

How Men Experience Family Dispute Resolution Mediation

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Abstract

Family mediation is mandatory in New Zealand since 2014 for disputes between separating parents regarding contact and day-to-day care of their children. This study aims to examine the experiences of fathers at family-mediation in an open, non-directive way. The study used qualitative, semi-structured interviews with 13 fathers who attended family mediation. The interviews revealed a highly challenging post-separation period for fathers as they battle through severe grief combined with confusing societal messages about fatherhood. The devaluation of fatherhood surfaced as a pervasive theme prevalent with mothers and mediators, as well as with fathers themselves. The most prominent experience that transpired in the interviews was gender-based bias and a strong feeling of powerlessness as fathers perceive mothers as holding absolute power in the mediation. Most fathers could see the potential in mediation and appreciated working together as parents to maximise the wellbeing of their children. Yet, the full potential of mediation has not been fulfilled for most. Implications for mediators include the need to understand and respect fathers, as well as the need for reflective practice, especially around gender-bias and gender-power issues. Mediators can contribute to the improvement of family-mediation by supporting the new fatherhood model thus enabling the full potential of family-mediation through more engagement of fathers.

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Table of Contents

Abstract.....	ii
Acknowledgements	iii
Table of Contents	iv
I. Introduction.....	1
II. The Legal Framework for FDR in New Zealand	3
A The Legislation	3
B The Practical Aspects of FDR.....	4
C Has the Purpose of the Reform Been Achieved?	5
D Studies on Participant Satisfaction of the FDR Process.....	8
III. Literature Review	10
A The Socio-Political Aspects of the Modern Family	10
B Power and Control in Gender Relationships	12
C How Fathers Enhance the ‘Welfare and Best Interests’ of Children	15
1 The Importance of the Father in Children’s Lives	15
2 Fatherhood After Separation.....	16
3 How to Minimise the Damage to Children Following Divorce	19
4 The Devaluation of Fatherhood	21
D The Severity of Men’s Reaction to Divorce	22
E Is Mediation More Congruent with “Welfare and Best Interests of the Child”?	25
1 The Nature of Conflict	25
2 The Ultimate Core Value of Mediation: Self-Determination.....	27
3 Key Tools for Resolving Disputes in Mediation.....	28
4 Characteristics and Advantages of Family-mediation	30
5 The Disadvantages of the Family Court in Care of Children Disputes.....	33
(a) The adversarial system exacerbates conflict and disempowers litigants	33
(b) The Family Court rarely makes decisions in family disputes	34
(c) The Family Court is not better equipped to make care of children decisions	34
6 Criticism of Family-mediation.....	35
(a) Gender power imbalance in mediation	35
(b) Mediator power and neutrality	37
(c) The absence of law from mediation	38
F Mediator Tools and Participant Experiences of Family-mediation	40
1 Studies on the Effectiveness of Mediator Interventions in Family-mediation.....	40

2	Studies on the Experiences of Family-mediation Participants.....	42
3	Studies on Men's Experiences of Family-mediation	45
IV.	Methodology	48
A	Choice of a Qualitative Research Method	48
B	Ethical Considerations	48
C	Participant Recruitment and interview process.....	50
D	The Interviews	51
E	The Analysis Process	52
F	Study Limitations.....	53
V.	Findings and Discussion	55
A	Severe Grief Response Following Separation.....	55
B	Men's Perceptions of Fatherhood before and after separations	57
C	The Devaluation of Fatherhood	59
D	Gender Power Struggles and Powerlessness.....	60
1	Men's Perception: Mothers Hold a Position of Power.....	61
2	Mother's Refusal to Sign the Agreement.....	62
3	Mother's Refusal to Communicate	63
4	What Sense They Make of Women's Behaviour.....	63
E	Mediator's Bias Against Fathers.....	64
F	Mediator's Skills.....	65
G	Opportunity to Talk About What Happened.....	67
H	Was Mediation Beneficial?.....	68
1	Mediation is a waste of time	68
2	Mediation Saved Us from the Court System.....	69
3	I Can See the Value in Mediation, But... ..	69
I	The System is Rigged, Flawed, Unfair	71
J	Discussion	73
VI.	Implications for Mediators.....	76
VII.	Conclusion	81
VIII.	Appendices.....	83
IX.	Bibliography	92

I. Introduction

“... the experience of nurturing and caring for young children has the power to change the cultural construction of masculinity into something less coercive and oppressive for both women and men. The redefinition of fathering is thus an essential step in the continuing feminist transformation of patriarchal culture.”¹

Major shifts in traditional gender roles and in the structure of the family have resulted in divorce rates of 40 to 50 per cent in most Western countries.² The devastating effects of divorce on women, children and men have been well documented and scholars have attempted to find ways to mitigate these harmful effects. In particular, the harm caused by adversarial legal battles between separating parents has been acknowledged and alternative ways to resolve such disputes have been developed.

In New Zealand, the Family Dispute Resolution Act 2013 (FDR Act) introduced a mandatory mediation process (family mediation) to resolve disputes between separating parents over day-to-day care of their children. This legislation intended to improve outcomes for families and reduce the burden on the Family Court. Figures presented in this thesis indicate that six years after implementation, family mediation is underutilised and the Family Court is still the main avenue for resolving care of children disputes.

Mediators and researchers expressed concerns over the level of engagement of fathers in family mediation and suggested improving the process to be more responsive to men’s needs.³ Little attention has been given in New Zealand to fathers’ experience of family mediation. In this study, I set out to bring men’s voices to the forefront, hoping to gain insights that might improve family mediation.

This study is based on interviews with 13 fathers who attended family mediation and shared their experiences. The interviews reveal a painful reality of fathers who have been separated from their children and the depth of their grief response. They illuminate the duality of the mixed societal messages to fathers and the clash between the new nurturant father model and

¹ Louise B Silverstein “Fathering is a Feminist Issue” (1996) 20 Psychol Women Q 3 at 31.

² Gert M Hald and others “The Divorce Conflict Scale” (2020) 61 J Divorce Remarriage 83 at 83.

³ Katherine F Britton and Carolyn H Johnson “Engagement and Participation of Men in Mediation” (2016) 22 J Fam Stud 20; and Richard J Fletcher and Jennifer M St George “Practitioners’ Understanding of Father Engagement in the Context of Family Dispute Resolution” (2010) 16 J Fam Stud 101.

traditional masculine gender roles. Most fathers in this study expressed frustration over aspects of family-mediation and, in particular, what they perceived as bias against fathers.

I begin by reviewing the legal framework for family mediation and examining whether the objectives of the legislation have been achieved. I then review the literature on the socio-political aspects of the family and on gender power struggles. I highlight the fundamental shift in the nature of fatherhood and examine how fathers enhance the wellbeing of children. I illustrate the severity of men's response to divorce and the psychological reasons behind it. I then explain the nature of mediation and examine whether mediation is a better process for resolving care of children disputes. At the core of this thesis, I present the main themes that emerged from the interviews and their implications for mediators. Finally, I argue that men's perceptions of gender bias may explain some of the underutilisation of family-mediation and that making the process more responsive to men may improve outcomes for families.

The terms divorce and separation are used interchangeably in this thesis, as they are both used in the interviews and literature and relate to the dissolution of marriage or a cohabitation relationship.

Throughout this journey, I have been acutely aware of the unilateral nature of this study, which does not account for the voices of women, children and mediators. The high level of family violence in New Zealand is no doubt a factor in many family mediations and although this study does not directly address family violence, it is nonetheless an underlying factor.

II. The Legal Framework for FDR in New Zealand

A The Legislation

The Family Dispute Resolution Act 2013 originated as part of the Family Court Proceedings Reform Bill (Reform Bill) introduced to Parliament in 2012. The explanatory notes to the Reform Bill included a general policy statement by the Minister of Justice which stated: “The purpose of the reforms is to ensure a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective.”⁴ Part of the mechanism to achieving this overall goal was:⁵

The Bill encourages faster, less adversarial resolution of family disputes through requiring parties to disputes about children to participate in an out-of-court family dispute resolution process, and a parenting information programme, before applying to the Family Court.

Further in the explanatory notes, under the heading: “Supporting people to resolve their disputes”, the rationale behind this part of the reform was explained:⁶

Out-of-court dispute resolution provides a distinct and effective opportunity for people to resolve disputes sooner and less acrimoniously than by court proceedings. Effective pre-court processes can reduce the number of cases coming to the court by encouraging people to focus on the needs of their children and on taking ownership of the agreement reached. This can improve outcomes for children by reducing the likelihood of heightened conflict that often results from litigation.

Following this reform of the family justice system — which further embedded the idea that a non-litigious process may better serve parents, children and the system — the current legal framework is governed by two statutes: the FDR Act and the Care of Children Act 2004 (CoCA). Section 4 of the FDR Act states the purpose and the predominating principle that together direct the process:

- (a) assisting parties to a family dispute to resolve the dispute without having to pursue court proceedings; and
- (b) ensuring that the parties’ first and paramount consideration in reaching a resolution is the welfare and best interests of the children.

⁴ Family Court Proceedings Reform Bill 2012 (90—1) (explanatory note) at 1.

⁵ At 1.

⁶ At 2.

The definition of what constitutes a family dispute and the substantive ideology that underlines the process are explained in sections 46R and 48 of the CoCA, which define the two scenarios that fall under family dispute: when parents or guardians need to make decisions on the day-to-day care of their children, and when they cannot agree on ongoing matters relating to their children. Therefore, the FDR Act relates exclusively to contact and care of children disputes.

The heading of section 46E of the CoCA reads: “Family dispute resolution mandatory before commencement of proceedings”, making FDR a prerequisite to Family Court applications. The section sets out five exceptions to this mandatory requirement, amongst them: applications of an urgent nature and situations where family violence is present or where one of the parties cannot participate effectively in mediation.

The overarching principle that should guide any family dispute is enshrined in section 4 of the CoCA: “The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration ...”. Section 5 of the CoCA sets out six guidelines to assist in determining what arrangements best support the welfare and best interests of a child; these include: safety, contact with both parents and with extended family, cooperation between parents, continuity of care and maintaining cultural identity.

B The Practical Aspects of FDR

The method for resolution used in the FDR process is mediation conducted by an approved FDR provider (mediator). The qualifications and competency required for approval are defined in section 7 of the Family Dispute Resolution Regulations 2013 (FDR Regulations). The list of competencies includes knowledge and experience in mediation, family law, child development, cultural diversity and an affiliation with a dispute resolution organisation.

The FDR Regulations stipulate that FDR services can only be provided by an approved dispute resolution organisation and set the criteria for such organisations. There are currently three approved dispute resolution organisations in New Zealand: Fairway Resolution Ltd, Family Works Resolution Service and the FDR Centre Ltd.⁷

The Ministry of Justice issued operating guidelines for FDR (guidelines) which indicate that dispute resolution organisations shall perform all the administrative tasks, including intake,

⁷ Ministry of Justice “Resolving Parenting Disagreements” <www.justice.govt.nz>.

assessment and funding tasks. The final decision on suitability for mediation should be made only by an FDR provider.⁸ The guidelines include two substantive requirements: one is to include children's voices in family-mediation (although the method of doing so is left to the discretion of the organisation);⁹ the second is to offer parties to participate in a preparation for mediation session, which aims to help them manage their emotions and focus on their children's needs at mediation.¹⁰ The guidelines allow parties to bring a support person to mediation, however they stipulate that this must be done with the consent of all parties.¹¹

The guidelines outline that parents are entitled to up to 12 hours of funded service (which includes preparation for mediation, voice of child, if required, and mediation) in a 12-month period. This allocation renews every 12 months and can be used each year, if needed, to discuss care of children matters.¹² The cost of FDR is set at a maximum of \$897 to be shared equally between the parties. The cost shall be waived by the Ministry of Justice for a party that earns under a certain threshold specified in the guidelines.¹³

C Has the Purpose of the Reform Been Achieved?

The family justice reform came into force in March 2014. It is debatable to what extent the first goal of this legislation, keeping parents out of court, has been achieved. In their 2018 book, Morris and Shaw point to a sense of disappointment in the mediation market with the number of FDR mediations that take place.¹⁴ The authors juxtapose the Minister of Justice's publicly stated expectation of 7,000 FDR mediations per year against the actual number of 1,618 FDR mediations that took place in 2016.¹⁵ They hypothesise that the sharp increase in the number of without notice applications to the Family Court following the 2014 reform means that lawyers are using this avenue to bypass the mandatory mediation requirement.¹⁶

⁸ Ministry of Justice "Family Dispute Resolution Operating Guidelines" (1 July 2018) at 7–9.

⁹ At 13.

¹⁰ At 10–11.

¹¹ At 13.

¹² At 20.

¹³ At 21.

¹⁴ Grant Morris and Annabel Shaw *Mediation in New Zealand* (Thomson Reuters, Wellington, 2018) at 211.

¹⁵ At 216.

¹⁶ At 212–214.

Current figures for FDR mediations were obtained from the Ministry of Justice under the Official Information Act 1982 in August 2020.¹⁷

Table 1 – Number of FDR mediation requests and their outcome

Mediation Outcome	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020
All matters resolved	947	1,058	1,119	1,157	1,206
Some matters resolved	345	329	359	372	376
No matters resolved	230	290	393	396	455
Other outcomes ¹⁸ (as % of FDR requests)	147 (9%)	175 (9%)	2,456 (57%)	3,540 (65%)	4,354 (68%)
Total FDR requests	1,669	1,852	4,327	5,465	6,391

The figures in the bottom line of table 1 show a considerable increase in the number of mediation requests, however, the *other outcomes* row reflects the significant number of requests that did not proceed to an actual mediation — around two-third of requests. A clearer picture of mediation numbers and outcomes is therefore outlined in table 2.

Table 2 – Actual FDR mediations and their outcomes

Mediation Outcome	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020
Parties reached full agreement	947 (62%)	1,058 (63%)	1,119 (60%)	1,157 (60%)	1,206 (59%)
Parties reached partial agreement	345 (22%)	329 (20%)	359 (19%)	372 (19%)	376 (19%)
No agreement reached	230 (15%)	290 (17%)	393 (21%)	396 (21%)	455 (22%)
Actual FDR mediations	1,522	1,677	1,871	1,925	2,037

¹⁷ Ministry of Justice letter (Ref: 85971, data extracted 29 July 2020) (obtained under Official Information Act 1982 Request to Nurit Zubery).

¹⁸ The Ministry of Justice's letter provides a list of possible other outcomes: the matter was not suitable for mediation, FDR exempt, the parties requested a withdrawal, the matter was a part of another mediation or agreement to mediate not signed.

These figures reveal a moderate yet consistent increase in the number of FDR mediations. They reflect good success rates in the mediations, around 60 per cent reaching full agreement and around 20 per cent reaching partial agreement.

However, comparing these numbers with the number of Family Court applications for parenting orders according to section 47 of CoCA in table 3 clearly reveals that FDR is not the main avenue for resolving care of children disputes. There are more applications to the Family Court than to FDR and the majority are without notice. This may indicate an attempt to bypass FDR by the legal profession, as suggested by Morris and Shaw. An alternative reason could be a reluctance by men to participate in mediation, as the findings of this study reveal fathers perceive a bias against them at mediation. This hypothesis cannot be supported since, unfortunately, the Ministry of Justice declined to provide details on the gender of the initiating party in FDR or the Family Court.

Table 3 – Number of parenting order applications to the Family Court

Family Court Applications	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020
Without notice	5,222	5,319	5,364	5,062	5,320
On notice	1,712	1,746	1,761	1,682	1,528
Total applications	6,934	7,065	7,125	6,744	6,848

Another important question is whether the second goal of the reform — promoting the welfare and best interests of children — has been achieved. In their 2020 book, Henaghan and Atkin explain the difficulty in ascertaining what is congruent with the welfare and best interests of a child. They begin by highlighting that in New Zealand the power to make decisions on care of children is recognised as a private matter and given to the parents, except when a child is at risk.¹⁹ They explain the rationale behind it is that no set rules can guarantee the welfare of all children, as each child is unique in his or her own circumstances.²⁰ The authors point out that the long list of factors guiding Family Court judges does not give higher priority to certain principles over others (except for safety considerations that take precedence over all others).

¹⁹ Mark Henaghan and WR Atkin *Family law policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) at 330–334.

²⁰ At 336.

They highlight that the common practice of appointing an expert is often subjective and unhelpful. This, according to Henaghan and Atkin, puts judges in a difficult position, as they have few tools but their own values to determine which principle should take precedence in each particular case.²¹

D Studies on Participant Satisfaction of the FDR Process

Three empirical studies commissioned in New Zealand since the 2014 reform examined various aspects of the family justice system. In 2015, the Ministry of Justice conducted a qualitative study to evaluate the reform. The figures reveal that in its first 15 months, the FDR system handled 1,364 mediation events, of which 897 (66 per cent) were fully resolved.²² The qualitative part of the study was based on interviews with 67 parents who attended FDR and the evaluation concluded that “[m]ost of the FDR parents believed that taking part in out-of-court mediation was preferable to going to the Family Court”. However, “[o]ther parents believed that going to the Family Court was inevitable.”²³

In 2018, the Minister of Justice appointed an independent panel to examine the 2014 family justice reform (panel). The panel funded a qualitative study based on interviews with 37 parents, 20 of whom attended family mediation. The main findings indicated that only a small number of people who attended mediation found it helpful, and that most parents had polarised views about day-to-day care and could not achieve resolution in mediation (this finding contradicts the figures in table 1 above indicating that around 60% of mediations achieve full agreement). For these parents, mediation only added delays and additional costs to the process.²⁴ In its final report, the panel concluded that *family-mediation is underutilised* due to a number of reasons, mainly reluctance of the legal profession to refer to it and a lack of knowledge of potential users to its existence or benefits.²⁵

The most recent and largest-scale study was funded by the New Zealand Law Foundation and carried out by researchers at the University of Otago. The study included online questionnaires

²¹ At 338–341.

²² Nan Wehipeihana and Tolotea Lanumata *Evaluation of Family Dispute Resolution Service and Mandatory-Self-representation* (Ministry of Justice, October 2015) at 11–12.

²³ At 12.

²⁴ Rosslyn J Noonan, La-Verne King and Chris Dellabarca *Te korowai ture ā-whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 43–47.

²⁵ At 67–68.

completed by 655 respondents and qualitative interviews with 180 respondents (only 20 per cent of respondents were men). Noteworthy findings were that 39 per cent of respondents who attended family-mediation reached full agreement, while 31 per cent reached partial agreement and 30 per cent reached no agreement. However, only 42 per cent were satisfied with their agreement and 30 per cent were confident the agreement would work.²⁶ In terms of the family-mediation experience, the study found that participants varied greatly in their views, with 53 per cent being dissatisfied and only 28 per cent being satisfied.²⁷ Similar dissatisfaction figures were found for the Family Court experience, with 55 per cent being dissatisfied and only 27 per cent being satisfied. As noted above, these agreement levels are considerably lower than the Ministry of Justice statistics, which raises the question of whether voluntary studies provide an accurate picture or should more random selection methods be used for an accurate evaluation.

²⁶ Megan Gollop and others *Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents’ and Caregivers’ Perspectives - Part 1* (New Zealand Law Foundation and University of Otago, October 2019) at 234.

²⁷ At 235–236.

III. Literature Review

A The Socio-Political Aspects of the Modern Family

Western societies have experienced a major shift in family behaviours over the past five decades towards less committed relationships, fewer children and high marriage dissolution rates, a shift often linked to women entering the workforce. Alongside these trends, studies have found an increase in men's involvement in household activities, which resulted in what scholars termed the gender revolution.²⁸ These scholars divide the gender revolution into two stages. In the first stage, women entered the workforce in great numbers but continued performing most household tasks, which paralleled, at least chronologically, with a massive increase in divorce rates.²⁹ We are currently in the second stage, in which men have begun to be far more involved in childcare roles and, to a lesser degree, in household chores.³⁰ Women, it should be noted, initiate around 70 per cent of divorce cases.³¹

A recent study on people's beliefs regarding gender equality found that there has been a slow but consistent shift towards more egalitarian views in both the public and the private spheres.³² Yet, other studies reveal that in families where both parents work the same number of hours, mothers spend an average of 33 hours per week in household and childcare activities, while fathers spend only 16 hours.³³

These gender-equality trends facilitated the emergence of the new fatherhood ideal, which is "characterized by the expectation that men should be highly involved in parenting, contribute significant time to housework, and be an engaged and equitable spouse, partner, or co-parent".³⁴ However, in her studies of fatherhood, Dermott found that contemporary fatherhood puts "an emphasis on the aspects of male parenting that fathers themselves view as most

²⁸ Frances Goldscheider, Eva Bernhardt and Trude Lappegård "The Gender Revolution: A Framework for Understanding Changing Family and Demographic Behavior" (2015) 41 *Popul Dev Rev* 207 at 207–208.

²⁹ At 210.

³⁰ At 211.

³¹ Margaret F Brinig and Douglas W Allen "'These Boots Are Made for Walking': Why Most Divorce Filers Are Women" (2000) 2 *Am L & Econ Rev* 126 at 127.

³² William J, Ray Sin and Barbara Risman "Attitudes and the Stalled Gender Revolution: Egalitarianism, Traditionalism, and Ambivalence" (2019) 33 *Gend Soc* 173 at 195.

³³ Richard J Petts, Kevin M Shafer and Lee Essig "Does Adherence to Masculine Norms Shape Fathering Behavior?" (2018) 80 *J Marriage Fam* 704 at 705.

