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COUNSELLING/MEDIATION IN THE FAMILY COURT: DOES IT WORK FOR WOMEN?

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CONTENTS

INTRODUCTION

The New Zealand Family Court rightly seeks to emphasize parental decision-making in child placement upon marital dissolution. There is broad satisfaction with the operation of the counselling and mediation procedure which gives parents this voice.[1] However, when the experience of women is considered, it is apparent that faith in the new system is based on assumption rather than reality. It is assumed that because the Family Court is non-adversarial, it must be women-friendly, and that it answers feminist criticism of the law, as reflecting male values of objectivity and fixity of rules.[2]

The criteria for judging the success of the new approach is based on a further assumption. Success is equated with reaching agreement and avoiding litigation before the court.[3] It is assumed that as custody cases are relatively rare, mediation works. In fact, the avoidance of court cases is a poor indicator of success. This is suggested by a Department of Justice survey, which found that approximately half of custody and access issues of separating couples are settled privately, without any assistance from court services. Of those who seek court help, only about one third of the cases are settled through counselling.[4]

The significance of the assumption lies less in its inaccuracy than in what it overlooks. The quality of the agreement reached and the manner in which it is arrived at, are more important than the mere fact of its existence. The Department of Justice survey[5] indicates reduced levels of satisfaction when the decision reached involves lawyer, counsellor or court.[6] At six months, when satisfaction with care and visiting arrangements was

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1 Judge B Barteau (address presented at "The Family Court 10 Years On", New Zealand Family Law conference, Wellington, 1990) 210.
2 K Bartlett "Feminist Legal Methods" (1990) 103 Harvard LR 829.
3 G Maxwell, J Robertson and P Vincent "Children, Parents and the Family Court" (1991) 3 FLB 38.
4 Above n 3.
5 Above n 3.
6 Above n 3, 39.

assessed, only 48 per cent were satisfied with the agreed arrangements, and 31 per cent were dissatisfied with the care arrangements.[7]

While client "satisfaction" may be a subjective approach to assessing the success of a mediated settlement, it is more reliable than assuming success on the basis of the existence of agreements because it is the judgement of the user of the system. It indicates a need to examine the process further.

This paper looks beyond assumptions. It examines the operation of the counselling/mediation function of the family court, using the various schools of feminist legal analysis as a framework. My primary object is to discuss what I perceive to be the problem areas for women in counselling/mediation. My second object is to relate these problems to feminist theory.[8] I assess how the process has worked out for the women who are the court's clients. I adopt as my template of 'success' the feminist objective of empowering women. Catharine Mackinnon identifies the objective as ending "enforced subordination, limited options and social powerlessness— on the basis of sex."[9] She argues for the empowering of women on women's own terms.[10]

> We seek not only to be valued as who we are, but to have access to the process of the definition of value itself. In this way, our demand for access becomes also a demand for change.

I conclude that the process of mediation/counselling fails to empower women. It fails because the external framework (counselling/mediation conference) is confused in its purpose and denies women voice. It fails because the internal dynamic of mediation, including power imbalances and the gender-neutral rules which are applied, disadvantage women. It fails because custody law has become private law, and is beyond public scrutiny. I therefore make "demand for change" so that the process of mediation/counsel-

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7 G Maxwell and J Robertson "Moving Apart: A Study of the Role of Family Court Counselling Services" (an unpublished report to the Department of Justice, Wellington, 1993).

8 Where relevant, I also relate the New Zealand experience to the American jurisprudence as a point of comparison.

9 C Mackinnon *Feminism Unmodified* (Harvard University Press, Cambridge, Massachusetts, 1987) 22.

10 Above n 9.

ling which promises so much may indeed "empower women on their own terms."

I THE LEGISLATIVE FRAMEWORK[11]

The irreconcilable breakdown of marriage is the only ground for its dissolution. Before a marriage can be dissolved, the court must be satisfied that suitable arrangements have been made for the care of the children.[12] Private arrangements may be made, but where there is any disagreement, or one parent makes an application for custody, or for a separation order, the parents are referred to counselling.[13] The counsellor must first attempt to reconcile the parents.[14] Counselling may be individual or conjoint, regardless of whether it is requested or directed.

