>197</sup> IBID., Ellis at 72.

the child care plan and support the woman's story of both the past patterns and future plans of child care. Part of the feminist lawyer's job in working within the parameters of litigation would be to anticipate the questions and ideological challenges to alternative caregiving and family styles that form her client's story and to meet them with practical reasoning. In this aspect, the oral argument could be used by feminists to make inroads into raising judicial and lawyer consciousness. The feminist lawyer would meet anticipated resistances to alternate family forms or alternate child care patterns by presenting an argument of how in each individual case, it could be seen to be in the child's best interest.

Finally, consciousness-raising may have helped Jane gain custody of her children. Bartlett notes that even litigation, "bears witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs."<sup>198</sup> She sees this method as more part of the substructure or a meta-method. But I think it still has utility in the courtroom. For example, one way to raise the consciousness of the "patriarch" and make the court responsible for their reasons as well as their decisions is to fill the courtroom with feminist supporters. A more long term approach is to organize feminist lawyers and judges who will inevitably have an impact on the collective feminist conscious. The feminist lawyer needs to take the legislation on child custody in its current form and fill it with the feminist perspective that would address where the legislation leaves out or denies women's concerns. For example, in the story of Jane this would ideally involve reconsideration of the conduct clause in the Divorce Act or an expansion of the factors to be considered in the best interest of the child test that would better reflect the consideration of the child "caring

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<sup>198</sup> Bartlett, supra note 153 at 864.



for” work that mothers more often do. There is no guarantee that all judges will hear it, yet when it is a woman's personal decision that the legal forum rather than mediation is to be the judge, then this is one way to work within the existing legal system and maintain a feminist perspective. And even if the judge does not hear it, women will hear it and it will help to name the frustration and anger that they have been feeling. The education of lawyers in the areas of the protective functions of custody law, the dynamics of lawyer negotiation and the lawyer's role in assisting or impeding law reform is vital.<sup>199</sup> Jane Ellis identifies the lawyer's role in facilitating or impeding change through the use of legal devices (as in a parenting plan or care plan) as an area for future research. The attitude of a lawyer is very important in affecting the proposition that a legal device can either have an immediate effect on a party's emotions or a long term effect on societal norms.<sup>200</sup>

#### **B. Court-Affiliated Mediation - Mandatory Mediation**

Another example of the complexity of a woman's story and voice being legally denied is the situation in legal jurisdictions where courts align themselves very closely to court conciliation-mediation facilities. I will argue that the courts pass the responsibility for child custody decision making to the mediators and through this process they completely deny the story of the woman by what almost amounts to MANDATORY MEDIATION.<sup>201</sup>

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<sup>199</sup> Ellis, supra note 196 at 178.

<sup>200</sup> IBID., at 178.

<sup>201</sup> Court appointed mediators are only sometimes trained in the process of mediation and usually have experience in branches of the social sciences. They are often the same personnel who, in another case, would be performing the court-ordered assessments often

Mediation is so rigorously promoted by the judiciary that it is almost mandatory and refusal to attend is considered a strike against the refusing party.

Many jurisdictions in the United States require that a divorcing couple who disagree on custody or visitation issues see a conciliator before getting access to the courts or at the least, during the litigation process. Court-ordered mediation involving custody and visitation issues is recognized by many states authorizing the court to order mediation or conciliation to help the parties formulate a custody or visitation plan in the interests of "protecting the rights of children and preserving a stable family life".<sup>202</sup> Other states have set up conciliation courts or conciliation services to work out custody and visitation issues.<sup>203</sup>

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required in contested custody cases. In British Columbia, many of the court-appointed government mediators are Probation Officers!

<sup>202</sup> Bette J. Roth, Randall W. Wulff & Charles A. Cooper, The Alternative Dispute Resolution Practice Guide (New York: Lawyers Cooperative Publishing, 1993) 7; For example, in Alaska and Maine, the court is authorized to order mediation in a divorce, dissolution, or annulment action [See, e.g. Ak. Stat. 25.24.060 (1962 & Supp. 1991), Me. Rev. Stat. tit. 19, 636, 665 (West 1992).] In other states, such as Connecticut, Indiana, and Iowa, the superior court in local districts may provide programs for mediation services for persons filing for dissolution of marriage.[See, e.g., Conn. Gen. Stat. Ann. 46b-53a (West Supp. 1992); Ind. Code 31-1-11.5-19 (West 1992); Ia. Code Ann. 598.16 (West 1992).] In others, such as Connecticut, Illinois, Kentucky, Nebraska, and Ohio, the court is authorized to order the parties to meet with a conciliator. [See, e.g., Conn. Gen. Stat. Ann. 46b-53 (West 1992); Ill. Ann. Stat. ch. 40, para. 404 (Smith-Hurd 1992); Neb. Rev. Stat. 42-360 (1992) Ohio Rev. Code Ann. 3105.91 (Anderson 1991).] Some states provide for a stay of the divorce proceeding pending the mediation or the conciliation. [See, e.g., Ariz. Rev. Stat. Ann. 25-381.18 (West 1991); N.H. Rev. Stat. Ann. 458:15-a (1992).]

<sup>203</sup> IBID. ,at 11 and 12 and [See, e.g., Colo. Rev. Stat. Ann. 14-10-123.5, 14-10-129.5 (West 1992); Conn. Gen. Stat. Ann. 46b-56a, 46b-59a (West 1992); Fla. Stat. Ann. 61.183 (West 1992); Ill. Ann. Stat. Ch. 40 602.1 (Smith-Hurd 1992); Iowa Code Ann. 598.16-598.41 (West 1992); La. Rev. Stat. Ann. 9:351 (West 1992); Me Rev. Stat. Ann. tit. 19, 752 (West 1992); Nev. Rev. Stat. 3.500 (Michie 1986 & Supp. 1991); N.M. Stat. Ann. 40-4-9.1 (Michie 1978); N.C. Gen. Stat. 50-13.1 (Michie 1989); Ohio Rev. Code Ann. 3105.091 (Anderson); Or. Rev. Stat. tit. 11, 107.179 (1991); R.I. Gen. Laws 15-5-29 (1988); S.D. Codified Laws Ann. 25-4-56 (1992); Utah Code Ann. 30-3-21-30-3-31 (1992)]

In Canada, there is no legislation that directly mandates mediation, but, the Divorce Act, promotes its use and protects its confidentiality.<sup>204</sup> Lawyers are exhorted to promote mediation but there is no direct statement exempting mediators from subsequent court appearances and giving evidence in the event of failed mediation. By contrast, a lawyer is not permitted to give testimony of failed negotiations.<sup>205</sup>

A Canadian report by James Richardson<sup>206</sup> claims its central focus of research to be a concern for the role of divorce mediation in reducing the impact of marriage breakdown on children. Two research projects evaluating court-based divorce and family mediation services in four Canadian cities were conducted. The second project was referred to as the "Winnipeg Study" and focused specifically on the Winnipeg Family Mediation Service. The report acknowledges the then recent substantive and procedural changes in family law in

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and [See, e.g., Cal. Civ. Proc. Code 1730-1749 (West 1992); Ariz. Rev. Stat. Ann. 25-332, 25-381 et seq. (West 1993); Iowa Code Ann. 598.16-598.41 (West 1992)]. Colorado additionally provides for court-mediation for issues arising from child support [Colo. Rev. Stat. Ann. 14-10-11 (West 1992)].

<sup>204</sup> The protection of confidentiality makes assessment of the process and objective inquiry into power imbalances difficult. Reports must come from the subjective evaluation of a party to the mediation. It is publicly regulated by making its content private, much the same as women are legally regulated in the family by being told that family matters will not be regulated.

<sup>205</sup> I question whether or not the difference in the legislative treatment between lawyers and mediators will result in the public being skeptical of the supposed confidential nature of mediation?

<sup>206</sup> C. James Richardson, Court Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results A report prepared for the Department of Justice, Canada, February 1988 at 12

Manitoba and Winnipeg, "in particular what is nearly mandatory divorce mediation in disputed cases".<sup>207</sup> The results of the Winnipeg Study showed that if it appeared that there was some desire on the part of the father for custody, both lawyers and mediators and, evidently, the couples themselves were more likely to offer joint custody than seems to have been true in the past (pre - 1970).<sup>208</sup> The data collected from the court records and client interviews suggested that those who attended mediation, whether or not custody was in dispute, were four times more likely to opt for joint legal custody than those who used a purely legal process (28.4% compared with 6.5%).<sup>209</sup> Further, court records indicated that sole custody to a mother is much less likely when the case is mediated (54.7% compared with 79.4%).<sup>210</sup>

It is acknowledged in the Report that the figures, particularly in the Montreal site were somewhat distorted by "the obvious preference of those mediators for agreements which result in joint legal custody and shared parenting."<sup>211</sup> The report is also dismissive of concerns that women may be coerced into joint custody. It states that,

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<sup>207</sup> IBID., at 13.

<sup>208</sup> IBID., at 35; Martha Fineman has also demonstrated the ways in which ostensibly neutral procedural devices - like mandatory mediation, often mask the implicit substantive agenda of shared parenting, Martha Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decision Making" (1988) 101 Harvard L. Rev. 729 at 728

<sup>209</sup> IBID., at 35.

<sup>210</sup> IBID., at 35.

<sup>211</sup> IBID., at 35. Joint custody was chosen by only 5% of the non-mediation cases but by 47% of the mediated cases. This contrasts St. John's and Saskatoon where joint custody was chosen by 15% and 7.4% of mediated cases.

Custody outcomes do suggest that mediators encourage couples to enter into joint custody arrangements. However, the data - both quantitative and qualitative - do not, in anyway, suggest that women (or men for that matter) felt compelled to accept this kind of order.<sup>212</sup>

Jane<sup>213</sup> emerges as a phoenix from ashes to tell her story. She would disagree with the above commentary that women do not feel coerced into mediation and shared parenting. Jane is the mother of two small boys aged three and one. Both Jane and her husband work full time in the Canadian Armed Forces. Jane left her husband, with police assistance, taking her children to a Shelter after her husband had punched and attempted to choke her. He decided to hang himself instead. His attempt failed due to Jane's intervention. Jane wanted nothing to do with her husband. She did not wish to see him, speak to him or for him to have any contact with the children, unless it was supervised by a professional. Jane told me that her husband abused the children and lacked parenting skills. He went through a program to control his anger, and one for parent effectiveness. He never disputed the fact that he had abused his wife or children, both on a physical and mental basis. But, he said he had changed. He had found God, a supportive therapist, and a good lawyer. As a result, not only did he want access to his children, he wanted joint custody. He also wanted mediation. Jane did not want mediation because she believed that her husband only wanted contact with her. She did not trust his new found trinity of God, therapist and lawyer.

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<sup>212</sup> IBID., at 35 and 36.

<sup>213</sup> Again, Jane is a former client of mine. To protect her anonymity, some minor details have been changed.

Jane desperately wanted her story told in a public forum. Whatever her reasons, this was very important to Jane. She felt that she needed the assistance of a lawyer to represent her interests as she perceived an incredible power imbalance between her and her husband's positions. Jane's case went to the Winnipeg Family Division of The Court of Queen's Bench. Despite having read Jane's story by way of affidavit evidence and the affidavits of a physician and child psychologist, the judge all but mandated mediation by firm encouragement to the parties to mediate their differences. He called the conciliation services and arranged an immediate interview from the court room. He applauded the husband's efforts in taking therapy and anger management. His interim order granted specified periods of care and control to each parent and a referral to mediation. A family assessment was also ordered. The judge reasoned that all these helping professionals could quickly determine the necessity for supervised access. The parties went to mediation. It did not succeed. As Jane suspected, her husband's focus in mediation was to try to reunite with her. He stalked her despite a restraining order. Jane's life was a nightmare. Despite the court ordered periods of care and control, she would not let her husband see the children without supervision.

When the judge refused to listen to Jane's story and instead, made an order for specified care and control periods, he effectively wiped out the past history of abuse. He set a new status quo, the current order of "specified periods of care and control". I have heard judges using their position of persuasiveness to promote and, in some instances, force women into mediating, despite women attempting to have their voices heard and their fears expressed

that their spouses would only attempt to manipulate both the mediator and themselves. Women often told me of their spouse's ability to lie very smoothly in mediation. They expressed concern that they would have a better chance of having their story told and heard in affidavit evidence where their spouse could not gaze them down, interrupt, mock or sweet talk them. Even recognizing the problems inherent in legal proceedings, they felt better about having a judge decide things than having their husband involved in the decision making. Ellen Lewin<sup>214</sup> reports that although only a small percentage of men actually seek custody in court, as many as one-third of women report custody litigation threats being raised in the course of divorce negotiations. Effectively, this can force compliance with other paternal demands.<sup>215</sup>

When a judge refuses to make an order of custody or even primary care and control of children in order to refer the matter to mediation, the true experience of primary care and control is often left behind in the legal arena. The court abrogates its power. This allows the mediation process to smoothly take over the issue of decision making by erasing the history and pattern of child caring, wiping out the status quo and replacing it with the neutral wording of specific care and control times. This enables mediation to focus only on the

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<sup>214</sup> Ellen Lewin, "Claims To Motherhood: Custody and Maternal Strategies" in Diana Wells, ed., Getting There: The Movement Toward Gender Equality (New York: Carroll & Graft Publishers / Richard Gallen, 1994) 303-323 at 304

<sup>215</sup> IBID., at 304. Low child support payments are often secured by men in exchange for abandoning their quest for custody. This could potentially change with new legislated child support guidelines.

future with the sanction of the court.<sup>216</sup> Jane aptly refers to this order of care and control, as “I get all the care; he gets all the control!”

How can this seemingly unusual alliance of court and mediation be explained? Asking the woman question can help. To assist in understanding power relationships and unequal bargaining positions in mediation and in the court, it is useful to look at the ideas of formal justice, the traditional polarization between culture and nature, and the way law is used to control the uncertainties and emotionality of the natural. I refer to Susan Williams's work.<sup>217</sup> Susan Williams's critique and analysis of social construction, the Cartesian model and feminist epistemology can be used to understand legal theory as it relates to practice, whether it be in the court or mediation. I propose that the “care and control” that a judge orders or a mediator facilitates is part of the Cartesian dichotomy ie. control/care. Control represents the reasoned responses of the parent to control the upbringing of the child with respect to education, medical care and religion. Care represents the uncontrollable, unpredictable and time-consuming, day to day tasks of child caring.

Carol Smart<sup>218</sup> calls this type of care “caring for”, using Joan Tronto's concept of a moral discourse of care,<sup>219</sup> while the work of “caring about” is often the caring work men do - the friendship, loving and fun things. The work involved in “caring about” is more intangible and

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<sup>216</sup> Future focusing, as a method used in mediation will be deconstructed in Chapter 4.

<sup>217</sup> Susan Williams, “Feminist Legal Epistemology” (1993) 8 Berkeley Law Journal 63-105

<sup>218</sup> Smart, supra note 86 at 491.

<sup>219</sup> Tronto, supra note 87 and Moral Boundaries: A Political Argument for an Ethic of Care (New York & London: Routledge, 1993)



I would suggest more symbolic. Are men who are given periods of care and control by the courts or mediators doing any more “care” in the sense of the day-to-day care or are they actually acquiring or maintaining symbolic control over their children? Smart notes that we continue to place “caring about” above “caring for” and that this marginalizes woman and the mother work they do. Smart piloted a small empirical study of divorced families and studied how child custody was negotiated between parents.<sup>220</sup> When the “caring for” issue became “transformed by solicitors and mediators into a question of welfare, the children were put centre stage thus quite marginalizing the mother and avoiding discussion of predivorce child care arrangements”.<sup>221</sup> “Caring for” work can get characterized as selfishness by mothers and is devalued.<sup>222</sup> This analysis supports Jane's contention that, “I get (give) all the care, he gets (takes) all the control!”

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<sup>220</sup> Smart concluded that:

1. There was a considerable sensitivity by both parents to the positions of fathers in the process of divorce.
2. There was a stated concern by both parents to preserve relationships after the divorce “for the sake of the children”.
3. “But it also showed that because “caring for” as a form of work is invisible and yet also collapsed into the moral category about “caring about”, mothers who “care for” have no legitimate voices unless they speak the language of equal rights (for fathers) or welfare (for children).”

Also see Chapters 2 and 5 for a more detailed discussion of “caring for” and “caring about”.

<sup>221</sup> *IBID.*, at 498.

<sup>222</sup> For an example of how “caring for” can be devalued by “caring about” even when custody is given to the true caregiver, see Subsection 39(4) of the FMA, “the non-custodial parent retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports.” If we can assume that the custodial parent is providing the majority of the “caring for”, then the non-custodial parent can still exercise a large number of demands and therefore control over the relationship by using this “caring about” clause.

#### IV. CONCLUSION

Feminist legal theory and methodology should be given the opportunity to be celebrated and valued in both written and oral narrative in the areas of litigation and mediation. Women, people of colour and aboriginal peoples historically have not been allowed access or entry into the Cartesian dialogue involved in the legal process because of assumptions of their "chaotic" nature and their supposed inability to reason.<sup>223</sup> But many groups developed or maintained story telling as a survival technique to preserve group affinity e.g. old wives tales, Indian story telling. Informal, oral approaches to story telling defied Cartesian reason and logic and largely went unchallenged because oral story telling was not considered valid as contrasted to written language. Therefore, the rhythm and history of oral story telling prevailed. I believe that it is this rhythm in the history of women, their lived experience and their pain, that preceded any feminist theory and ultimately named it. Feminist theory and practice is less the individual practice than we often think. It usually emerges from engagement with collective sources.<sup>224</sup> Jane has many different stories to tell to many different people and in many different ways. Yet they remain Jane's stories until we allow them to become part of our own stories. I believe this to be converting feminist theory to practice and, as one thinks about and make sense of the practice, practice is converted to theorizing, completing a circle.

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<sup>223</sup> Williams, supra note 217 at 66 and 67. This analysis also uses the rational empiricist position to challenge assumptions about women that underlie laws.

<sup>224</sup> bell hooks, supra note 7 at 5.

Both litigation and mediation continue in their present forms to silence, censor and devalue feminist theoretical and practical voices. Those involved in the legal and social processes of child custody dispute resolution should engage in critical reflection and engage in the practice of feminism as a means to "reflect the reality of child care as it is currently organized, without creating obstacles to alternative forms of caring that might develop".<sup>225</sup> The concept of feminist theory and practice enabling each other in reciprocity of self discovery and collective liberation is extremely exciting if it can be applied to the traditional legal system. The silencing of a woman's past and the invalidation of past fact finding that takes place in both mediation and litigation denies feminist legal theory entry into the practice of child custody law. The telling of women's stories and addressing the woman question are not yet possible. But introducing feminist methodology into the legal system might allow a multi-dimensional inquiry within the situation of a particular family's parenting and expectations prior to separation. Using feminist methods, gender, social, racial, ethnic, class, religious, sexual orientation and disability issues can be addressed.<sup>226</sup> Individual and collective values which inform parenting relationships held can be examined. I realize that this may not be and has not been readily accepted by the judiciary and mediators, but feminist lawyers and mediators must raise their voices louder. This approach is not radical and does not suggest a breaking down of legal or social processes in any fundamental way. Part of my purpose has been to provide practical suggestions to help women who have no choice but to address the system as it exists. I again acknowledge that applying feminist

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<sup>225</sup> Carol Smart, Feminism and the Power of Law (London: Routledge, 1989) at 154.