³⁴ At 705.

significant: emotions, the expression of affection, and the exclusivity of the reciprocal father-child dyad”.³⁵ Dermott further argues that the new fatherhood “is centred on a personal connection at the expense of participation in the work of childcare”.³⁶

Feminist scholars criticised fathers for their choice of care activities. In her 2020 article, Jordan relies on the work of Gilligan who unveiled the inherently different gendered moral attitudes as women use ethics of care while men use ethics of rights.³⁷ She cites Tronto who argued that hegemonic masculinity adopted a different model of care in order to excuse men from feminine care activities. Men chose to care by protecting women and children and by providing for them, enabling them to be involved “at one removed, rather than in the direct and intimate ways usually associated with care”.³⁸ In her own study, Jordan found that men use fundamentally masculine aspects of care in their fatherhood practice, emphasising activities such as physical play and breadwinning.³⁹

Tensions between new fatherhood and feminism, especially in the context of legal rights after separation, led to the phenomenal rise of father’s rights groups (FRGs) in Western countries, which is seen by some scholars as a backlash to the success of feminism.⁴⁰ The main allegation of FRGs is that fathers are systematically discriminated against in the family justice system, which favours women as custodians. Collier, who studied FRGs, highlighted the significant role they played in shifting legislation in many countries from maternal sole-custody to a shared-parenting model.⁴¹

Other studies into the ideology and tools used by FRGs revealed that their common rhetorical devices include: claiming victim status and demanding equality, selective use of statistics, fusing the interests of fathers with those of children, and warnings against the dangers of “lone motherhood”.⁴² A 2019 scoping review of 52 studies on FRGs concluded that most researchers

³⁵ Esther Dermott *Intimate Fatherhood: A Sociological Analysis* (Routledge, New York, 2008) at 143.

³⁶ At 143.

³⁷ Ana Jordan “Masculinizing Care? Gender, Ethics of Care, and Fathers’ Rights Groups” (2020) 23 JMM 20 at 22.

³⁸ At 23–24.

³⁹ At 25–26.

⁴⁰ Michael Flood “Backlash: Angry Men’s Movements” in SE Rossi (ed) *The Battle and Backlash Rage On: Why Feminism Cannot be Obsolete* (Xlibris Press, Philadelphia, 2004) 261 at 271.

⁴¹ Richard Collier “Fathers’ Rights, Gender and Welfare: Some Questions for Family Law” (2009) 31 J Soc Welf Fam Law 357 at 358.

⁴² Miranda Kaye and Julia Tolmie “Discoursing Dads: The Rhetorical Devices of Fathers’ Rights Groups” (1998) 22 Melb U L Rev 162 at 163.

were critical of the motives behind FRGs' claims and their arguments.⁴³ Some of the studies reviewed found FRGs are "a regressive attempt to reinstate patriarchal privileges, derail ongoing efforts to fight violence against women, and delegitimize policies aimed at countering structural gender inequalities in society".⁴⁴ Other studies, though critical of their methods, acknowledged the important role FRGs play in supporting fathers at difficult times.⁴⁵ Collier argued that the success of the movement has to be seen in the context of the complex social changes in the family and in the difficulties created by the contradictory message and expectations from fathers.⁴⁶

B Power and Control in Gender Relationships

Gendered power struggles are ever-present in the relationship of most heterosexual couples. Feminist research points to gender power inequality in intimate relationships as a major source of conflict.⁴⁷ In the mid-1990s, Arendell completed a qualitative study interviewing 75 divorced fathers and found that gender power was a central theme in their discourse. The majority of participants believed in inherent gender differences and held an underlying assumption of male superiority.⁴⁸ Most participants understood divorce as a gender war and believed they were victimised and their rights violated in the divorce.⁴⁹ Arendell concluded that "[d]ivorce unseated men, especially noncustodial fathers, from their positions of privilege in the family."⁵⁰ She cited Riessman's earlier observation that "[w]ith divorce men experience a decline in their spheres of control and women experience an increase in theirs".⁵¹

Smart and Neale argued that men often use *debilitative power* over women within relationships, causing women to feel powerless. Following divorce, men describe losing much of their power over the family, which prompts them to try and stay involved in the life of their ex-partner. Men perceive women as holding all the power following divorce, mainly because they have

⁴³ Jonathan Alschech and Michael Saini "Fathers' Rights' Activism, Discourse, Groups and Impacts: Findings from a Scoping Review of the Literature" (2019) 60(5) J Divorce Remarriage 362.

⁴⁴ At 367.

⁴⁵ At 367.

⁴⁶ Collier, above n 41, at 357.

⁴⁷ Sharon Sassler and Amanda J Miller "Waiting to Be Asked: Gender, Power, and Relationship Progression Among Cohabiting Couples" (2011) 32 J Fam Issues 482 at 484.

⁴⁸ Terry Arendell *Fathers & divorce* (Sage Publications, Thousand Oaks California, 1995) at 14.

⁴⁹ At 14.

⁵⁰ At 46.

⁵¹ At 46.

the children, a power termed by these scholars as *situational power*.⁵² Smart and Neale observed that: “Many of the fathers in our sample experienced having to negotiate with their ex-wives as demeaning and as a tangible sign of their powerlessness ...”.⁵³ Following divorce, women often need to find their own power, and to do so, they must detach themselves completely from their ex-partner’s debilitating power.⁵⁴

Elizabeth, Gavey and Tolmie, who studied the experiences of New Zealand women following separation, highlighted the subtle yet systematic forms of inequality and subordination which characterise relationships.⁵⁵ The women in their study described constant use of dominating power by their partners during the relationships, which continued and often exacerbated following separation.⁵⁶ The authors warn against ignoring this interactional power, which they argue is often as potent and damaging as physical violence, and urge professionals in the legal system to be mindful of its profound effect.⁵⁷

Family violence is the most harmful manifestation of the gender power struggle. Family violence is defined in the Family Violence Act 2018 as including physical abuse, sexual abuse or psychological abuse inflicted against a person by a current or previous family member.⁵⁸ The Act clarifies that the definition includes coercive controlling behaviour, which is a number of acts of violence, each may seem minor, yet together they create a pattern of violence.⁵⁹ Family violence is highly prevalent in New Zealand, which has the highest level of family violence in the OECD.⁶⁰ The data reveals that one in three women in New Zealand experiences physical or sexual violence from an intimate partner in her lifetime, and if psychological violence is included, this figure increases to 55 per cent.⁶¹ Research found that family violence is often characterised by denial and invisibility by both victim and perpetrator and often by professionals and health services.⁶² Studies on the motivations of perpetrators found that their

⁵² Carol Smart and Bren Neale *Family fragments?* (Polity Press, Malden, Massachusetts, 1999) at 145–146.

⁵³ At 145.

⁵⁴ At 143–144.

⁵⁵ Vivienne Elizabeth, Nicola Gavey and Julia Tolmie “The Gendered Dynamics of Power in Disputes Over the Postseparation Care of Children” (2012) 18 *Violence Against Women* 459 at 464–465.

⁵⁶ At 474.

⁵⁷ At 475.

⁵⁸ Section 9.

⁵⁹ Section 9(3).

⁶⁰ Mandy Morgan and Tony Mattson “Dignity, diversity, and resistance: A bicultural, community-led approach to transforming social responses to domestic violence in Aotearoa New Zealand” (2018) 29(2) *ACP* 5, at 5.

⁶¹ New Zealand Family Violence Clearinghouse *Data Summaries Snapshot 2017* <www.nzfvc.org.nz>.

⁶² Patrizia Romito *A deafening silence* (Policy Press, Bristol, 2008) at 122.

goal is to achieve power and control over the victim, and they are driven by a strong sense of entitlement to the obedience of the victim.⁶³ The psychological effects on victims are devastating and include anxiety, emotional numbing, dissociation, depression, and avoidance behaviour.⁶⁴

Inextricably linked to family violence are accusations of parental alienation, mostly raised by fathers against mothers who express concerns about violence. Parental alienation is used to “describe parental conduct in separated families where the children are, apparently without good reason, reluctant or resistant to spending time with one parent.”⁶⁵ Alienation is a highly contentious issue as many scholars assert it is not an existing phenomenon, but an excuse to deflect allegations of family violence.⁶⁶

A balanced picture of the gendered power dynamics should include the phenomenon of maternal gatekeeping, which was identified in 1999 by Allen and Hawkins, who defined it as:⁶⁷

... a collection of beliefs and behaviors that ultimately inhibit a collaborative effort between men and women in family work by limiting men’s opportunities for learning and growing through caring for home and children.

These researchers found that women set standards for household and childcare tasks and display mistrust in their partner’s ability to conform to these standards by criticising them, redoing tasks, and setting guidelines to how they must be performed. They trace this behaviour to women’s need for external affirmation of their maternal role.⁶⁸ In a 2017 article, Saini, Drozd and Olesen affirmed the centrality of the gatekeeping concept within families, but pointed out that it is used by both mothers and fathers and is therefore gender-neutral.⁶⁹

⁶³ Barbara J Hart “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 Mediat Q 317 at 318.

⁶⁴ Leone Walker *The Battered Woman Syndrome* (4th ed, Springer, New York, 2017) at 3.

⁶⁵ Zoe Rathus “A history of the use of the concept of parental alienation in the Australian family law system: contradictions, collisions and their consequences” (2020) 42 J Soc Welf Fam Law 5 at 6.

⁶⁶ In New Zealand the Backbone Collective has done extensive research on the link between parental alienation and family violence, see: <www.backbone.org.nz>.

⁶⁷ Sarah M Allen and Alan J Hawkins “Maternal Gatekeeping: Mothers’ Beliefs and Behaviors That Inhibit Greater Father Involvement in Family Work” (1999) 61 J Marriage Fam 199 at 200.

⁶⁸ At 204.

⁶⁹ Michael A Saini, Leslie M Drozd and Nancy W Olesen “Adaptive and Maladaptive Gatekeeping Behaviors and Attitudes” (2017) 55 Family Court Review 260 at 263.

C How Fathers Enhance the 'Welfare and Best Interests' of Children

1 The Importance of the Father in Children's Lives

A historical view of fathers' role in Western societies unveils a major shift from distinct parental roles, where mothers provide care and nurturance and fathers provide authority and discipline. Social changes created the nurturant father, who continues to enforce authority, while sharing in childcare, emotional support and parent-child play.⁷⁰ In his seminal 2004 article, Paquette introduced his theory that fathers provide unique aspects for the development of children. Observation studies found fathers interact differently with children, being more involved in physical play and in trying to excite them.⁷¹ Paquette argued that there is a qualitative difference between the attachment of mothers and fathers to their children and termed fathers' style *activation relationship*, done mainly through play and specifically through rough and tumble play.⁷² He summarises his theory on fathers' role:⁷³

Fathers play a particularly important role in the development of children's openness to the outside world and their autonomy. Men seem to have a tendency to surprise children, to destabilize them momentarily, and to encourage them [to] take 'risks', thus enabling children to learn to be brave in unfamiliar situations and to stand up for themselves.

Contrary to this view, Pleck carried out a meta-analysis of fatherhood research to test whether fathers' contribution to child development is uniquely masculine.⁷⁴ His conclusion is that there is more overlapping than differences between the parenting of mothers and fathers, with the only clear difference being mothers spending more time with their children. Pleck acknowledged that children in two-parent families have better outcomes, however, he points to studies that compared families with male/female parents and female/female parents and found no difference in children's outcomes. These findings, Pleck argues, indicate that better child outcomes in two-parent families are likely to result from having two parents, rather than from father's masculinity.⁷⁵

⁷⁰ Daniel Paquette "Theorizing the Father-Child Relationship: Mechanisms and Developmental Outcomes" (2004) 47 Hum Dev 193 at 196.

⁷¹ At 198.

⁷² At 202.

⁷³ At 212.

⁷⁴ Joseph H Pleck "Fatherhood and Masculinity" in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, Wiley, Hoboken NJ, 2010) at 34.

⁷⁵ At 35–46.

Recent studies provide clear evidence that the involvement of fathers in their children's lives is hugely important and that fatherhood is not inferior to motherhood. In a 2018 meta-analysis of 46 studies on fatherhood, Fabiano and Caserta concluded: "There is clear and consistent evidence that positive father involvement supports child development across a host of domains."⁷⁶ A 2021 article reporting on a longitudinal study at Cambridge University compared the quality of parenting between heterosexual, gay and lesbian families with adopted children. In the literature review, the researchers noted that previous studies on gay fathers consistently found better outcomes for children:⁷⁷

... findings indicated more positive family functioning in gay father than in heterosexual parent families ... Specifically the gay fathers had higher levels of psychological well-being, were more responsive, displayed higher levels of interaction and lower levels of disciplinary aggression, and showed greater warmth toward their children than the heterosexual parents did.

In their own study, the researchers examined the parenting quality at various stages of child development (currently at adolescence) and concluded:⁷⁸

Contrary to the view that fathers are less suited to child rearing than are mothers, the only difference in parenting that emerged reflected more positive parenting by gay fathers than by heterosexual parents.

It seems that deeply rooted masculine socialised norms, rather than inherent deficiencies, are behind fathers' lower involvement in parenting.

2 *Fatherhood After Separation*

As divorce is a relatively new phenomenon in the history of humanity, divorced fathers often find themselves in new territory with few tools to guide their behaviour. Seltzer pointed out that the wide variation in post-divorce fatherhood styles identified in research "suggests an absence of clear rules or norms for his role".⁷⁹ Seltzer explains that although society encourages

⁷⁶ Gregory A Fabiano and Abigail Caserta "Future Directions in Father Inclusion, Engagement, Retention, and Positive Outcomes in Child and Adolescent Research" (2018) 47 J Clin Child Adolesc Psychol 847 at 847.

⁷⁷ Anja L McConnachie and others "Adoptive Gay Father Families: A Longitudinal Study of Children's Adjustment at Early Adolescence" (2021) 92(1) Child Dev 425 at 427.

⁷⁸ At 438.

⁷⁹ Judith A Seltzer "Relationships between Fathers and Children Who Live Apart: The Father's Role after Separation" (1991) 53 J Marriage Fam 79 at 81.

men to be more nurturing and involved, “fathers face ambiguous messages from their families and the mass media about their responsibilities to children with whom they do not live.”⁸⁰

This lack of clear expectations from fathers is evident from the statistics showing that following divorce, 70 to 80 per cent of mothers want sole custody, while fathers are split: a third want sole paternal custody, a third joint custody and a third sole maternal custody.⁸¹ These authors hypothesise that the reason for this difference between mothers and fathers is the prevailing notion amongst lawyers and the public that it is unrealistic for fathers to ask for sole or joint custody, and this perception discourages most men from pursuing it.⁸²

Pleck offers a different explanation for these variations, highlighting the fundamental difference between the motivations of men and women: “... [I]n most cultures, among those who are parents, mothering is mandatory while fathering is discretionary”.⁸³ Understanding that men and women receive profoundly different socialised messages is incredibly important. It may explain why, following separation, fathers feel they have options and that if choosing to stay in the lives of their children is too hard, they may give up and disengage from their children.

Collier reviewed the legal attitude towards fathers following divorce and highlighted the recognition for the father-child dyad, which “reflects a growing belief that fathers do, and should, have a direct, vertical relationship with their children unmediated by the child’s mother”.⁸⁴ Collier stresses the importance of accepting the different *quality* of fatherhood, as society and Family Courts often judge fathers as failing to contribute to family life because of their different parenting style.⁸⁵

⁸⁰ At 81.

⁸¹ William V Fabricius and others “Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce” in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, Wiley, Hoboken NJ, 2010) 201 at 211.

⁸² At 213.

⁸³ Joseph H Pleck “Integrating Father Involvement in Parenting Research” (2012) 12 *Parent Sci Pract* 243 at 250.

⁸⁴ Collier, above n 41, at 361.

⁸⁵ At 366.

A disturbingly prevalent behaviour of fathers is disengagement from their children following divorce.⁸⁶ The damaging effects of father absence on children were illustrated by Kruk.⁸⁷

Father absence is associated with diminished self-concepts in children, youth crime (85% of youth in prison have an absent father), poor academic performance (71% of high school dropouts have an absent father), and homelessness (90% of runaway children have an absent father). Fatherless children are more likely to be victims of abuse, and have significantly higher levels of depression and suicide, delinquency and promiscuity, behavior problems, substance abuse, and teen pregnancy. ... And children of divorce consistently report that they wish they had more contact with their fathers and feel abandoned when fathers are not involved in their lives.

Understanding the causes of father absence provides an important insight into the mindset of non-custodial fathers. In an early 1990s study, Kruk uncovered an unexpected finding — disengaged fathers were fathers who during the marriage were most attached to their children, spent more time and had a close emotional bond with them. He found that these fathers were so heartbroken by the sharp change in the relationship with their children — from a close nurturing parent to a distant “visiting” parent — that many could not bear the pain and disengaged.⁸⁸ Kruk explained: “What made the ‘visiting’ relationship particularly difficult for these fathers was the pain of the visits themselves, their brevity, artificiality, and superficiality.”⁸⁹

Other researchers hypothesised that the reason for disengagement is the difficulty in the interactions with the ex-wife, which are too painful and full of anger.⁹⁰ The father vulnerability hypothesis suggests that disengagement is a result of men using withdrawal as a coping response to difficult emotional situations.⁹¹

⁸⁶ In the 2019 United States census figures, 20.2 per cent of fathers are absent: US Census Bureau “The Two Extremes of Fatherhood” <www.census.gov>.

⁸⁷ Edward Kruk “Divorced Fathers at Risk of Parental Alienation: Practice and Policy Guidelines for Enhancing Paternal Responsibility” (2016) 5(1) JMS 95 at 96.

⁸⁸ Edward Kruk “Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce” (1992) 30 Fam & Concil Cts Rev 81 at 85.

⁸⁹ At 95.

⁹⁰ Arendell, above n 48, at 576; and Nehami Baum “Postdivorce Paternal Disengagement: Failed Mourning and Role Fusion” (2006) 32 J Marital Fam Ther 245 at 247–248.

⁹¹ Mark E Cummings, Christine E Merrilees and Melissa W George “Fathers, Marriages, and Families: Revisiting and Updating the Framework for Fathering in Family Context” in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, Wiley, Hoboken NJ, 2010) 154 at 157–158.

3 *How to Minimise the Damage to Children Following Divorce*

Over the fifty years since divorce became a widespread phenomenon in Western societies, the negative outcomes on children have become evident. Research on the effect of divorce on children revealed a wide range of negative outcomes ranging from anti-social behaviours such as aggression, failure to respect rules, lying, impulsivity, vandalism and poor academic performance, through to delinquent behaviours and suicide.⁹² As divorce seems unavoidable, researchers focussed on how to minimise the damage. Studies found that children will adjust better to family separation if there is:⁹³

(1) an authoritative relationship with at least one parent; (2) mild parental conflict or conflict that does not involve the children; (3) economic stability; and (4) a good relationship with both parents.

Experts emphasise that the most important factor for children's wellbeing is having a meaningful relationship with both parents.⁹⁴ Meaningful relationship is measured by the openness and depth of sharing emotional content, not necessarily the length of time spent with each parent. However, experts concluded that a minimum amount of time together is required for creating a meaningful relationship, and in particular the participation of both parents in children's everyday lives.⁹⁵

The question of what post-separation parenting arrangement best supports the wellbeing of children, taking into consideration the above factors, is at the centre of scholarly debate. The three models which dominate post-separation family arrangements are:⁹⁶

- *Primary caretaker* — this model prioritises stability and awards day to day care to the parent who provided most of the care prior to separation.
- *Approximation rule* — still regards stability as important, but acknowledges the importance of continued contact with the second parent, so time allocation is based on

⁹² Paul R Amato and Cassandra Dorius "Fathers, Children and Divorce" in Michael E Lamb (ed) *The Role of the Father in Child Development* (5th ed, Wiley, Hoboken NJ, 2010) 177 at 184; Paquette above n 70 at 197.

⁹³ Robert E Emery, David Sbarra and Tara Grover "Divorce Mediation: Research and Reflections" (2005) 43 *Fam Ct Rev* 22 at 24. Also see: Amato and Dorius, above n 92, at 185.

⁹⁴ Fabricius and others, above n 81, at 218.

⁹⁵ At 227.

⁹⁶ At 204–205.

an assessment of how much time each parent spent in childcare activities prior to separation.

- *Shared parenting (or joint custody)* — this model regards continued relationship with both parents as more important than stability and awards day to day care to both parents.

The current literature still reflects the debate between scholars. In 2016, Lamb reviewed the research and stressed the importance of children maintaining a supportive relationship with both parents, emphasising that significant time allocation to non-resident parents is crucial for the development of such meaningful relationships:⁹⁷

Brief dinners and occasional weekend visits do not provide a broad enough or extensive enough basis for such relationships to be fostered, whereas weekday and weekend daytime and night-time activities are important for children of all ages.

Lamb concludes, however, that shared parenting may not always be the right arrangement, especially in situations of high parental conflict, and that the individual circumstances of each family should be assessed and considered.⁹⁸

In 2017, Nielsen reviewed the literature on post-separation child outcomes, paying particular attention to high conflict families, and concluded:⁹⁹

In sum, the best research currently available suggests that the quality of the parent-child relationship is more closely linked than parental conflict or the quality of the coparenting relationship to children's outcomes, with the exception of the most extreme forms of conflict to which some children are exposed.

Two 2019 articles examined the shared-parenting model and emphasised its advantages over the primary caretaker model, both concluding that, overall, it is the best arrangement to foster a high-quality relationship with both parents.¹⁰⁰

This enthusiasm with the shared-parenting model was criticised by Smyth, who highlighted that most studies on shared parenting are so heterogeneous and lacking in methodology that

⁹⁷ Michael E Lamb "Critical analysis of research on parenting plans and children's well-being" in Lesley Drozd, Michael Saini and Nancy Olesen *Parenting Plan Evaluations* (Oxford University Press, New York, 2016) at 206.

⁹⁸ At 206.

⁹⁹ Linda Nielsen "Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements" (2017) 23 Psychol Public Policy Law 211 at 228.