If no agreement is reached in counselling, the couple attend a mediation conference accompanied by their lawyers, and presided over by a Family Court judge, who has the power to make consent orders.[15]

Court proceedings are available as a last resort, and it is possible for the judge who was the mediator to hear a defended hearing.

Mediation[16] has thus made the transition from innovation to mainstream, and has been institutionalized in the Family Court.[17]

> The task now is to consider whether what is done now could be done better, and whether what may already be done is the right thing to be doing.

In this context, I believe that "the right thing" should be the empowerment of women.

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11 For a fuller outline, refer Appendix One.
12 The Family Proceedings Act 1980, s 45.
13 Above n 12, s 10.
14 Above n 12, s 11.
15 Above n 12, s 14.
16 Mediation is an umbrella term in New Zealand, embracing both counselling and mediation conferences.
17 I MacDuff "Assessing Mediation" (1986) 1 FLB 55, 57.

II COUNSELLING AND CONTEXT: CULTURAL FEMINISM

The feminist school of 'Cultural Feminism' is centred around Gilligan's different voice theory.[18] Gilligan studied the reasoning processes of girls and boys, and concluded that, in general, women's moral system is contextual, with an emphasis on care and connection, whereas men's is hierarchical. Women's voices emphasize nurturing, empathy and relationships. Men's emphasize competition, aggressiveness and autonomous individualism. This is also called the difference model. Women are different and this should be valued.

Thus, for mediation/counselling to meet this model, it must provide a vehicle for the expression of emotion and the valuing of relationships.

Radical feminists reject difference theory. Catharine Mackinnon has said that the voice (moral system) identified by Carol Gilligan is simply the voice of subordinated women, and that we do not know what women who are not subordinated sound like. Difference theory reinforces submissiveness.[19] Mackinnon may well be correct, and the 'voice' identified by Carol Gilligan may be 'different' only as a reflection of societal disempowerment. However, to ignore that voice in mediating/counselling is only to further disempower women. I therefore accept the 'voice' and would change the process so that it may be heard.

The American jurisprudence suggests the 'voice' is not being heard. Grillo[20] says that modern 'no fault' divorce, combined with the no rules and compromise required in mediation, effectively prevents women finding voice. In the emphasis on the practical working out of future care arrangements for children, there is no room to review relationships. In fact, Ricci (an American mediator) describes women's prioritization of relationships as a "self-defeating pattern in women".[21] American mediation may also sup-

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18 C Gilligan *In a Different Voice* (Harvard University Press, Cambridge, Massachusetts, 1982) 1–39.

19 E Dubois, M Dunlap, C Gilligan, C Mackinnon and C Menkel-Meadow "Feminist Discourse, Moral Values and the Law—a Conversation" (1985) 34 Buffalo LR 11, 27.

20 T Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale LJ 1567.

21 I Ricci "Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women" (1985) 8 Journal of Divorce 49.

press the cathartic release of emotion integral to care and connection. Saposnek, in a mediator's guide, views the expression of feelings as antithetical to problem solving.[22] Other mediators argue that the communication of anger in mediation should be circumscribed.[23] Others allow both parties to communicate anger when one has been the victim of sustained abuse in the marriage.[24] That is to deny the legitimacy of the anger of the abused partner.

The New Zealand experience also reflects these problems. I submit that the division of the New Zealand process into counselling and mediation has created confusion as to the role of counselling. As mediation conferences are available only for those for whom counselling fails, dispute resolution must be expected to occur in counselling. If the emphasis is placed on dispute resolution, then the therapeutic aspect—the vehicle for expression of the woman's voice—is lost.

A consideration of the difference in definition between counselling and mediation/dispute resolution makes this apparent. Pritchard describes counselling as:[25]

> [a]n intervention process aimed at assisting people to achieve personal growth and change, both for enhancement of personal goals, as well as to enhance the individual's relationship with others.