<sup>226</sup> A postmodern position allows for the deconstruction of the existing discourse and a consideration of all factors that affect a custody decision.

methodologies to traditional methods has been largely untested and that I cannot predict if such an exercise would be accepted or even effective. But feminism does provide hope and has had some influence:

If there has been one growth area in the social sciences during the 1980's, it has been in feminist research and women's studies. Nowhere has this growth been more evident than in areas of justice, the sociology of law and legal research generally. Feminist perspectives have often wedded theory and practice with the result that there has been mounting pressure, backed sometimes with solid research, for legislation to be made more sensitive to the particular situation of women, so that well meaning reforms do not have the unintended consequence of worsening the already disadvantaged position of women in contemporary society.<sup>227</sup> (my emphasis)

Perhaps, in the long term, this would mean evolving a new form of feminist dispute resolution suitable to child custody involving legislative change.<sup>228</sup> Finally, I conclude that in order to evaluate the success of whether or not feminist methodology can be introduced into the courts and mediation, giving voice to women's stories and experiences, all women must be allowed to name their practice and pain, and those who are enabled and privileged, such as lawyers, must assist in formulating theory from the experiences of all women.

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<sup>227</sup> Richardson, supra note 206 at 13.

<sup>228</sup> This will be addressed further in Chapter 5. In the interim, I am proposing practical steps for women who must make decisions today. Also see: David D. Duff and Roxanne Mykitiuk, "Parental Separation and the Child Custody Decision: Toward a Reconception" (1989) 47 University of Toronto Faculty of Law Review 874-938. Duff and Mykitiuk state that, "In contrast to traditional communitarian and liberal conceptions, we develop a feminist approach to understanding both the family and the legal resolution of intra-familial disputes" at 876. They continue with a lengthy review of child custody, best interests, joint custody and primary care giver presumptions, but never really develop alternatives, either using feminist or any other methodology. They note in conclusion that institutional reforms designed to facilitate cooperative solutions are required and simply leave it at that, at 938.

## CHAPTER 4

### THE DECONSTRUCTION OF CHILD CUSTODY MEDIATION

#### I. INTRODUCTION

In the previous two chapters I have shown how women's mothering and caregiving are undervalued and rendered invisible in our society because the dominant ideology of motherhood informs and is reinforced by our legal system in child custody disputes. I have introduced the reader to a sampling of the diversity of real mothering experiences which I argue should be considered in custody dispute resolution. I have explored the possibility of introducing feminist methods into the legal procedures used by the courts in both litigation and court-affiliated mediation. But I have not yet explored the methods used in custody mediation to determine if they are less oppressive to women than those used in litigation. The content of this chapter responds to the particular and disturbing fact that child custody mediation is largely presented in legal and social reformative writing as a panacea to the ills of traditional litigation.<sup>229</sup> Popularly, custody mediation conjures up images of empowerment, equality, and private ordering.<sup>230</sup> Contentiously, I take the position that mediation disempowers women. My objective in this chapter is to

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<sup>229</sup> There is a plethora of family mediation texts, articles and government sponsored studies that contrast mediation to litigation, listing alleged advantages to mediation and disadvantages to litigation. Among the books on family mediation reviewed for this thesis are : John M. Eekelaar & Sandford N. Katz, eds., The Resolution of Family Conflict (Toronto: Butterworths, 1984); Howard H. Irving and Michael Benjamin, Family Mediation (Toronto: Carswell, 1987); Barbara Landau, Mario Bartoletti, and Rith Mesbur, Family Mediation Handbook (Toronto: Butterworths, 1987); and Haynes, supra note 196.

<sup>230</sup> For the most part, the advantages of mediation mechanisms for coping with family disputes are said to be that they are "inexpensive, discretionary, personalized, voluntary, consensus - oriented and therapeutic, and that, unlike the formal methods, they empower the participants" (my emphasis). Anne Griffiths, "Mediation, Conflict, and Social Inequality: Family Dispute Processing among the Bakwena" in Robert Dingwall and John Eekelaar, eds., Divorce Mediation and the Legal Process (Oxford: Clarendon Press, 1988) 129 at 130

show that despite whatever claims mediation proponents make, men, in general, have more power than women in child custody mediation. This observation in its own right would make mediation "unjust". It is not a system of freely bargaining equals mediated by a benign third party. Anne Bottomley notes that,

Private ordering can only be detrimental to women; economic, social and psychological vulnerability all militate against the image of the equal bargaining situation which is presumed to be present in mediation for it to be a truly mutual agreement. Ignoring power relationships within the "private" domain can only reproduce them... Women suffer in three ways: they face their partner with lack of equality; they face a mediator who even in practising seeming neutrality between the parties is actually the purveyor of the dominant social values which are oppressive to women. Finally, as a group whose position in society is controlled through family, fundamental problems become hidden by relegation to the "private" sphere. They are blocked from bringing their problems and needs into the public sphere of formal justice.<sup>231</sup>

Some mediation proponents take the position that there is an overreaction to the shiboleth or watch cry "inequality of bargaining power".<sup>232</sup> I find this position especially dangerous for women because it fails to comprehend the roots of the complex power relationships that are manifested in mediation. The power imbalance and the "inequality of bargaining power" go much deeper than the more obvious issues of violence and

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<sup>231</sup> Anne Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation" in Julia Brophy and Carol Smart, eds., Women-in-Law (London: Routledge and Kegan Paul, 1985 ) 162 at 180-181

<sup>232</sup> John H. Wade, "Forms of Power in Family Mediation and Negotiation" (1994) Australian Journal of Family Law 40-57. Wade lists ten types of power that can be exercised. His position is that by naming the types of power used in mediation, each can be addressed with strategy to overcome any inequality resulting from the exercise of power. This is a step in the right direction but Wade's analysis falls short of an inquiry into the norms and values which frame the exertions of power.

abuse against women.<sup>233</sup> Power imbalances have a social, historical, legal and cultural context shared by both formal and informal justice processes and procedures. It is my position that mediation most likely has sprung from the brow of litigation. For example, both systems are reflective of the construction of gender ordering in our society. Both are rooted in patriarchal concepts.<sup>234</sup> Both are informed by community values and norms about motherhood, family and work that reproduce and sustain patriarchal power and devalue women's work and caregiving.<sup>235</sup> Litigation and mediation are not separate

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<sup>233</sup> For example, the Canadian Advisory Council on the Status of Women, Child Custody and Access Policy: A Brief to the Federal/Provincial/Territorial Family Law Committee (February 4, 1994)[hereinafter CACSW Brief] at 29 states that mediation is problematic and disempowering for women because of the following factors:

Generally, men are greatly advantaged in divorce mediation, as a result of their higher socio-economic status, dominant behaviours, relatively low levels of depression, higher self-esteem, higher reward expectations, and assertive rather than accommodating tactics in negotiating. All of these factors are reinforced by traditional sex role ideology.

Abuse and violence against women have begun to be acknowledged as situations where mediation is inappropriate or that at the very least safeguards need to be put in place to ensure that there is not an imbalance of power. For example, Society of British Columbia, Gender Equality in the Justice System: A Report of The Law Society of British Columbia Gender Bias Committee Volume II, 1992, Chapter 5 at 5-73 to 5-75 (Hereinafter called the "Gender Equality Report") and the Working Group Report, supra note 196 at 96 (Hereinafter called the "Report") and CACSW at 30&31.

<sup>234</sup> See Chapter 1, supra note 5 for a definition of patriarchy as used in this thesis. It is defined as a system of social relationships that privileges men while disadvantaging women, although the precise form of power inequities varies historically and cross-culturally.

<sup>235</sup> See Chapter 2, Part II, for an analysis of the ideology of motherhood and the social construction of "good" and "bad" mothers, and for examples of patriarchal considerations of "good" and "bad" mothering, see the Chapter 3 stories of women's experiences with both litigation and court-affiliated mediation. Both Chapter 2 and this Chapter also deal extensively with the topic of women's work both in and out of the home being undervalued and the effect this has on women's disempowerment.

entities.<sup>236</sup> They are not mutually exclusive. Their norms and values become blurred. They influence each other and wider social values. But, I argue that ultimately, mediation poses a greater threat to women because unlike litigation, the relevance of mediation's systemic problems is obscured by romanticism and rhetoric.

In addition to issues of women's disempowerment in mediation, I focus on custody mediation in this chapter because of the increasing and obdurate trend in common law courts to defer decision making power to the processes of mediation services<sup>237</sup> under the assumption that custody issues are inherently suited to mediation, that mediation reduces the hostilities of divorce, and that mediation as a means of achieving a custody result is in the best interests of children. The traditional emphasis and role that Canadian governments have played in shaping and maintaining accountability for social welfare issues may partially explain both the low levels of private mediation and the ever

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<sup>236</sup> Pickett, *supra* note 18. Pickett does not view law and mediation as radical alternatives. She sees law and mediation in an alliance along a continuum perpetuating the same ideologies. She critiques Martha Fineman's work (See Fineman, *supra* note 208 at 728) which suggests that the mediation of custody disputes is the appropriating of the business of child custody decision making by the helping professions through an active campaign to discredit the existing legal processes of custody resolution. She does acknowledge the value of Fineman's work in accounting for the diverse interests of varying social groups, but sees as problematic "[Fineman's] thesis that the use of particular 'narrative strategies' has enabled mental health professionals to appropriate the mechanism of child custody decision-making." Pickett is not convinced that the shift from the public (litigation) to the private (mediation) for the resolution of child custody disputes has actually taken place despite those proponents of mediation who advocate that it has or should. She submits that courts still retain jurisdiction as jealous keepers of the final decision making authority in child custody. She sees judges as becoming more involved in an interventionist rather than a neutral arbiter role.

<sup>237</sup> See the second story of Jane in Chapter 3 for an example of how the court's defer their power to mediation services.



increasing level of referrals to court and government affiliated mediation services.<sup>238</sup> It is very much in the interests of government to ensure that child custody disputes are settled in an ostensibly non-costly, timely fashion, with results that reflect the values and dominant ideologies of the time. Therefore, it can be argued that child custody mediation has become another process in the larger picture of child custody litigation.<sup>239</sup> So in terms of systemic problems, again I stress that I do not view litigation and mediation as polarized but rather as two processes along a continuum of patriarchal interests in child custody dispute resolution.<sup>240</sup>

In this fourth chapter, I will review and deconstruct the origins of mediation in North America and its rapid rise into the realm of child custody discourse. In order to do this, I will also look at some of the history of child custody because it is my proposition that the two are linked. Second, I will show how specific methods such as future focusing, summarization and normalization, used by mediators perpetuate existing legal patriarchal ideologies with mediation simply mimicking the law and disempowering women in their stories. Deconstructing the specific methods used in mediation to show that they perpetuate the same assumptions present in litigation has not yet to my knowledge formed part of the feminist inquiry into mediation, although Elizabeth Pickett

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<sup>238</sup> In Canada most of these mediation services are court affiliated or government funded. Cost and inconvenience are two other forces preventing any significant reliance on private mediation.

<sup>239</sup> Just as pre-trial conferences and motions form steps in the litigation process, so does the court-affiliated mediation service. The judge encourages its use and arguably demands it.

<sup>240</sup> See Pickett, supra note 18.

does write that mediation perpetuates litigation and that both are along the same continuum that represents patriarchal ideals. I will also attempt to provide some suggestions about whether feminist methodology might be used to introduce women's voices, more audibly, into the mediation process. I recognize that the present methods used in mediation are designed to perpetuate patriarchal ideologies about mothers, fathers, children and family and may prevent the possibility of feminist reform. Nevertheless I will explore the possibility in the interests of women who must engage with the system.<sup>241</sup>

## II. TWENTIETH CENTURY DEVELOPMENTS IN CUSTODY MEDIATION

In order for mediation to have merged into the discourse of child custody, I argue that certain historically and culturally specific circumstances had to occur simultaneously. It is therefore necessary to look at the history of child custody in order to explain the rise of custody mediation as an alternative to custody litigation.

Over millennia of the human story, fathers have been the legal guardians of their children.<sup>242</sup> In the latter part of the nineteenth and into the twentieth century the concept

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<sup>241</sup> Carol Smart argues that law is unable to hear women's stories. An example is that women reformulate demands grounded in women's experiences rather than abstract notions of rights which are seen as selfish. She maintains the position that though the law resists and denies women's concerns, it is still important to understand the law in order to construct an alternative reality other than that manifested in legal discourse. Smart, supra note 221 at 158-160.

<sup>242</sup> Jay Folberg, "Custody Overview" in Jay Folberg, ed., Joint Custody and Shared Parenting (Second Edition) (New York: Guilford Press, 1991) 4

of the nuclear family as the foundation of society emerged partially due to the specialization of parental functions and the smaller economic units fostered by the industrial revolution.<sup>243</sup> Jane Ursel has traced the Canadian state's increased authority over children and families by the implementation of welfare law.<sup>244</sup> This reordering of state and parents' familial authority led to the new concepts of children's "rights", welfare and "best interests".<sup>245</sup> Emphasis was placed on women providing child care thus allowing men to work. This encouraged the sexual division of labour and the fostering of the nuclear family. Correspondingly, in the late nineteenth century, women began to be selectively awarded custody of minor children. From the 1920s until the mid 1960s, there was a presumption of maternal custody, judicially referred to as the "tender years doctrine". Young children were believed to need mother's loving care and tender touch. Eventually, the courts began to redefine children's needs as the paramount consideration in awarding custody. Thus, the "best interests test" emerged, first with case law and then with statute law defining the best interests of the child by listing specific factors to be considered by the courts. Tension arose in the 1970s between the notion of the "single psychological parent" on marital breakdown<sup>246</sup> and the concept that

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<sup>243</sup> Jane Ursel, "The State and the Maintenance of Patriarchy: A Case Study of Family Labour and Welfare Legislation in Canada", in James Dickinson and Bob Russell eds., Family, Economy and State: The Social Reproduction Process Under Capitalism, (Toronto: Garamond, 1986) 180-181

<sup>244</sup> IBID., at 180.

<sup>245</sup> IBID., at 150&180.

<sup>246</sup> J. Goldstein, A. Freud and A. Solnit, Beyond The Best Interests of the Child (New York: The Free Press, 1973)

"both parents are forever."<sup>247</sup> Much weight was given to a child's need for stability of environment and continuity of both parental relationships.<sup>248</sup> Three social factors emerged in the 1980s that were identified as having made an impact on custody awards: first, more women were working outside the home; second, it was perceived that more men were participating in child care and household tasks,<sup>249</sup> and third, there was a greater concern about sexual discrimination and gender neutrality.<sup>250</sup> These trends coincided with the passing of joint custody laws in the United States and in Canada.<sup>251</sup>

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<sup>247</sup> J. Wallerstein and J. Kelly, Surviving the Breakup (New York: Basic Books Inc., 1980) and see Julien Payne and Brenda Edwards, "Cooperative Parenting After Divorce: A Canadian Legal Perspective" in Jay Folberg, ed., Joint Custody and Shared Parenting (Second Edition) (New York; Guilford Press, 1991) for a more comprehensive discussion of the ideologies of the "single psychological parent" and "both parents are forever" at 290-295

<sup>248</sup> Leonard Marlow and Richard S. Sauber, The Handbook of Divorce Mediation (New York and London: Plenum Press, 1990) at 80-81. The authors provide a list which defines the best interests of the child as consistently, universally and essentially identifiable "needs" and the post divorce continuing relationship as a part of family. The two most instructive (and suspect) items on their list state propositions that represent mediator's views on the continuing post-divorce relationship are:

7. The needs of children are always the same - to be able to maintain an ongoing relationship with both their parents, free of interference and free of any undue tension between them.
8. To be sure, the family is going through a traumatic and painful reorganization. But it remains a FAMILY, nevertheless - the same as it would have had that reorganization been as a result of death, incarceration, permanent institutionalization, disability or the induction into the military...

<sup>249</sup> There are studies which indicate that women who work during the day outside the home take on a second shift on returning home and that men are only marginally more involved in child care and house work. See: McDaniel, supra note 89 at 427; Pat and Hugh Armstrong, supra note 60 at 114; and, Lero and Johnson, supra note 89 at 8.

<sup>250</sup> Landau, Bartoletti and Mesbur, supra note 229.

The legal stage was set for the introduction of mediation to promote joint custody and parental sharing of children.

It has become the practice of almost all Canadian and American courts in almost all situations to urge parents to seek the aid of mediators where parental conflicts exist.<sup>252</sup>

According to Alfred W. Meyer, mediation responded to two identifiable concerns. The first concern was pragmatic - mediation was a supposedly cost effective remedy to the congestion in the courts and the second concern was idealistic - community values were reflected in mediation.<sup>253</sup> The process of mediation was said to emphasize problem solving, not winning or losing, and was therefore advanced as being particularly conducive to divorcing couples who presumably had a joint interest in establishing financial and custodial arrangements for their children.<sup>254</sup>

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<sup>251</sup> Folberg, supra note 242 at 4; Joint custody legislation was passed in California in 1979. In Canada, see the Divorce Act, 1985, Subsection 16(4); Anne Marie Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 CJWL 33; Payne and Edwards, supra note 247 at 290-295.

<sup>252</sup> See Richardson, supra note 206 at 13. Also for a review of current jurisdictional requirements see, Landau, Bartoletti and Mesbur, supra note 229. As well, see Payne and Edwards, supra note 247 at 275-295 and see Chapter 3, supra notes 202 & 203 noting the various mediation requirements in the United States and finally, see the Divorce Act, R.S.C. 1985, Chapter 3 (2<sup>nd</sup> Supp.), ss.16(4) legislating joint custody as an option. It is not a legislated preference nor is it mandatory. The Divorce Act, ss.9(2) also requires that the lawyer must discuss the advisability of negotiating custody matters and advise the spouse of mediation facilities that might assist in the negotiating.

<sup>253</sup> See Alfred W. Meyer, "To Adjudicate or Mediate: That is the Question" [1993] 27 Valparaiso University Law Review 357 at 374 and 375. Meyer provides us with a comprehensive review of both litigation and mediation. He notes that community values are defined as being motivated by bargaining and the performance of bargaining in relationships of heavy interdependence.

<sup>254</sup> IBID., at 373.