¹⁰⁰ Anja Steinbach "Children's and Parents' Well-Being in Joint Physical Custody: A Literature Review" (2019) 58 Fam Process 353 at 363; Kim Bastaitis and Inge Pasteels "Is joint physical custody in the best interests of the child?" (2019) 36 J Soc Pers Relat 3752 at 3767.

they amount to a “conceptual and methodological quagmire”.¹⁰¹ He points to the scarcity of studies that rely on sound data and warns against attempts to simplify one of the most complex issues in family law. He concludes that the reality in most countries is that shared parenting is not the prevailing outcome in Family Courts.¹⁰²

4 *The Devaluation of Fatherhood*

Studies on fatherhood reveal that most fathers consider fatherhood to be the most important aspect of their lives, yet they experience a lack of respect for their role as fathers. Kruk, a Canadian researcher who studied post-divorce fathers extensively, found that “the majority of fathers define parenting as a primary attachment and their most important and valued social role.”¹⁰³ One of the main findings in his 2010 study of 82 divorced fathers was: “A perceived lack of valuing of the paternal (and parental) role by social institutions is discouraging for divorced fathers.”¹⁰⁴ In a 2016 article, Kruk distils what he perceives as key to engaging fathers following divorce:¹⁰⁵

Respect for fathers’ strengths and capacities is crucial to engagement; alienated and absent fathers in particular report being stereotyped as and dismissed as ‘deadbeat dads’, assumed to be voluntarily disengaging from their children’s lives ... Above all else, the key to practice with divorced fathers is to validate and seek to enhance their parenting identity and their parenting role.

Kruk notes that a comparison between his 1990 study and his 2010 study revealed worse outcomes for fathers in the later study, especially in the legal system, despite fathers’ increased childcare involvement over these 20 years.¹⁰⁶

Appleby and Palkovitz termed this devaluing attitude “the deficit paradigm of fatherhood” and pointed to the clinical literature which both creates and reflects this deficit in the derogating and dismissive terms used for fathers, such as ‘infantile’, ‘incompetent’ and ‘under-developed’.¹⁰⁷

¹⁰¹ Bruce M Smyth “Special Issue on Shared-Time Parenting after Separation” (2017) 55 Fam Ct Rev 494 at 494.

¹⁰² At 497.

¹⁰³ Edward Kruk “Parental and Social Institutional Responsibilities to Children’s Needs in the Divorce Transition: Fathers’ Perspectives” (2010) 18 J Men Stud 159 at 160.

¹⁰⁴ At 173.

¹⁰⁵ Kruk, above n 87, at 109–110.

¹⁰⁶ At 99.

¹⁰⁷ David W Appleby and Rob Palkovitz “Factors Influencing a Divorced Father’s Involvement with His Children” (July 2007) Liberty University Faculty Publications <digitalcommons.liberty.edu> at 8.

Other researchers found that the devaluation often originates from mothers. In a 2006 Australian study on mothers' perceptions on fathers' involvement in parenting, Hand noted that previous research found that "... most mothers simply 'consider them incompetent', believing that they 'can't handle the simplest of childrearing tasks'".¹⁰⁸ Her own study found similar notions of mothers seeing fathers as less important, doubting their abilities to parent adequately and often seeing them as no more than providers.¹⁰⁹

This devaluation of fatherhood contradicts the new fatherhood ideal which emphasises a close relationship with children. Collier finds a possible explanation in the observation that contemporary fatherhood focusses on the intimate emotional connection between men and their children, rather than on childcare *work*, leaving mothers to carry the burden of this work.¹¹⁰

D The Severity of Men's Reaction to Divorce

Scholars who studied men's experience of divorce agree that, as a general rule, men's reaction is highly intense and severe, more than the reaction of women. In the early 1980s, researchers started noticing evidence of this severe reaction in an array of statistical figures: divorced men were nine times more likely to be admitted to psychiatric hospitals than married men; divorced men's rate of involvement in car accidents doubled between six months prior to the divorce to six months after divorce; and divorced men were present in higher numbers in the statistics on suicide, homicide and death from various illnesses such as cancer, diabetes and heart disease.¹¹¹ Studies that examined the psychological mindset of fathers following divorce found consistent evidence of loneliness, despair, depression and isolation.¹¹²

Kposowa examined the link between marital status and suicide and found that divorced men were 4.8 times more likely to commit suicide than divorced women.¹¹³ Kruk found evidence of grief, loss and helplessness, loneliness, depression and apathy, feelings of inadequacy, and incompetence.¹¹⁴ Studies that examined the physical health of divorce on fathers found that

¹⁰⁸ Kelly Hand "Mothers' Accounts of Work and Family Decision-making in Couple Families" (2006) 75 *Fam Matters* 70 at 72.

¹⁰⁹ At 76.

¹¹⁰ Collier, above n 41 at 367.

¹¹¹ John W Jacobs "The Effect of Divorce on Fathers: An Overview of the Literature" (1982) 139(10) *Am J Psychiatry* 1235 at 1236.

¹¹² At 1237.

¹¹³ Augustine J Kposowa "Marital Status and Suicide in the National Longitudinal Mortality Study" (2000) 54 *J Epidemiol Comm Health* 254 at 257.

¹¹⁴ Kruk, above n 103, at 161.

approximately half of the fathers developed physical symptoms, including weight loss, nerve-related eye and dental problems, high blood pressure, increased drinking, sleeping and eating difficulties, and psychosomatic complaints.¹¹⁵

Several researchers who engaged in qualitative studies on the experiences of divorced fathers found that men often used the words ‘death’ or ‘bereavement’ to describe their experience.¹¹⁶ The classic stages of the bereavement process, which are essential for healing, were identified as denial, anger, bargaining, depression and acceptance.¹¹⁷ Men are often deprived of a healthy bereavement process due to a combination of factors described below.

Psychological research found profound differences between men and women in emotional expression.¹¹⁸ Men *express* their emotions less than women, but do not necessarily *experience* them less. Scholars distinguished between powerless and powerful emotions, and identified that women express more of the powerless emotions such as sadness, fear and love, while men express the powerful emotions such as anger, contempt, disgust and pride.¹¹⁹ Other studies found that while women tend to externalise their emotions, men tend to internalise them and withdraw from emotionally difficult situations.¹²⁰ It is important to note that these differences are not inborn, but were found to be a result of the differences in socialisation between boys and girls.¹²¹

Research on gender differences in the mourning process found that grieving styles are also correlated with the traditional societal gender stereotypes, thus men are expected to be strong and not display outwardly emotional reactions to grief. This approach, referred to as “masculine grief”, is characterised by suppressed emotions and enhanced cognitive and problem-solving attitudes.¹²² Other researchers highlighted the difficulty of men who conform to societal gender norms to reconcile their intense feelings with the expectation to be strong and stoic.¹²³

¹¹⁵ At 161.

¹¹⁶ Edward Kruk “The Grief Reaction of noncustodial Fathers” (1991) 8(2) *Men Stud Rev* 17 at 18.

¹¹⁷ Elisabeth Kübler-Ross and David Kessler *On Grief and Grieving: finding the meaning of grief through the five stages of loss* (Simon and Schuster, New York, 2007) at 7—28.

¹¹⁸ Paula M Niedenthal, Silvia Krauth-Gruber and François Ric *Psychology of Emotion: Interpersonal, Experiential, and Cognitive Approaches* (Psychology Press, New York, 2017) at 275.

¹¹⁹ At 285.

¹²⁰ At 293.

¹²¹ At 299.

¹²² HAW Schut and others “Intervention for the bereaved: Gender differences in the efficacy of two counselling programmes” (1997) 36 *Br J Clin Psychol* 63 at 64.

¹²³ Kenneth J Doka and Terry L Martin “Grieving Styles: Gender and Grief” (2011) 14(2) *Grief Matters* 42 at 43.

Kruk explains that in addition to the losses experienced by all divorced people, fathers, who are typically non-custodial parents, suffer the added loss of separating from their children.¹²⁴ Kruk applied the five stages of grief to non-custodial fathers and explained that denial functions as a temporary defence against the initial shock of the enormous loss entailed in the divorce. Once the reality becomes impossible to deny, strong feelings of anger and hostility emerge, often directed at the partner initiating the divorce.¹²⁵ Bargaining often involves attempts for reconciliation, however when these fail, anger is often replaced by depression triggered by the vast extent of the loss. Acceptance may be reached in time for men who work through the grief, however, Kruk concludes:¹²⁶

A significant number of fathers do not reach the point of ‘acceptance’ or ‘resolution’; many speak of continuing depression and an overwhelming sense of loss, with themes of isolation, loneliness, and a total upheaval of their lives, related first and foremost to the absence of their dependent children.

Baum analyses the differences between the divorce mourning patterns of men and women and highlights that women typically mourn early in the process, even before the separation, while men start after the separation. Men mourn the loss of their children, home, and routines, while women mourn the loss of the marital relationship. In terms of style, men mourn through increased activity, somatisation and self-medication with alcohol and drugs.¹²⁷ Baum emphasises that completing the grieving process is essential for enabling psychological separation and concludes that men are more severely affected by divorce because the marital relationship is often their only source of emotional support and intimacy and because they often lose close daily contact with their children.¹²⁸

¹²⁴ Kruk, above n 116, at 17.

¹²⁵ At 18.

¹²⁶ At 19.

¹²⁷ Nehami Baum “The Male Way of Mourning Divorce: When, What and How” (2003) Clin Soc Work J 37 at 38.

¹²⁸ Nehami Baum “On Helping Divorced Men to Mourn Their Losses” (2004) 58 Am J Psychother 174 at 175–177.

E Is Mediation More Congruent with “Welfare and Best Interests of the Child”?

In New Zealand, as well as in many other Anglo-European countries, mediation has become the preferred process for resolving care of children disputes. The Government Centre for Dispute Resolution (GCDR) is the agency that informs policy and legislation on dispute resolution. The GCDR’s glossary of dispute resolution terms includes a general definition of mediation:¹²⁹

Mediation is a process where the parties, with the assistance of external help, create a safe environment where they can address their issues and resolve them if they wish. Mediation is based on the principles of voluntariness, confidentiality, impartiality, and self-empowerment.

Moore offers a more comprehensive definition, centred around the role of the mediator:¹³⁰

Mediation is a conflict resolution process in which a mutually accepted third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist involved parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.

Mediation is often mistakenly equated with lawyer-led negotiation or with compromise and settlement. However, at its core, mediation is a more powerful and evolved process with potential to truly resolve disputes, at their deeper level, rather than settle them.

In this chapter, I briefly touch on the nature of conflict and introduce the main schools of mediation and the tools each developed to resolve conflicts. I then move to explore the special characteristics of family-mediation and review studies that analysed mediator interventions and participant experiences of family-mediation. I then review studies on the specific experiences of men in family-mediation. Finally, I highlight the arguments why the adversarial court system is not a good forum for family disputes and explore some of the criticism and concerns about family-mediation.

1 The Nature of Conflict

At the heart of progressive mediation philosophies is the idea that conflict is not a negative thing, it is merely a symptom indicating the existence of unfulfilled needs and unmet interests

¹²⁹ Government Centre for Dispute Resolution “Glossary of dispute resolution terms” (2019) <www.mbie.govt.nz>.

¹³⁰ Christopher W Moore *The Mediation Process* (Wiley & Sons, New York, 2014) at 8.

of one or all parties. Cloke explains that conflict is merely a manifestation of the need for change.¹³¹

Without conflict, quite simply, there would be no learning, growth, or change. This is not merely because leaning, growth, and change require a release from obsolete circumstances, but because every human being, relationship, organization and system stabilizes itself by means of integration and order, yet is only able to evolve to higher levels of functioning by means of disintegration and disorder, expressed primarily through conflict.

Other mediation scholars point to basic human needs and interactions as the deep source of conflict and highlight the need for mediators to identify this source in order to resolve the conflict. Moore's cycle of conflict centres around issues, needs, and interests and lists the main factors that contribute to the formation of a conflict: communication, emotions, history, structure, values, power and information.¹³² Boule, Goldblatt and Green refer to the Maslow hierarchy of needs, which outlines the five levels of human needs: basic physiological needs, security and safety needs, love and belonging needs, the need for esteem, and at the top are self-actualisation needs. Conflict can be traced back to any of these needs not being met.¹³³

Other scholars view conflict from the lens of its psychological outcomes, focussing on the effect conflict has on people as incredibly difficult and unpleasant. Bush and Pope minimise the importance of identifying the source, focussing instead on the negative feelings associated with conflict:¹³⁴

What most people find hardest about conflict is not that it frustrates their satisfaction of some right, interest, or project, no matter how important, but that it leads and even forces them to behave toward themselves and others in ways that they find uncomfortable and even repellent. It alienates them from their sense of their own strength and their sense of connection to others, and thus it disrupts and undermines the interaction between them as human beings.

The authors isolated the two elements that create these negative feelings in people: *weakness*, experienced as loss of control, confusion, uncertainty; and *self-absorption*, defined as a focus on self, protectiveness, suspiciousness, hostility and being closed to the perspective of others.¹³⁵ Bush and Pope explain the vicious cycle of conflict which entangles parties in

¹³¹ Ken Cloke *The crossroads of conflict* (Janus Publications, Calgary, 2006) at 40.

¹³² Moore, above n 130, at 110.

¹³³ Laurence Boule, Virginia Goldblatt and Philip Green *Mediation Skills and Strategies* (New Zealand ed, LexisNexis, Wellington 2015) at 72–73.

¹³⁴ Robert A Baruch Bush and Sally Ganong Pope "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation" (2002) 3 Pepp Disp Resol L J 67 at 71.

¹³⁵ At 73–74.

feelings of demonisation, alienation and disrespect for the other party. The assistance parties need most is in breaking that cycle and acknowledging the other party as human, though holding a different perspective.¹³⁶

These theories acknowledge the deeper source leading to the emergence of conflict and the profound effects it has on the people involved, hence the need to resolve conflict effectively.

2 *The Ultimate Core Value of Mediation: Self-Determination*

At the very heart of mediation is the idea of self-determination, of encouraging people to resolve their own dispute in their own way. The American Bar Association's Model Standards for Conduct for Mediators set self-determination as its first standard and defines it as: "... the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome".¹³⁷

The self-determination theory was first introduced by psychologists Deci and Ryan, who asserted that the *quality* of a person's motivation counts more than its quantity for achieving important outcomes such as psychological and physical wellbeing, effective performance, creative problem-solving, and deep learning. They distinguished between autonomous motivation and controlled motivation. Autonomous motivation forms when one chooses to identify with a value and integrates it into one's sense of self. Controlled motivation emerges when one's behaviour is controlled by external forces of reward and punishment, and the experience of being in control is absent.¹³⁸

In 2008 Deci and Ryan highlighted the enormous amount of research done over the previous decade, which empirically established the strength and subtleties of the self-determination theory.¹³⁹ This body of research verified that satisfying the need for competence, autonomy and relatedness increases psychological wellbeing.¹⁴⁰ Studies concluded that controlled motivation is linked to a need for external contingencies, to rigid functioning and to diminished wellbeing. The overall aspirations of people driven by controlled motivation are extrinsic

¹³⁶ At 76.

¹³⁷ American Bar Association "Model Standards of Conduct for Mediators" (September 2005).

¹³⁸ Edward L Deci and Richard M Ryan "The General Causality Orientations Scale: Self-determination in Personality" (1985) 19 J Res Per 109 at 131.

¹³⁹ Edward L Deci and Richard M Ryan "Self-determination theory: A Macrotheory of Human Motivation, Development, and Health" (2008) 49 Can Psychol 182 at 183.

¹⁴⁰ At 183.

aspirations such as fame, wealth and attractiveness. Autonomous motivation, on the other hand, is linked to intrinsic aspirations such as affiliation, generativity and personal development.¹⁴¹

The ideology of mediation is based on the self-determination theory as mediators empower disputants to exercise their autonomy and agency and lead them through a process which encourages them to find their own solutions. This, according to the self-determination theory, will lead to a more profound and enduring resolution of conflicts.

3 *Key Tools for Resolving Disputes in Mediation*

The purpose of mediation is to empower parties to work together to achieve resolution of their dispute. However, the underlying ideologies and techniques employed by mediators to assist parties vary greatly. The literature reveals several mediation schools which developed different philosophies and tools to resolve disputes.¹⁴² Yet, as the mediation profession matures, it is clear that mediators do not necessarily subscribe to a certain school, but use the techniques in an eclectic way to suit their own style and the circumstances of each dispute. Moore suggests that rather than looking at distinct schools, we can view mediation as a continuum, and every mediator may choose where to place themselves on this continuum.¹⁴³

The main schools of mediation and their corresponding techniques are briefly summarised below.¹⁴⁴

- *Facilitative techniques* — facilitative mediators focus primarily on the process and leave the substantive content to the parties.¹⁴⁵ This ideology is based on centring the process around the parties, helping them communicate effectively and revealing their needs and interests.¹⁴⁶ Facilitative techniques shall include: allowing parties to tell their stories, identifying their issues and interests, facilitating communication, information sharing and problem-solving.¹⁴⁷

¹⁴¹ At 183–184.

¹⁴² Moore, above n 130, at 46.

¹⁴³ At 46.

¹⁴⁴ It should be noted that different scholars use different typologies of mediation. The schools I chose to list are the most common in the majority of typologies.

¹⁴⁵ Moore, above n 130, at 47–48.

¹⁴⁶ Bernard Mayer “Facilitative Mediation” in Jay Folberg, Ann Milne and Peter Salem (eds) *Divorce and Family-mediation: Models, Techniques, and Applications* (Guilford Press, New York, 2004) at 32–33.

¹⁴⁷ At 43–48.

- *Settlement techniques* — the main goal of settlement mediation is to assist parties through a positional negotiation process. This model emphasises settling the dispute over improving the communication or relationship between the parties or identifying the deeper sources of the conflict. Settlement mediators aim to create conditions that encourage effective positional bargaining and typically employ frequent use of separate meetings with the parties, often assuming a directive and even interventionist role in the negotiations.¹⁴⁸
- *Transformative techniques* — the transformative mediation model, as conceptualised by Folger and Bush, suggests counteracting the weakness and self-absorption which characterise human reaction to conflict with *empowerment* and *recognition*. Empowerment is defined as “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems”.¹⁴⁹ Recognition “means the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other” even when they do not agree with their point of view.¹⁵⁰ The transformative approach advocates for minimal intervention and direction by the mediator, apart from supporting parties in moving towards more empowerment and recognition.
- *Therapeutic techniques* — this school centres around dysfunctional relationships and behaviours and draws techniques from psychology and social work. These techniques focus on improving communication and relationships as these are key to achieving agreement and long-term change in behaviours.¹⁵¹ Moore notes that these techniques are often used in divorce mediation and especially with high conflict couples. They revolve around a healing paradigm where the emphasis is initially on improving parties’ wellbeing and then focussing on achieving a plan of action.¹⁵²
- *Narrative techniques* — this model focusses on relationships and emphasises the wider cultural, social, political and power-relationship dimensions at the background of the conflict. The rationale behind this philosophy is that people develop stories about their lives and experiences, and these stories are heavily influenced by the social and cultural

¹⁴⁸ Nadja Alexander “The Mediation Meta-model: The Realities of Mediation Practice” (2011) 12(6) ADR Bulletin 126 at 128.

¹⁴⁹ Robert A Baruch Bush and Joseph P Folger *The Promise of Mediation: The Transformative Approach to Conflict* (Rev ed, Jossey-Bass, San Francisco, 2005) at 22.

¹⁵⁰ At 22.

¹⁵¹ Moore, above n 130, at 47.

¹⁵² At 48.

constructs that surround them and the power struggles between various elements. The way to untangle conflict, from this perspective, is to work with parties' stories, analyse them and help parties step back and understand these stories. The ultimate goal is for parties to develop alternative stories that support common grounds that all parties can agree on.¹⁵³

- *Advisory and evaluative techniques* — these techniques are usually based on the mediator being an expert in a particular field and able to provide the parties with knowledge and expertise that will contribute to the resolution of the dispute. Evaluative mediators may also provide legal advice on various aspects of a dispute or on the likely outcome if the matter went to court. Tools used often involve reality-checking and the use of more separate meetings with the parties.¹⁵⁴

4 *Characteristics and Advantages of Family-mediation*

The idea of family-mediation emerged in the 1970s in the United States as a specialised form of mediation aimed at assisting families in separating without the damage of litigation.¹⁵⁵ The goal of family-mediation was to reduce the conflict between parents and bring them together to discuss and make their own decisions about the best care arrangements for their children. The ultimate objective, driven by the understanding that the best outcome for children is to have a meaningful relationship with both parents, was to encourage parents to be more collaborative and fully involved in the lives of their children after separation. Family-mediation was typically characterised by the encouragement of direct communication and cooperation between parties, a restriction on the presence of lawyers and a reduced use of caucusing.¹⁵⁶

In the following two decades, much research was done attempting to empirically establish whether there are advantages to family-mediation over litigation. Joan Kelly, a prominent family-mediation researcher, conducted two meta-analyses of family-mediation research and published the following findings:¹⁵⁷

¹⁵³ At 51–52.

¹⁵⁴ At 55–57.

¹⁵⁵ Folberg, Milne and Salem, above n 146, at 4–6.

¹⁵⁶ Robert H Mnookin “Foreword Symposium: Children, Divorce and the Legal System” (1985) 19(4) *Columbia J Law Soc Probl* 393 at 394–395.

¹⁵⁷ Joan B Kelly “A Decade of Divorce Mediation Research: Some Answers and Questions” (1996) 34 *FCCR* 373 at 375–382; and Joan B Kelly “Family-mediation Research: Is There Empirical Support for the Field?” (2004) 22 *Confl Resolut Q* 3 at 28–29.