Mediation is the intervention into a dispute of a neutral third party who has no authoritative decision-making power, to assist contending parties to reach voluntarily their own mutually acceptable settlements for issues in dispute.[26] It is a goals-focused process, directed at achieving specific outcomes.

Clearly, the two processes are different, but somehow have to be combined. It is not surprising that one observer concludes, "just where media-

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22 Saposnek "Mediating Child Custody Disputes" (1983), quoted in above n 20, 1574. Refer below n 30 for the New Zealand experience which parallels this.

23 S Rogers and C Francy in above n 20, 1574.

24 Above n 20, 1575.

25 R Pritchard, quoted by H Lapsley, N Robertson and R Busch "Domestic Protection Study: Family Court Counselling" (1983) 3 FLB 152, 155.

26 C Moore *The Mediation Process* (Jossy-Bass, San Francisco, California, 1987).

tion and conciliation end and where counselling and therapy begin, in practice, is still a matter of conjecture."[27] Parry and Pritchard go further. After acknowledging that in "Counselling", counselling and mediation should be a "happy blend", they say it[28]

> often ends up being a sort of Clayton's option—the counselling (or mediation) you have when you are not having counselling (or mediation).

In this confusion, the therapeutic approach may be lost. The comments of both counsellors and women clients confirm that this happens. One counselling coordinator stated directly that context has no place:[29]

> Family Court counselling is often seen as therapy when it is goal oriented.

Rhonda Pritchard[30] comments that after 10 years in practice as a counsellor and, having accepted many Family Court referrals, she is uneasy when she hears the counselling coordinator on the phone, because she knows that, in addition to fulfilling the counselling role for which she is trained, she may also have to act as a referee, a mediator. Referring to the outcome for clients, she states, "So often what is left is disillusionment and disappointment—at the counsellor's failure to 'resolve' a child care or access dispute, to 'bring back' a partner who has left . . . ."

Client comments reflect this:[31]

> But the whole counselling really was very traumatic and I think that whilst obviously the court wanted to resolve the custody situation primarily, I really felt there should have been some assistance towards resolving what caused our problems . . . . I think if we had had better counselling, if [ex-partner] had had time for counselling to actually explain her feelings more and so on as opposed

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27 GP Davidson, Senior Lecturer, Dept of Psychological Medicine, Wellington Clinical School of Medicine, Wellington Hospital "Family Court Counselling and Mediation". (1986) 1 FLB 73.

28 Above n 25.

29 Above n 25.

30 "Access to the Family Court—Meeting the Needs and Finances of the Consumer: A Counsellor's Perspective" (paper presented to "The Family Court 10 Years On", New Zealand Family Law conference, Wellington, 1990) 210.

31 A Harland "Custody and Access Orders: Interviews with Parents about Their Court Experience" (Family Court Custody and Access Research Report 4, Department of Justice, Wellington) 40.

> to simply resolving the custody situation in that the results would have been more beneficial to [son].
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> She [the counsellor] wasn't making any sense. As far as I could see, what I was picking up, she wanted to get it out of the way and over and done with. That is the reaction I got from that. Like I said I wasn't pleased after I came out of there.

The Counselling Research Report to the Department of Justice thus concluded: "There are real needs in the clients, which are not being met by the current range of Family Court services."[32]

A tension exists between the terminology the Family Court uses to describe the first stage of its process, counselling, and its intention, which is to achieve dispute resolution. To ensure that women's voices are heard, that there is a place for context and emotion, the term counselling should be retained, but its purpose must be counselling (not disguised mediation). Clients should be referred to both a counsellor and a mediator. This would entail acceptance by the court of the legitimacy and importance of dealing with individual client needs, and the provision of additional services to ensure availability of personal counselling. Once feelings and insights have been addressed, the mediator can focus on addressing individual interests and solutions. The mediation envisaged is far removed from the current judge-led Mediation Conference, and is discussed further below.