No one can doubt that mediation has become a popularized and widely promoted alternative to the litigation of child custody disputes. I note the irony that it has become so successful as an alternative to litigation that the courts have co-opted it and reintegrated it into the judicial process.<sup>255</sup> Child custody mediation is government mandated in certain American states and all but mandated in others.<sup>256</sup> In Canada, all provincial jurisdictions have some degree and form of court affiliated mediation services. For example, in Manitoba, it is so highly promoted and encouraged by the judiciary that it can be considered almost mandatory.<sup>257</sup> It is perceived by the court as a mark against the party if she refuses to attend. It is often encouraged even where abuse has been alleged.<sup>258</sup>

My analysis of mediation as an alternative form of child custody dispute resolution, as known in North America, begins with the work of Lon L. Fuller during the 1960s.<sup>259</sup> Besides mediation, Fuller also addressed four other subjects: adjudication, contract,

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<sup>255</sup> *IBID.*, at 374. For example, many jurisdictions have court-affiliated mediation. See Pickett, *supra* note 18 wherein her thesis is that mediation and adjudication are part of the same process on a continuum.

<sup>256</sup> See Chapter Three, *supra* notes 202 & 203.

<sup>257</sup> Richardson, *supra* note 206 at 13.

<sup>258</sup> For an example, see the story of Jane and court-affiliated mediation in Chapter 3.

<sup>259</sup> Lon L. Fuller, "Mediation - Its Forms and Functions" (1971) 44 S. Cal. L. Review 305; "The Forms and Limits of Adjudication" (1972) 92 Harv. L. Rev. 353. Lon L. Fuller was the then Carter Professor of Jurisprudence at the Harvard Law School. He retired in 1972, acclaimed by many as the preeminent American legal philosopher of his time.

legislation and managerial direction.<sup>260</sup> Fuller's purpose was to show that each of the above five processes served a distinctive function: "its appropriate use depended on the nature of the problem to be resolved, the resources available, and the values to be realized".<sup>261</sup> The distinguishing principle between mediation and adjudication was mediation's moral force being derived from parties making their own agreements and law, rather than being restricted to only enabling people to participate by the legal presentation of proofs and reasoned arguments.<sup>262</sup> Within Fuller's framework of dispute resolution, adjudication was inappropriate to "polycentric issues" or "many centred tasks", where all parties were affected by all aspects of a problem.<sup>263</sup> Mediation was considered more appropriate to the polycentric issues associated with human relationships that would otherwise be potentially destroyed by adjudication's formal delineation of rights and wrongs. Fuller used the example of a marriage contract to illustrate a situation where mediation would be more appropriate than adjudication in arriving at a resolution and at the same time preserving a relationship. From this example the family mediation movement extrapolated that mediation was the best form of dispute resolution in family breakups.<sup>264</sup> They assumed that all familial relationships needed preservation. The jump to equating the negotiation of a marriage contract (between two consenting adults entering into a legal and personal relationship) with the

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<sup>260</sup> IBID.,(1972) at 363 and (1971) at 338.

<sup>261</sup> Meyer, supra note 253 at 359 wherein Fuller is cited.

<sup>262</sup> IBID., at 360.

<sup>263</sup> Fuller, supra note 259 (1972) at 363.

<sup>264</sup> Meyers, supra note 253 at 359.

mediation of a separation contract (involving possibly only one consenting adult wanting to dissolve a legal and personal relationship) involves a questionable leap of logic.

In her feminist critique of child custody mediation, Martha Bailey argues that the family mediation movement stretched Fuller's analysis of mediation in an attempt to appropriate the authority and neutrality of his work.<sup>265</sup> They equate dispute resolution within a functioning family to the dispute resolution required when the traditional husband-wife relationship dissolves. Bailey concludes that mediators advocate divorce or separation as simply a reorganization rather than a termination of family relationships. Bailey, and others,<sup>266</sup> have noted this relatively new assumption of what is coined as the post-divorce continuing relationship. Bailey states that,

The power of the new discourse of divorce as a restructuring of the family is such that Fuller's analysis of ongoing families is applied without distinction to separated couples. Fuller's original point has been overtaken by the ungrounded and politically loaded assumption that separated couples maintain a continuing relationship much the same as those who live together or carry on business together.<sup>267</sup>

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<sup>265</sup> Martha Bailey, "Unpacking the "Rational Alternative": A Critical Review of Family Mediation Movement Claims" [1989] 8 C.J.F.L. 61 at 62

<sup>266</sup> Jessica Pearson and Nancy Thoennes, "A Preliminary Portrait of Client Reactions to Three Court Mediation Programs" (1984) 3 Mediation Q. 21 at 22 write: "Given the 'polycentric' nature of most divorce disputes (Fuller, 1971) and the need for divorcing parties to maintain a parenting relationship, mediation seems a natural means of achieving resolutions to custody or visitation differences" and see feminist scholar, Martha Shaffer, "Divorce Mediation: A Feminist Prospective"(1988) 46:1 University of Toronto Faculty of Law Review 162 at 171

<sup>267</sup> Bailey, supra note 265 at 64.



One way to encourage a continuing relationship between parents is to promote joint custody or some form of a shared parenting scheme which obligates parents' continuing involvement with each other ostensibly because of the children. This may explain the focus on joint custody that mediators have. It is arguable that joint custody found its way into the mediator's agenda, at least initially, as a means to ensure the continuing viability of the patriarchal dominant ideology of the nuclear family and not because it was in the best interests of children.<sup>268</sup>

Not all feminists support Bailey's contention that family mediators have misapplied Fuller's analysis. A feminist mediator, Janet Rifkin,<sup>269</sup> cites Fuller for her authority that the central quality of mediation is its unique capacity to "reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>270</sup> Rifkin is apparently in support of a continuing post-separation relationship between the parties.

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<sup>268</sup> It is debatable that the best interests argument evolves from the premise that "what's best for the family is best for the child". The difficulty is that "best" is largely a subjective measurement dependent upon which particular ideology is held by both the individual and society. The linkage of mediation and joint custody will be further looked at in Part III of this chapter and in Chapter 5, Part II, Family Justice Centres.

<sup>269</sup> Janet Rifkin, "Mediation From a Feminist Perspective: Promise and Problems" (1984) 2 *Journal of Law and Inequality* 21 at 27

<sup>270</sup> Fuller(1971), supra note 259 at 325.

Efforts to maintain and establish mediation through the government and courts in British Columbia are currently being made. Family Justice Centres<sup>271</sup> are being piloted through the Ministries of the Attorney General, Social Services and Women's Equality with a major emphasis on increasing and promoting mediation of child custody and other family matters. As well, Recommendation 5.49 of the Law Society of British Columbia's Gender Equality Report<sup>272</sup> recommends that the Ministry of the Attorney General continue its existing practice of offering mediation on a voluntary basis as an alternative to the court system for the resolution of family disputes. This Report further recommends that family court counsellors receive additional training in mediation and that they must be sensitized to the signs of unequal bargaining power and the dynamics between the parties, the danger of unfair concessions and the effects of abuse on the parties and their children. It would appear that the government of British Columbia and proponents of mediation are attempting to meet the legitimate criticisms of mediation. Yet, women should still be advised to resist the "siren call" of mediation.<sup>273</sup>

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<sup>271</sup> Report, supra note 196. The Breaking Up Report was one of the thirteen reports studied by a Review of Family Justice Working Group which resulted in recommendations for family justice centres and increased mediation of family disputes. In Chapter 5, I will inquire as to whether or not the British Columbia government's initiated and funded concept of a neighbourhood family justice centre, promoting custody mediation and discouraging custody litigation, provides anything new or is it just a perpetuation of the same western liberal origins and assumptions about law, gender and motherhood which continue to oppress women.

<sup>272</sup> Gender Equality Report, supra note 233.

<sup>273</sup> Smart, supra note 225 wherein Carol Smart warns feminists to avoid the "siren call" of law at 160.

A growing body of literature exists that “expresses a concern that divorce mediation, as a form of informal justice, is not in the best interests of women and children.”<sup>274</sup> Some of the problems with divorce mediation identified by the British Columbia Gender Equality Report,<sup>275</sup> are:

1. Lack of rules of procedure, substantive law or precedent may result in more cost to women and children versus using a well trained lawyer.
2. Unequal bargaining power of spouses. Women may need skilled negotiators to represent their side.
3. Experience and qualifications of mediators are not regulated. Biases of mediators are not evaluated.
4. Neutrality of the mediator may be compromised by their own personal values and biases.
5. A preference for joint custody is a concern of women's groups because of the lack of an assessment of a man's parenting skills.
6. Joint custody often results in the physical care and control assigned to the mother. She often bears most of the financial responsibility for child rearing on fewer resources, especially if the support order is smaller as a result of joint custody.
7. Women feel they are forced to accept joint custody or be seen by judges and mediators as uncooperative.
8. Mandated mediation is not advisable as many disputes do not belong in mediation.
9. Violence against women is not adequately addressed.
10. Power abuses are not adequately addressed.

Martha Bailey criticizes the most commonly cited claims of family mediators, questioning and disproving each of the claims. The most commonly cited claims in favour of mediation according to the Gender Equality Report are:

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<sup>274</sup> Gender Equality Report, supra note 233 at 5-73.

<sup>275</sup> IBID., at 5-73 and 5-74.

Advocates of family mediation say it is more humane than traditional legal approaches because it: (a) provides a more therapeutic approach to family disputes; (b) reduces rather than exacerbates the pain and bitterness associated with marriage breakdown; (c) protects the children's interests; (d) produces more amicable settlements; and (e) encourages former spouses to recognize and accept their ongoing role and responsibility as a parent. Mediation advocates say there are cost benefits to this type of process; it reduces court costs and court time, decreases the costs of lawyers and litigation, reduces the number of subsequent applications, and decreases default on maintenance orders. (There are studies, however, that show mediation does not increase the likelihood of compliance with maintenance orders.)<sup>276</sup>

Each, according to Bailey, fails on empirical grounds as being either unsupported or contradicted by the available evidence.<sup>277</sup> Barbara Landau published a rebuttal to Martha Bailey's article, stating that Bailey's criticisms of the Ontario Association for Family Mediation (OAFM) were unfounded.<sup>278</sup> Landau's commentary shows that criticism of mediation is a highly volatile issue. Those who question its applicability in legal practise are held suspect.

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<sup>276</sup> IBID., 233 at 5-73.

<sup>277</sup> Bailey, supra note 265.

<sup>278</sup> Barbara Landau, "Mediation Article Elicits Response" (1990) 9 CJFL at 193-195. In her rebuttal, Barbara Landau, former president of the Ontario Association for Family Mediation (OAFM) and the author of the position paper cited by Bailey in her article states that the OAFM did not lobby for mandatory court-connected mediation or ignore issues of screening for domestic violence and other matters which might make mediation inappropriate. She denies that mediators advocate joint custody. Landau also criticises the work of Judith Wallerstein as having great methodological weakness and she criticises Bailey's reliance on Wallerstein's research on joint custody and the best interests of children. See supra note 247 for reference to Wallerstein's work.

In the next section some of the problems of mediation which oppress women, especially problems with power imbalance, will be deconstructed as they arise in specific mediation techniques.

### III. DECONSTRUCTING THE METHODOLOGY OF MEDIATION

In this section, three methods traditionally taught and used by mediators will be deconstructed to reveal the replication of patterns in the litigation of child custody decision making which oppress women. These methods are **normalization**, **future-focusing** and **summarizing**. My assumption is that by reducing mediation to its barest units, the opportunity to replace existing methods with feminist methods becomes possible. This, in turn, might create the opportunity to replace existing ideologies with feminist thinking.

#### A. NORMALIZATION

NORMALIZATION is the process mediators use to convince their clients that their problems are "normal" and therefore solvable, rather than unique and difficult to solve: "[t]he mediator undermines the uniqueness of each problem definition by normalizing the situation."<sup>279</sup> This method responds to the mediator's position<sup>280</sup> that each person comes to mediation with a story to tell. The job of the mediator is to take control by

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<sup>279</sup> Haynes, supra note 196 at 6.

<sup>280</sup> IBID., at 7.

putting doubt into a party's mind about the validity and fairness of their story.<sup>281</sup> To achieve the mediator's goal of coming to an agreement, people's voices must be selectively silenced, their stories invalidated and made suspect. Their truth is measured against the truth of the mediator. This approach assumes an ultimately correct version which can only be attained by completely normalizing the situation. In order to normalize, a relational norm must be constructed - what is "normal" within the patriarchal ideology of family. This relational norm will almost inevitably privilege men. Martha Fineman<sup>282</sup> has argued that male lobby groups have found a friend in mediation's normalization of the family. Men are rewarded with joint custody for coming up to a bare minimum involvement with their children which is considered as normal. Fineman writes:

Joint custody or shared parenting, however, empowers fathers as a group without requiring any demonstration of responsibility. I consider this inappropriate. In no other area does the law reward those who have failed in their duties as an incentive for them to change their behaviour.<sup>283</sup>

Studies show that men are either only slightly or no more greatly involved in domestic chores and parenting than they ever have been.<sup>284</sup> In the majority of households women

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<sup>281</sup> Invalidating the story is analogous to what happens, too, in litigation in the drafting of affidavits. See: Chapter 3 for the first story of Jane.

<sup>282</sup> Fineman, *supra* note 209 at 759 and for an example where normalization occurs in litigation, see Susan Boyd, "Child Custody, Ideology and Employment" (1989) 3 C.J.W.L. 111 at 130, in *Tyndale v. Tyndale and Foster* (1985), 48 R.F.L. (2d) 426, 428-49 (Sask. Q.B.), the judge found a father who "talks a good act but there is little evidence of performance" was granted custody over a "sufficiently strong mother" so as that he would not lose interest in his children.

<sup>283</sup> Haynes, *supra* note 196 at 7.

<sup>284</sup> Lero and Johnson, *supra* note 89 at 8.

still perform the majority of daily housework and childcare.<sup>285</sup> Anne Marie Delorey has written that joint legal custody gives rights and responsibilities to mothers and rights without responsibilities to fathers. Mere legal control of children is simply an assignment of power. Assigning the veto power to a non-caretaker reduces the caretaker to a puppet.<sup>286</sup> And in the vast majority of mediated cases, the woman is the caretaker and therefore marginalized. Her power and ability to bargain for her needs and those of her children are diminished when the method of normalization is practised.

## B. FUTURE FOCUSING

Mediation can erase women's voices and concerns about child care through FUTURE FOCUSING. The idea behind future focusing is that change, hope and the solution to problems will always lie in the future.<sup>287</sup> Future focusing invalidates past concerns and the reality of the situation that preexisted the separation. Martha Fineman<sup>288</sup> addresses the possible inconsistencies of future focusing as it applies to the best interests of the child. Future focusing involves a great degree of speculation and psychological assumptions about what is best for a particular child in a future of uncertainties. By

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<sup>285</sup> Delorey, supra note 251 at 43.

<sup>286</sup> Fineman, supra note 12 at 83.

<sup>287</sup> Haynes, supra note 196 at 9. Also note that Martha Fineman points out mediators' criticism that lawyers and judges are biased, dwelling on the past, finding fault and failing to focus on future conduct and that by contrast, through future focusing, mediators see themselves as neutral decision makers encouraging the post divorce continuing relationship at 83.

<sup>288</sup> Fineman, supra note 208 at 766.

contrast, she would prefer to see addressed the more action-centred exercise of inquiring into the details of the past care of the child. But, in future focusing, discussions about the past are considered only to lead to an emotional encounter of who was right and who was wrong.

The mediator is advised to exclude non-useful information and is taught that, "in general ... non-useful information includes social talk, emotional and emotive statements and legal and therapeutic questions".<sup>289</sup> I would suggest that what women need to say concerning the past care and caregivers of their children would largely be considered 'non-useful' according to Hayne's definition of future focusing.

The feminist concern with future focusing is that it would appear to invalidate past concerns before and during the family breakdown. Issues such as abuse, power imbalances and the experiences particular to parenting styles are effectively ignored. I argue that discouraging past fact finding blocks feminist methodology being used in mediation. The telling of the women's story is ignored. It does not address the woman question of how she has been disadvantaged in a gendered way through the assumed caretaking roles during marriage. It is not grounded in practical reasoning because situational issues cannot be addressed and solutions offered.<sup>290</sup> All of these feminist

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<sup>289</sup> Haynes, *supra* note 196 at 9. Also note that the idea that women's stories be considered non-useful if they delved into the past replicates the same idea of it being next to impossible for a woman to tell her story in an affidavit without it being alleged irrelevant (inflammatory or scandalous, too). See Jane's first story in Chapter 3.

<sup>290</sup> For a review of feminist methods see Bartlett, *supra* note 153 at 829 and Chapter 3, Part II.



methods would arguably allow a multi-dimensional inquiry into the situation of a particular family's caregiving expectations prior to the separation.

Fineman also explores the dilemma facing mothers who seek sole custody in mediation.<sup>291</sup> They are seen as having illegitimate motivations towards their children's best interests. According to Fineman, to an unsettling extent, women's stories of allegations of mistreatment, abuse or neglect on the part of husbands to wives and children can be trivialized by the mediator and lost in the psychological rhetoric that reduces a mother's desire to have custody and control of her children to pathology.<sup>292</sup> A pathetic irony takes place as a result of future focusing. A father who has had no previous involvement with his children will now be encouraged to spend as much time as possible with them. Joint custody or shared parenting will be encouraged. Fineman points out the irony that in no other area of law is a father rewarded for failing at his duties as a parent.<sup>293</sup> His reward, as a result of future focusing, is joint custody. The mother, on the other hand, is punished and accused of being non-cooperative.

In Alternative Dispute Resolution: The Fundamentals of Family Mediation, John Haynes tells the story of a mother, father and their eleven year old diabetic daughter.<sup>294</sup> The mother has been solely responsible for her daughter's emotional and physical care in

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<sup>291</sup> Fineman, supra note 208 at 766.

<sup>292</sup> IBID., at 766.

<sup>293</sup> IBID., at 759.

<sup>294</sup> Haynes, supra note 196 at 10.

the past. The father has had great difficulty in accepting his daughter's illness and admittedly has had no previous interest or involvement in her care. He simply felt it was too much for him. At mediation, the husband has a change of heart. He decides to become involved in his daughter's care. He wants joint custody. The mother objects; she does not believe that he will sustain any long term interest in their daughter's care. She believes that he wants to continue to control her as he did during their marriage and that joint custody will allow this manipulation. She wants to tell her story of the number of times she has been left alone with the child, attending to all of the child's medical needs including the numerous times the child has been taken to the hospital without her father's support. She wants to voice her concerns that he doesn't have the skills or temperament to assist his child. She wants to say that their daughter is not comfortable with her father and that if he fails to follow through with skilled and consistent care, it will harm their daughter's physical and emotional health.

In Haynes' fact situation, the mediator is told that it is in the best interests of the little girl for her father to become involved.<sup>295</sup> The father's motives are not examined. The mother, however, is thought to be unrealistic and unfeeling in questioning a father's right to involvement where previously there had been none. Mom is supposed to be happy and not ask questions based on her past concerns. In this future focus her care giving is undervalued and rendered irrelevant in the bargaining process. She and the child are both oppressed by the methodology of future focusing.