- *Settlement rates* — all studies show that parties reach agreement in 50 to 85 per cent of the cases, with more studies in the mid to high end of this range.
- *Time and cost efficiency* — studies found that mediation took less than half the time of litigation and at a considerably lower cost.
- *Better agreements* — studies found that compared with litigation outcomes, mediation agreements were characterised by more shared-parenting; no difference in child-support amounts; and they tended to be more detailed and specific.
- *Higher compliance* — studies indicated that mediated agreements have a better probability of being complied with than litigated outcomes.
- *Client satisfaction* — most studies found a high level of satisfaction with both the process and outcome of mediation — between 60 to 85 per cent (except for in England, where satisfaction was between 38 to 50 per cent).
- *Gender differences in satisfaction* — studies found no difference between satisfaction levels of men and women with the mediation process and outcome.
- *Improved cooperation and communication* — couples who participated in family-mediation reported less conflict during the process and better cooperation and communication over the first two years following mediation.
- *High conflict couples* — studies found that high emotionality and conflict were not barriers to reaching an agreement in mediation.

In 2005, Emery, Sbarra and Grover completed a twelve-year longitudinal study comparing randomly assigned mediation and litigation participants. Their study found mediation had high settlement rates (around 80 per cent), better time efficiency and lower costs, as well as higher client satisfaction both in the short term and after 12 years.¹⁵⁸ An important finding was that 12 years after separation, 30 per cent of fathers who participated in mediation were in close contact with their children, compared with only nine per cent in the group that participated in

¹⁵⁸ Emery, Sbarra and Grover, above n 93, at 28.

litigation.¹⁵⁹ The researchers pointed to the following elements of mediation which were found to make the most difference:¹⁶⁰

- *Taking the long view* — mediation helped parents see the need for cooperation over care of their children in the long run.
- *Education about emotions* — mediators made a conscious effort to assist parents in understanding their emotions and get help in learning to control them.
- *Business-like relationship* — mediation encouraged parents to develop a new type of boundaries around their co-parenting relationship, which enabled more distance and reduced conflict.
- *Avoiding becoming adversaries* — mediation prevented parents from following an adversarial route which inevitably destroys future relationships.

In 2010, another meta-analysis of five mediation studies supported the hypothesis that mediation is more effective than litigation in the following factors: process and outcome satisfaction, emotional satisfaction, increased understanding of children's needs, and a positive effect on the spousal relationship.¹⁶¹

It should be noted that the above studies, as well as others, found that mediation agreements typically provide fathers more time with their children than litigation outcomes.¹⁶²

It is important to point out that the three New Zealand studies mentioned in section II D revealed a different picture, with higher levels of dissatisfaction with the family-mediation process. A possible explanation for these differences is the voluntary nature of participation in the New Zealand studies, as opposed to the random selection of participants in the above studies.

¹⁵⁹ At 30.

¹⁶⁰ At 34.

¹⁶¹ Lori Anne Shaw "Divorce mediation outcome research: A meta-analysis" (2010) 27 Conf Resolut Q 447 at 465.

¹⁶² Lawrie Moloney and others "Evaluating the Work of Australia's Family Relationship Centres: Evidence from the First 5 Years" (2013) 51(2) Fam Court Rev 234 at 244.

5 *The Disadvantages of the Family Court in Care of Children Disputes*

Alongside the review of the advantages of family-mediation, it is useful to look at the disadvantages of the alternative, the Family Court. Below are some of the disadvantages of using the Family Court to resolve care of children disputes.

(a) The adversarial system exacerbates conflict and disempowers litigants

The past few decades have witnessed a lively debate on the question to what extent is our legal system equipped to resolve disputes between people. Touching on this debate very briefly, its essence is well captured in the words of two opposing scholars. Owen Fiss, a leading constitutional law expert, strongly objects to the concept of settlement and explains:¹⁶³

Adjudication uses public resources and employs not strangers chosen by the parties, but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and [statutes]: to interpret those values and to bring into accord with them. This duty is not discharged when parties settle.

On the other side of this debate, Carrie Menkel-Meadow, a leading dispute resolution scholar, has argued that “the adversary system is inadequate, indeed dangerous, for satisfying a number of important goals of any legal or dispute resolution system”.¹⁶⁴ She points out that in our postmodern and multicultural world, with its high level of complexity and sophistication, we need a more flexible and diverse system, which offers a range of different dispute resolution processes. Furthermore, she argues that the central purpose of a justice system, to expose the truth, cannot be achieved by the adversarial system:¹⁶⁵

Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies. More significantly, some matters - mostly civil, but occasionally even criminal cases - are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution.

¹⁶³ Owen M Fiss “Against Settlement” (1984) 93 Yale L J 1073 at 1085.

¹⁶⁴ Carrie Menkel-Meadow “The Trouble with the Adversary System in a Postmodern, Multicultural World” (1996) 38 Wm Mary L Rev 5 at 6.

¹⁶⁵ At 6.

Nowhere are these words truer than in care of children disputes, which embody a painful reality of emotional tangles that require delicate handling in ways that would enhance the wellbeing of the family and each of its members.

The two recent New Zealand studies that examined satisfaction with the Family Court both found inherent problems with client satisfaction. The first study found lengthy, unnecessary delays in the progression of cases¹⁶⁶ and a feeling of lack of respect towards users.¹⁶⁷ The second study found overall dissatisfaction with the Family Court on all aspects checked.¹⁶⁸ Some of the comments from respondents indicated that: “Cross-examination was said to be a ‘gruelling’, ‘bullying’ and an ‘annihilating’ experience.”¹⁶⁹ It should be noted that satisfaction levels with mediation in these studies were only slightly higher.

(b) The Family Court rarely makes decisions in family disputes

The notion that in the Family Court an educated judge delivers a just and fair ruling is curtailed by the fact that the vast majority of court cases end in settlement. Henaghan and Atkin state: “Only approximately six per cent of all Family Court cases actually go on to require a full defended hearing.”¹⁷⁰ These settlements are mostly the product of lawyers negotiating on behalf of their clients, rather than two parents communicating with each other in a safe environment, practising the skill of resolving their own problems and perhaps finding new ways to communicate and co-parent.

(c) The Family Court is not better equipped to make care of children decisions

As discussed in section II C, the welfare and best interests of the child in his or her particular circumstances should be the paramount consideration in deciding care arrangements. Henaghan and Atkin explain the complexity of the task, which involves legislation, case law, social science and expert reports. The authors demonstrate through case law the great difficulty judges face when a case presents two conflicting considerations, for example, stability and

¹⁶⁶ Noonan, King and Dellabarca, above n 24, at 78.

¹⁶⁷ At 26.

¹⁶⁸ Gollop and others, above n 26, at 257.

¹⁶⁹ At 259.

¹⁷⁰ Henaghan and Atkin, above n 19, at 335.

continuity of care versus preservation of cultural heritage. Henaghan and Atkin summarise this dilemma in the beautiful quote from Mnookin:¹⁷¹

Deciding what is best for a child poses a question no less ultimate than the purpose and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values of life in warm interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? Custody statutes do not themselves give content or relative weight to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.

John Dewar warns that attempts to consider all these variables created family law systems so complex that they often cease to provide guidance.¹⁷²

Faced with this complex reality, judges are often forced to use his or her own set of beliefs and values as the basis for decisions. The result is substituting parents' values and beliefs with those of Judges, who are not better equipped to understand the circumstances of each particular child. The principle that decisions about care of a child should be made by his or her parents is better served through the use of mediation, where parents are assisted and empowered to make their own decisions.

6 *Criticism of Family-mediation*

Alongside this scholarly support of family-mediation, there are strong arguments, mostly by legal scholars, some supported by empirical studies, against the use of mediation in family disputes. At the core of the criticism is the absence from mediation of the higher principles of the modern law system, such as natural justice, process fairness, protection for the weak and judicial scrutiny. The three main critical arguments revolve around the inherent inequalities in gender power, misuse of mediator's power and the private and confidential nature of mediation.

(a) Gender power imbalance in mediation

In their book *Family Justice*, Eekelaar and Maclean express concern over the lack of power equality between couples in family-mediation. This imbalance, which may have existed

¹⁷¹ Robert Mnookin "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 LCP 225 at 261.

¹⁷² John Dewar "Can the Centre Hold - Reflections on Two Decades of Family Law Reform in Australia" (2010) 22 CFLQ 377 at 385.

throughout the relationship, may lead to unacceptable outcomes at separation. At this critical point, the authors believe disputes should be examined by impartial judges and ruled according to the law, which embodies society's values of gender equality.¹⁷³ O'Donovan takes a wider view and warns against the systemic effects of using mediation extensively, as it may reinforce existing inequalities and prevent the evolution of family law towards protecting the weak.¹⁷⁴

Power imbalance between parties in mediation has been one of the most debated and controversial areas in dispute-resolution scholarship. The difficulty stems from the fluid, changeable, relational and contextual nature of power, making it difficult, some say impossible, to even diagnose the power dynamics accurately.¹⁷⁵ Scholars vary in their views, while interventionist approaches encourage the mediator to actively balance parties' power (e.g. Moore), others promote empowering the parties to balance their own power instead (e.g. Boule, Acland), or to maximise parties' control of the mediation (e.g. Astor and Chinkin).¹⁷⁶

Power imbalance in family-mediation is a complex issue due to the inherent differences between men and women and the gendered power struggles discussed in section III B above. The question of whether women are likely to be able to pursue their rights when negotiating with their ex-partners, especially if family violence was involved, has been hotly debated in the 1980s as much as it is today.¹⁷⁷ The high prevalence of family violence within the population of separating couples (between 40 to 80 per cent),¹⁷⁸ makes it highly likely that it is a factor in the majority of cases at mediation or the Family Court.

Interestingly, despite the logic of this concern, most empirical research found no evidence for the assumption that women are disadvantaged in mediation. As discussed in sections III E 4 and III E 5 above, women consistently reported high levels of satisfaction with both the process and outcome of family-mediation. One might argue, though, that women's subjective views

¹⁷³ John Eekelaar and Mavis Maclean *Family Justice* (Hart Publishing, Oxford, 2013) at 16–17.

¹⁷⁴ Katherine O'Donovan *Sexual divisions in law* (Weidenfeld and Nicolson, London, 1985) at 195.

¹⁷⁵ Ilan Gewurz "(Re)Designing Mediation to Address the Nuances of Power Imbalance (2001) 19(2) CRQ 135.

¹⁷⁶ Bernadette Rogers "Power in Mediation" (2004) 6(9) ADR Bulletin 169 at 169–171.

¹⁷⁷ See for example: Trina Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100(6) Yale Law J 1545; and Claudia Lanzatta "Mediation/Collaborative Law: Exploring a New Combination in Alternative Dispute Resolution in Cases of Divorce and Domestic Violence" (2018) 20 Cardozo J Confl Resol 329.

¹⁷⁸ Helen Cleak and others "Screening for Partner Violence Among Family-mediation Clients" (2015) 33(7) J Interpers Violence 1118 at 1120.

are merely reflective of women's focus on relationships and affiliation,¹⁷⁹ and that women may forego their rights 'for the sake of the family' or out of fear from a dominant partner. In a study that seems to disprove this concern, Dingwall, Greatbatch and Ruggerone analysed 150 hours of audio-recorded family-mediation to examine whether parties' interactions reflect patterns of male dominance. The researchers found that the structure of mediation inhibited the emergence of the typical gender behaviours. Parties waited for their turn to speak, and even when drawn into direct arguments, they did not assume the traditional conversational gender behaviours. The researchers found no evidence that women were disadvantaged (nor advantaged) in any way in these mediations.¹⁸⁰

Other studies attempted to examine whether power, in the context of family violence, affects the *outcome* of mediation. A 2015 study examined the question, "does level of intimate partner violence and abuse predict the content of family-mediation agreements?"¹⁸¹ The researchers tried to find a correlation between level of violence and two factors: the number of agreements reached in mediation and the level of protection for women. The results, as well as the review of eight previous studies, found little or no difference in the likelihood of reaching an agreement between couples with or without a history of family violence.¹⁸² As for the agreement's content, the main finding, which may indicate intimidation, was that higher levels of violence were positively associated with a greater number of days awarded to fathers.¹⁸³

(b) Mediator power and neutrality

Another power-related area of concern is the behaviour of mediators. Eekelaar and Maclean point to a number of observation studies done in the United Kingdom, which found that mediators use framing and other techniques to influence parties and lead them to certain outcomes favoured by the mediator.¹⁸⁴ These studies also established that references to

¹⁷⁹ Jennifer J Halpern and Judi McLean Parks "Vive La Difference: Differences between Males and Females in Process and Outcomes in Low Conflict Negotiation" (1996) 7 (1) Int J Confl 45. Also see: Grillo, above n 179, at 1601.

¹⁸⁰ Robert Dingwall, David Greatbatch and Lucia Ruggerone "Gender and Interaction in Divorce Mediation" (1998) 15 Mediation Q 277 at 284.

¹⁸¹ Fernanda S Rossi, Amy Holtzworth-Munroe, and Amy G Applegate "Does Level of Intimate Partner Violence and Abuse Predict the Content of Family-mediation Agreements?" (2015) 53(1) Fam Ct Rev 134.

¹⁸² At 135–136.

¹⁸³ At 149–150.

¹⁸⁴ Eekelaar and Maclean, above n 173, at 39.

children's needs were rarer than expected.¹⁸⁵ Furthermore, although it is widely accepted that both mediators and judges have personal views and beliefs, the authors stress that judges are operating within the formal and public domain and are therefore subject to scrutiny, whereas mediators operate in the private domain and therefore cannot be assessed.¹⁸⁶

The extent of a mediator's power is intricately linked to the debatable concept of mediator neutrality discussed above. In a 2008 Australian study of mediators' perceptions on neutrality, the researcher found that mediators made sense of their often-conflicting roles in the process by focussing on the principle of party self-determination.¹⁸⁷ The researcher therefore suggested adopting a postmodern view on power and neutrality in which "... the limits of mediator power will incorporate self-imposed limits consistent with ideas about the legitimate scope of mediator influence given a commitment to party self-determination".¹⁸⁸

Another aspect of mediator power is its use to promote outcomes desired by government policy, such as shared parenting. Dingwall and Greatbatch do not criticise the promotion of positive values as such, however, they believe it is misleading to promise neutrality and a pure facilitative role while manipulating participants through various means towards desired outcomes.¹⁸⁹

(c) The absence of law from mediation

The private nature of mediation is criticised by O'Donovan as a regression to an archaic assumption that the law should not interfere with family relationships.¹⁹⁰ This criticism echoes the battle of the feminist movement against the tendency of state institutions to view the family home as a private domain and refuse to protect women and children from oppression and violence.¹⁹¹ The success of the feminist movement led to the enactment of laws that secure basic rights to equality and to freedom from violence within the family.

¹⁸⁵ Robert Dingwall and David Greatbatch "Behind Closed Doors: A Preliminary Report on Mediator/Client Interaction in England" (1991) 29 Fam Court Rev 291 at 297.

¹⁸⁶ Eekelaar and Maclean, above n 173, at 40.

¹⁸⁷ Susan Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 QUTLJ 139 at 149.

¹⁸⁸ At 155.

¹⁸⁹ Dingwall and Greatbatch, above n 185, at 296.

¹⁹⁰ O'Donovan, above n 174, at 197–198.

¹⁹¹ Catherine A MacKinnon *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989) at 191.

One of the negative consequences of the privatisation of mediation is the absence of substantive law. Australian researchers found that agreements reached in family-mediation often do not reflect the principles of the law.¹⁹² This empirical evidence contradicts the influential concept introduced by Mnookin and Kornhauser, that parents negotiating post-separation arrangements *bargain in the shadow of the law*, meaning they are aware of their legal rights and their agreement is inevitably affected by these rights.¹⁹³ A recent Australian study appears to disprove this concept by finding that parties to mediation are not guided by a coherent understanding of their legal rights but by a complex, ambiguous and often even self-conflicting set of rules.¹⁹⁴ This study unveiled that the sources parents most relied upon were informal sources such as advice from family and friends, online searches and popular media. Even parents who received legal advice gave it no more importance than to the other sources mentioned above.¹⁹⁵ This means that important policy changes in legislation, such as child inclusiveness, have a limited influence on parents' notion of their legal obligations, and therefore are not likely to affect the negotiated outcome.¹⁹⁶ Similarly, the absence of substantial law results in research findings indicating that negotiating parents don't always focus on the best interests of children.¹⁹⁷

¹⁹² Eekelaar and Maclean, above n 173, at 38.

¹⁹³ Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution" (1978) 88 Yale L J 950 at 968.

¹⁹⁴ Jonathan Crowe and others "Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolutions" (2018) 40 Sydney L Rev 319 at 329.

¹⁹⁵ At 330–333.

¹⁹⁶ At 336.

¹⁹⁷ Eekelaar and Maclean, above n 173, at 39.

F Mediator Tools and Participant Experiences of Family-mediation

The complexity of relationships and emotions in family-mediation prompted scholars to try and isolate factors that might help family mediators achieve better outcomes. Such studies typically focussed either on various mediator tools and interventions or on analysing participant experiences and evaluations.

1 Studies on the Effectiveness of Mediator Interventions in Family-mediation

As illustrated earlier, the process of mediation does not follow one discipline, but offers a variety of tools which mediators utilise according to their personal beliefs and style. The literature on possible mediator interventions is wider than the scope of this thesis, however, below is an overview of a few recent studies that offer insights on helpful interventions in family-mediation.

An interesting study by Baitar, De Mol and Rober identified three relational dialectical processes in family-mediation, which illustrate the difficulties facing family mediators:

- (a) *Self-Determination versus control* — should the mediator let the parties lead the discussion, or should he/she take control? The study highlighted that both processes are important for mediation and do not contradict each other.¹⁹⁸
- (b) *Efficiency versus exploration* — family mediators face contradictory themes of delay versus quicken, work with the past versus the future, and be sensitive versus practical. The study concluded that “slowing down efficiency and making room for emotional talk about the past are also helpful processes in mediation.”¹⁹⁹
- (c) *Neutrality versus engagement* — the researchers contended that mediators should relinquish some of their neutrality in favour of developing committed connections with the parties. They point to studies showing that good mediators express amiability, empathy, authenticity, integrity and expertise.²⁰⁰

¹⁹⁸ Rachid Baitar, Jan De Mol and Peter Rober “Exploring Helpful Tensions between Divorce Mediators and Clients: A Relational Dialectical Analysis” (2017) 34 Conf Resol Q 7 at 20.

¹⁹⁹ At 21.

²⁰⁰ At 22.

In their 2018 article, Charkoudian, Walter and Eisenberg noted the paucity of studies on the effectiveness of mediator behaviours during family-mediation.²⁰¹ Their review of previous studies revealed that mediators tend to have either a settlement-oriented style or a problem-solving style. The problem-solving style, which includes asking questions, searching for parties' underlying needs and having a sense of strategic direction, had proven to be more effective in producing better outcomes. Another mediator behaviour that produced good results was attending to parties' emotions and relational concerns.²⁰² In their own large-scale study, they identified two mediator strategies that resulted in better outcomes:

- (a) *Eliciting participant solutions* (i.e. asking participants to suggest solutions, summarising those solutions, and asking participants how they think those solutions might work for them) — this strategy resulted in the broadest positive impact.²⁰³
- (b) *Reflecting* — led parties to less rejection of the other parent's perspective and to more long-lasting outcomes (although the use of reflecting alone, not in conjunction with problem-solving strategies, decreased the likelihood of reaching an agreement).²⁰⁴

The use of caucusing was found to improve a party's relationship with the mediator but increase the feeling of hopelessness and of being able to reach an agreement.²⁰⁵ Directing strategies (such as introducing and enforcing behavioural guidelines, explaining one party's position to the other, providing their own opinion and advocating for one participant or the other) were found to negatively affect parties' perception that the mediator is respecting them. Surprisingly, a convenient physical location for the mediation had a significant effect on the parties' willingness to reach an agreement.²⁰⁶ These last two factors highlight once again that the core value of party autonomy and self-determination is key to achieving good results.

Other studies focussed on the effect of active listening on mediation outcomes. A 2016 study examined the effectiveness of four mediator techniques on the number of agreements reached

²⁰¹ Lorig Charkoudian, Jamie L Walter and Deborah Thompson Eisenberg "What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors" (2018) 56 Fam Court Rev 544 at 544.

²⁰² At 545.

²⁰³ At 557.

²⁰⁴ At 560.

²⁰⁵ At 560.

²⁰⁶ At 261.

and found that active listening was overall the most successful one.²⁰⁷ Psychological research on the effects of active listening on the psyche has unveiled its immense effect on people. The non-judgmental nature of active listening has been shown to create a sense of psychological safety and reduce anxiety. This allows more elaborate thinking, creates a capacity to be aware of and accept new cognitions, and become more complex and less extreme.²⁰⁸ The most interesting understanding of the effects of active listening was suggested by Philips, who argued that when people speak, the meaning of what they say is often not already stored in their mind but is *constructed* during the conversation. Philips challenges us to accept that: “Conversations, rather than serving just to convey thoughts and feelings, actually function to *create* or *construct* ideas, meanings, and perceptions between people.”²⁰⁹ Facilitating a conversation between parties, which provides the opportunity to speak and be heard, may be used in family-mediation to create new narratives between separating parents.

2 *Studies on the Experiences of Family-mediation Participants*

The confidential nature of mediation is the likely reason that the majority of studies on family-mediation focussed on *outcome*, while very few focussed on the *process*.²¹⁰ In a 2009 article, Cohen indicates that even studies that focussed on process typically used directive questions designed to examine specific aspects of the process, and not on the overall experiences of participants.²¹¹ Cohen identified only one previous study that focussed on listening to mediation clients in a non-directive way using open ended-questions. This 1999 study from Norway found the following main themes in participants’ experiences:

- *Different expectations* — couples were often not aligned in their motivations, as often one was ready to discuss the childcare arrangements while the other wanted to discuss

²⁰⁷ Jacques Fischer-Lokou and others “Effects of Active Listening, Reformulation, and Imitation on Mediator Success: Preliminary Results” (2016) 118 Psychol Rep 994 at 1004–1005.

²⁰⁸ Guy Itzhakov and Avraham N Kluger “Listening with Understanding in Negotiation and Conflict Resolution” in Chris Honeymann and Andrea Kupfer Schneider (eds) *The Negotiator’s Desk Reference* (DRI Press, Minnesota, 2017) 409 at 412–413.

²⁰⁹ Bruce Phillips “Reformulating Dispute Narratives Through Active Listening” (1999) 17 Mediat Q 161 at 165.

²¹⁰ Kelly 1996, above n 157, at 373.

²¹¹ Orna Cohen “Listening to Clients: Facilitating Factors, Difficulties, Impediments, and Turning Points in Divorce Mediation” (2009) 36 Fam Ther 63 at 64.

the reasons for separation or the possibility of a reunion. This study found higher levels of client satisfaction when mediators allowed such exploration of the past.²¹²

- *Mediator's neutrality* - participants viewed the mediator as neutral when she/he provided equal opportunity for them to speak, gave them equal attention, recapitulated their views correctly and avoided direct advice.²¹³
- *Length of mediation* — the mediation model used in this study conducted mediation over nine to twelve one-hour sessions, and participants mostly viewed this length of time as a positive aspect. The most positively assessed mediators were the ones who constantly signalled to the parties at what stage in the mediation they are.²¹⁴

Cohen's own qualitative study was focussed on identifying *turning points* in the mediation. Turning points are defined as identifiable events that interrupt the flow of interactions and bring about change (in a positive or negative way) in negotiation.²¹⁵ Cohen argues that a mediator's ability to identify such turning points enables the creation of a breakthrough in the mediation.²¹⁶ In Cohen's study, participants spoke of two main areas that enabled settlement: mediator's behaviours and outside factors. Useful mediator's behaviours were identified as:²¹⁷

- *Providing structure* — through regularity of weekly meetings, the graduated stepwise nature of the process and prioritisation of issues.
- *Identifying the issues and focussing on facts* — means used included homework assignments and the mediator's provision of information and suggestions.
- *Facilitating transactions* — mediators helped with enabling civil communications (establishing ground rules, stopping unacceptable comments and highlighting kids' needs) and facilitating negotiations.

²¹² Odd Arne Tjersland "Evaluation of Mediation and Parental Cooperation Based on Observations and Interviews with the Clients of a Mediation Project" (1999) 16 *Mediat Q* 407 at 414-415.

²¹³ At 416.

²¹⁴ At 418.

²¹⁵ Mara Olekalns and Philip L Smith "Moments in Time: Metacognition, Trust, and Outcomes in Dyadic Negotiations" (2005) 31 *Pers Soc Psychol Bull* 1696 at 1696.

²¹⁶ Cohen, above n 211, at 65.

²¹⁷ At 68-71.

- *Creating a conducive atmosphere* — achieved by displaying understanding, warmth, equal care and non-judgmental acceptance, by encouraging parties to voice their difficulties and allowing emotional release, and by empowering parents to find their own arrangements.

The outside factors that affected parties' ability to reach agreement were the ex-partner's cooperation and support from family and friends. The three most difficult aspects were identified by parties as: the need to work collaboratively with the other party; the great energy required for detailed planning; and the need to make their own decisions.²¹⁸ The greatest impediment to reaching settlement was identified as emotional pain and flooding. Interestingly, the need to make their own decisions was experienced as being useful and one of the most difficult.

Parties identified three main turning points in the process:²¹⁹

- *Insights acquired during mediation* — in particular: new awareness of the pain or point of view of ex-partner; realisation they are responsible for reaching agreement; and the understanding that the marriage was really over.
- *A shift in focus* — from parent's own needs to the good of the children and from the past to the future.
- *Fear of litigation* — a realisation that failure to reach agreement would result in litigation.

In terms of mediator's behaviours, Cohen highlights the fact that the main themes that surfaced are also the main conundrums of mediation:²²⁰

- *How much attention should mediators give to emotional expression* — parties highlighted the importance of structure and focus on facts yet acknowledged the importance of being able to express emotions, and even pointed to insights about ex-partner's pain as a turning point.

²¹⁸ At 71.

²¹⁹ At 73–74.

²²⁰ At 75–77.

- *Self-determination versus mediator's suggestions* - parties liked the feeling of empowerment in making their own decisions yet pointed to mediator's interventions and suggestions as helpful.
- *Neutrality* — parties appreciated the mediator providing equal care to both sides, and at the same time wanted the mediator to be on their side.

Cohen explains that these conundrums highlight the great need for *flexibility* in balancing parties' vastly different and often contradicting need:²²¹

... for structure and a conducive atmosphere on the one hand, and for attention to their emotions, on the other; for empowerment to reach their own settlement, and for suggestions and direction so that they do not feel rudderless and afloat, for even-handedness and fairness, but also for caring and empathy.

Cohen highlights another aspect that is rarely discussed in the literature, yet participants consistently mentioned — the tremendous difficulty of the mediation, which they describe as laborious and exhausting.²²²

3 *Studies on Men's Experiences of Family-mediation*

The particular angle of how men experience family-mediation has not had much scholarly attention. Studies that examined gender differences in satisfaction levels produced mixed results. Some studies found no gender difference in satisfaction,²²³ other studies revealed higher satisfaction levels for women compared with men,²²⁴ while others found men were significantly more satisfied with mediation than with litigation,²²⁵ despite their feeling that mothers had an unfair advantage in mediation.²²⁶

In 1990, Bay and Braver studied the important aspect of *perceived control* over divorce settlements and found that “fathers perceive less control over settlement issues and are, as a

²²¹ At 78.

²²² At 72.

²²³ Bryce F Sullivan, Andrew I Schwebel And Jessica Shimberg Lind “Parties’ Evaluations of their Relationships with their Mediators and Accomplishments in a Court-Connected Mediation Program” (1997) 35 Fam & Concil Cts Rev 405 at 411.

²²⁴ Virgil L Sheets and Sanford L Braver “Gender Differences in Satisfaction with Divorce Settlements” (1996) 45 Fam Relat 336 at 340.

²²⁵ Kelly 1996, above n 157, at 378; and Robert E Emery and Melissa M Wyer “Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents” (1987) 55(2) J Consult Clin Psychol 179 at 182–183.

²²⁶ Kelly 2004, above n 157, at 7.

result, more distressed”.²²⁷ They drew on Brehm’s psychological theory of reactance which established that people have an expectation to control important outcomes in their lives and that a perceived lack of control is likely to result in *noncontrol distress* leading to reactance and anger.²²⁸ Bay and Braver concluded that “fathers, more than mothers, are likely to initiate conflict with their ex-spouse when distressed about a perceived lack of control”.²²⁹ In a later study, Sheets and Braver examined gender differences in satisfaction with divorce settlements and similarly found that women felt significantly more in control than men.²³⁰ Their interesting observation was that the perceived inequitable *process*, rather than a perceived inequitable *outcome*, most contributed to men’s dissatisfaction with a divorce settlement.²³¹

Australian scholars turned the spotlight to men’s state of mind during family-mediation and raised concerns about their level of engagement. In a 2008 article, Fletcher and Visser pointed to the difficulties in engaging men in family-mediation due to the nature of mediation, which often requires discussions about emotions and a level of vulnerability. The authors noted a number of barriers resulting from socialised masculine gender norms, such as their different communication style, tendency to avoid talking about emotions and a help-seeking avoidance pattern.²³²

In a 2010 study, Fletcher and St George used mediator focus groups to identify behaviour patterns of men in mediation and techniques mediators employ to increase engagement. These focus groups identified that “Reluctance to participate was characterised by ‘stone-walling’ and passive-aggressive behaviour towards the practitioner: angry and argumentative, ambivalent or distrusting”.²³³ Another theme noted by mediators was men’s perception of the relationship talk as ‘feminine’, and their common assumption that female mediators are biased in favour of their ex-wife.²³⁴ Mediators highlighted men’s perception that the world devalues the importance of fathers.²³⁵

²²⁷ Curtis Bay and Sanford L Braver “Perceived Control of the Divorce Settlement Process and Interparental Conflict” (1990) 39 Fam Relat 382 at 386.

²²⁸ At 382.

²²⁹ At 386.

²³⁰ Sheets and Braver, above n 224, at 340.

²³¹ At 341.

²³² Richard J Fletcher and Amy L Visser “Facilitating Father Engagement: The role of Family Relationship Centres” (2008) 14 J Fam Stud 53 at 55–57.

²³³ Fletcher and St George, above n 3, at 106.

²³⁴ At 106.

²³⁵ At 107.

In their 2016 study, Britton and Johnson focussed on the issue of men's anger and how the expression of anger affects the dynamic of the mediation. The researchers presented one father's story, who described his experience at mediation as follows:²³⁶

I felt a bit cornered because I needed to address some issues. ... I got angry. If you're a dad you don't see your kids. The mediators need to be conscious of the mental state of the dads. I went to anger-management classes so that I could put my case without being angry. Anger is a normal emotion. But you need to channel the energy.

The researchers analysed the socio-political context and pointed to a tendency to see fatherhood as an anti-feminist concept that contributes to the devaluation of fathers. They highlighted men's help-seeking avoidance and urged mediators to acknowledge the difficulties men experience following divorce and to adopt a more father-focussed approach.²³⁷ They warn that men's expressions of anger during mediation may result in negative reactions from mediators, including countertransference. They strongly recommended regular supervision to assist mediators in dealing with the complexities of such situations in a professional manner.²³⁸

²³⁶ Britton and Johnson, above n 3, at 24.

²³⁷ At 25–27.

²³⁸ At 28.

IV. Methodology

A Choice of a Qualitative Research Method

This research was motivated by the complaints made by fathers who participated in family-mediation that the process is biased against men. The aim of the study was to give fathers the opportunity to share their experiences, stories and thoughts about the process. To that end, qualitative research (or interpretative research, an alternative term used by scholars) was chosen since it provides the most suitable tools for achieving this aim, as Magnusson and Marecek summarise:²³⁹

...interpretative researchers think of people as always located in social contexts and as continually engaged in making sense of their experiences. Interpretative researchers seek to understand the meanings that people give to particular events and actions. They also want to know how those meanings arise in the cultural and social settings in which people live – how people arrive at meanings through their interactions with others and how they then make those meanings their own.

The method used for information gathering was semi-structured, in-depth interviews, chosen as their exploratory nature “enables the researcher to learn about a wide range of experiences and meanings related to the topic, including new or unexpected things”.²⁴⁰

B Ethical Considerations

This study was approved by the University of Auckland Human Ethics Committee on 2 June 2020 (reference number 024401). The ethical approval process required careful examination of all aspects of the study due to the emotionally sensitive and private nature of family-mediation. The Participant Information Sheet (PIS) (Appendix A) included detailed information about the procedure, the risks and benefits of the study, the right to withdraw from participation, the protection of confidentiality, and the potential conflict of interests.

The question of how to maintain confidentiality was of the utmost importance, as family-mediation involves not only the participant but his partner and children as well. To prevent

²³⁹ Eva Magnusson and Jeanne Marecek *Doing Interview-based Qualitative Research* (Cambridge University Press, Cambridge, 2015) at 178.

²⁴⁰ At 179.

identification, all names, place names, number of children and other potentially identifying details about participants or their family were changed or removed from any outcome.

In addition, in compliance with the data minimisation principle and to encourage participation and minimise concerns for loss of privacy, the researchers did not ask participants for any personal or demographic details. The researchers believe that asking for such details would have potentially resulted in less disclosure and sharing of highly personal and vulnerable information, while not contributing much to the robustness of the study due to the small sample size.

The confidentiality of information was further protected by storing any identifiable information on a University of Auckland secure storage server with access allowed only to the student researcher and principal investigator through use of their University of Auckland credentials. The information shall be stored for six years, then access to these documents shall be deleted.

The confidentiality of mediation was another major concern. To protect such confidentiality, the researchers phrased the interview questions in a way that asks about the experiences, thoughts and feelings of the participant, rather than what happened at mediation. The Consent Form (Appendix B) includes a clause reminding participants of their obligation to confidentiality and directing them to limit their answers to their own subjective experience, thoughts and feelings, as opposed to what happened during the sessions. In addition, at the start of each interview, the interviewer clearly explained this obligation and warned participants against disclosing confidential information.

Participants were advised in the PIS that the researchers have a legal obligation to report information disclosed during the interviews if such information gives rise to the possibility of imminent risk of harm to the participant or to a third party, and that this legal obligation overrides the researchers' confidentiality obligations

Another risk factor identified at the ethics approval stage was a risk to the psychological wellbeing of participants as they were asked to talk about highly stressful and emotional issues. The researchers acknowledged that the risk of emotional distress could not be eliminated but took measures to minimise it. These included:

- full disclosure of such risk in the PIS;

- the interview guide was sent to each participant prior to the interview, to enable withdrawal if they felt the issues to be discussed were too difficult;
- the inclusion of clauses that inform the participant of his right to do the following: withdraw from the study at any stage without providing reasons; stop the interview or refrain from answering any question; review the interview recording and/or transcript and withdraw any data up to two weeks after receipt of such material; and
- providing a list of support services to any participant who displays signs of distress during the interview.

C Participant Recruitment and interview process

The target group for participant recruitment were fathers who participated in family mediation in the two years prior to the interview. The recruitment method was a flyer (Appendix C) which was distributed through an approved dispute resolution organisation, Fairway Resolution Ltd, FDR providers, Fathers' Rights Groups and family lawyers. Seven of the participants heard about the study from Fairway Resolution Ltd, two heard about it through their FDR Provider, two through a Fathers' Rights Groups and one through his lawyer. One participant did not disclose how they heard about the study.

All participants proactively e-mailed and expressed their wish to take part in the study. Each prospective participant was emailed the PIS and Consent Form and asked to review these and raise any questions or concerns. A total of 25 prospective participants e-mailed me, and out of this group 13 fathers who completed family mediation were recruited and interviewed. The rest of the applicants either did not respond to requests to schedule an interview or did not complete family mediation in the two years prior to the interview.

Out of the 13 interviewees, four have one child, eight have two children, and one has three children. Twelve of the participants were in a long term committed relationship with the mother of their children (either married or in a de-facto relationship), while one had a causal relationship and never cohabited with the mother of his child. Six of the participants completed one mediation, four completed two mediations, one completed three mediations and the last two participants each completed five mediations.

In terms of mediation outcome, seven participants did not reach agreement in their most recent mediation, five participants reached full agreement (although two said the agreement reflected

their ex-partner's wishes only), and one reached a partial agreement. Seven participants went through a family court process, either before or after mediation.

D The Interviews

All interviews were conducted by me between June 2020 and September 2020. They were based on the interview guide (Appendix D) which was developed based on the knowledge interests identified in the literature review and updated after the first three interviews. Each participant received a copy of the interview questions around a week prior to the interview. The questions were open-ended and invited reflection and stories. The semi-structured nature of the interviews led to an emphasis on following the participant's story rather than adhering to the interview guide. Participants were asked to share their thoughts and feelings around their fatherhood, the separation, and the mediation process. They were encouraged to try and make sense of what happened and offer their insights and suggestions for improvement.

The length of the interviews was on average around one and a half hours. Twelve of the interviews were done through Zoom and one was done face-to-face. The interviews were recorded and transcribed by me, which enabled me to gain in-depth knowledge not only of speech, but of intonation, pauses and other non-verbal cues.

A copy of the interview transcript was sent to all the participants who requested it in the Consent Form (seven participants) and participants were given the opportunity to amend or withdraw any information in the transcript within two weeks of receiving the transcript. None of these participants asked to change or withdraw anything from the transcript. A summary of research findings was sent to 12 participants who asked for one after the submission of the thesis.

One of my early concerns about the interviews was whether being a woman interviewing men about their post-separation experiences will affect their level of honesty and disclosure. This question was examined by Arendell following her large-scale study interviewing 75 men about their post-divorce experiences in the United States in the 1990s. Arendell elucidated the paradoxical position she was in. On one hand, most of the participants were critical of women's behaviour and accused them for their strife. On the other hand, Arendell was aware that these

men expressed the depth of emotional experience in the interview *because* she was a woman.²⁴¹

Arendell bases this conclusion on the following:²⁴²

Most participants in my study stressed that they especially exercised caution to not disclose their deeper feelings or even to fully describe their divorce and after-divorce experiences to other men who, they believed, were more likely to be critical of any displays of emotional distress. They expressed gratitude and appreciation "for having the chance" to share their experiences.

Arendell's understanding of the high level of emotional disclosure by her participants is that it was not her as a person that these men confided in, but her as a woman.²⁴³ She explains that one of her early concerns was that men would not express their sexist views to a woman even when they held such views. In reality, she found that her participants expressed their sexist, misogynist and denigrating views of women freely and excessively in the interviews.²⁴⁴ Compared with Arendell's experience, three decades later, in New Zealand, I found less misogynist and denigrating views openly expressed in the interviews. Yet, most of the participants in this study have portrayed their ex-partner in a negative light, with the following tags used by participants: irrational, too emotional, manipulative, vengeful, bitter, liar, mentally ill, controlling and narcissistic.²⁴⁵

E The Analysis Process

A qualitative thematic analysis was done to identify central themes in the interviews as it "provides a flexible and useful research tool, which can potentially provide a rich and detailed, yet complex account of data".²⁴⁶ The interview transcriptions were analysed and coded using the NVivo software. At the first stage, I created 10 excerpt files ('node' in NVivo) for topics that came up in the literature review or were evident in the interview process. I then began reading and re-reading the transcriptions, identifying pieces of talk that relate to either one of these topics or to new topics that came up in the transcripts and seemed of significance. These pieces of talk were copied into a node created for this topic. The analysis process was done in

²⁴¹ Terry Arendell "Reflections on the Researcher-Researched Relationship: A Woman Interviewing Men" (1997) 20(3) *Qual Sociol* 341 at 347.

²⁴² At 348.

²⁴³ At 348.

²⁴⁴ At 359.

²⁴⁵ See chapter V sub-section D4 for details.

²⁴⁶ Virginia Braun and Victoria Clarke "Using thematic analysis in psychology" (2006) 3 *Qual Res Psychol* 77 at 78.

two stages: initially, the first three interviews were analysed, and 45 nodes (25 main nodes containing 20 sub-nodes) were identified. By the time all 13 interviews were completed, this list grew to 62 nodes, which were eventually reduced through the analysis process to 30 main nodes.

Once this process was completed, each excerpt file was read and assessed for its importance based on a combination of the following main factors:

- How often did the theme repeat in the interviews?
- Was it consistently referred to by the participants in a certain way, or were there contradictions?
- How important was it for the participants?
- What cultural meaning (predominantly gender culture) does it have?
- Did it affect the mediation process? and
- Is the theme supported by the literature?

Based on this analysis, nine main themes were identified as prominent and these are included in the findings chapter.

F Study Limitations

The small and self-selected nature of the recruitment method is the greatest limitation of this study. Such small sample may not be representative of the general population. The self-selected recruitment method potentially attracted participants who were critical of the process and eager to share their criticism or had a specific agenda they wished to promote. Three of the participants were members of Father's Rights Groups, which typically promote the idea that men are discriminated against in the family justice system.²⁴⁷ Such gender politics were evident in the interviews as all the participants spoke of the 'system' being biased against men, though such bias was not necessarily evident in the facts of their stories.

²⁴⁷ See chapter IIIA for a discussion on Father's Rights Groups.

Another limitation is the fact the research was carried out by one researcher with limited interviewing experience. The semi-structured nature of the interviews and the absence of a defined goal often led the interviews to where the participant wanted to take them – which I see as both a strength and a weakness of the process. On one hand, it enabled me to explore experiences that were not initially identified as topics of interest (e.g., the devaluation of fatherhood), and some of these were central themes. On the other hand, in a few interviews I did not have enough time to cover all the interview questions.

V. *Findings and Discussion*²⁴⁸

The 13 men who volunteered for the study came from different backgrounds and told different stories, but the one thing they clearly share is love for their children and the desire to be as involved in their lives as much as possible. Compared with Arendell's findings of strong adherence to masculine gender roles and traditionalism,²⁴⁹ my impression of the fathers I interviewed is that they hold less traditional gender-role views, yet their discourse still included much stereotyping of woman as being too emotional, mentally unstable and irrational. As I will demonstrate below, the pattern Arendell described of fathers seeing themselves as victims of 'the system' still dominates the discourse.

The issue of family violence surfaced in seven of the interviews, despite the fact I did not ask any questions about it. Four participants said their ex-partner falsely accused them of violence. Two others did not disclose it directly, but there were hints to its existence in their story (in one case, the mediation was held at a Women's Refuge centre; and, in the other, the ex-partner had a support person from Women's Refuge). One participant said his ex-wife used violence against him throughout their marriage.

Nine central themes emerged from the interviews and will be analysed below. These themes relate to the severe effect of separation on fathers, to men's perceptions of fatherhood and to the devaluation of fatherhood. Most participants put a strong emphasis on the mediators themselves, their skills, personality and bias. As for the mediation process, the themes that emerged relate mainly to power and control, with some acknowledging how the mediation provided an opportunity to talk about the past. Finally, participants' opinions about the family justice system and their overarching impression of a systematic bias against fathers are discussed.

A *Severe Grief Response Following Separation*

The literature reveals the severe grief response men experience following separation. Seven of the participants described a severe response, with depression-like symptoms and some

²⁴⁸ All names, place names or other potentially identifying details in the quotes are pseudonyms to protect participant confidentiality.