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<sup>295</sup> IBID., at 11.

### C. SUMMARIZING

In SUMMARIZING, the mediator is taught that only one universal story can be summarized and accepted. When discussing parenting issues, the parties are not supposed to talk about spousal differences such as parenting styles or personal issues or feelings. To ignore differences, again, assumes a normal or standard type of a family where differences are not allowed. Feminism would challenge this ignorance of difference. Here, mediation is guilty of invoking the same sort of "universal family" that law is accused of invoking in the "universal man".<sup>296</sup> Mediation perpetuates the ideology of liberal positivism. The mistakes of litigation that it seeks to remedy are simply perpetuated. Mediation treats neutrality as law treats "equality for anyone anywhere, abstracted from their specific place in the social world".<sup>297</sup> The legal system has been criticized for not being equal to all because "[i]t anticipates and assumes a very particular type of social order in which a particular type of individual is thought to flourish. And it is this individual, not anyone, whom law in fact endeavours to serve."<sup>298</sup> The methods of mediation perpetuate this "social order" by endeavouring to serve only one particular type of family. They exclude any consideration of differences based on class, race, culture, disability, sexuality and gender. The "social order" of mediation is

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<sup>296</sup> Haynes, supra note 196 at 10 and 11. Summarizing has elements of normalizing and future focusing, bringing up considerations of neutrality as well. See Ngaire Naffine, Law & The Sexes: Explorations in Feminist Jurisprudence (Sydney: Allen and Unwin, 1990) at 21 and see Chapter 3, Jane's affidavit story wherein the "universal man of law" erases Jane's identity in her affidavit.

<sup>297</sup> IBID., at 21.

<sup>298</sup> IBID., at 22.

predominantly white, male, nuclear, heterosexual and middle class family norms and values.<sup>299</sup> Differences are discouraged altogether or barely tolerated. In summarizing, all issues are reduced to keeping the separating family in a continuous viable relationship with two opposite sexed parents who supposedly have the resources, time and maturity to accommodate joint custody.

Mediators participate politically in the story transformation process by asking questions and SUMMARIZING.<sup>300</sup> The mediator makes summaries and recontextualizes important events in the plot of the story, finding symmetry in the stories of both parties and collapsing them into one story<sup>301</sup> The problem is that this involves the assumption that there is only one story (as does normalization). Cobb and Rifkin make the point that in twenty-four out of thirty mediation sessions that they taped and studied, the second speaker in mediation was never able to tell their story in a way that was not colonized or marginalized by the first story which dominated.<sup>302</sup> This means that eighty percent of the time, the second person's story is colonized by the first speaker and the second person is not able to legitimize herself. Unfortunately, Cobb and Rifkin did not provide statistics

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<sup>299</sup> IBID., at 22 for a discussion of how the man of law takes the form of a certain exaggerated style of middle-class masculinity: assertive, articulate, independent, calculating, competitive and competent. I would argue that this style is replicated in mediation.

<sup>300</sup> Sara Cobb and Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 Law and Social Inquiry, 35 - 62 generally and specifically at 52. Cobb and Rifkin are feminist mediators. They have conducted longitudinal studies on mediation including neutrality.

<sup>301</sup> IBID., at 56.

<sup>302</sup> IBID., at 53 and 61.

as to whether men or women more often told the first story, but, they did observe a distinction of results based on gender: “[m]any times the “linear” plot (more often than not told by the males) will predominate over a “circular” plot (more often than not told by women).”<sup>303</sup> They also refer to gender-based differences in speaking styles and story logic, noting that women use relational or circular logic on the basis of story themes; which differs from linear plot sequencing, which men often use.<sup>304</sup> I would argue that the circular logic of women would make it more difficult to summarize. Therefore, mediators may be more inclined to use men’s plot sequencing. There is some support for my argument in Cobb and Rifkin’s study of narration in mediation. One description or analysis always became dominant, accepted and used as the natural description of events.<sup>305</sup> Any alternative story that contested the dominant story was colonized or silenced altogether. I conclude that mediation is a hegemonic process precisely because it generates only one story as dominant, true, good, legitimate and appropriate and predominant. I argue that this is the male story.

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<sup>303</sup> IBID., at 53.

<sup>304</sup> IBID., at 53 wherein Cobb and Rifkin cite Carol Gilligan, “In a Different Voice: Women’s Conceptions of Self and Morality” (1977) 47 Harv. Educ. Rev. 481 and Mary Belenky, Blythe Clinchy, Nancy Goldberger, and Jill Tarule, Women’s Ways of Knowing (New York: Basic Books, 1986)

<sup>305</sup> IBID., at 51 & 52. In their analysis and deconstruction of the narrative organization as the discursive structures in the process of mediation in which conflicts are constructed and transformed, they identify a plot (events sequenced), a theme (based on causal logic) and characters (positions people take). They found that in all 30 cases the position of the first speaker was to locate themselves as the good or right in a moral order in which the other disputant was always responsible for the problem. This is an adversarial technique. I note that the feminist postmodernist theory of knowledge as defined by Bartlett, supra note 153 would challenge the universal story created by **summarizing**.

The symmetry created by collapsing the dominant story denies that stories are important in different ways. Feminist methodology would allow differing stories to be told.<sup>306</sup> Feminist practical reasoning views legal resolutions as pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives. Feminist practical reasoning might assist the mediator to comprehend the extent of their own role in creating alternative stories. Mediators, themselves, noted in interviews that summarizing provided an important opportunity for them to shift the semantic frames and moral orders in disputants' stories.<sup>307</sup> The mediator's values and norms, including the rules and methods they are taught are based on patriarchal ideologies. The dominant story becomes the more powerful story and therefore the more right and legitimate in their eyes. Ideological processes go unchecked in mediation, marginalizing and delegitimizing the non-dominant disputant, who I have argued is most often the woman. The mediator needs to become aware that they are not exempt from supplanting unrealistic expectations of mothers (and fathers, too!) into the family story that they create when they summarize.<sup>308</sup> It is not surprising that many women's complaints about mediation are that it paints a picture of parenting as very different than their

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<sup>306</sup> IBID., at 831.

<sup>307</sup> Cobb and Rifkin, supra note 300 at 56.

<sup>308</sup> The Gender Equality Report supra note 233, at 5-74 quotes from a letter to the Committee from Associate Professor Susan Boyd(as she then was), Carleton University, dated January 24, 1992:

...[M]any of the unrealistic expectations of mothers are held by mediators just as they are held by judges, and the seemingly consensual framework offered by mediation may well conceal the power dynamics which prevail nonetheless...

personal perception and experience.<sup>309</sup> Women also complain that in the process, they often feel that they are defending themselves against spousal attacks and not getting their stories told.

#### IV. CONCLUSION

In this chapter, I have presented an argument that child custody mediation is not the answer to the ills of child custody litigation. Instead of amelioration, I have argued that mediation perpetuates litigation's patriarchal norms and values, thus oppressing women. I have focused on the power imbalances in mediation that go beyond the obvious (violence against women) and extend to its patriarchal roots. The mediation methods of normalizing, summarizing and future focusing have been deconstructed to expose their legal positivist and patriarchal roots and I have illustrated how women are oppressed and power imbalanced by these methods and the ideologies that they perpetuate. I have argued that litigation and mediation are not so very different and that courts have arguably appropriated mediation. Jocelyn Gifford notes:

In British Columbia, as elsewhere, family court counselling services are justified on the basis that conciliation and mediation are a more humane and less costly alternative to the adversarial system of the courts for settling disputes which arise in separation or divorce proceedings.<sup>310</sup>

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<sup>309</sup> These are the voices of women speaking to me as a legal practitioner in family law between July 1988 and April 1994. Since their voices are silenced in the process of summarizing, they are not heard and are not represented even in the few studies presented e.g. Rifkin's study.

<sup>310</sup> Jocelyn Gifford, "Delivering Family Conciliation and Mediation Services: The British Columbia Model" (November, 1985) 4 CJFL 385-411 at 390

And finally, my position is that mediation is more oppressive to women than litigation because of the rhetorical masquerade that it hides behind as being better for separating parties and their children. Its cloak of confidentiality and private ordering discourages and denies any feminist study into its methodology and ability to address women's concerns and power imbalances inherent in our society. By contrast, courts, judges and lawyers are constantly under public surveillance and subject to criticism, which can be used by women to further feminist inquiry.

In the next and final chapter I will take up the issue as to whether feminist systems, methodology and concerns can be introduced into our legal system to address child custody.



**CHAPTER 5**  
**CREATING A SPACE FOR FEMINISM IN**  
**CHILD CUSTODY LITIGATION AND MEDIATION**

**I. INTRODUCTION**

In this chapter I will examine whether it is possible to create a space for feminist methodology in the litigation and mediation of child custody disputes without a complete breakdown of either system.<sup>311</sup> The previous chapters have demonstrated that a shift in emphasis from litigation to mediation has brought little change that results in improved custody decisions for mothers because both systems are informed by the dominant patriarchal ideologies about women, mother, father, child and family. My position is that the shift that has taken place in child custody dispute resolution has really masked the rhetoric of existing, predominant ideologies instead of promoting progress. Despite legal changes in the last ten to twenty years that support and encourage the use of child custody mediation, joint custody and the preservation of the nuclear family, it can be safely said that our society's traditional legal instruments of change, legislatures and courts, have not been very successful in changing patriarchal ideologies about family which remain informed by dominant ideology.<sup>312</sup> The status quo has been maintained. In contrast to much literature on dispute resolution, my thesis has examined the likeness of mediation and litigation. There is much cross over between the legal and non-legal arenas. There are at times uneasy alliances such as in court-affiliated mediation schemes.

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<sup>311</sup> For a definition of feminist methodology see Reinharz, *supra* note 8 wherein "Feminist Methodology" is defined as the sum of feminist research methods.

<sup>312</sup> This has been discussed in Chapter 4, Part II.

There are feminists who engage directly with the law to bring about the end of oppression against women, for example in rape law, in the belief that legislation and case law are capable of changing thinking and ultimately some ideologies, albeit often slowly.<sup>313</sup>

Other feminists caution against resorting to law because of its deep rooted resistance to women's concerns. Carol Smart questions why law is so resistant to the challenge of feminist knowledge and critique.<sup>314</sup> She argues that even though it may not hold the key to unlocking patriarchy, law should remain an important site of struggle for feminists to be heard:

[T]here is a congruence between law and what might be called a 'masculine culture' and that in taking on law, feminism is taking on a great more as well. Ironically it is precisely for this reason that law should remain an important focus for feminist work, not to achieve law reforms (although some may be useful) but to challenge such an important signifier of masculine power... [I]t provides the forum for articulating alternate visions and accounts. Each case of rape, sexual abuse, domestic violence, equal pay, and so on provides the opportunity for a different account to emerge. This account may not emerge in court (indeed it would be silenced there), nor in the media, nor in the formulation of reformed legislation, but it can and does emerge in women's writing and feminist groups. These resistant discourses are growing in power, and it is often law that provides a focal point for the voice to be heard.<sup>315</sup>

<sup>313</sup> See for an example of feminists who use existing law to effect legal changes for women: A. Scales, "Towards A Feminist Jurisprudence: An Essay" (1980) 19:1 Yale Law Journal 373-403; K. McCann, "Battered Women and the Law: The Limits of the Legislation" in J. Brophy and C. Smart (eds.), Women In Law (London: Routledge and Kegan Paul, 1985); Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986) 14:2 International Journal of the Sociology of Law 109-23; and Catharine MacKinnon, Feminism Unmodified: Discourse on Life And Law (London: Harvard University Press, 1987).

<sup>314</sup> Smart, supra note 225.

<sup>315</sup> IBID., at 2 and 88.

Martha Fineman also sees little hope for any “uncontaminated” alternative for those women and others who seek to reform the law. Maybe there can be some change on a case by case basis but she does not see large scale transformation in the near future.<sup>316</sup>

Despite feminist pessimism about the extent to which the legal system can change, I view my task as much more immediate - how to prevent the marginalization of women's stories in child custody disputes as they engage with the legal system today? How can each woman's story retain its own uniqueness without maternal caregiving becoming essentialized?<sup>317</sup> To start with, I believe that the patriarchal definition of mother as white, middle class and heterosexual must be transcended and that one of the most essentialized aspects of mothering - caregiving - should be focused on in all its diversity and complexity.<sup>318</sup> In Chapter Two, I reviewed and deconstructed the dominant

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<sup>316</sup> Fineman, supra note 12.

<sup>317</sup> By using the term ESSENTIALIZED, I mean the process wherein dominant patriarchal institutions, such as the legal system, force a non-dominant practice(s) (for example motherhood), to be categorized and reduced to one primary definition that the dominant system wishes to portray. This dominant portrayal will weaken the non-dominant practice and strengthen the ESSENTIALIZED definition. In the above paragraph, I am referring to maternal caretaking, which I argue can be undertaken in many ways that if recognized by the legal system would prevent maternal caretaking from being ESSENTIALIZED into a prescribed definition ie. all mothers should provide 24 hour care for their children.

<sup>318</sup> See Amy Rossiter, From Private to Public: A Feminist Exploration of Early Mothering (Toronto, Ontario: The Women's Press, 1988) at 277 wherein she states, “maintaining relationships of domination between man and woman depends to a considerable extent on seeing women as caretakers. The activity of caretaking is devalued and socially denigrated; the work of power, then, is to fashion women's subjectivities so that doing caretaking is common sense, ‘natural and normal’”.

ideological constructs of mother, caregiving and family. In the next chapter I introduced two women's stories that provided a context through which to view how the legal system marginalizes mothers' stories. The stories also provided a means to explore the possibilities of introducing feminist methodology as an immediate way to assist women in custody litigation and mediation. In this chapter, I look a little bit deeper to see if a space for feminist methodology exists in litigation and mediation that will not essentialize women's individual ways of mothering. I will try four different approaches that thematically relate to maternal caring and which might help bring women's diverse caregiving experiences through the doors of litigation and mediation.

First, I will review the new British Columbia Family Justice Centres (hereinafter "FJCs") which have an impact on child custody dispute resolution. I first review the methodological weaknesses found in the research results of the Family Justice Review Working Group's (hereinafter the "Working Group") report called Breaking Up is Hard To Do: Rethinking the Family Justice System in British Columbia (hereinafter called the "Report").<sup>319</sup> Among other things, the Report recommends that the justice system adopt family justice centres, mediation and shared parenting. I base my review of FJCs on my premise that because the results of the Working Group's research are flawed, the FJCs will be flawed and perpetuate the same problems that I observed in the Report. I conclude that if feminist research methods had been used by the Working Group in the Report, women could have been more empowered and child caregiving better recognized by the legal system.

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<sup>319</sup> Breaking Up Report, supra note 196.

Second, I present a few examples of feminist conceptions of maternal caring found in feminist scholarship, literature and utopian constructions of mother and caring. The purpose is to stimulate thought and raise consciousness about different feminist ways of looking at "mother" and "caregiving" which can provide useful insights for women litigating or mediating child custody disputes. Third, I review the KINSCRIPTS family framework which focuses on the interplay between family ideologies, norms and behaviors over the family's life. Fourth, I introduce child care plans as a tool which uses feminist practical reasoning both to name and explain child caregiving. All the above constructs have potential uses in the court setting which would allow women's caregiving stories to be better heard.

The purpose of my eclectic presentation of ideas in this chapter is that it may lead towards improving women's position in custody litigation and mediation in the interim period of time before a large scale feminist transformation of the justice system might take place. Hopefully, thoughts and ideas about caregiving and maternal connections will spark both practical and imaginative solutions for women who must cope with the everyday realities of separation and the devaluation of their caregiving. I hope to raise consciousness, tell stories, ask the woman question, use feminist practical reasoning and feminist social research methods.

## **II. FAMILY JUSTICE CENTRES**

Over the last three to four years in British Columbia, FJCs have emerged in an attempt to meet the needs of women, men and children that arise in child custody issues. They also ostensibly address the power imbalances between women and men. In British

Columbia, the Ministries of Attorney General, Social Services (as it was then called) and Women's Equality established a pilot project launching FJCs in four communities chosen to reflect B.C.'s "geographic and demographic diversity".<sup>320</sup> The FJCs were set up in Burnaby/New Westminster (a large, urban, multicultural community in the Lower Mainland), Kamloops (a relatively large, self-contained community in the Interior), Kitimat (a small, relatively remote northern community), and Nicola Valley (an aboriginal community in the Interior). The projects were to commence by July 1, 1994 and run for approximately 12 to 18 months. There were some delays and extensions, but ultimately, within the last year the four FJCs have become considered permanent government projects within their communities.

The concept behind FJCs is to open a front door to the justice system to families experiencing separation and to provide information and education about the family justice system and family breakdown which reflect the unique needs and interests of the community in which the family lives.<sup>321</sup> At face value, the concept seems to have the potential to address women's concerns that their unique stories of child caregiving are not being heard by the justice system. So one of my concerns about the family justice centres is whether or not this government initiated and funded concept of neighbourhood family justice promoting custody mediation and discouraging custody litigation provides women with anything new. Or do FJC's just perpetuate the same western liberal origins and assumptions about law, gender and motherhood which continue to oppress women? Another and perhaps more practical concern is whether or not the information gathered by the Breaking Up Report actually and accurately reflects clients' preferences for custody mediation and shared parenting. Is it possible the discussions and the

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<sup>320</sup> Province of British Columbia Ministry of Attorney General, "The Family Justice Reform Project", AGPMS-94038, March 1994 at 8.

<sup>321</sup> Breaking Up Report, supra note 196 at 92.

recommendations in the Report were summarized in a way that further perpetuated the patriarchal interests of government and its service providers. The process of information gathering itself may have contributed to the bias in favour of mediation and joint custody. I will address my second concern first.

The Breaking Up Report<sup>322</sup> states that the Working Group gathered information on separation and child-related issues by holding informal, open-ended workshops throughout various communities. The workshops were to have focused on the concerns and experiences encountered by clients<sup>323</sup> who had engaged with the justice system during the process of separation or divorce. They were to be comprised of a mix of 15 to 30 people (2/3 from the client group and 1/3 representing internal and external service providers).<sup>324</sup> At the workshops, comments and recommendations made by participants were recorded and summarized.

The methods used by the Report to gather information on what it refers to as "client-based"<sup>325</sup> concerns and recommendations about the family justice system and the interpretation of this information are highly questionable. The Working Group recognize that their process of information gathering did not meet,

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<sup>322</sup> There were 13 reports and studies considered by the Working Group but the Breaking Up Report was considered the most recent and significant in considering the FJC concept, Province of British Columbia Attorney General, supra note 196.

<sup>323</sup> "Clients" is the term used throughout the Report to identify the Workshop participants as those people who had used the family justice system in the past or were now using the system to deal with the legal issues of separation and divorce. Client does not include service providers, whether divorced or not.