²⁴⁹ Arendell, above n 48, at 45–61.

characteristics of physical injury and death. For some, it was a mixed reaction where grief was mixed with relief over the secession of ongoing conflict. When talking about this period, the men who described great difficulties often spoke in incomplete sentences, as if not able to find the words to describe the experience. Most men did not relate the grief to the separation from their partner but preferred to make sense of it as having been caused by the separation from their children. Interestingly, the severity of the response did not seem to be related to whether they or their ex-partner initiated the separation.

Jeremy, who initiated the separation, described the progression of emotions:

At that point in time, I was definitely sad, depressed, grieving, angry, yeah, yeah. Relief was at the start, just to get away from the conflict, so there's an initial relief just because, yeah, not being attacked. But by the time we got to mediation I lost a lot of weight, I wasn't eating very much, I was, you know, there were some days when I wasn't getting out of bed ...

When asked to identify the source of his severe reaction, Jeremy explained:

There was a combination of things. Part of it was, even though I was leaving the relationship and it was my choice, um, I still had to grieve that the plans and the goals and the picture of what I thought life is gonna be, was gone. And I had to kind of accept that and learn, just kind of go through letting it go and that took some time. So, there was that overarching aspect and then the stress of trying to see my children, having to battle and push and fight to get access to them, um, it was, it was really upsetting, just wrestling. And to be, I felt like the system was assuming that I was a bad man, until I proved it otherwise.

Brad started by describing his feeling of relief after leaving his wife, yet when asked about the separation from his children, Brad used vivid metaphors of physical injury:

Ah, it was like ripping my heart out, it's like someone had just ripped my heart out, um, um, it's like, ... it feels like someone had cut my arm off, I'm always looking, bits and pieces, it just feels, it feels like something's missing, somebody's missing, like, something hot, you know ...

John, who was accused by his ex-wife of being violent, talked about suicidal thoughts and the grief of losing regular contact with his children:

So yeah, it really pushed me to a breaking point. You know, the thought of suicide crossed my mind a couple of times, but it didn't really go very far because I will not do that to the kids [chuckle]. Hard as it was, at the time, I was like, well, I can't do that to the kids, so um, it was, yeah it was really bad straight after the separation, everything.

...

But more so about the kids, that felt like yeah, my kids have died. It wasn't so much my partner [chuckle] although I still cared about her and all that as well, it was the kids. It felt like my kids have died, but I couldn't properly grieve because they weren't dead. ... it's

like, it's like having that loss, but you can't go through the process, grieving process, because they're not actually gone.

Tom, who initiated the separation, struggled to put into words his pain following separation:

But yeah, you know, like, um [pause] yeah, it was, it, like, yeah, I can't really describe it. It was physically, so, so emotionally difficult that it was kind of physically harming in a way, you know. Like I, like I was almost sick, and I couldn't talk, and I couldn't control my, you know, crying and all sorts of things.

Tom added an important insight about his dissociation from the difficulty at the time it was happening:

I think probably, I could have probably would look at myself now from a distance and go like: crikey, god, like, what a mess you were. Yeah. But at the time, I was like: I'm doing okay, you know?

Jonathan was the only participant who openly acknowledged his love for his ex-wife and the devastation of her leaving with no prior notice:

Yes, so I was, I was angry, but I was also absolutely shocked. Um yeah, and I'd come home from work just in shock, make dinner, and I'll be honest, I sat down after dinner each night about 7:30 and I'll just bawl my eyes out for half an hour, and then kind of throw off to bed, and then repeat it all the next day. It was all quite blurry, you know.

B Men's Perceptions of Fatherhood before and after separations

The majority of participants described fatherhood as having a central role in their lives. When asked what their ideal post-separation arrangement was, seven of the participants wanted 50/50 care. Out of the other six, one father wanted full custody, one wanted more than 50%, one was happy with 40% and three fathers lived in a different city to their children, so had less frequent contact. When asked how much time they spent caring for their children before the separation, most fathers described their pre-separation parenting as less than 50%, often explained by the fact their ex-partner was a stay-at-home mum while they worked full time.

Jeremy described his idea of parenting following separation and how hard it was when, in the first year after separation, his ex-wife did not allow the children to spend the night with him:

Well [pause], it has very much been from the outset to be as involved in their lives as much as I possibly can, given the new circumstances. ... So, I was always gonna stay in [this city], I was always gonna be as close to them as possible.

...

For a year I didn't get to tuck any of my children to bed and that's all I wanted. I just wanted to be able to have them and wake up and have breakfast with them and, you know,

just, just, you know, the bare minimum. I just wanted the bare minimum to start with, cause I wasn't getting that, and over time it evolved and now I very much want shared care 50/50.

In the five years since his divorce, Eric was happy to have his kids around 20 per cent of the time, despite the fact he and his ex-wife signed a 50/50 shared parenting agreement after separation. He recently attended mediation and refused his ex-wife's request to sign a parenting agreement that reflected the actual arrangement. Eric explained the symbolic meaning of the 50/50 arrangement for him:

So, in the end [of mediation], they try to propose, try to push me to signing something that gives me less access to the kids. And I said, I'm happy to sign a 50/50, but right as we stand, sitting here, or when we walk out, we can basically, on a verbal agreement, keep everything the same as we have in the last five years ... And the mediator was very determined on me and trying to push that I'm going to sign something that's less than 50%, and I didn't agree on that. I want to do anything for the kids and I wanna do anything possible. And I would have happily gone with the same arrangement that we had for five years ... *but not going to be pushed into signing away my kids*, my access to the kids. (emphasis added)

Jonathan shared an interesting observation on how differently he and his ex-wife perceive parenthood:

And I want to be part of Rebecca's [his daughter] life and I'm not giving up till I, I, I, [pause] yeah, till I, I was gonna say till I get what's rightfully mine, and it's not rightfully mine. It's, Rebecca is neither mine nor Jenny's, but I do think that Jenny has a view that she is Jenny's probably. It's a hard one. How do you fix it? No idea. I don't think it's fixable, to be honest.

At the other end of the scale, talking in the language of parental responsibility rather than an emotional connection, Brad explained his motivation for wanting sole custody of his children:

I just cared about the future of the kids, you know. I had to place my life on hold, and put my career on hold, and put everything in for them, so be it. Um, you know, they would thank me when they're 18 or 19 years old. Um, you know, I'd rather see them go and have, become engineers and doctors or Masters or something high education, than being a criminal or sitting on, you know, you know, or anything like that. So that's why I did it.

An interesting theme that came up in five of the interviews was the standard against which these fathers chose to measure their fatherhood — the disengaged father. These fathers seemed engaged in internal dialogue on the need to choose between being a fully engaged father or disengaging from their children. Juxtaposing these disengaged fathers against themselves, who fight for more time with their children, illustrates how commendable their behaviour is, and how unjust the hurdles they have to overcome are.

Barry talked about the huge effort required from a father who wants to be involved in his children's lives:

Because there are times when you think, surely, surely, there's, um, there's people out there who um, I'll just say it, who have fathers who basically have escaped, and they basically don't want anything to do. And, and yet, here's me who's trying my hardest, but, but she is making it as difficult as humanly possible, with some cherries on top.

Brad elaborated further, comparing himself with men who do not care about their children:

Well, my partner ... she has a girl, and her partner didn't want to have, male partner didn't want to have anything to do with the girl. So, yeah, I think there are cases, there are bits and pieces, but I, I um, some men have a vested interest. I have a vested interest in these kids to do well in, um, but some males, I know this particular guy, he's got six kids to five different mothers, he doesn't want to do anything. As soon as the girl is pregnant, he dumps her, just walks away. Doesn't wanna know ...

Cullum compared himself to the father of his ex-partner's other children:

... the interesting thing is the, the father of the older siblings of hers, of Chloe's, they, he has nothing to do, he doesn't have much to do with his kids ... No contact, lets them down, makes them upset, things like that.

Jonathan briefly distinguished himself from disengaged fathers: "There's some ridiculously horrible fathers I'm sure out there that are very neglectful, just don't care. I'm very much the opposite."

C The Devaluation of Fatherhood

Eleven participants described experiencing devaluation of their role as fathers, mostly by their ex-partner, but often by the mediator and society in general. The devaluation message they described works at two levels: one is that their performance as fathers is not good enough, the other, more subtle yet more profound, is the belief that fathers are not as important as mothers for their children's wellbeing.

Tom talked about devaluation of his parenting as a tool used by his ex-wife to win arguments about parenting:

... I'd say, something was gonna be, some, I don't know, say something, and she'd be like, well, of course it's like that for you because you're a shit father ...

Barry, who has completed five mediations with his ex-partner in the ten years they have been separated, described his constant feeling that the mediator thinks he is a bad father:

And I get the impression when we come together, I just get the vibe that the mediator has heard this story about me as a person, me as a dad, and I'm a shit person, I'm a shit dad. And I kind of get that impression that she's [the mediator] basically made up her mind that I'm a bad person, and I'm a bad dad.

Brad generalised his ex-wife's attitude towards his fatherhood as a common attitude women hold that fathers are not important, except as a source of money:

She just, she just: she was right, she should have the kids and I was just, all she cared about me was just the money. ... I think there's an attitude out there that a lot of women have that: 'I'm the mother, therefore I'm right and I should have the children'. And it's not what's best for the children. And you've got somebody who have, who's belief system is 'I'm right, I'm the mother and you're just a sperm donor, what do you care about your, you can fuck off'...

Cullum described at length throughout the interview how his ex-partner constantly criticises his parenting skills:

So, I don't interfere with her parenting skills, but she loves doing it to me. And a lot of the time I can go: okay, yeah, and put up with it for the sake of seeing my daughter. But it gets to a point where you're like, I'm being pushed around, man. I'm literally flying here there and everywhere and getting in trouble for it.

When I asked Phil whether he thought his ex-partner respects his relationship with his daughter, he replied:

No, no, never has never will. And I say that because I've got many stories I can tell you about her lying to Ruby, about her lying to me. Yeah, she never will, never has.

Paul was surprised by a comment the mediator made during the session:

She [the mediator] just, she probably believes that mother is a better parent than the father. At one point, she said to me that I am very unusual that I want to have 50/50 per cent care of a child. And I looked at that, and my, and my support person was also shocked like a bit. Where are you living? We are not, we're not in the 60s!

D Gender Power Struggles and Powerlessness

Gender power and control was unsurprisingly the most prominent issue, with all 13 participants describing feeling powerlessness and trying to gain more control. These fathers felt their ex-partner had control over how much time they will spend with their children and misused this power to limit their time. The majority of participants linked these feelings to gender, often describing women as almighty creatures sitting in a position of power, yet at the same time describing them as irrational, too emotional, manipulative, vengeful, bitter, liars, mentally ill, controlling and narcissistic.

Below are the main themes relating to power dynamics.

1 Men's Perception: Mothers Hold a Position of Power

Jonathan's partner left him without notice and restricted access to his daughter to short, supervised visits. He described his ex-partner's behaviour throughout the three mediations they completed:

One thing that just stands out, so essentially Jenny sits in a position of power in the mediation because it's essentially her saying 'yes' or 'no' to my requests. ... so, someone who has everything and doesn't want to give up anything, is ultimately in a position of power. I go into every mediation with a view that whatever I get, everything to me is seen, from my perspective, as a win. More time with my daughter is a win - if it's an hour, if it's a day, if it's a night, whatever, it's always a win for me. Jenny's perspective is, every time we go into mediation Jonathan gets more time, which to her, I think, it's been viewed as a loss, you know. And people will fight harder for a loss typically, mentally, than they will for a win. So, I think the whole structure of it being a female and the likes, and having, essentially, her, she has Rebecca [the daughter], I think that puts her in a better position of power.

Barry had five mediations with his ex-wife during the 10 years since their divorce, and described the essence of his experience:

... at the end of the day, I think, as a father who's not with the children, um, you, you are basically powerless. You can, you can have the best of intentions, and you can have the smallest of intentions, but a person who has the children, and the mother says, 'no', you can't get anywhere. You have to agree to what the mother says. ... And you go in there, but you know that at the end of [the] day, you're up against it. And if you have an ex who is bitter, who, who, um, for some reason, only she, [stutters] she probably, she can answer, is bitter and: 'I'm angry, you're not going to get anywhere.' End of story.

Barry had one suggestion for improvement that beautifully illustrated his frustration:

I think that um, the word 'no' should not be allowed in the process. I think it's, it's a word that just, must just breaks that many fathers' hearts. Because they, like I said, they've tried, they're doing everything humanly possible, and the ex can just say 'no', and the whole thing just collapses. I think it's a word that should not be allowed, I, it's as simple as that. I think it's just a, it's a harsh slap in the face, kick in the guts, for a father who's trying everything humanly possible, to be basically told with two letters, you've just been crushed, end of story. ...

Cullum is a young father who only had a brief relationship with the mother of his daughter when she got pregnant and moved away. He attended two mediations with the mother and built a relationship with his daughter over the past five years. He explained his perception of how his ex-partner controls the mediation:

... basically, you still feel powerless, you don't feel like you've got any, you've got a bit of a say and somebody's there to listen to what you've got to say, but it's, it makes no

difference. You can ask away you can say: 'I would prefer if this was the situation or that was the situation'. If the mother turns around and says: 'no, this is the situation because I'm not doing that' [scoffs], the mediator's only response is to come back, because that's all he can do, they're not allowed to jump in. So, all he can do is come back and say: you know, I get that you don't want to do that, and that's not gonna work, but court's a long process, man, you don't want to go that way. It's going to cost you a lot of money it's up to you, but that's going to cost a lot. She can still turn around and say: 'I don't want to do it', and then you're back to square one. So, what options as a man do you have then? you've got literally: do what they say or pay to go through court to do what they say [laughs]. Is there, is there another option? because I was looking, I didn't find anything.

Keith is a gentle, soft-spoken man, who described his lack of power in the mediation as well as in the relationship:

... how I felt was that my, my, sort of what, what *I* want, *my* thoughts or *my* feelings, or, or what *I* wanted to achieve was like, that was right, right down the bottom. And up the top was the children, and then my, you know, then the mother or my ex. And then I felt like, whatever I wanted was: 'na, sorry, mate, that's, you, you're down the bottom', you know, you got to take what you're given sort of thing sometimes.

2 *Mother's Refusal to Sign the Agreement*

Seven of the participants experienced a similar scenario: an agreement was reached at mediation, but their ex-partner refused to sign it or introduced too many changes. Most participants perceived it as another way of gaining power.

Jeremy described what he perceived as his ex-wife's way of controlling the mediation process:

And afterwards what ended up happening, the mediator drafted up the agreement and by the time it got to me, my ex-wife made a whole round of amendments to it and notes on it ... So, what was actually agreed on the day was then, was not stuck to, and then she came back with all of these changes and I was like: 'what? I didn't agree to all of this!' But it was my ex's way of trying to get more control. If she couldn't get enough control on the day, she'd try to do it after the fact. And the fact that the mediator kinda allowed that to happen is disappointing.

Matt's ex-wife refused to sign the mediation agreement. When asked what might improve the mediation process, Matt used language of control to describe his wishful thinking scenario:

... I would have liked to have probably seen what would have happened with a mediator that was maybe a bit more direct, and then he'd *tamed* a lot of the stuff that she brought up. It would have been interesting, just to see if someone, sort of, kept her *under better control*. But she's a very bolshie dominant person anyway, um and can easily railroad people. So, yeah, it would have been interesting if someone had been more dominant themselves. (emphases added).

3 *Mother's Refusal to Communicate*

Five of the participants described that following separation their ex-partner refused to have any contact with them, which complicated their attempts to see their children.

Tom illustrated how his ex-wife blocked all communication and his subsequent frustration, which led to an escalation of the conflict:

Because like, she blocked my phone, I couldn't, I couldn't text her, I couldn't call her. She blocked me from all her email accounts, Facebook and everything, and set up one new email account that was just for me to contact her about access, and she very rarely checked it as well. ... So she'd get emails from me that are kind of angry, direct. Cause I'm so frustrated because I want to book flights ...

Jonathan describes a similar behaviour of his ex-partner:

... after six weeks she'd refuse to take any phone calls or communicate by email or text about anything apart from directly relating to Rebecca. But there's no phone calls or anything. ... so yeah, so what I'm essentially saying is, so when we went through the mediation, yeah, I think things have got better because now we do the handover. ... We're only allowed to talk around ... anything directly associated to Rebecca and Rebecca's wellbeing only.

Matt recounted how his ex-wife explained why she would not answer his calls:

... I was trying to get hold of the kids and I'd call her phone, and I couldn't get a hold of the kids for like a week on end. And she'd be like, ah ... 'it's too emotional for you to call me. So if you want to speak to the kids, you buy a cell phone', things like that.

4 *What Sense They Make of Women's Behaviour*

The majority of participants understood women's behaviours as attempts to gain control or as resulting from their ex-partner having a personality disorder or being vindictive. Below are a few excerpts portraying participant's perceptions.

Jeremy: "When you experience someone who's got a seriously, like narcissistic personality disorder in that situation then ..."

Anthony: "She, she's like a what's called a vulnerable narcissist, and she actually can't understand where other people are coming from."

Phil: "she, she is narcissistic, she is a gaslighter and she doesn't, she wants everything her way. But, yeah, she is just a very controlling person."

Matt: “She’s just so wound up and bitter, and all those sorts of issues are like, right there as if it was yesterday.”

Brad: “But if you got two parties that ... basically wanna hurt each other ... she was trying to hurt me through the children.”

Barry:

... if you have an ex who is bitter, who, who, um, for some reason, only she, she probably, she can answer, is bitter and: ‘I’m angry, you’re not going to get anywhere.’ End of story.

E Mediator’s Bias Against Fathers

Eight of the participants said the mediator was biased against them and favoured their ex-partner. Allegations of bias were sometimes concrete and supported by examples, while other times they were vague and unsupported, as if saying something that is a universal truth.

Anthony described how in his first mediation, the mediator was helping his ex-wife achieve her goals for the mediation:

... the mediator’s demeanour, yeah, she just tended towards Mary because Mary was upset. And Mary, she just believed her I guess ... But even the movement away from 50/50, you know, ... I had to compromise first. And I don’t think, cause I don’t think that’s right. ... Because I thought I was right, 50/50, I wasn’t asking for 100%. I was going down the middle. So, to suddenly have to compromise first, I found was um biased towards the mother.

Paul, who was familiar with the concept of mediation through his work, compared his mediator with the behaviour of other mediators he experienced:

I know very well what the mediation is, and I, I already had some experience of seeing how impartial mediator works. ... I realised that the mediator I was dealing with she, she wasn’t even pretending that she was, she was biased. She was openly biased.

...

As a result of the first couple interview, or mediation, I had some suspicions that, that the mediator was biased. And so I decided, okay, maybe, I’m clearly, clearly I’m not objective, so I thought, okay, I need to, I need to bring a support person and see what they think. So I brought, I brought a support person to the second meeting, and they said that the mediator was not only biased, but very, very condescending.

Keith described feeling the mediator was biased in favour of his ex-wife:

... my impression from the mediator was, I thought the mediator was supposed to be like, not to take sides. But during the course of that mediation, and after the, after we finished that first initial mediation, I’ve felt like the mediator was actually taking my ex’s side. She

was listening to what I was saying, but I just, you know, in the back of mind it felt like the mediator was actually, like, sort of more on to her side around that, sort of, around the schooling and stuff like that as well.

Eric described his feeling that the mediator was trying too hard to push him into signing the agreement his ex-wife wanted:

So you can see it from two ways, either she wanted, she was one sided, she believed that my ex is right, and she'd support my ex to get what she wants or closer. Or she, it almost felt like if she works through everything on the list and we sign it all, she gets a good rating at her agency and gets more money, or gets employed, if she gets the ticks on everything if there's gonna be a signature at the end.

It should be noted that three of the participants had the impression that the mediator favoured them over their ex-partner and was trying to assist them.

F Mediator's Skills

The participants expressed different views on how the mediator handled the process. Six men criticised the skills of the mediator, four thought they did a very good job and one had mixed feelings about the mediator's skills. The other two men had an interesting perspective, since they each did five mediations and could compare between different mediators. The criticism related to various aspects of the mediator's skills, as demonstrated in the examples below.

Jeremy's impression was: "I think she was too soft with my ex-wife and let, she wasn't firm enough in actually controlling the mediation."

Brad's criticism was around the lack of negotiation skills:

I don't think she was, she wasn't a negotiator [laughs], she was a, a counsellor first and a negotiator second. ... Which is fine, but it's like [pause], It's like trying to, say, a car racing driver is also an aircraft pilot [laughs]. One might be doing the other, but one is not very good at the other, you know. Racing car drivers are not really good pilots ...

Eric, who was keen to use the mediation to improve the co-parenting relationship with his ex-wife, came prepared with research on how good cooperation between parents enhances the wellbeing of children. He was bitterly disappointed when the mediator blocked his attempts to explain this to his ex-wife during mediation:

... she did not, she did not care at a slightest bit about actually making an effort to encourage communication between me and my ex. She wanted to get the dates done, she wanted to get, run through the points and get this thing signed, with such aggression ... And I said, look, and I thought about, you know, I read all about, you know, the damage on the kids between 8 and 14 on the psychological damage ... Well, during the mediation,

she wasn't, she wasn't interested at all, and she said: 'no, we don't have time for this'. ... I was shocked that there's a mediator that calls themselves mediator that wants to discourage anything. Anything. That tells me 'there's no, there's no time for lectures and presentations' and blocks down my attempt to get through to the ex-wife that, that, and we want to do something for the kids, that's why we're there.

Jonathan had one bad experience and one good experience with mediators. He started the process with a mediator who asked both parties to write down what they wanted to achieve at mediation and based on these lists decided there is not much point in doing the mediation:

And then she said pretty much like, she didn't think that we were gonna be able to agree on anything, so she would do a four-hours, she'd do one four-hour, if we couldn't agree on everything in that period of time, that was it. So, she had already kind of doomed us before... And I thought, this isn't, going into that, there's gonna be like pressure. I knew how Jenny [his ex-partner] was very fragile. And Jenny doesn't work well under pressure. I work in a corporate environment that's very intense, so I'm probably more used to thinking on the fly. But Jenny's, Jenny's a deep thinker...

Jonathan complained about this mediator and asked to replace her. He described his state of mind and his strong wish to avoid the Family Court:

... but she [the mediator] was my kind of, she was my face of FDR. And I was actually really scared, I was scared that my only option to keep me out of the court was essentially this lady. And this lady, I didn't think it was very professional at all.

Barry, who had five mediations, expected the mediators to be more proactive and interfere when he was unfairly treated by his ex-wife:

Because she [ex-wife] can basically start having a, her talking, me talking, her talking, her talking, me trying to talk, her basically kicking me off, go over top of me and I'm looking at them going, um, aren't you supposed to be um, allowing us to both have a say? And how come she's starting to get louder? Um, aren't you supposed to actually bring the sword down, so that we, kind of, try to be as adult as possible?

Another reason for criticism was the notion the mediator gave more time or attention to the other party. Phil discovered that the mediator spent more time talking to his ex-partner in the pre-mediation meeting than to him:

And I was thinking: oh, where did the other six and a half hours go? So I emailed [the mediator], and apparently she spent three and a half hours talking to Shirley on the phone. ... and she spent ... one hour and 45 minutes talking to me on the phone, which is all good and fine. But um, why is it that she can talk to Shirley twice as long as she talks to me?

Keith described how he arrived at the mediation meeting and found the mediator chatting to his ex-wife. This had a significant impact on him, even the way he talked about it with lots of repetitions and incomplete sentences, which illustrates how distressing it was for him:

So I went up to the, to the, to the, to the office, and they were already, like my ex and the mediator, were already in there, and they are in the, in the room, and they're already talking. And this is, this is before that was due to start. And I was like, oh, what's going on here? This seems a bit odd, why? So you guys already talking before we're supposed to start? So, I was a little bit, sort of, wary. I thought, I mean, they could have just been talking about the weather or something, I don't know. But I thought that was a bit strange that the mediator and my ex were talking one on one before I got there for the mediation that was set at a certain time. ...

G Opportunity to Talk About What Happened

Another important question was how much time should be spent in mediation on discussing past events as opposed to just resolving care arrangements. There was no correlation between gender and wanting to talk about the past, as some participants wanted to do it and others complained about their ex-partner wanting to do it. A few participants noted that the allocated time for mediation was insufficient to allow such discussion.

Tom spoke about his need to talk and explain his point of view and his frustration over lack of sufficient time:

... I was probably more like wanting to get her to understand where I was coming from and what was motivating my, my need. ... to see if that would change anything ... I felt frustrated in the mediation by that, by this kind of, maybe not really enough time to kind of air grievances, I suppose. Yeah, and so, it was, it was limited, the time was limited, so the mediator was quite, kind of, we need to figure out what we can agree on about what's gonna happen in the future, cause that's why you're here.

Eric viewed the mediation as an opportunity to improve the communication with his ex-wife and was devastated by the mediator's refusal to allow this discussion (which led to an impasse):

Well, during the mediation, she [the mediator] wasn't, she wasn't interested at all, and she said: 'no, we don't have time for this'. And then I requested that break because I was so, [pause] so stressed out by her pressure to *not* talk about anything actually, just to nail down these points, about school holidays and tick, tick, tick, tick, tick ... And I was sitting there and I was completely speechless that three times she repeated: 'no time for lectures or presentations' when I was highlighting, where I'm maybe misunderstood.

Keith did not achieve all his goals at mediation but was grateful for the opportunity to express himself:

I think it was a positive thing, and that, like I said, I managed to, like, express my thoughts and feelings around, around our relationship or our ex, you know, and the childcare and everything like that as well. So yeah, and that way, it was positive for me personally, I felt like I, you know, said a lot of things that I probably should have said a long time ago, so that was good.

At the opposite end, Matt resented his ex-wife's wish to talk about what happened in the marriage:

... she [ex-wife] basically wasted a lot of time talking about things that happened years ago in our marriage and all this other stuff. And I was like, look, I'm not here to talk about that. And um, the mediator entertained that, and basically was like, ah you could have, you know, maybe if you have apologised, and I was kind of feeling like, hang on, I'm here for mediation, I'm not here for post-marriage counselling.

H Was Mediation Beneficial?

Participants' view on mediation can be divided into three groups: two of the participants viewed mediation as a complete waste of time; two participants viewed mediation as a very beneficial tool that kept the conflict from escalating; the majority of participants could see the value in mediation, but said it did not work in their case either because of the mediator or their ex-partner's behaviour.

1 Mediation is a waste of time

The two most militant participants, who perceived divorce as war and worked hard to ensure they win it, saw mediation as meaningless and a waste of time and ended up applying to the Family Court.

Brad, who has full custody of his children following litigation, shared his view on mediation:

It was a waste of time and effort that I could have taken to the court with the kids. It was just, just for nothing, a waste of my time and money for nothing. So, you know, that's that's, that sums up my experience with the family-mediation. It was a waste of time.

Brad described one of the consequences of his victory — living in constant stress:

It's a war. I treated it as a war, and to this day it's still, it's still ... I'm dreading every holidays, I dread Christmas holidays, I dread everything...

Phil, who has a 50/50 care arrangement for his daughter, spoke of his disappointment with the mediation process and preference to go to the Family Court to prove his ex-partner is lying:

I'm now going through a lawyer to get a court order cause I'm basically over the process of mediation. It's pointless, it's toothless, and it's got no weight. ... I just don't feel it's worth sitting down for five or six hours, being put up with false allegations, put up with no reliance on evidence. And watching her cry and cry and cry, and not backing it up with anything at all.

2 *Mediation Saved Us from the Court System*

At the opposite end of the scale is Jonathan, who made a conscious choice to prioritise the wellbeing of his ex-partner and daughter over winning:

But one thing FDR has allowed us to do is: I'm slowly getting what I want. It's kept us out court. And I didn't, I had the money to go to court. And Jenny comes from a very wealthy family. And I knew both of us having quite a lot of resources, there was only going to be one set of winners, because Jenny's stubborn and I'm stubborn. And the lawyers would definitely be the winners. And Rebecca [his daughter], I'm sure, wouldn't be. And I was also concerned for mine and Jenny's mental wellbeing, what a court solution system would do for us as well.

The choice Jonathan made is even more impressive when he explains his overall rationale:

... so, I have also thought about, would it have been better earlier in the piece to just go: 'bugger all this' and just go hard out in the court system. By now, I might potentially have what I wanted, which was 50% custody. I do also think that it would have potentially created a much deeper rift and a bigger wound to heal as well. Whereas, you know, I still care for Jenny, I genuinely still care for her, you know, and, you know, I want her, the best for her. Because of the fact she's a human, but also she's the mother of my daughter, you know, and I don't, I don't want anything, you know, I want the best for the person that's looking after my daughter majority of the time.

Similarly, Keith could see the value of mediation despite the fact he did not achieve his main goal:

I guess the mediation process itself works. I suppose it works pretty well. ... [E]ven though the mediator was, you know, I'd say, overall, pretty professional, I think, I think they need to be a little bit more mindful of both parties. ... But I think, yeah, but I think overall, I think that the process, you know, it works quite well. I guess I didn't get what I wanted, but yeah, I don't know what what's the next, I mean, what the next step would be, you know, do you really want to go down that road as well, I mean, sort of trying to avoid that, I suppose, with mediation.

3 *I Can See the Value in Mediation, But...*

The majority of participants thought mediation is a positive process in principle, although agreements were reached only for five of the participants, and only two were happy with the agreement. These participants attributed the failure either to their ex-partner's behaviour or to the fact the mediator was not skilled enough or was biased. The main benefits they mentioned were being able to talk and express their views to their ex-partner, improving communication and working together to enhance the wellbeing of their children.

Jeremy has been through court prior to mediation and could see the benefit of mediation. However, due to his ex-wife's behaviour, these benefits did not last:

But you know, like, I think going back, thinking back to when we first did the mediation, there was probably a little bit of a period of time there where it did help with our, I do remember feeling that we were trying to work together to try and achieve something for the children. Um, as opposed to the adversarial nature of the litigation. I remember receiving every affidavit and every legal letter from my lawyer, ... and its just so combative. And so, to go to mediation, I did enjoy or appreciate trying to sit around a table and work together as opposed to fighting all the time. So, there was a period of time where I think that did help but it didn't last unfortunately.

Eric wanted to use mediation to improve the communication with his ex-wife, yet the mediator did not allow him to talk about it:

So that's what exactly [what] I was hoping in the mediation, that the mediator is gonna help that we talk ... Because my idea was that she [the mediator] helps us to communicate to bring these things to light. I was hoping that we both get a little bit emotional and focus back on what the kids need.

Tom could see the benefit of being able to understand each other's point of view, and said that communication did improve following the mediation:

... what I was told about it was that everybody's got to give some ground and it's about understanding each other's position. And I kind of reflected on it and thought, like, actually, you're right, I don't understand her position, I don't know where she's coming from, and that will help to, to find out something about that. And, and, likewise, you know, the other way around as well.

...

... I'd say... something, and she'd be like, well, of course it's like that for you because you're a shit father, you know, that sort of stuff, you know, get kind of abuse back. And we agreed [in mediation] that that wasn't helpful, you know, and to not do it, and that hasn't, that hasn't happened. It's still tense, but that kind of yelling at each other has, has not occurred. So that'll be, that's good.

Barry talked about his hope that mediation could work if power was more evenly distributed:

... [T]he process, I think the intentions are good, but there's parts of it, it just completely collapses because the power is in her hands. We have no power; we have nothing at all.

...

So, I thought, um, at least going back to mediation, there's a faint, very very faint possibility that I could get a person to basically see her side and my side and help us come to an agreement as such. I'm yet to find a mediator that could achieve that personally.

Cullum expressed his overall feeling that mediation is a good thing, despite the fact he did not achieve his goals at the two mediations he attended:

They do whatever they can do within their restraint of realm, you know what I mean? They can't get involved, they can only make you feel better about the situation and try and come up with the best resolution so that you can both see your kid. ... So, I don't want to sound

like I was saying that's no good, because they are, cause it gives me a voice when nobody else is, apart from my friends, is gonna listen, you know? So they're really good.

Paul pointed to the mediator's bias against him as the reason for the failure of mediation:

... I think the, the, key to the failure of this mediation was the personality of the mediator, I think. In general, I think the process is, [pause] I don't think, I don't think I could pinpoint on anything in the whole process, anything else in the process that I, I could say, didn't work ...

Anthony attended two mediations, one with a female mediator and one with a male mediator, as well as a court process. When asked whether he sees any value in mediation he replied:

I'd say: yes, but the mediator is critical. Who the mediator is, is critical. ... but in that first one, we had to go to court, because we just couldn't agree. ... But that legal process, it was just about the law, right? It's not, it wasn't really about family dispute, and so it became more, you know, not fearsome, but it was a different type of process, which wasn't, it wasn't nice. So I would hope that FDR would work.

I The System is Rigged, Flawed, Unfair

All 13 men in this study, regardless of whether they were happy with the mediation or not, said 'the system' is biased against men. Interestingly, the only two participants who fully achieved their care arrangement goal — one has sole custody and the other has 50/50 shared care — made the strongest accusations.

Seven of the men in this study told heart-breaking stories of being separated from their children and getting very little time with them. The fact they had to fight for their right to see their children more is what these fathers found unjust. Below are some of these stories.

Jeremy's ex-wife only allowed him to see his two kids separately, once a week, for a short time, with no overnight stays. He described his feelings during the long months he fought for more access to his children:

... I really felt up against the system. I really felt like this whole system and what I'm being told needs to happen, it really feels rigged. It feels rigged against the fathers and that I, why should she, with what I know about her and how she behaves, and the risk she poses to my children ... why should the system allow her to have as much time with them as she can, and for me to have to fight for everything else?

Barry described his last mediation and how his attempts to achieve a more favourable arrangement failed:

And unfortunately, the whole process is flawed in that if, if a father who, who tries his hardest to ask for this or this or this, and the other person says no, that's it. That's a no.

You can't go anywhere, you can't move, until you start to agree to her demands. You end up having to um agree to this, this this and this to get ... to, to actually pick up your, your kids. And it's, yeah, and that's not fair. That's not fair.

Keith felt that he was the victim in his relationship and expressed his view on gender bias:

Yeah, cause I don't think, it's like sometimes people tend to think that it's the mother, that's the one that's that has it the hardest or something, or the victim or something, but it's actually not always the case. Sometimes it's the, actually the father that's actually the one that has it the hardest ...

Jonathan's interpretation of the situation is perhaps the most interesting in its internal contradictions. Jonathan consciously chose not to engage in a legal battle, yet he still criticises the system:

So, the whole, the whole system is set up for the, against the male, in my personal opinion. And as far as my rights, Jenny has no extra-legal right to have more access to Rebecca than me, supposedly. But of course, she has sat the whole time as judge and jury and not let me have the access that I wanted with Rebecca. Yeah, so, I think, I think the court system is not set up at all favourably towards males. ... And I think the mediation is probably, my, my feeling is it's not really [pause] set up, it's probably set up probably more in favour of the female party, I would say.

Surprisingly, later on in the interview, Jonathan suddenly reverted to agreeing with the traditional gender-role view:

The setup is, some might say unfair, but it's, it's, you know, let's be honest, the woman carries the child for nine months. That, that Rebecca is more attached to Jenny - absolutely, than she is to me. I know that. I get it. I understand that. A mother's protectiveness and the likes of that.

At the opposite end is Brad, who has full custody yet complains how the system is broken. When asked why he feels that way when the system gave him exactly what he wanted, he replied that his ex-wife is often two days late in returning the kids and the police refused to enforce compliance. His unequivocal conclusion seems to reflect the masculine discourse, rather than his own circumstances:

I don't know if I have an interesting story, and I tell everybody who wants to listen, um, about the history, cause I think ... I think the justice system is pretty much broken when it comes to Family Courts, and, and I just, I was just extremely lucky enough ...

The participants were asked if they have any suggestions for improvement. Their answers varied. Four of the participants spoke about more training for mediators to eliminate bias against men and to improve their negotiation skills. Two participants would like to see mediation as a more legal process, one wanted the mediators to have more authority and the other wanted them to rely on evidence and decide who is right. Two participants thought it

would be a good idea for parties to exchange their positions in writing prior to the session and two others wanted the mediator to be more actively involved and intervene when things are not fair. One participant wanted to see more effort to encourage reconciliation and one commented that scheduling the mediation should happen faster.

J Discussion

Family-mediation should be viewed in the context of the socio-political climate of our times. Understanding that we are in the midst of a major shift in traditional gender roles in general, and within the family in particular, is crucial to managing family-mediation effectively. These changes create much confusion for both mothers and fathers at the individual level and influence the creation of new social and legal norms, such as shared parenting. Yet, these new norms are still fragile and often ambiguous. Fathers, more than mothers, are faced with a confusing and contradictory message regarding their parenthood. On one hand, is the relatively new expectation of being a caring, nurturing, emotionally involved father. On the other, is a systematic devaluation of fatherhood, reflected in the message from mothers, from mediators and from society at large.

The interviews provided a glimpse into the difficult psychological state of fathers following separation. This severe grief reaction is in line with the literature and in contradiction with the popular notion that men do not care. Masculine gender norms prevent men from expressing the full extent of their emotions and grief. Although non-custodial fathers often have more losses to mourn, particularly the loss of daily contact with their children, they experience difficulties in accomplishing a healthy grief process. Furthermore, the masculine pattern of emotional expression involves anger as the only legitimate emotion to externalise and a tendency to withdraw from emotionally difficult situations. This combination often results in anger and non-cooperation during mediation.

The majority of participants described feeling the mediator was biased in favour of the mother. All the participants, including those who achieved their goals, expressed the view that ‘the system’ is biased against men. It is important to view these allegations in the context of the political message promoted by father’s rights groups. These organisations embedded the discourse that fathers are discriminated against in the family justice system. Gender politics seem to be mirrored at the individual level, as they are recited even by fathers who have not been disadvantaged by the system. Nonetheless, it is equally important to acknowledge that

bias against fathers and the devaluation of fatherhood are often very real, as reflected in some of the interviews.

A few participants described how their ex-partner was visibly distressed during the mediation and how the mediator became protective of her, a natural response. Yet, mediators should be acutely aware that despite the tendency of men to present themselves as strong and in-control, their internal reality is often quite different. In their fragile post-separation state, men are likely to be hypersensitive to any real or perceived sign of bias. As transpires from the interviews, the fact mediators spent more time with the mother or chatted with her before a mediation session was experienced quite strongly as a breach of impartiality.

The highly complex dynamic of gender power struggles was evident in all 13 interviews. Being the main custodians in most cases, often gives mothers the power to determine how much time the father will spend with the children. As discussed, Smart and Neal described women's power at this stage as situational power and noted that women use it as a reaction to men's dominating or debilitating power during the relationship.²⁵⁰ This shift in power may explain why men feel predominantly powerless during mediation. The risk in powerlessness, as Bay and Braver explained, is the resulting noncontrol distress experienced by men, which is likely to provoke attempts to regain power.²⁵¹ This dynamic may increase the level of conflict between parents, an obviously undesirable outcome.

In this context, it is crucial to stress, once again, that this study reflects the experiences of men only and does not provide a balanced picture of the dynamics. Family violence allegations came up in seven of the interviews and are likely to have affected the attitudes of mothers and mediators. The scope of this thesis did not allow an in-depth analysis of the possible effects of family violence.

Nine participants highlighted one of mediation's greatest qualities, providing the opportunity to speak and the experience of being truly listened to. As discussed, research on the effects of active listening on the psyche found it creates a sense of psychological safety and reduces anxiety. This enables more elaborate thinking, better capacity to accept new cognitions and to become more complex and less extreme.²⁵² Scholars argued that allowing parties to speak

²⁵⁰ Smart and Neal, above n 52, at 145–146.

²⁵¹ Bay and Braver, above n 227, at 386.

²⁵² Itzhakov and Kluger, above n 208, at 412–413.

constructs new meanings and new narratives, which may be used in family-mediation for creating new co-parenting relationships.²⁵³

Participants' evaluation of mediation presented a diversified picture. The only two participants who were entirely negative about mediation were the ones who viewed divorce as war and were determined to win it. At the opposite end were two participants who consciously chose to cooperate with their ex-partner as a way to maximise their children's wellbeing. These fathers were strong enough to put aside their need to win for the sake of increased wellbeing of the family. Between these two extremes, the majority of participants reflected the ideological confusion about gender norms and relationships. These participants thought family-mediation is a good idea in theory, but for various reasons it has not worked in their case. They attributed the failure to either the mediator's bias or lack of skills or to their ex-partner's excessive power. These fathers spoke of the advantages of family-mediation, compared to an adversarial process which they perceived as combative, expensive, and more stressful.

The New Zealand legislation enshrined the wellbeing and best interests of children as the prevailing principle to guide decisions on day-to-day care. Social science studies concluded that having a meaningful relationship with both parents optimises children's wellbeing. Fatherhood has a different quality to motherhood, yet, contrary to common belief, recent studies have shown that fathers' parenting quality is not inferior to that of mothers. These three principles should guide family mediators in their practice.

Finally, the underutilisation of family-mediations in New Zealand, with two-thirds of FDR requests not reaching mediation, raises the question of whether the discontent expressed by participants affects fathers' willingness to engage in mediation. Men have a natural tendency to favour rights-based justice found in the adversarial justice system.²⁵⁴ This tendency, in conjunction with testimonies from friends and men's support groups about gender bias at mediation, may be the reason behind some of this underutilisation of mediation. Further research is needed into the reasons behind the high number of cases that do not proceed to mediation.

²⁵³ Phillips, above n 209, at 165.

²⁵⁴ Jordan, above n 37, at 22.

VI. *Implications for Mediators*

Family-mediation is undoubtedly one of the more complex and emotionally charged fields of mediation. The considerable body of research on family-mediation over the past 40 years provides guidance for best practice and tools to assist in achieving good outcomes. Based on the findings of this study, together with insights from the literature, below are some highlights and recommendations for mediators.

- *Awareness of the fragile mental state of fathers* — the interviews and literature reveal the enormous difficulties men experience following separation, more than women do, and how fragile they are likely to be when attending mediation. Britton and Johnson highlighted men’s emotional avoidance, unwillingness to seek professional help and tendency to express anger. They cautioned that such behaviours might affect mediators and stressed the importance of being less judgmental and more supportive of men.²⁵⁵ Mediators should consider how their reflective practice in peer support groups and supervision can account for gender stereotyping and reactions to gendered behaviours. The practice of mindfulness can be a helpful tool in acknowledging and managing one’s biases and reactions. Cultivating the essential attitudes of mindfulness practice can be especially useful, in particular, non-judging, patience and acceptance.²⁵⁶
- *Respect for the different quality of fatherhood* — as detailed above, recent studies provided evidence that fathers can be as good parents as mothers, however, fatherhood has a different quality to motherhood. Collier spoke of the need to understand and respect this different quality, rather than judge it as inferior.²⁵⁷ Fletcher and St George identified *respect* and *reframing* as the two main strategies mediators can use to counteract fathers’ disengagement in family-mediation. Respect, they explained, is achieved “[t]hrough listening to, empathising with, and eliciting a father’s story in a non-judgmental manner” and through an effort “to acknowledge the value of fathers as parents”.²⁵⁸ Reframing involves mediators “using their knowledge of law changes and their familiarity with social

²⁵⁵ Britton and Johnson, above n 3, at 25–27.

²⁵⁶ Jon Kabat-Zinn *Full Catastrophe Living* (2nd ed, Bantam Books, New York, 2013) at 68–76.

²⁵⁷ Collier, above n 41, at 366.