<sup>324</sup> The Law Society of British Columbia did not formally participate but each group manager was to identify a family lawyer who might participate.

<sup>325</sup> Breaking Up Report, supra note 196 at 3.

...the standards and tests used to measure the reliability and validity of more empirical social and scientific research. It was not our intent to arrive at quantifiable and definitive solutions to the issues raised but to give the people who have used the services the best opportunity possible to reflect on their experiences and offer suggestions on how the "system" could be improved.<sup>326</sup>

Were the clients responding to topics designed to elicit strong anti-litigation, anti-lawyer responses? The Report repeatedly states that its veracity and validity are based on "what the client told us". There are examples of how "what the client told us" could have been summarized to fit a preconceived bias to mediation as being the most viable form of dispute resolution. For example, the Report states unequivocally that workshop participant "were most vocal about the need to have alternate dispute resolution services offered in a non-adversarial setting outside the courts"<sup>327</sup> and that "[w]hen clients discussed the concept of a CFJC, they made it clear that they value alternate dispute resolution as a method for resolving family conflict". How was alternate dispute resolution (hereinafter "ADR") defined? What was their experience with ADR? How was the issue put before them? If they were given the impression of having a choice between, "spending a large sum of money fighting in a prolonged custody battle and exposing all the skeletons in your closet" versus "attending a free, quick, nonaggressive, nonadversarial, private resolution to custody", I think the choice would be obvious. Were they given statistics on the percentage of custody cases that actually are litigated? Mediated? Resolved by negotiations or by the parents themselves? Were they led to believe that it is always in the best interests of children that a broken family be patched, maintaining a relationship with both parents? What were they told about other forms of

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<sup>326</sup> IBID., at 27.

<sup>327</sup> IBID., at 94.



ADR and why have they not been implemented in the FJCs as the Report suggests?<sup>328</sup>

I am sure that several more questions can be raised as to the reliability of the information gathered and its interpretation. My point is that the Report has chosen to rely on research that it has not adequately measured. And although the Working Group acknowledges this point, as I noted earlier in this section, it seeks to justify excluding any checks on reliability and validity by saying that it would have compromised the integrity of the participants' experiences. I disagree. Even if the Working Group was adverse to using traditional research methods, using feminist research methods such as feminist action research,<sup>329</sup> feminist oral history,<sup>330</sup> feminist survey research and other statistical research formats,<sup>331</sup> feminist ethnography,<sup>332</sup> feminist interview research,<sup>333</sup> or

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<sup>328</sup> IBID., at 21, wherein it is recommended that FJCs promote a range of dispute resolution alternatives that allow family members to choose the mechanism most compatible with their needs, financial abilities and legal requirements. This has not materialized. The FJCs offer only family mediation and conciliation services, see Ministry of Attorney General, Province of British Columbia, "Family Justice Centres: Services for Families Experiencing Separation and Divorce" Brochure # AGPMS94038. I was advised by the FJC directly that they only do mediation. The mediation was performed by Family Court Counselors who often did double duty as Probation Officers. They may have very limited training in mediation. IBID., at 7 and Gender Equality Report, supra note 233.

<sup>329</sup> Feminist action research can be defined as an action oriented study repudiating the status quo and oriented to social and individual change. The method is described and examples are given in Reinharz, supra note 8 at Chapter 10, 175-196.

<sup>330</sup> IBID., at Chapter 7, 126-144. There is some debate as to whether oral history exists as a separate entity or overlaps with the various disciplines. But if the method had been employed according to its design it would allow for experiences to be recorded with a greater degree of accuracy than that used in the Report.

<sup>331</sup> IBID., at Chapter 4, 76-94.

<sup>332</sup> IBID., at Chapter 3, 46-75. This alternative method focuses on the researcher's immersion in social settings, and aims for "intersubjective understanding between researchers and the person(s) studied" at 46. This method does not have to be at the sacrifice of reliability and it purports not to skew knowledge in an andocentric or male oriented way.

a multiplicity of feminist methods research<sup>334</sup> would have allowed the client-focused approach to have been maintained and more credible, meaningful results to have been obtained. The nature of feminist research methods is to ensure that both women's and men's experiences are assessed in a nonpositivist and nonpatriarchal manner transcending gender relations and the societies in which we live.<sup>335</sup> Learning and using feminist social research methods should not be difficult for a researcher because feminist methods build upon existing disciplines and traditional research methods to inform feminist methods:

Feminist social research...is research that requires a method supplied by the disciplines (e.g., experimentation, ethnography, survey research, content analysis) or created by the researcher (e.g., drama, genealogy, group diaries). That method is not supplied by feminism itself. The researcher has to learn the disciplinary methods, rules of logic, statistical procedures, procedures for "writing up" research projects, and whatever else is relevant to the field in which she wishes to work. She may learn them only to criticize them, but she has to learn them nonetheless.<sup>336</sup>

Another aspect of the Report which may have skewed the results, which state that the participants wanted mediation and shared parenting, is that the target ratio for the workshops (2/3 clients and 1/3 service providers) was not achieved. Further, this

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<sup>333</sup> IBID., at Chapter 2, 18-45. This method uses semi-structured or unstructured interviewing which serves as a qualitative data-gathering technique which, "differs from ethnography in not including long periods of researcher participation...and differs from survey research or structured interviewing by including free interaction between the researcher and interviewee" at 18. This method would again improve on the credibility of the results of the Breaking Up Report.

<sup>334</sup> IBID., at Chapter 11, 197-213 at 197. Feminist multiple methods research uses a variety of methods in order to generate multifaceted information.

<sup>335</sup> IBID., at 252.

<sup>336</sup> IBID., at 242 and 243.

information was not adequately presented in the narrative of the Report, except for a brief statement at the end that it was not always possible to achieve the ratio.<sup>337</sup> The statistics were only presented in the Tables, thus requiring a reader to decipher the statistical results.<sup>338</sup> The reader could also easily be misled into relying on the ratios presented in the section of the Report on "information gathering".<sup>339</sup> For example, in the workshop held in Vancouver, there were only six clients to seven service providers. More than 50% of the workshop participants were service providers. In the Kelowna workshop, there were seven service providers and only three clients. The ratio was greater than two service providers to every client. There is a potential problem that occurs because the Working Group does not attempt to differentiate between the experiences of two distinct groups (as in clients and service providers). The results of their research can become skewed because the service providers may bring into the workshop setting their professional biases which may support patriarchal systems. The Working Group makes assumptions about the clients being comfortable with the service providers but they do not provide any research or study on this point. They rely on "a feeling".<sup>340</sup> Would the stories of the service providers colonize the stories of the clients?

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<sup>337</sup> Breaking Up Report, supra note 196 at 35.

<sup>338</sup> IBID., at 40.

<sup>339</sup> IBID., at 28.

<sup>340</sup> IBID., at 30 & 31. Because there would be service providers and clients in the workshops, the Working Group initially felt that they should have conducted exercises around consensus-building to ensure that everyone's feelings were respected and that confrontation would be avoided. The Working Group concluded that consensus-building would not be necessary because they felt that they had spent a lot of time on the phone with potential participants(both clients and service providers) explaining that they wished everyone to feel comfortable. They state that taking this phone time to explain the

I question how the Working Group could have been so sure that there was no sense of “we/they” mentality between the clients and the service providers. But, the most distorted and disturbing statistic was that in the Prince George First Nations community workshop, there was only one client present! By contrast there were five service providers. The resulting ratio of 5/1 service providers to First Nation clients calls into question whether or not the First Nations community in Prince George was truly interested in government family justice reforms, let alone supportive of ADR, co-parenting or mediation as defined by the Report. Then, further complicating how workshop decisions were applied indiscriminately, Chinese-Canadian and the Indo-Canadian workshops were comprised of ONLY clients.<sup>341</sup> There were no service providers. I question why these workshops were confined in theory to only clients whereas the First Nations workshops were not. What cultural and ethnic considerations were at play? Were “cultural sensitivities” not considered as far as First Nations people were concerned?<sup>342</sup>

The statistics provided in the Report identify 228 women clients and only 38 male clients among the workshop participants. It would be interesting to see the difference, if any, in

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ground rules paid off and that the workshops were very conciliatory, congenial and respectful. They added the comment that, “[p]erhaps not surprisingly, many of the service providers had been divorced, and so they shared common experiences with the clients. There was no sense of a “we/they” mentality.”

<sup>341</sup> IBID., at 33. There were no service providers because community workers indicated that ethnic clients would not feel comfortable in the same workshop as service providers, as many of the problems associated with family breakdown are considered shameful. As well, men and women were not to be in the same group because of “cultural sensitivity”. As it turned out there were no male clients at all, at 34.

<sup>342</sup> IBID., at 34.

the workshop concerns and recommendations enunciated by women and men clients that were quoted and/or summarized in the Report. In Chapter Four I presented research showing that in mediation the first story told was normalized, thereby colonizing the second story.<sup>343</sup> I also presented research that suggested that the male story was most often taken to be the dominant story. Would these results also apply by analogy to a workshop scenario? Would the male concerns colonize the female concerns despite there being a far greater number of female participants? Were male or female comments proportionately quoted in the Report? We are not given statistics as to the number of male and female service providers attending at the workshops. A number of significant questions arise as to why this information was not provided. One question that arises is whether male and female service provider concerns were constructed differently. If so, were the male service provider concerns enunciated more often than those of female service providers? The Working Group itself states that right and wrong comments were not the concern of the Report but rather that it was preferable to identify participants' perceptions of the justice system.<sup>344</sup> Therefore the participants' perceptions should have been more reliably and accurately presented. This may have helped to allay some of the concerns that I present. The use of feminist research methods would have been one way of accomplishing this.

One final concern that should be noted is that the Report states that it recognizes that ADR may not be appropriate in cases where power imbalances exist between parties or

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<sup>343</sup> See research results of Cobb and Rifkin, supra note 300.

<sup>344</sup> Breaking Up Report, supra note 196 at 41.

where family violence has occurred.<sup>345</sup> The Working Group also states that it is its position that government should consider amending existing legislation to state that when a child has witnessed family violence, it should be considered a factor in determining custody.<sup>346</sup> Both these positions are a positive step in the interests of women; however, the Report also supports Washington State's assumptions that proceeded its The Parenting Act.<sup>347</sup>

Cases in which there is substantial ground for concern about child abuse or neglect should be isolated for special treatment. In all other cases, both parents are to be presumed fit. They should be encouraged to agree on both residential issues and the process for making decisions about the child's upbringing.<sup>348</sup>

This statement is problematic because it is indicative of the attitude that does not recognize power imbalances between men and women. There is a failure to recognize that inequality of bargaining can exist because of the more systemic marginalization that women confront in issues of child care and poverty and abuse. Despite legislation in the Washington State Parenting Act (26.09.191- Restrictions in temporary or permanent parenting plans) that put limits on mutual decision making and dispute resolution other than court where a history of domestic violence has been revealed or alleged, Section 10 is largely unenforceable because it only comes into consideration if it is noted as a "Section 10 limitation" in the parenting plan. And it will only be noted if both the spouse and the lawyer agree. The lawyer may not believe the allegations of abuse. Issues of

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<sup>345</sup> IBID., at 96-7, 100 & 148-9.

<sup>346</sup> IBID., at 9.

<sup>347</sup> Washington State's Parenting Act, supra note 196 for information on parenting plans.

and the lawyer agree. The lawyer may not believe the allegations of abuse. Issues of confidentiality and disclosure arise when a spouse remains silent about the abuse or asks that it not be disclosed. The Parenting Act places the onus on the abused party to disclose rather than on the court or lawyer to inquire during negotiations. This problem also presents in mediation. Hilary Astor notes the problems with the silence of fear in abused women.<sup>349</sup>

At the beginning of the section I asked if the FJCs provided anything new and empowering for mothers in child custody litigation and mediation. The Report is quite clear that it is pro-mediation and anti-litigation. The FJCs promote the concept of co-parenting and mediation. For example, in November, 1994, I attended at the Burnaby/New Westminster FJC. I was given a poster advertising a "Parent Education and Peer Support Group" which stated that, "[t]he task of continuing to co-parent while experiencing the emotional, social and financial turmoil of the separation process can be a difficult burden" (my emphasis).<sup>350</sup> The group assisted separating parents with co-

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<sup>349</sup> See Ellis, supra note 196 at 108-113 & 145-168 & specifically 152-156. Also see Hilary Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M. Thornton, ed., Public and Private: Feminist Legal Design (Melbourne: Oxford University Press, 1995) 174-196 at 174-5 and 184-190, wherein she observes that there are likely many cases that find their way into mediation where violence has occurred or remains a continual threat to women but that the woman has kept her silence about the violence for any of many reasons. She may be afraid of the "parking lot violence" that may occur before mediation. In this situation, the woman is threatened or beaten into remaining silent about violence. (This happened in the second story of Jane when she was stalked.) She may keep silent believing that it will never happen again or believing that matters will settle more quickly. Whatever her reason for silence, mediation cannot screen it out or provide for an equal bargain when there is silence. This begs the question whether mediation should ever be used as long as there is a risk of the silence of abuse slipping into the process.

parenting, obviously holding it out to be the norm for separating parents. I have argued throughout my thesis that the promotion of joint custody and the methods used in mediation devalue the caregiving that mothers do and laud any efforts fathers make at child care. Based on my limited observations, the devaluation of motherwork may be perpetuated at the FJCs.<sup>351</sup>

My conclusion is that, on a balance, the FJCs in British Columbia have not provided women with any new empowerment in child custody issues nor do they work at eliminating ideologies which essentialize maternal caregiving. Further, they purport to be largely premised on the Report, which in itself, has not convincingly or reliably presented valid information on the ADR interests of the representative sample. The FJCs are a good example of how difficult it is to assist women without first changing ideologies about motherhood and caregiving. In the next section, I will address feminist conceptions of caring which may work towards creating a space for feminism in custody

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<sup>350</sup> It is interesting to note that at the bottom of the poster it stated that, "Child Care Services are NOT available"! Considering that the Report's first of fifty-five recommendations contained the statement that FJCs, "be physically designed to accommodate children who accompany their parent/parents", supra note 196 at 92. I consider the lack of child care ironic.

<sup>351</sup> During my two hour visit at the FJC, I also observed that there were no clients. Two of the five mediators were obviously engaged in non work related activities i.e. reading the newspaper. I was told that most of the clients were referrals from Legal Aid and that there were virtually no walk-in clients. This raises questions as to whether the FJC is actually a front door to family services serving the unique needs of the community or is it merely a government service designed to take up the slack of an over burdened Legal Aid service. Is it partly motivated by monetary concerns? Is it a service that colonizes women who cannot afford the services of a lawyer? Does it force women into accepting its policy of co-parenting? There are several issues that arise as to whether or not the FJCs work to empower women. I will not be addressing these issues in my thesis, except in a limited manner at the end of this section, but I feel it necessary to draw the readers attention to the existence of these issues.



litigation and mediation.

### III. FEMINIST CONCEPTIONS OF CARING

Feminists have not been idle in attempting to find ways for women to transcend exclusive caregiving roles without undervaluing women or caregiving. They have been addressing the construction of woman and mother in the family and formulating theories of caregiving which take steps to free women from oppressive ideological constraints of caregiving work. Different types and ways of maternal caregiving have been theorized, written about and practised by feminists. In the next section, I will explore the works of feminists Martha Fineman, Carol Smart, Anne Marie Delorey, Toni Morrison, Ursula LeGuin and Shulamith Firestone.<sup>352</sup> These works are important in helping women to conceptualize new ways of viewing maternal caregiving that may empower women in child custody disputes.

#### A. THE MOTHER/CHILD METAPHOR

In The Neutered Mother, Martha Fineman speaks of a new definition of a "core family unit" which makes family and sexuality nonconfluent :

[R]ather, the mother-child formation would be the "natural" or core family unit - it would be the base entity around which social policy and legal rules are fashioned. The intergenerational, nonsexual organization of intimacy is what would be protected and privileged in law and policy.<sup>353</sup>

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<sup>352</sup> The work of each feminist will be cited as they arise in the next sections.

<sup>353</sup> Fineman, supra note 12 at 5-6.

In the Introductory chapter, I clarify that Fineman uses the Mother/Child metaphor as a symbolic embodiment of nurturing because as a cultural symbol its positive aspects exemplify caretaking.<sup>354</sup> In her dyad she focuses on all inevitable dependencies that traditionally go undervalued both inside and outside of the family. She uses the Mother/Child pairing in a non-gendered way. Mother may be a male. Child may be an elderly, ill or disabled person. Within the core family unit the caregiving paradigm is the mother and child relationship.<sup>355</sup> She desexes the family. No legal privileges are based on sex.<sup>356</sup> (Or in other words marriage!) Fineman challenges assumptions about the male's role in the family as being defined in terms of sexual affiliation with the female. In her Mother/Child formation, sexual affiliation does not constitute family. Men do have family roles as sons, brothers, uncles and grandfathers.<sup>357</sup> And, there may be males who are either sexually or non-sexually affiliated with the mother and/or child who may have caring relationships within this structure. I accept Fineman's metaphor of the Mother/Child dyad and her concept of its gender neutrality but for the purposes of my thesis, as noted in the Introduction and in the previous chapters, I focus on the literal mother and child relationship and maternal connections because in our society women, as compared to men, are still responsible for the majority of child care. I will refer to this relationship as the mother-child dyad.

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<sup>354</sup> IBID., at 8-9 at 234.

<sup>355</sup> IBID., at 234-5.

<sup>356</sup> IBID., at 4-6.

<sup>357</sup> Arguably fathers, too, can have a role to play with children but according to Fineman, it is not to be based upon a "right" of paternity. Eliminating paternity as a consideration or "desexing" the family can become conceptually difficult when explaining why grandfathers, uncles and brothers would even take an interest in children that are "related" to them. They may not have a sexual affiliation with the mother but their interest no doubt partly arises from a related male's sexual affiliation with the mother. This is just one example of a conceptual difficulty with Fineman's paradigm.

Toni Morrison's 1988 Pulitzer Prize winning novel, Beloved,<sup>358</sup> explores the meaning of "care" for Sethe, a 19<sup>th</sup> century African-American slave mother. In Beloved, Morrison explores the placing of males within the family unit as sons or brothers in caring roles rather than sexual roles, "Halle was more like a brother than a husband. His care suggested a family relationship rather than a man's laying claim."<sup>359</sup> Halle is Sethe's husband who is the biological father to all her children. Yet, his membership in the "family" is not based exclusively on a sexual relationship, but rather on his capacity to care. Halle's mother, Baby Suggs, has had six different fathers for her eight children, conceiving some of them by having been raped by white men. It is her son, Halle, and not any of the fathers, who sells himself to buy his mother's freedom from slavery. This causes Baby Suggs, in later life to muse, "A man ain't nothing but a man...But a son? Well now, that's somebody."<sup>360</sup>

By contrast to men's care within the family not being seen as inherent in the concept of paternity, the essence of women's care is seen as maternal and nurturing. Sethe observes,

Anybody could smell me long before he saw me. And when he saw me he'd see the drops of it on the front of my dress. Nothing I could do about that. All I knew was I had to get milk to my baby girl. Nobody was going to nurse her for me. Nobody was going to get it to her fast enough, or take it away when she had enough and didn't know it...Nobody knew that but me and nobody had her milk but me.<sup>361</sup>

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<sup>358</sup> Toni Morrison, Beloved (New York: Plume, Penguin Publishers, 1988). She has killed her own baby rather than see her taken back into slavery.

<sup>359</sup> IBID., at 25.

<sup>360</sup> IBID., at 23.

<sup>361</sup> IBID., at 16.

Sethe goes on to describe how she was beaten and raped by a group of white men while she was pregnant and also nursing. It was not the rape and beating that she considered to be the most painful violation of her body; it was the fact that these white men viciously sucked her milk from her "'...and they took my milk.'", 'They beat you and you was pregnant?', 'And they took my milk.''<sup>362</sup> (my emphasis). Literally and metaphorically, these white men broke the family bond. Mother and Child became disunited. Perhaps, Sethe's words, "And they took my milk," are like the auger to the fate of 20th century motherhood. We now must look forward to a mother and child reunion.

Fineman makes the point that if marriage (the sexual tie) was taken right out of the law as a legal construct, it would repave the way for family law and policy to be constructed and treated legally with the Mother/Child metaphor at its base. This creative reorganization would obviously affect the process of custody litigation and mediation as it is now understood and practised. The dyad to focus on would not be the husband/wife or the mother/father but, rather, the Mother/Child.

But, there are foreseeable problems with Fineman's paradigm. Dispute resolution will always be relevant to people and societies. One can envision disputes based on the recognition of the right of entry into the core family unit. How will membership be determined? Will it be the relationship to the mother or to the child, or both, either exclusively, independently or simultaneously, which defines membership? Obviously, there would be changing membership, but which is it, the mother or child which is the

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<sup>362</sup> IBID., at 17.

pith of the core? What begins or ends the family unit: symbiosis, codependency or the caretaking need? One could also be part of many families simultaneously, as would a mother with many children. Competing interests between different families would have to be sifted through and could lead to disputes. But, in any event, Fineman's fecund thinking attempts to transcend patriarchal and gendered oppression within the dynamics of family.

Reconceptualizing the family as the Mother/Child dyad places the relationship of the mother and child at centre. Mother and child are looked at in unison with their relationship being connected potentially with a variety of others. This way of looking at the relationship is more empowering for women because it recognizes the care that they give to their children. As well, all their maternal connections are valued as sustaining and nurturing the symbiotic relationship. The litigation and mediation of child custody would eventually become a moot point if Fineman's move to end family law as we know it occurred," [t]his caretaking dyad would replace the historic dyad of the heterosexual married couple as the core intimate family unit upon which family policy and law are constructed."<sup>363</sup>

But in the interim, the Mother/Child dyad could still be useful in informing the legal processes of child custody mediation and litigation. For example, the best interests of the child test (the welfare principle) which I have argued is used presently in many instances to gain "rights" and control for fathers would not be the appropriate test to apply because rights to children based on a sexual connection between parents would not be supportable without evidence of a nurturing or other supportive connection to the

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<sup>363</sup> Fineman, supra note 12 at 8 wherein talks about her utopian revisioning of family.

mother-child dyad.<sup>364</sup> The supportive connection that would/should be considered to give rise to custody rights would/should not be based on sustaining a post divorce continuing relationship between the adults<sup>365</sup> but rather on the connections that the mother-child dyad has nurtured and maintained to ensure its survival and growth. In Chapters Three and Four, I spoke of the method of FUTURE FOCUSING used by the courts and mediators to help determine the “best interests” of the child. I showed how future focusing can empower men who have previously not been actively involved in the care of their children (or not as actively involved as the mother).<sup>366</sup> Essentially, I have argued that future focusing can give men rights without responsibilities, as was the case in Chapter Three when Jane’s husband’s mother would be watching the children for him while he worked or pursued other interests. Remember that he had admitted that he had had little interest in his children. In mediation, I gave the example of how a mediator encouraged the mother of a diabetic girl to agree to joint custody under the thinly veiled threat that she would be seen as a “bad” mother if she did not. In that situation, not only had the father not contributed to his daughter’s care, his daughter did not feel comfortable with him. If the Mother/Child relationship is used as the focus of a future inquiry into the child’s “best interests”, relationships that have not provided value to the support of the mother-child dyad would not be improperly elevated.

If the mother-child dyad was the court’s focus in custody litigation, one of the tasks for the feminist lawyer would be to use feminist practical reasoning to map out the significant relationships in the lives of the mother and child and to inform the court practically why the father might not be entitled to custody, joint custody or even access

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<sup>364</sup> See Chapter 4, Part II.

<sup>365</sup> The post divorce continuing relationship was discussed in Chapter 4, Part II.

<sup>366</sup> See Chapter 3, Part III for the stories of Jane and Chapter 4, Part III, Section B on Future Focusing.

because he does not fare significantly in the mother-child dyad. Using a mother's evidence, maternal and child connections would be presented to the court emphasizing how the care, nurturing and work provided in the mother-child dyad would be devalued by the court if not recognized and also how the mother-child dyad would be devalued if the father's non-involvement is recognized by giving him custody rights that do not reflect his level of involvement with the mother-child dyad. Lawyers should also draw on social science studies and research that recognize the hidden and under-valued work that women do and the second shift that they take on when they come home from work.<sup>367</sup> This research would help to confront the father who challenges that he is the one who provides the primary care. In social research studies there is information that would set up a presumption against the father being considered as part of the mother-child dyad. If he can rebut the presumption, then the dyad does provide for his inclusion. Cases which support custody decisions based on looking at the mother-child dyad or similar concepts that look at the devaluation of maternal caregiving are severely limited at this time. But with constant legal argument and appeals that argue that the maternal connections of the child must be assessed on a practical inquiry that empowers women in their caregiving, it is possible that there will be more reported cases.<sup>368</sup> The fact that lawyers can use methods such as feminist practical reasoning and asking the woman question allows for the creative distinguishing of the facts of cases that may potentially encourage judges to listen to well-presented alternative

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<sup>367</sup> The Supreme Court of Canada decision in Moge v. Moge [1992] 3 S.C.R. 813 deals extensively with the "feminization of poverty" which provided a way of enhancing judicial notice of how women and children are economically marginalized after separation. This is a step in the right direction.

<sup>368</sup> For an example where single mothers' contributions to child caregiving are recognized by the courts see the comments of Madame Justice Bowman in Brockie v. Brockie (1987) 5 R.F.L. (3<sup>rd</sup>) 440 at 462-466 and also referred to in the Moge decision wherein she recognizes all the extra work that women do to ensure the preservation of the mother-child unit after separation.

visions of family such as the Mother/Child dyad. Conversely, it has been argued that precedent setting rules such as stare decisis hinder the court's ability to envision change.<sup>369</sup> The feminist lawyer will have the task to prove to the court that the unique woman's story of caregiving that she presents is worthy of consideration on a distinguishment of facts.

In the mediation of custody disputes it is not as clear to me how the use of the mother-child dyad could be introduced. The concept would lend itself well to the mediation setting because there are no judicial precedents which would prevent the mediator from looking at different visions of family. Yet, there is no way to ensure that the woman's story will be heard. The lawyer or another advocate of the woman is not present in court-affiliated mediation. Perhaps the possibility of having any interested parent's lawyer or some other champion present would ensure that the woman's story is heard.

In conclusion of this section, I reiterate my position that the legal system disempowers women but that for the time being, we must live and work with it to help women achieve some degree of result that better fits their child care stories. The alternative, waiting until the patriarchal ideologies that define our society change, is unacceptable and unrealistic! The Mother/Child (and the mother-child) dyad provides a focus for looking at maternal connections and nurturing in a more empowering way. I do not tout it as the best or only approach. It is simply one approach to try that does allow the use of feminist methodology and is worthy of consideration.

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<sup>369</sup> An argument can also be made that rules such as stare decisis, "give content to the primacy of precedent and compel adherence to the status quo, thus ensuring that revolutions in conceptualization seldom occur." Martha Albertson Fineman and Isabel Karpin, eds., Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood (New York: Columbia University Press, 1995) at xii.



## B. "CARING FOR" v. "CARING ABOUT"

Carol Smart identifies "how to be heard" as the hardest problem that faces mothers' engagement with law:

Although the repertoire of maternal instinct is alive and well in everyday life, it is increasingly an exhausted script in the divorce courts and the solicitor's offices... This does not mean mothers are saying nothing only that what they say in relation to motherhood cannot be heard or will not register because legitimate speech is in the mouths of those whose subject position has been freshly constituted. Mothers may make recourse to the previously acceptable language of maternal love or instinct, but this is now discredited and is made to appear as self-interest speaking.<sup>370</sup>

Smart's observes that speaking about mothercare is being "silenced by the dominant discourse of contemporary family law. This silenced discourse is what may be referred to as the moral discourse of care."<sup>371</sup> Reference has been made throughout my thesis to the fact that the voice of mother - the maternal caring actions- are largely ignored and/or silenced in both the litigation and mediation of child custody. In particular, context is given to this argument by the telling of the two stories of Jane in Chapter 3. Each story illustrates that the large amount of work that women do - the "caring for" work- is lost in the legal rhetoric of the "caring about" work that men typically have the luxury of doing more. In Chapter Two, I introduced the reader to Smart's use of Joan Tronto's moral discourse of care where the WORK of CARING FOR is primarily done by mothers as contrasted to the ABSTRACT concept of CARING ABOUT which they say

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<sup>370</sup> Carol Smart, "The Legal and Moral Ordering of Child Custody" (1991)18:4 Journal of Law and Sociology at 486 and see Selma Sevenhujsen, "Fatherhood and the Political Theory of Rights: Theoretical Perspectives in Feminism" (1986) 14 International J. of the Sociology of Law 329-340.

<sup>371</sup> IBID., at 487.

is more often claimed by men.<sup>372</sup> In this section I hope to illustrate the difference that the two different types of caring have in the way custody determinations are and should be made.

Carol Smart claims that society places "caring about" above "caring for" and "turn(s) the moral claims which rest on acts of caring into self interest."<sup>373</sup> Smart's solution is to understand women's (and some men's) voices about "caring for" as being non-synonymous to "caring about" by using a different conceptual framework. "Caring for" (the practicalities and responsibilities of caring) should not be used by the legal system and other social systems as a reiteration of the ideology of motherhood and maternal instinct. Traditionally, women's caretaking is looked at as "caring for", a natural acknowledgment that needs no acknowledgment while men's "caring about" is seen as having a higher morality and as based more on concern and friendship with their children rather than on the day-to-day tasks and nurturing work that women most often do.<sup>374</sup>

Smart's research showed that "the parents who had 'cared about' but did little 'caring for' often seemed angry at the emotional and practical work suddenly required in separation."<sup>375</sup> It also showed that a lot of invisible work was shared by parents who

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<sup>372</sup> See Chapter 2, Part II, Section B, and IBID., at 489.

<sup>373</sup> IBID., at 491.

<sup>374</sup> Although neither Smart nor Tronto say the following explicitly, I believe that the moral discourse of care does not claim that women do not do CARING ABOUT or that men do not do CARING FOR. It is arguable that women do both types of caring and that the extra "caring for" work that they do is largely ignored by the legal system. By contrast, it can be argued that men consider their "caring about" work to be largely in lieu of any need to "care for".

<sup>375</sup> IBID., at 496.

had actually successfully joint parented before separation - all the extra work of planning and negotiating (versus fathers who had had little involvement in their children's care). Smart found, too, that some women "covered up" for fathers, allowing them to keep on only "caring about" after separation. Other women, who felt their husbands had abrogated their duties in the relationship, did not do "cover up work". They did not discourage men from doing "caring for" work, they simply refused to do it for the men and sustain "the father's status in the eyes of their children."<sup>376</sup> However, Smart concluded that in both litigation and mediation, the father's moral claim was often equated to the welfare principle (best interests of the child) and consequently the welfare principle was often used to override the moral principle of "caring for". Thus mothers were expected to preserve father's relationships (even "bad fathers") at all costs or be branded as "bad or vindictive mothers".<sup>377</sup>

Alternatively, the issue became transformed by solicitors and conciliators into a question of welfare, the children were put center stage thus quite marginalizing the mother and avoiding any discussion of pre-divorce child care arrangements. This could deflect conflict but it still rendered the work of 'caring for' an unspoken and unspeakable element in the debate.<sup>378</sup>

Smart's research on the moral discourse of care can possibly assist women in their

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<sup>376</sup> IBID., at 497.

<sup>377</sup> IBID., at 496.

<sup>378</sup> IBID., at 498. And consider Delorey, supra note 251 at 43. Similar to Smart's observation that lawyers and conciliators focus on the welfare principle which too often allows bad fathering to be deflected is Anne Marie Delorey's observation that in situations of joint legal custody where the mother does the primary caregiving, a veto power over caregiving decisions is given to the non-caregiver by the judge and the caregiver is often reduced to a puppet because, "Joint legal custody gives rights with responsibilities to mothers, but it gives rights without responsibility to fathers. Mere legal control of children is simply an assignment of power, and when this type of power is given to fathers, judges are merely reinforcing patriarchal power."

awareness that there are two very different ways of caring for children. It appears that the courts and mediation appear to make the assumption that anyone can do the “caring for” that children need and therefore it has not become an important part of the best interests test. Instead the legal weight is placed on “caring about” which is considered worth preserving between a father and child, even to the point of fictionalizing. The fiction is created, for example when in Smart’s research, mothers allowed fathers to continue “caring about” by mother continuing all the “caring for” work that father should have been doing after the separation. Another example is when mothers make excuses to their children concerning their father’s lack of “caring about” behavior in order to protect their children from being hurt.

A third example that illustrates mother’s “caring for” work being rendered invisible is in the mediation method of SUMMARIZING.<sup>379</sup> The mediator tries to find symmetry in the two stories of child care and then collapses and recontextualizes important events in the plot. The mundane details of “caring about” are easily envisioned as irrelevant and dropped. Fatherhood statements such as, “You know Jane, that I would give my right arm for the kid! Go ahead, tell her.” and “Remember that time there Jane that I took him to the zoo! Go ahead, tell her” can easily dominate the overall story. The sheer sentimentality and seeming strength of these statements are good examples of how the mother’s story pales by comparison to the father’s. (She made their lunches for them to take to the zoo and finished up the week’s laundry that Sunday afternoon while they were out).

What women can glean from these examples is that their stories will remain unheard in the courts and mediation unless they can convincingly holler about the importance of the

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<sup>379</sup> See the section on deconstructing the methods used in mediation and specifically SUMMARIZING in Chapter 4.

mundane as well as the more exciting details of their "caring for" work. Women should have their lawyer tell the court about the importance of the plethora of things that they "care for" as well as how they "care about" their children. I am not optimistic that anything can be done in mediation in the immediate future because there is no one there to advocate the story of the woman. As in the Mother/Child metaphor, the small changes that can be done now are primarily in the litigation of custody and these small changes are largely dependent on lawyers who are willing and able to expand consciousness and perception by gaining insight into how to construct arguments for mothers from feminist analysis, such as that provided by Smart.

A practical approach for the lawyer to take in the courtroom is to ask the woman question: "How is woman as mother left out of the examination of the best interests of the child?"<sup>380</sup> (The answer is that the "caring for" work that she performs is not considered important because she is expected to do it.) The next part of the woman question is to ask how this omission might be corrected? (The answer is to show the court that they can correct their exclusion by asking why they consider "caring about" work to be more important and why they undervalue both the "caring for" and "caring about" work that women do.) The third part to the woman question is to consider what difference including woman in the consideration would make? (The answer could be that by the court doing so they would be better considering the child's best interest.) The lawyer can frame the questions and the answers to meet the result that she wishes to get. There is no one correct answer and the answer that will be arrived at is "situated provisionally" as Bartlett has pointed out.<sup>381</sup> This makes it an attractive stance for mothers to take in custody litigation when they do not want their stories to be

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<sup>380</sup> Bartlett, supra note 153 at 837.

<sup>381</sup> IBID., at 877.

essentialized.<sup>382</sup> It remains somewhat dubious whether women would get a proper hearing from the court, but by making the effort of asking the woman question the lawyer at the very least establishes a record of the efforts made.

### C. MOTHERCARE AND FATHERCARE - EITHER, BOTH, OR NEITHER

In this section I will present a discussion on utopian conceptions of mother, father, and family present in certain feminist nonfiction and fiction writing in order to emphasize the importance of transcending the spaces that have been created by patriarchal and gendered traditional disciplines. Answers to alternative legal constructions of family may be found in other disciplines and in earlier feminist writings. At the very least, negotiating these spaces can stir the imagination to think about new ways of constructing family which are more conducive to the interests of mothers and children in custody litigation and mediation.

An alternative conception of women, children and family was presented over twenty-five years ago by Shulamith Firestone.<sup>383</sup> Her position was that both the biological and patriarchal nuclear family would need to be eliminated in order to give women and children total independence. Her work recognized the gendered nature of caretaking relationships as they extended to children. One of her ideas was that she envisioned a

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<sup>382</sup> *IBID.*, at 877-886. Positionality is a feminist stance on knowledge that situates the truth or "being right at law" provisionally.

<sup>383</sup> Firestone, *supra* note 9 at 52.

concept of family as a "household" and in this respect it was similar to Martha Fineman's work on the desexed family because the biological parents did not necessarily stay involved in the children's care and in particular the fathers did not stay involved.<sup>384</sup> Firestone's concepts were considered radical because she proposed revolution (a complete breakdown of the family). Firestone viewed that the most important characteristic of any revolution was its ability to remain flexible, proposing "...multiple options to exist simultaneously, interweaving with each other, some transitional, others far into the future. An individual may choose one 'lifestyle' for one decade, and prefer another at another period."<sup>385</sup> Two of the options she presented were labeled: single professions and living together.<sup>386</sup> To this point, children were left out of the analysis. She then presented "Households" as a system to satisfy the needs of children and reproduction.<sup>387</sup> Firestone's goal was to present a revolutionist's alternative to family. She cynically stated that the classic trap for a revolutionary was always, what's your

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<sup>384</sup> IBID., at 214-224.

<sup>385</sup> IBID., at 214 and 212.

<sup>386</sup> IBID., at 214. A "single profession" was chosen by people who did not want a partner relationship but did want a career. It did not exclude others from having a profession. "Living together" was the loose social form in which, "two or more partners, of whatever sex, enter a non-legal sex/companion arrangement, the duration which varies with the internal dynamics of the relationship." The non-legal relationship as used by Firestone meant legally unrecognized and NOT illegal.