²⁵⁸ Fletcher and St George, above n 3, at 107.

constructions of fatherhood to offer fathers a new context in which to see themselves”.²⁵⁹ These scholars distilled the essence of good mediation.²⁶⁰

In the end, however, it may be that the competence to successfully respect and reframe fathers’ experiences is an aspect of practitioner responsiveness ... responsiveness, perhaps a ‘sine qua non’ of good mediation, results from a highly sophisticated skills and knowledge base that cuts across gender and professional qualifications, and in the end relies primarily on a personal commitment to ongoing training, supervision and the accumulation of professional experience.

Fletcher and Visser suggest using more male-responsive methods which may help men feel more comfortable, such as goal setting and problem-solving, reciprocity, normalising problems, and less emotional talk.²⁶¹ They too stress the importance of mediators’ self-awareness to their own possible bias about fathers and the importance of self-reflection.²⁶²

- *Acknowledging and Managing Gender Power Struggles* — the most prominent dynamic that transpired in the interviews was fathers’ perception that mothers sit in a position of power and use this power to limit fathers’ time with the children. All 13 fathers described *powerlessness* as their main experience in family-mediation.

Smart and Neal explained the behaviour of mothers as a reaction to men’s debilitating power and as an attempt to build their own fragile self-confidence following separation.²⁶³ Bay and Braver explained the danger in fathers’ powerlessness which may lead to noncontrol distress manifested through anger or through disengagement and non-cooperation. They warned mediators that “an overt or drastic shift of power to the female may be an overcorrection”²⁶⁴ and that “it may be that fathers, more than mothers, are likely to initiate conflict with their ex-spouse when distressed about a perceived lack of control”.²⁶⁵

As a first step, mediators’ awareness to what causes this typical cycle is crucial. The literature highlights the fluid, changeable, relational and contextual nature of power, which makes it difficult, some say impossible, to manage. Lang, who studied how mediators

²⁵⁹ At 107.

²⁶⁰ At 112.

²⁶¹ Fletcher and Visser, above n 232, at 58–60.

²⁶² At 61.

²⁶³ Smart and Neal, above n 52, at 145–146.

²⁶⁴ Bay and Braver, above n 227, at 383.

²⁶⁵ At 386.

assess power disparities between couples, found that mediators' practice decisions were based on their personal beliefs and values. He suggests using the cycle of reflection, a five-step process which helps diagnose and assess different assumptions about power and their suitability to the specific case.²⁶⁶

- *Bias against men* - The stories of fathers reveal much frustration with a system that treats them like bad people and with mediators who are perceived, rightfully or wrongly, as being protective of mothers and biased against fathers. An awareness to the high prevalence of family violence in New Zealand, combined with the fact most perpetrators of family violence are men, naturally plays a role in the perceptions of mediators. Again, a firm commitment to self-awareness and to ongoing reflective practice and supervision is necessary to avoid gender stereotyping and unjust conclusions.
- *Balancing between efficiency and exploration* - a repeating theme in the interviews was the tendency of mediators to run through a list of topics at the expense of improving communication between parties. A main objective of family-mediation is to enable the creation of a working relationship between parents so they can co-parent successfully. Research uncovered that the experience of being actively listened to reduces defensiveness and increases openness and creativity. Cohen noted that parties described as turning points in mediation “insights gained about the past or about the other party”.²⁶⁷ Baitar, De Mol and Rober emphasised the importance of exploration over efficiency in achieving sustainable resolution.²⁶⁸

Obviously, such exploration requires time, which is limited under the FDR scheme. Extending the time allocated for parents' first mediation may enable a more effective and long-lasting resolution of disputes. The Ministry of Justice currently subsidises 12 hours per year for family-mediation — a more flexible arrangement may allow parents to use in the first year the allocation for the second year, where needed, to enable more exploration without additional costs. The shifting of hours to the first year, to the point where the

²⁶⁶ Michael Lang “Understanding and Responding to Power in Mediation” in Jay Folberg, Ann Milne and Peter Salem (eds) *Divorce and Family-mediation: Models, Techniques, and Applications* (Guilford Press, New York, 2004) at 218–220.

²⁶⁷ Cohen, above n 211, at 78.

²⁶⁸ Baitar, De Mol and Rober, above n 198, at 16–21.

difficulty is often the greatest, may end up saving costs in further disputes and court proceedings.

- *Differences between mediators' styles* — another theme that emerged in the interviews was the great differences between lawyers and counsellors as mediators. While differences in style are expected and even welcome, some of these strong traits stemming from professional background seem to be unhelpful in family-mediation. Participants described lawyers as strongly pushing towards settlement, often at the expense of establishing communication and a new co-parenting relationship. This sometimes led to agreements not being signed by one party or agreements not holding in the long term. Borton and Paul explained how lawyers' professional training orients them towards a settlement-seeking rather than a relationship-building approach and concluded that only extensive training can uproot these traits.²⁶⁹ At the opposite end of the scale, counsellors were described by some participants as ineffective negotiators, which sometimes led to an impasse. Overcoming these tendencies requires consistent continued professional education and a commitment to reflectance and supervision. Professional organisations can assist mediators by offering a robust system for continued education and supervision for mediators.
- *Prevention* — a recurrent theme in the interviews was the gradual escalation of the conflict between parents. These stories started with an amicable separation that gradually escalated, often due to minor things, such as an aggressive tone in an email. This led to attribution of negative motivations, creating a snowball of hostility and blame that kept growing. Since prevention is always the best way to handle problems, an intervention at the early stages of separation in the form of education and building awareness of this typical cycle could prevent some of these conflicts from escalating. Encouraging parents to use one of the purpose-built parent communication apps such as OurFamilyWizard or CustodyConnection may help keep communication as harmonious as possible.
- *The magic of mediation* — a few participants described mediators as technicians going through a list of issues and pushing parties to settle. Much has been written about the unique qualities of mediation and its potential to achieve transformative resolution of conflicts. Bowling and Hoffman borrow from a number of scientific theories, such as quantum

²⁶⁹ Ian M Borton and Gregory D Paul "A Mixed-Methods Analysis of Mediator Socialization Through Training" (2018) 29(1) Int J Confl Manag 109 at 118.

physics and systems analysis, to demonstrate that “there are phenomena at work in mediation that operate on a level of subtlety that we have only begun to fathom.”²⁷⁰ Jameson, Sohan and Hodge differentiate between reaching agreement and achieving conflict transformation, which they defined as a change in the quality of the relationship between the parties.²⁷¹ Their study found that the key to conflict transformation was parties’ recognition of insights about the other party, especially when mediators encouraged acknowledgement and used tools such as paraphrasing, empathy and finding common grounds. Mediators who used more directive methods sometimes achieved agreement, but without the benefits of conflict transformation which produced more sustainable, long-term outcomes.²⁷² Improving this skill for mediators requires highly experienced mediators to share their tools and experience with less skilled mediators for continual growth and improvement of family-mediation.

²⁷⁰ Daniel Bowling and David Hoffman “Bringing Peace into the Room: The Personal Qualities of the Mediator and their Impact on the Mediation” (2000) 16 *Negot J* 5 at 20.

²⁷¹ Jessica Katz Jameson, Donna Sohan and Jenette Hodge “Turning Points and Conflict Transformation in Mediation” (2014) 30 *Negot J* 209 at 211.

²⁷² At 224–227.

VII. *Conclusion*

This study sought to open a window into the state of mind of fathers attending family-mediation. The findings illuminate the complex, often contradictory, messages our society communicates to fathers: “be a man, be strong”, on one hand, and “be a nurturing, emotionally-connected father” on the other. The depth of fathers’ grief reaction to separation exacerbates this conflictual state, as many fathers struggle to manoeuvre these clashing expectations while trying to complete the bereavement process. Alongside these difficulties, many fathers encounter a devaluation of fatherhood, as the different quality of fatherhood is judged inferior by mothers, by mediators and by society at large. It is therefore unsurprising to see the statistics on high levels of suicide, substance abuse and health problems in men following separation.

The stories of fathers reveal much frustration with a system that treats them like bad people and with mediators who are perceived, rightly or wrongly, as protective of mothers and biased against fathers. Mediators are faced with a difficult task. The high prevalence of family violence in New Zealand, combined with the fact most perpetrators of family violence are men, no doubt play a role in the perceptions of all stakeholders in the family justice system. This dynamic is difficult to reconcile as the need to protect victims of family violence must take precedence. Yet, not acknowledging the pain and confusion of fathers means losing some of the potential of family-mediation.

It is also hard not to wonder whether some of the negative behaviours, such as family violence and father absence, are a result of fathers’ anger and frustration. Perhaps a fundamental change in our social and legal discourse that cements the notion that fathers can be caring, emotionally connected parents will provide fathers with recognition of their fatherhood. Such recognition is essential for building their confidence to become caring, emotionally connected parents and break the cycle of anger and frustration.

I would argue that such fundamental change can primarily be facilitated and nurtured only through mediation, as its underlying values truly respect human beings and their innate capacity to do good. Respect, non-judgment and acceptance are key to invoking change. The adversarial system which uses the tools of the patriarchy, of right and wrong, of reward and punishment, cannot facilitate such social change.

Mediators can play an important role in supporting and encouraging this budding, fragile as a new seedling, fatherhood at the most crucial stage of its growth. By understanding and truly respecting fathers, supporting their capacity to be nurturing fathers, mediators can enhance the wellbeing of children and of the post-separation family.

VIII. Appendices

APPENDIX A

PARTICIPANT INFORMATION SHEET

Project title: How do men experience the Family Dispute Resolution mediation process?

Principal Investigator/Supervisor: Prof Mark Henaghan mark.henaghan@auckland.ac.nz

Student researcher: Nurit Zubery nzub343@aucklanduni.ac.nz

Researcher introduction

Professor Mark Henaghan is a senior lecturer at the Auckland Law School, specialising in family law.

Nurit Zubery is a Master of Laws student at the Auckland Law School.

Project description and invitation

Since 2014 the NZ law requires separating couples who are in dispute regarding custody and care of their children, to attend the Family Dispute Resolution process prior to applying to the Family Court. Family Dispute Resolution (FDR) is a mediation process in which the mediator, an impartial third party, assists parents in engaging in a collaborative discussion for the purpose of reaching a mutually beneficial agreement on the future care of their children.

The study is aimed at examining the experiences of men who attended the process, check if they experienced any gender-based discrimination and how comfortable they felt during the process. It also seeks to identify if any changes to the process are required. The ultimate purpose of the study is to improve the Family Dispute Resolution process, so that men can feel more comfortable while using it.

You have been selected to participate in the study since you are currently involved in family mediation or have previously been through family mediation. **Participation is voluntary** and if you choose not to participate, this fact shall not be disclosed in any way to anyone. We would appreciate it if you respond to this **within two weeks**, so we can progress with the study's time frames.

Project Procedures

Participation in the study shall involve one face-to-face interview with the student researcher, which would take approximately one hour. The interview shall take place at a location convenient for you (if no convenient location found, the interview may take place on Zoom or Skype). The interviews shall be audio-recorded (or video recorded if done digitally), and a

transcript of the interview shall be produced either by Nurit Zubery or by a third-party who will be required to sign a confidentiality agreement. During the interview you have the right to not answer a particular question or ask, at any stage, that the audio recording to be turned off.

The interview questions shall be sent to you at least one week prior to the interview, so you are prepared for the content of the interview. The transcript of the interview shall be sent to you following the interview if you wish to read it and make any amendments. You will be asked to do so within two weeks from receipt of transcript.

Benefits and Risks

The main purpose of this study is to examine whether an improvement of the FDR process is required to suit the needs of male participants. Family separation is a highly emotional and stressful process and discussing these issues may create psychological distress. Please consider whether you are able to handle such distress and make your decision to participate with this in mind. Remember you have a right to withdraw from participation, as explained below.

Right to Withdraw from Participation

You have the right to withdraw from participation in the study at any time without giving a reason. Should you wish to withdraw your data from the study after the interview, you can do so only for up to 2 weeks after completion of the interview, or 2 weeks after receiving the interview transcript if you asked for it.

Anonymity and Confidentiality

The information you provide shall be analysed and published as described in the 'data usage' section below. We will de-identify any information or quotation taken from your interview, and phrase it in such a way that will not disclose your identity, the fact you took part in this research or any identifying details which may lead to identification. To that end we will:

- (a) Assign you a number at the interview, which will be used to identify your transcript and any quotations from it during the analysis process and for the purpose of sending you the transcript of your interview.
- (b) Ensure that the transcriber we employ signs a confidentiality agreement preventing him or her from revealing any identifying information.
- (c) During the research process, the Master List of participant names and numbers will be kept separately from the recordings and transcripts and will only be available to the student researcher. After the research is complete all data will be securely stored as described below.

While every effort shall be made to de-identify information from your interview, the researchers acknowledge that there is a possibility that a third party, who is familiar with this information, may be able to identify you.

All information disclosed at the interview shall be confidential as described above. However, you should be aware that the researchers have a legal obligation to report information disclosed during the interview if such information gives rise to the possibility of imminent risk of harm to the participant or to a third party, and that this legal obligation overrides the researchers' confidentiality obligations.

Data usage/storage/retention/destruction/future use

The data obtained in the study shall be analysed by the student researcher and principal supervisor and be summarised in a written thesis submitted to the university as part of the Master of Laws program requirements. The study results and thesis may be shared with other interested parties, including organisations commercially involved in the Family Dispute Resolution market. It may also be used in articles, lectures or presentations within the university or in conferences. Any study information made public shall be de-identified, either by using a pseudonym or code, and by not using any names of third parties, locations, or other information which may identify the participants or their spouse or children. The digitally recorded interviews will be transcribed either by the researcher student or by a third party who will be required to sign a confidentiality agreement. Participants can choose to have the digital recording returned to them or it will be destroyed by the researcher.

Digital copies of all Consent Forms, PIS, confidentiality agreements with the transcriber, and master list of participant codes will be retained for a period of six years and stored securely on University of Auckland managed storage. Access will be restricted to the student researcher and principal investigator through use of their University of Auckland credentials. After six years, access to these documents shall be deleted.

The originals of the above documents shall be shredded and securely disposed of once all have been scanned and securely stored as above.

While data is being processed, interview recordings and identifiable data will be stored securely by the student researcher on a research drive network folder allocated on University of Auckland managed storage. Access will be restricted to the student researcher and principal investigator through use of their University of Auckland credentials. Once the processing is completed, all the recordings will be deleted and the transcripts will not contain any identifiable information.

De-identified interview transcripts will be stored securely on University of Auckland managed storage indefinitely, to allow for publication and future re-analysis.

Should you wish to receive a summary of the findings, please mark this on the Consent Form and this will be emailed to you once the data is analysed and conclusions drawn.

Conflict of Interests

This is an independent academic study; however, the student researcher was granted a scholarship by Fairway Resolution Ltd (FairWay), which includes a 12-week internship at FairWay. The internship involved joining the FairWay call-centre team and conducting screening and assessment interviews with customers who wish to initiate or engage in family mediation. In addition, FairWay is assisting the student researcher in practical advice on the

design of the study process, and in the recruitment of participants. FairWay shall email the study flyer to men who participated in family mediation over the past two years and FairWay mediators may handout flyers to prospective participants prior to mediation. Following the participant selection, Fairway shall not be involved in the research process or analysis of the data. The research results and subsequent conclusions and recommendations shall be shared with FairWay as part of the scholarship terms.

Contact Details

If you have any questions or concerns regarding the study, please contact any of the following people:

Student researcher: Nurit Zubery nzub343@aucklanduni.ac.nz

Principal Investigator: Prof Mark Henaghan mark.henaghan@auckland.ac.nz Ph: 09-923 5568.

Academic head: Prof Janet McLean, j.mclean@auckland.ac.nz Ph: 09-923 9720.

For any queries regarding ethical concerns, you may contact the Chair, The University of Auckland Human Participants Ethics Committee, Office of Research Strategy and Integrity, The University of Auckland, Private Bag 92019, Auckland 1142. Telephone 09 373-7599 ext. 83711. Email: humanethics@auckland.ac.nz

CONSENT FORM**THIS FORM WILL BE HELD FOR 6 YEARS**

Project title: How do men experience the Family Dispute Resolution mediation process?

Principal Investigator/Supervisor: Prof Mark Henaghan mark.henaghan@auckland.ac.nz

Student researcher: Nurit Zubery nzub343@aucklanduni.ac.nz

I have read the Participant Information Sheet, have understood the nature of the study and why I have been selected. I had an opportunity to ask questions and have had them answered to my satisfaction.

- I agree to take part in the study.
- I am aware that the confidential nature of mediation precludes me from disclosing details of what happened in mediation and that my answers shall be limited to my personal experience of the process. I shall not disclose anything that was said or done at the mediation.
- I understand that I am free to withdraw my participation at any time, without giving a reason, and to withdraw any data traceable to me up to 2 weeks following the interview date or from receiving the interview transcript if I asked to receive it.
- I agree / do not agree to be audio recorded (or video recorded if the interview shall take place on Zoom or Skype) and for the recording to be transcribed.
- I wish / do not wish to have my recordings returned to me.
- I wish/do not wish to receive a transcript of my interview for editing.
- I wish / do not wish to receive the summary of study findings, which can be emailed to me at this e-mail address: _____ or sent to my postal address: _____

Name: _____ Signature: _____ Date: _____

Please use the above e-mail or postal address to send this document to the research team.

Approved by the University of Auckland Human Participants Ethics Committee on 2.6.2020 for three years.
Reference number 024401.

Dads - Have Your Say on Family Dispute Resolution

We invite you to participate in a study that examines how men experience the Family Dispute Resolution process.

The study involves a one-hour interview that will examine various aspects of the mediation process.

No personal details will be published.

The study is done within the University of Auckland Law School:

- Principal Investigator: Prof Mark Henaghan
- Student Researcher: Nurit Zubery

For more information about the study, please contact the student researcher, Nurit Zubery by email at nzub343@aucklanduni.ac.nz

Approved by the University of Auckland Human Participants Ethics Committee on 02/06/2020 for three years. Reference Number 024401.

Interview Guide

Preliminary comments

- **Introduction** - Thank you for agreeing to take part in this study. I know how precious time is and I fully appreciate your investment. I am doing this study as part of my studies and because I'm passionate about mediation and would like to contribute to the development and improvement of family mediation. The idea to study the experiences of men who go through family mediation came about because not much research has been done about the experiences of men and I think that learning more about it can help improve the process.
- **Confidentiality** - I would like to reassure you that everything we talk about here is confidential and the information I will hear from you shall be de-identified, which means it will get a code and your real identity shall not be disclosed at any stage. If any of the details you disclose is used in the written thesis, we will make sure any potentially identifying details have been removed (not just the name, but things like location, number of children etc).
- **Right to withdraw** – you have the right to withdraw from participation in this study, without giving a reason, up to two weeks after this interview. You also have the right not to answer any of the questions in this interview or ask me to turn off the recording at any stage.
- **Mediation confidentiality:** The mediation process is confidential, and you should not disclose in the interview anything that was said or done at mediation. **The information I'm looking for** is your own experiences of the mediation. How did you feel during and after the process. I am going to ask questions that relate to various aspects of the mediation, but please feel free to tell me anything else about your experience.
- **Recording** - as we previously explained, this interview shall be recorded mainly to achieve accuracy and so we can have a conversation and I wouldn't have to take notes all the time.
- Is it OK if we both turn off our phones during the interview?

The questions:

1. Can you please tell me a little bit of background about your separation? When did it happen? Who initiated it? Why?
2. How many children do you have and how old were they at the time of separation?
3. How much time did you typically spend with your children before separation? What kind of things did you do together?

4. What was your ideal (wishful thinking) arrangement for care of your child/ren after separation? Do you think this is what the kids wanted as well?
5. How did you feel after separation? (for example: were you sad, depressed, relieved, happy, angry, grieving?). Where you angry at your ex wife?
6. Why did you and your ex not agree on care arrangements between you?
7. Did you have any support around you during this difficult time? If so, was it structured support, such as: counselling or support groups, or less structured such as: family and friends?
8. How did you end up in mediation? Did you initiate it or your ex? Did you prefer to go to mediation or the family court? Why?
9. What did you know about mediation prior to your separation? How did you imagine mediation? Was the experience similar or different? How?
10. Did you bring with you a support person to mediation? If not, why? If you did, was it helpful?
11. How did you feel going into the mediation session? During the session?
12. Were you able to fully express your views and needs during the individual session with the mediator? and then during the joint session with your ex-partner? What contributed to you being able to express yourself or prevented from doing so?
13. Did you feel you were listened to in the joint mediation session? By your ex-partner? By the mediator?
14. How did you feel about the way the mediator led the mediation?
 - a. Was the mediator respectful?
 - b. Was he/she even-handed and neutral?
 - c. Did you feel the mediator understood your point of view?
 - d. Is there anything you have liked the mediator to do that he/she didn't?
 - e. Is there something you would have preferred the mediator refrained from doing?
 - f. Was the mediator focussed on issues important to you during the session?
 - g. Did the mediator raise important issues you were not aware of?
15. Were a lot of emotions expressed at the mediation session? Did you feel comfortable with the level of emotional expression?
16. Do you feel that your views and needs influenced the final agreement? What were you hoping to achieve in mediation? Did you achieve it? If not – why?

17. Did you feel anger at any stage during the mediation? If so, why? Did you display this anger at the session and how? How did the mediator respond?
18. Did you reach an agreement at mediation that resolved all or some of the issues around care of your child/ren? If not, what did you do with the unresolved issues?
19. What did you know about your legal rights when you attended the mediation meeting?
20. Based on your experience, what would you suggest changing about the family mediation process? What would your 'dream mediation' look like if you could design it?
21. How has mediation effected your relationship with your ex-spouse – did it make it better? Worse?
22. If another issue relating to care of your children comes up, would you go back to mediation?
23. How did you hear about the study?

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