<sup>387</sup> IBID., at 214; See at 214-224 a comprehensive account of "Household" defined as the proportion of the population who wish to live at any given time in reproductive social structures,

This unit I shall call a HOUSEHOLD rather than an extended family. The distinction is important: the word FAMILY implies biological reproduction and some degree of division of labour by sex, and thus the traditional dependencies and resulting power relations, extended over generations... 'household', connotes only a large grouping of people living

alternative? “[b]ut even if you COULD provide the interrogator with a blueprint, this does not mean he would use it, in most cases he is not sincere in wanting to know.”<sup>388</sup>

Firestone presented three reasons why concrete proposals for change in the social structure of family would be difficult: “[t]here have been no precedents in history for feminist revolution; there has been no utopian feminist literature and the nature of the family unit is it penetrates the individual more deeply than any other social organization.”<sup>389</sup> Despite her statement that there was no feminist utopian literature, Firestone’s own ideas were utopian and there actually was feminist utopian literature in existence.

Utopian feminist literature questioning existing ideologies and constructing alternative visions of family and mother were available at the time of her writing. In 1969, Ursula K. Le Guin had published her Hugo and Nebula Award winning science fiction novel.<sup>390</sup> In The Left Hand of Darkness, winter is a world where not quite hermaphrodites, not quite humans, confront a murderous Ice Age cold. LeGuin creates a vision of a world free from the socio/psycho gendered causes and effects of sex, motherhood, fatherhood, rape, war and freedom of choice. There, difference is recognized as important, essential, balanced, shared, doubly enjoyed and revered:

I can be both mother and father, (either, both or neither)- but regardless of I, mother exists, child bearing is recognized...[N]o one is tied down to

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together for an unspecified time, and with no specified set of interpersonal relations...

<sup>388</sup> IBID., at 210-211.

<sup>389</sup> IBID., at 211.

<sup>390</sup> Ursula K. LeGuin, The Left Hand of Darkness (New York: Ace Books, 1969)



childbearing as a woman is elsewhere. These people do not underscore sexuality, male and female is latent in each...A person can be both mother and father. Winter envisions equality, burden and privilege as shared out equally, yet it escapes the trap of equating women to men as the standard of equality...Therefore nobody is quite so free as a free male anywhere else.<sup>391</sup>

#### IV. KINSCRIPTS - KINCARE

Between 1968 and 1990, an ethnographic study of rural and urban, low-income, multigenerational, black, extended families in the northeastern, southeastern and Midwestern United States was undertaken.<sup>392</sup> This study revealed that caring for kin in these families is shared among male and female adults, elders and children. This shared mothering has been characteristic of African-American communities since slavery.<sup>393</sup> Carol Stack and Linda Burton introduce KINSCRIPTS as,

[A] framework representing the interplay of family ideology, norms, and behaviours over the life course. Kinscripts encompasses three culturally defined family domains: KIN-WORK, which is the labour and the tasks that families need to accomplish to survive from generation to generation; KIN-TIME, which is the temporal and sequential ordering of family transitions; and KIN-SCRIPTION, which is the process of assigning kin-work to family members.<sup>394</sup>

The KINSCRIPTS paradigm might be instructive to both custody litigation and court-

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<sup>391</sup> IBID., at 96 and 98.

<sup>392</sup> Carol B. Stack and Linda M. Burton, "Kinscripts: Reflections on Family, Generation, and Culture" in Evelyn Nakano Glenn, Grace Chang, and Linda Rennie Forcey, eds. Mothering: Ideology, Experience, and Agency (New York and London: Routledge, 1994) 33-44.

<sup>393</sup> Carol Stack, All Our Kin (New York: Harper Row, 1976); and Deborah Gray White, Ar'n't I a Woman: Female Slaves in the Plantation South (New York: Norton, 1985)

<sup>394</sup> Stack and Burton, supra note 392 at 33.

affiliated mediation because it introduces the concept of involving the entire family and those intimately involved in a child's care in these processes. Aside from the ethnographic study, KINSCRIPTS is also derived in part from the family life course perspective,<sup>395</sup> studies of kinship<sup>396</sup> and literature on family scripts.<sup>397</sup> Based on the premise that families have their own agendas, interpretation of cultural norms and stories,<sup>398</sup> families assist individual members in constructing not only their personal life courses, but also in the process, families as collectives create a life course of their

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<sup>395</sup> See: Joan Aldous, "Family Development and the Life Course: Two Perspectives on Family Change" (1990) 52:3 *Journal of Marriage and the Family* 571-583; Glen H. Jr. Elder, "Families and Lives: Some Developments in Life-Course Studies" (1987) 12 *Journal of Family History* 179-199; Gunhild O. Hagestad, "Social Perspectives on the Life Course" in Robert K. Binstock and Linda K. George, eds. Handbook of Aging and the Social Sciences Third Edition (New York: Cambridge University Press, 1990); Tamara K. Hareven, "Family Time and Industrial Time: The Relationship Between the Family and Work in a New England Industrial Community" (New York: Cambridge University Press, 1982); "Historical Changes in the Social Construction of the Life Course" (1986) 29:3 *Human Development* 171-180.

<sup>396</sup> Joyce Aschenbrenner, Lifelines: Black Families in Chicago (New York: Holt, Rinehart, and Winston, 1975); Micela Di Leonardo, "The Female World of Cards and Holidays: Women, Families and the Work of Kinship" (1986) 12 *Signs: Journal of Women in Culture and Society* 440-453; John Hinnant, "Ritualization of the Life Cycle" in C.L. Fry and J. Kieth, eds. New Methods for Old Age Research (Mass: Bergin and Garvey, 1986)

<sup>397</sup> See: John Byng-Hall, "The Family Script: A Useful Bridge Between Theory and Practice" (1985) 7 *Journal of Family Therapy* 301-305; John Byng-Hall, "Scripts and Legends in Families and Family Therapy" (1988) 27 *Family Process*, 167-179; C.M. Steiner, Scripts People Live: Transactional Analysis of Life Scripts (New York: Grove Press, 1976).

<sup>398</sup> Gunhild O. Hagestad, "Dimensions of Time and the Family" (1986) 29 *American Behavioral Scientist* 679-694; David Reiss, The Family's Construction of Reality (Cambridge, MA: Harvard University Press, 1981); David Reiss and Mary Ellen Oliveri, "The Family's Construction of Social Reality and Its Ties to Its Kin Network: and Explorations of Causal Direction" (1983) 45 *Journal of Marriage and the Family* 81-91; and Charles Telly, "Family History, Social History, and Social Change" (1987) 12 *Journal of Family History* 320-329.

own.<sup>399</sup> The KINSCRIPTS framework was developed to organize and interpret qualitative observations:

- (a) the temporal and interdependent dimensions of family role transitions;
- (b) the creation and intergenerational transmission of family norms; and
- (c) the dynamics of negotiation, exchange, and conflict within families as they construct their life course.<sup>400</sup>

KINSCRIPTS can be a useful framework for both the mediation and litigation of child custody decision making. It addresses basic questions concerning how families and individuals negotiate, construct and reconstruct their life courses. Some of the issues that African American, immigrant and First Nations families have historically wrestled with in juggling work and family roles for mothers, women, single parenthood, extended family relationships and poverty have only begun to have relevance to the mainstream and nuclear family. This makes KINSCRIPTS useful not only for the study of the variety of family forms present in our society<sup>401</sup> but also for an action-oriented approach to developing a family picture of how family responsibilities are worked out among members. This picture can inform courts and mediators on their methods of child custody decision making. I will present an example of how each script can inform the litigation or mediation about motherwork.

KIN-WORK is the collective labour expected of family networks over time. This may require members to cross back and forth over the public-private divide, including wage and non-wage labour. It is defined as self-sacrificing and hard work. It ensures the

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<sup>399</sup> Susan C. Watkins, "On Measuring Transitions and Turning Points" (1980) 13:3 Historical Methods 181-186

<sup>400</sup> Stack and Burton, supra note 392 at 34.

<sup>401</sup> IBID., at 34.

survival of the collective. It may provide family labour for reproduction, intergenerational care or a migratory support network across geographical boundaries in order to allow some members to send remittances to the homebase.<sup>402</sup> One example is that a young adolescent female may be expected to bear children and seek employment while her mother is still young enough to keep up with the demands of “mothering” grandchildren.<sup>403</sup> Centering on this experience of multiple and shared “mothering” can assist the mediator or court to look at new ways of mothering and caregiving instead of the ideology of the experience of the dominant culture’s “mother” and “family”. In my example, imposing any form of a legal assignment of care and control to this young adolescent mother and the biological father would upset the internal balance of the individual and collective aims of the entire family for its survival.<sup>404</sup> It would impose responsibilities on the young mother and father that would interfere with their ability to work at paid employment for the benefit of the entire family. It would also undervalue

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<sup>402</sup> IBID., at 36.

<sup>403</sup> Evelyn Nakano Glenn, “Social Constructions of Mothering: A Thematic Overview” in Evelyn Nakano Glenn, Grace Chang, and Linda Rennie Forcey, eds. Mothering: Ideology, Experience, and Agency, (New York and London: Routledge, 1994) 1-29 at 6.

<sup>404</sup> Katharine Bartlett and Carol Stack, “Joint Custody, Femininity and the Dependency Dilemma” (1986) 2 Berkley Women’s Law Journal, 9-41 would disagree because they make note of ethnic black rural and urban kin systems [at 16] and kinscripts to explain a consciousness that they claim has developed from the experience which accepts both men and women as able parents and nurturers of children. They admit gender oppression exists but not with respect to the capability of both genders to raise children. They equate this to joint custody. They also state that women of colour and black women, “do not necessarily depend on their children for identity and security”, [at 17]. Their implication means that these women, as contrasted to white women, can handle joint custody. I find their analysis essentializes and marginalizes both white women and women of colour and black women. They proscribe a white middle class, heterosexual patriarchal label like joint custody on black families and tell them they are giving them what they always had anyway. But this is not so. Kinscripts does not even necessarily involve the biological parents in the relationship. Stack and Burton are still pressing for individual rights in a communal concept. Second, white women are essentialized by being lumped into a category as “dependent on their children” for identity and security.

the motherwork being done by other members of the family (such as the grandmother). Finally, the child would suffer because legal constructs of caretaking would deprive the child of the benefit of intergenerational and transgenerational mothering that has contributed to the culture and survival of that family.

KINWORK can also help to recognize the gendered nature of caregiving as it would exist in varying family forms. An example would be a young First Nations mother who must seek employment off of the reserve and leave her child in the care of the child's father's mother. Most likely this mother will walk into custody litigation facing an uphill climb to prove that despite her physical absence she is still very instrumental in the planning of care for her child. A look at her entire KINSCRIPT (work, time and subscription) tells us that at this stage it is her time to contribute financially to her child and family as well as provide love and support when she is able. Perhaps this does not equate to the "primary caregiver" envisioned by those who advocate its use in custody determination, but it is akin to the situation of a woman with a disability who cannot give her children actual physical care and may at times need to be hospitalized, away from her children for extended periods of time. In both these situations, the court is using gender in tandem with culture/race in the first instance to construct a "bad" mother and gender in tandem with disability in the second instance to construct an "incapable" mother. Both women are held up in comparison to the idealized mother of the nuclear family. Both women would lose ground in a custody battle to fathers who rely on their mothers to care for their children. By using KINSCRIPTS to inform the process, the argument can be made that the collective kin-work done on behalf of children is still primarily done by women and that the script this mother has chosen along with the other caregivers should be respected. The mother should not lose custody to the father

because his mother looks after the child.<sup>405</sup> The mother is still providing management, support and love.

This situation happened in the first story of Jane wherein I described how the husband intended to meet the demands of parenting with the help of his mother. Why should Jane's husband get care and control because his mother is prepared to care for the children? If the woman question was asked (How is the woman disadvantaged by or left out of the decision and why?) it might point to the judge's and society's prejudice against alcoholic and Metis mothers. For example, the judge has mentioned Jane's alcoholism and not the husband's in his deliberations. In Chapter Two I introduced the reader to the myths about the natural mother and how easy it is for mother to fall from grace because of the sometimes impossible to achieve ideals that society constructs. A mother's alcoholism is one example of how mother can fall from grace. It is considered to embody a willful and deliberate lack of love or caring for her family instead of a disease that requires physical and emotional supports (How could she do that to her children!). It would, however, be more difficult for the woman question to expose prejudice against Jane as a Metis mother because racism is more masked in the court's consciousness. Racism or prejudice is something that the judge may feel but cannot articulate. It is a double edged sword because on the one side the judge would be called to task if anything that could be considered racist was said in his deliberations. On the other side, because he cannot articulate his position, the judge's attitude (whether positive, negative or neutral) towards Metis mothers cannot be questioned in the court processes. But this does not mean that attitudes about Metis mothers do not affect his decision about custody and it is therefore still beneficial for the woman

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<sup>405</sup> There is also the argument that can be made that states that regardless of what a court or mediator decide, these mothers and kin will ignore the decision and follow their own KINSCRIPT.

question to be asked. The answer most likely would not reveal any practical reason for Jane not to continue to provide the care she has always provided for her children. Asking the woman question applied against a KINSCRIPTS framework could also reveal to the court that there is no practical reason why the father should have custody. For example, a feminist practical inquiry would show that Jane's husband did not care for the children in the past and therefore that he does not have the necessary mothering skills and rapport with his children to ensure their comfort and growth. The KINSCRIPTS framework could be introduced to the judge. The judge may dismiss its relevance. But, there is always a chance that the judge may listen or inform himself about the concept.

A further example of how KINSCRIPTS can inform the custody and mediation processes is that the same grandchildren whom the grandparents are now raising may be called upon to care for their grandparents when the time comes. There is a concept of reciprocity that crosses generations. Children can perform mothercare and so can grandparents. It is expected. This is KIN-TIME, the shared understanding among family members of "when and in what sequence role transitions and kin-work will occur."<sup>406</sup> There are some similarities between KIN-TIME and the MOTHER/CHILD metaphor in that there can be many caregivers and different people other than children who can require care.

Another example of KIN-TIME would be the decision for a young family member to move to an urban area to find work and send money home for the entire family's benefit, including their biological children, who may be in the care of a sister, uncle or other family member or friend. If custody became an issue, an understanding of these temporal scripts within a family collective would also inform the processes of mediation

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<sup>406</sup> Stack and Burton, *supra* note 392 at 36.

and litigation, which are not conditioned to deal with the anachronisms which transcend the expected ordering of mothercare in a nuclear family. This understanding might assist a judge in moving beyond the “mother blaming” that the courts have been historically engaged in when condemning a young First Nations woman of what the court would consider a “lifestyle choice” of prostitution, migration and child abandonment. A custody order that removes the child from the biological mother seems completely out of context, because she is not the one performing all the mothercare in the first place. Removing the child threatens the collective survival of family and changes the KINSCRIPTS. The court is really challenging an intergenerational family and picks the family’s least socially empowered member (the young mother) to champion her family’s integrity.

Marlee Kline has extensively researched race, class and gender specificity in the form, content, operation and effects of the dominant ideology of motherhood as reflected in the decisions of the courts and child welfare systems on First Nations' women, children and communities.<sup>407</sup> She presents several case studies of examples of Canadian courts finding First Nation biological mothers to be “bad” mothers.<sup>408</sup> The cases illustrate situations where children have been removed from their families, at least, in part, because of the biological mother's “transience”, “uncleanliness” or “lack of provision of primary care”. Kline points to the aspect of individuation of motherhood in the dominant ideology<sup>409</sup> which relates to liberal ideology more generally. I would submit this concept

<sup>407</sup> Kline, supra note 187.

<sup>408</sup> IBID at 318, Kenora - Patricia Child and Family Services VL, (P)[1987] O.J. No. 1858 (Q.L.); at 325 New Brunswick (Minister of Health and Community Services) V.L.M. and F.G. (1989), 93 N.B.R. (2d) 261 (Q.B. Fam. Div.); at 325 Re A.B. C.B. and M.B. (1989) 100 A.R. 150 (Alta. Prov. Ct.) and at 326 L.O. and S.O.V. Superintendent of Child Welfare [1984] N.W.T.R. 295 at 328 Re J.H. and N.H. (1988) 3 Y.R. 282 (Yuk. Terr.Ct)

<sup>409</sup> IBID., at 319.



of individualism makes it difficult for courts to even grasp the concept of the collectivity of mothercare amongst First Nation people.<sup>410</sup>

In KIN-SCRIPTING families are continually rounding up and summoning or recruiting individuals for kinwork. In the area of KIN-KEEPING (the mothercare), children and women are more easily recruited. This does not exempt men from kinscription of KIN-WORK, other than KIN-KEEPING, which is considered as important to the individual and collective survival of the family.<sup>411</sup> Children are also decision makers within these scripts. Leeway is given to children, even at a young age, to make judgments in the context of personal and family interests.<sup>412</sup> The idea of younger children being responsible for decision making in their own care and the care of other family members is largely foreign to our courts and mediation.

KINSCRIPTS can also be applied to families who construct their life courses in any variety of ways other than those of the families illustrated in the ethnographic study. Stack and Burton use the example of KINSCRIPTS being particularly useful in exploring the effects of the individuals (across all racial, ethnic and social groups) who cannot be counted on to carry out kin tasks, "who leave the family fold for reasons of personal survival, make excessive emotional, economic demands on family members, and who return to the bosom of kin because of personal experiences such as unemployment, homelessness, divorce or widowhood."<sup>413</sup> In the situation of a divorce, an adult child

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<sup>410</sup> The dominant ideology of motherhood also informs mediation even without any explicit statement of the expectations of a "good" mother in the dominant ideology. See Pickett, supra note 18.

<sup>411</sup> IBID., at 36 & 37.

<sup>412</sup> IBID., at 39.

<sup>413</sup> IBID., at 4.

with dependent children may return to their parents' home. The kin-work, kin-time and kin-scription of the family may need some reconstruction to accommodate this return. Grandparents may play a more active role in child care or may defer retirement to maintain an income to meet the increased economic demands. The member experiencing divorce may have been the family KIN-KEEPER (the person charged with organizing family reunions, documenting family history and negotiating conflict between relatives).<sup>414</sup> A new kinkeeper might need to be found. Kinscription also encourages the looking at the motherwork that is involved in the emotional management of tension within a family as well as who performs this managerial function. On a practical inquiry, it can also answer "Who cleans the toilet?"<sup>415</sup>

Some suggestions to incorporating the model of kinscripts into mediation and/or litigation would be:

- 1) litigators, courts and mediators would have to be trained and educated in the model itself.
- 2) litigators, courts and mediators would have to be familiar and sensitive to the dynamics of the predominant family systems of different cultures, races and family groupings with whom they would have to work.

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<sup>414</sup> Barbara M. Herrerger, "Changing Terms of Endearment: Women and Families" in Joan Turner, ed. Living the Changes, (Winnipeg: The University of Manitoba Press, 1990) 57-67 at 65 where she speaks about another role of women's labour in the family being "kin-keeping" which refers "to the work involved in maintaining connections with the extended family, for example writing letters, remembering birthdays and planning holiday celebrations. The tensions created for home workers were managed in part by relationships with women friends and female relatives". She is speaking of kin-keeping in the context of the nuclear family, but nevertheless, it has application to the notion and concept of kinscription being adaptable to all family forms.

<sup>415</sup> IBID., at 66, Herrerger notes that these basic inquiries also can tell as much about parenting as psychological profiles and expensive expert advice and testimony. The acknowledging of the kinds of management work that mothers can do (and usually do) is important. For example, the motherwork that women with disabilities perform becomes valued.

- 3) litigators, courts and mediators would have to be prepared to go to the family or community to problem solve. For example, the setting up of neighbourhood justice centres to accommodate socio/legal concerns would be contraindicated. This would be asking the kin to come to a white middle class concept of community. Instead - let the kin decide - or go to their churches, community centres, homes or public forums to assist.

Gender based ideologies of motherhood, family and kin would inevitably inform the process and this may be unavoidable. But, I would suggest that by approaching a KINSCRIPT framework, less emphasis would be placed on individual rights for men, women or child(ren) and caring relationships could be illuminated. For example, more emphasis and consideration would be placed on the continuation and preservation of the culture through a particular family. This larger picture would shift some of the emphasis away from the mother/father relationship. The KINSCRIPTS paradigm might be able to challenge ideologies and, as well, in the interim, the lawyer can keep trying to introduce the KINSCRIPTS concept to the courts and encourage judges and mediators to have all involved kin attend at the hearings or court-affiliated mediation.

## V. CHILD CARE PLANS

Another practical approach that might help women engage in child custody litigation that identifies patterns of caring for children is to create a child care plan by using feminist practical reasoning. By care plan, I mean a written or oral plan of care for a child that specifically addresses a child's needs, sets objectives and plans constructed upon existing pattern(s) of care while respecting future dreams and goals. The concept of a care plan is not new to women in caretaking roles. Nurses, for example, construct care plans to assist in the provision of patient care.<sup>416</sup> Such a care plan might be directed to

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<sup>416</sup> Between 1976 and 1985, I worked as a Registered Psychiatric Nurse in Manitoba. Care plans are largely task oriented and involve identifying behaviors in need of nursing

social and physical care, security, self-value, play, attention and affection and other examples of dependency needs of children required in varying degrees and unique ways at various points in their lives.<sup>417</sup> It is difficult if not impossible to divide the care of a child equally between two or more caregivers whether they live with the child or not. A child's needs and desires change too often to be able to predict and delineate addressing them in an equally divisible way.<sup>418</sup> It is therefore important to have a primary care manager. This person would most often be the mother.

The formulation of a care plan to present in court or mediation involves at least the following considerations. The care plan should define the dependency needs, as described herein, of the child and the degree of emphasis to be placed on each need based on the age and the particular development of the child. The care plan should,

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intervention and care. In my experiences as a community health nurse and as a hospital general duty nurse, nursing care plans were used to clarify the needs of patients/clients and to set clear goals and objectives.

<sup>417</sup> John Bradshaw, Bradshaw On Healing The Shame That Binds You (Deerfield Florida: Health Communications, Inc. 1988) at 56-59 wherein he states "As children, we had needs that depended on others for fulfillment. Children are dependent and needy. They need their parents for 15 years. Their dependency needs can only be satisfied by a caregiver." The needs identified are self-value, stimulation, socially-healthy primary caretakers, structure, security and stroking. I am not saying that these needs are exact or all inclusive. Neither am I saying that all children need these needs fulfilled by caretakers until 15 years old. What I find instructive is his recognition of "caretakers" and his needs approach which is capable of being applied intersectionally, cross-culturally and intergenerationally.

<sup>418</sup> I do not conceptualize a conventional circle or wheel when I envision a care plan (with the child being the hub and each need being a spoke) because I view the circle as too defined, too static. It invites symmetry, equality and balance. I do not believe these to be realistic properties to expect in child caregiving. I see an ellipsoid and elliptical planes as my conceptual framework for a care plan because they are asymmetrical, fluid, changing, multidimensional and flexible. These features are important to the utility of a care plan. The pith of the ellipse can change its position with ease depending where the child is relative to her other needs.

where possible, define the objectives for the child. And finally, a plan of action with outcomes should be set.

The first step to be taken before specific needs can be identified is to understand the child's story and create a profile of the child. Let me give an example. The mother would supply the lawyer or mediator with information about the everyday needs, interests and behaviors of the child, as well as cultural, religious, medical and educational realities in the child's life.<sup>419</sup> The mother should note the mundane details of caretaking such as a child's favourite songs, games, sayings, activities, toys, time of day, foods and playmates. Both likes and dislikes should be noted. The significant and primary caregivers would be identified. My definition of a caregiver is any person (and perhaps animals if they are special pets or seeing eye dogs) who contributes to satisfying a child's basic dependency needs. The emotions of a child and her need for affection, positive touching, security, etc. are noted. The collective values of the family unit, culture, religion and community of the child are stated. Again, these are merely examples. The managerial work that is done to coordinate the child's daily activities should be noted. Many more items could be considered specific to the child's needs. The more mothers are encouraged to define the things that they do for children, the less women's work is silenced.

Once the child's story has been put into words, the next step is to create the profile which is a snapshot that identifies the child at her particular space and place in time as seen through the mother's lens and perspective. The profile narrows the multiple

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<sup>419</sup> The possibilities in a child's story are inexhaustible because of the uniqueness of each child. One child may collect bugs. Another child may be afraid of going under bridges. Another child may be taking illegal drugs... or refusing to keep kosher in a conservative Jewish home... or refusing to traditional and fancy dance in their Nation's pow wow.

dimensions of the child's primary needs. For example, based on the information in the child story about favourite toys, games, songs and cultural expectations, the mother identifies a pattern of stimulation for the child based on pleasure/pain, fun, excitement, challenge and play. A second example would be a profile on security helping to develop the pattern of care including enough food, medical care, protection, clothing and shelter. This is derived from multifaceted observations as diverse as the eating habits of the child, possible religious significance in medical intervention, poverty issues and ethnic foods. The care plan is a medium. It provides the judge with a suggestion about what to order based on a clearly presented, ordered and flexible plan. The care plan could be attached as an Exhibit to the mother's affidavit. In oral argument, the lawyer could highlight the general needs and identify the major patterns of care and concerns.

I recognize that there is nothing to prevent a father from presenting a detailed care plan to the court and in all likelihood, he would be encouraged by his lawyer to do so in response to the mother's care plan in her affidavit. For women who must deal with the legal system today it becomes irrelevant that a large scale transformation of the legal system may better reflect their interests as mothers and caregivers. Women need either some method, technique or approach that will help them have their stories heard today and care plans is one such way. And if a father decides to submit a care plan, his plan may be seen as more credible by the court because of its "man of the law" standard and its difficulty in seeing the family as other than in its idealized nuclear form.<sup>420</sup> The court's blindness may render invisible the mother's version of the child's needs and interests and how they are met. Nonetheless, care plans are still a step in the right direction for women. They could be presented as evidence. The mother's lawyer should be seen as the protector of the woman's child story and plan. She would present argument based

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<sup>420</sup> See Naffine, supra note 185.

on the use of feminist practical reasoning and asking the woman question. Feminist practical reasoning could be used to argue why the father's version is not representative of the child's story and care giving patterns and by contrast, why the mother's care plan is representative. Biases of the judge which might favour the father's version can be questioned in argument by asking the woman question and finding a space for the mother's version if it is being colonized. It would be more difficult to ensure that the care plan is used in the mediation setting because of the cloak of privacy that the process provides to the participant's. In theory, the use of the care plan may not suit the methods used in mediation which try to focus on the future plans for child care. For example, future focusing which was discussed in Chapter Four.

I recognize that there is no empirical research, as yet, to support my conception of a child care plan as a feminist legal method. It has not yet been proven successful in allowing women's voices about caregiving to be heard and children's needs to be identified and better met. I also acknowledge the difficulties involved in gaining acceptance for a new method. There are foreseeable problems with education and promotion. Finally, I ask the reader to recognize that my ideas about care plans are not yet sufficiently developed to be usable in all situations of custody litigation. They require much discussion and input from other sources including feminists from professions more knowledgeable in child development. It may be that upon further consideration they will not be deemed feasible. But, they may also lead more to the preservation of the integrity of caregiving and motherwork stories in court and mediation. The impact of sexuality, cultural identification, ethnicity, colour, class and economics on the child could be recognized through explicit descriptions of past patterns of care. I predict that it would be more useful to women than traditional methods and mediums that are now used, for example in the drafting of affidavits, that resulted in Jane being metaphorically and physically silenced in her first story in Chapter Three.

#### **IV. CONCLUSION**

Each of the feminists who have contributed theory or experience to this chapter have contributed mortar and tar to the construction of new ways of thinking about caregiving and maternal connections. But the question still remains. Do such constructions assist women in having their stories of child caregiving understood by lawyers, judges and mediators? I believe that they do have some utility in the litigation of child custody. There is opportunity for the lawyer to engage feminist legal methods such as raising consciousness, feminist practical reasoning and asking the woman question. There is opportunity to question government (and private) studies that support legal processes that are oppressive to women. The utility of the constructions in mediation is much more limited. It is difficult for a woman's advocate to observe mediation because it is kept sheltered from criticism by proceeding behind closed doors. This is one reason why I conclude that women's child care concerns and maternal connections may potentially be better acknowledged in custody litigation where the forum is public and can be appealed. There is a space for feminist methodology in child custody litigation and mediation but it will take considerable effort by lawyers to claim and maintain it.



## CHAPTER 6

### CONCLUSION

In the Introductory chapter of *The Mother and Child Reunion* I defined my thesis statement to be that neither the mediation nor the litigation of child custody disputes in Canada address the systemic problems associated with the marginalization of women and children in Canadian society in the child custody context. My thesis developed from the mounting frustration and anger that I felt from many of my mother family law clients as they struggled unsuccessfully to have the stories of their maternal care and connections valued rather than misconstrued by the legal system. Their primary complaint was that the legal system was not responsive to the importance of the maternal care that they provided for the benefit of their children. It was a perplexing task for me to pin down the cause of the legal mistreatment women as mothers were receiving and my search to name what was wrong was difficult. Under the constraints of a busy family law practice, I did not have the advantage of feminist teachings and legal theories which may have taken me further and faster to my conclusion. But the opportunity to study my concerns and to share them with other legal feminists presented itself and I now find myself having reached conclusions to some of the questions that I asked.

One question that I wanted to address was whether it was possible, as a feminist lawyer, to improve the processes of custody litigation and/or mediation without a complete transformation of either process. For mother clients it remains imperative on a

practical level to engage with the legal system as it exists. I believe that I have met my objective in so far as I have developed some compelling arguments in regard to the limitations and potentials of custody mediation and litigation for mothers. It has been more difficult to find feminist legal methods that might assist mothers and their lawyers to mitigate against the white, male, middle class, heterosexual expressions, productions and perpetuations of patriarchy present in custody litigation and mediation. I conclude that despite the problems with the litigation and mediation processes that I have identified, feminist legal methodology can be introduced incrementally into the processes with the objective of reconstructing the ideology of motherhood in a way that empowers and reunites mother and child.

In Chapter Two, I concluded that all the idealized tasks of motherhood that are considered by the legal system to be natural, expected and needed by women arise within the context of one normative type of mother - white, middle class, heterosexual - and in one normative type of family - nuclear. In the chapter I defined "mother" both as an ideology and as a reality. I deconstructed the dominant ideology of mother as it related to patriarchy, technology and capitalism. The path was then clear to make room for alternate stories about mothering experiences that ranged over a few hundred years in time and across two continents in location. This exercise introduced many different kinds of "mothers" which I concluded more accurately reflected the realities of maternal caregiving. These "mothers" each reflect a truth of who mother is and how mother cares for children that demonstrates the limits of the dominant ideology of motherhood. I argue that although there may be others who provide "mothering" (fathers, siblings,

grandparents and even paid labourers), the vast majority of maternal caregiving is done by women for children and this is why my thesis focuses on women and children - the Mother and Child Reunion. The importance of this chapter to my thesis is that it illustrates how the legal system defines "mother" as different from how mothers' define themselves through their caregiving. An understanding of this difference is essential to an understanding of how the litigation and mediation of child custody can sever the ties that bind the existing patterns of care between mother and child.

In Chapter Three, I begin to ask the perplexing question as to whether or not feminist legal methodology can inform and be integrated into the legal processes of custody litigation and mediation in an effort to lessen women's oppression in the context of child custody. My question was motivated by my concern that the practicalities of day-to-day deliberations and the economics of childcare, food and shelter necessitated women bringing their custody issues to the legal system. Based on the work of Katharine T. Bartlett,<sup>421</sup> I identified the feminist legal methods of consciousness raising, asking the woman question and feminist practical reasoning as basic tools to be used to challenge and develop alternatives to traditional legal methods which might be more responsive to women's maternal experiences and needs.

I then introduced the reader to two women and the stories of their encounters with the legal system which silenced their voices as mothers and marginalized the patterns of care which they had given their children. The first story is about litigating child custody by way of affidavit evidence presented on a motion for interim custody. The second

story is about how on an interim motion for custody, the judge so strongly encouraged court-affiliated mediation that the woman felt coerced to attend. I illustrated through story telling how some of the current evidentiary processes in litigation are used against women. I concluded that these same evidentiary processes apply to court-affiliated mediation because common law courts are increasingly deferring their custody decision making authority to mediators appointed by the justice system. I stated my belief that the lines between the two primary methods of child custody dispute resolution had become murky, both reproducing dominant ideologies. Finally, I re-evaluated the stories to consider whether feminist legal methodology could have been used to make the two women's stories more audible and visible and if so, I asked if it would be feasible to consider the possibility of integrating feminist methodology into existing custody litigation and court-affiliated mediation. I concluded that there may be a space for feminist legal methods to be used in the legal system.

Chapter Four focused on the mediation of child custody disputes because of its rapid rise in the realm of alternate dispute resolution as a panacea to the ills of traditional litigation. Mediation's rise in popularity is linked to the history of child custody and I outline the connection. I made the observation that joint custody's rise in popularity paralleled that of mediation and that mediation, at least initially, used joint custody as a means to hold the failing nuclear family together in what was coined by mediators as the post-divorce continuing relationship. I noted that with time joint custody became an end in itself.

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<sup>421</sup> Bartlett, supra note 153.

Three specific methods used in the mediation of child custody disputes, NORMALIZATION, FUTURE FOCUSING and SUMMARIZING were defined and deconstructed. Each method could be traced to roots that relate to and replicate the same patriarchal constructions of family and mother as do the methods of litigation. I concluded that mediation is more destructive and oppressive to women's empowerment issues and maternal caregiving than litigation because mediation is held out to be something it is not, its systemic problems being obscured by romanticism and rhetoric.

Chapter Five continued the search that I began in the third chapter. I examined whether it was possible to create a space for feminist conceptions of caring and feminist legal and research methods in custody litigation and mediation without a complete breakdown of either system. I found pockets of space where feminist methodology and/or concepts of maternal care could be introduced albeit without any assurance that judges or mediators would be responsive. I concluded that the efforts needed to negotiate these spaces was still worthwhile because women would hear their stories told in a way that would let them see their maternal caregiving valued. It could be an empowering experience that would also have the feature of creating an appealable record if it took place in litigation. The more women are encouraged to define the things they do for their children, the less mother's work is silenced.

To arrive at my conclusion that women's differing maternal caregiving experiences could be articulated in the litigation and mediation processes, I tried four different approaches

that related thematically to maternal caregiving. First, I reviewed a new British Columbia government initiative that recommended (among other things) the establishment of Family Justice Centres (FJCs) to provide alternative dispute resolution (ADR). This initiative was designed to respond to concerns and needs of divorced and/or separated parents who had in some way engaged with the legal system and also the concerns and observations of service providers in the social justice system. I deconstructed the research methods used by the Working Group, concluding that the methodology and assumptions used were flawed, skewing the results and making them unreliable and invalid. Had the researchers used feminist social research methods, I argued that more meaningful results would have empowered women in legal custody processes. ADR can be equated to mediation and joint parenting, which encourage power imbalances oppressive to women in the custody bargaining process. I concluded that the FJCs would also be flawed because they would perpetuate the same problems that I observed in the research that they were based on: the FJCs did not offer anything new that would improve women's position in custody mediation and they had not made any efforts to include feminist methods in their processes.

Second, I presented examples of feminist conceptions of maternal caring found in feminist scholarship, literature and utopian constructions of mother and caring. This section was designed to stimulate thought, raise consciousness and encourage the asking of the woman question in hope that differing conceptions of caring might be used as a vehicle to carry women's caregiving stories into litigation and mediation.

Third, I analyzed the KINSCRIPTS framework of understanding family dynamics between ideologies, norms and behaviors, including differing ways of mothering and providing care that would sustain the growth and survival of a family over its lifecourse. Kinscripts could be useful to litigators, courts and mediators in helping them appreciate the dynamics of the predominant family systems of different cultures, races and family groupings. All relevant caregivers identified in a child's life could be heard on custody issues and should be heard in the kin community. Kinscripts recognizes that different women perform the primary care of children throughout their lives and therefore their caregiving should be valued in many forms and degrees.

Fourth, I introduced CHILD CARE PLANS which I constructed as a feminist tool/method to be used in custody litigation in support of oral argument and affidavit or oral evidence by providing an approach developed through feminist practical reasoning that values past patterns of care indicating maintenance of the mother-child union after parents have separated. The child care plan supports Martha Fineman's<sup>422</sup> metaphor of the Mother/Child dyad which would place the relationship of the mother-child (instead of the husband and wife) at the centre of judicial and mediated custody determinations.

Each of the four approaches that I used to explore whether maternal caregiving could inform the processes of litigation and mediation provided at least one example of how feminist legal and/or social research methods could be used in the litigation of custody disputes. Problems arose in trying to work out how feminist methodology and concepts of maternal caring could fit into mediation in a way that would both empower mothers

and not marginalize their stories of their caring patterns. Because of the cloak of privacy that covers the mediation process, there is no way to measure whether feminist methodology is being used as intended, if used at all and therefore it is difficult to see whether mothers' positions improve.

I believe that child custody litigation and mediation currently respond to women's stories about their mother-child connections in ways that disempower and marginalize their caring relationships. I have argued that debates that favour one process over the other are overstated in their claims and more polemical than empirical. Based upon my observations as a custody lawyer, upon my deconstruction of the methods used in each process and upon my search for a space within each process for feminist legal and social methodology, I conclude that custody litigation is less oppressive to women and children than mediation.

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<sup>422</sup> Fineman, supra note 12.



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