III MEDIATION[33] AND CONTROL: RADICAL FEMINISM

Some radical feminists argue that women's societal disempowerment stems from sexual domination. Gender is a system of power relations. Historically, society has given men the power to control women.[34]

Dominance is an issue in counselling and mediation. I will now identify four controlling factors in counselling/mediation which act as impediments

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32 GM Maxwell, R Pritchard, J Robertson "A Counsellor's Perspective on the Family Court and Its Clients" (Family Court Counselling Report 2, Department of Justice, Wellington, 1990) 32.

33 Mediation is here used in its umbrella sense to embrace both counselling and the mediation conference.

34 A Dworkin *Our Blood: Prophecies and Discourse on Sexual Politics* (Harper-Collins, New York, 1976).

to the empowerment of women, and which ensure that society continues to control women.

The first factor is imbalance between the parties. Parkinson has identified several inequalities in bargaining power, which may affect women, including emotional dominance and emotional blackmail, and the physical power of actual or threatened violence.[35] To this could be added familiarity with negotiation situations and financial strength. In a situation of impasse, where the goal is to produce agreement, the stronger party can resist making any settlement. Pressure is then transferred to the weaker party to be 'reasonable', to compromise.

Research evidence suggests that women make the compromises.[36]

> The only way anything could have been solved at that place was for one of us to give in, and he wasn't willing to, so I did.

and again:[37]

> We were in there for hours and I really felt taken over. I came out with a splitting headache and I felt totally drained. I went home and I said, 'I've agreed to it but I don't know why.' Two months later, I thought, 'Why the hell did I listen to that woman?' I was right all the time. I regret every minute of it. We went through hell because I gave in.

Women are more vulnerable to pressure when the bargaining inequality they experience is fear they will lose their children.[38]

> If a woman's got custody, then it's a case of, well he has a right to see his children and don't you think you ought to try and be a bit reasonable . . . you know, sometimes I used to come out of there thinking, well maybe I am being a bit mean; maybe I'm not looking at it clearly.

Women are also vulnerable when the bargaining inequality they experience is a violent relationship. Astor states categorically that violence

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35 B Parkinson in G Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988) 63.

36 Above n 35, 64.

37 Above n 35, 64.

38 Above n 35, 64.

creates "an extreme imbalance of power between the parties" and on that ground excludes all disputes involving violence from mediation.[39]

She argues that male violence in the home is not characterized by 'conflict about' issues but by 'control over' one person by another.[40] Because it is about control of a relationship, it is not possible to separate off the violence from issues such as money, custody and access. When there is control, there is inevitably power.

Merry has gone so far as to claim that "with few exceptions, a mediated settlement reflects the status inequalities between the disputants". So a mutually acceptable solution tends to be one in which the less powerful gives up more. In our society, that is more often women.

The second controlling factor in counselling/mediation is the mediator.

Neumann identifies nine ways in which the mediator exercises power or control:

(1) creating the ground rules;

(2) choosing the topic;

(3) deciding who may speak;

(4) controlling the length of time a person may speak;

(5) allowing and timing a person's response;

(6) determining which spouse may present a proposal to the other;

(7) presenting an interpretation of what the spouse said;

(8) ending the discussion;

(9) writing down the agreement.

As she observes: "The mediator actually has the most power in the room."[41]

This is situational power. The danger arises when counsellors use it to become 'directive' as research suggests some do.[42]

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39 H Astor "Violence and Family Mediation Policy" (1994) 8 Australian Journal of Family Law 4.

40 Above n 39, 5. Violence is discussed further in relation to mandatory counselling (below).

41 D Neumann "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce" (1991-1992) 9 Mediation Quarterly 232.

42 A Lee, A Harland, G Hall "Custody and Access Issues", *New Zealand Suffrage Centennial Women's Law Conference Papers* (Conference Publishing, Wellington, 1993) 285.

> They said it [custody] should be shared basically.[43]
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> The counsellor just says 'Look, he's going to get access, he'll get it somehow or other.'[44]

However, control is a much more significant issue in mediation conferences. In fact, the name 'mediation' is something of a misnomer. A Family Court judge acting as mediator, inevitably has authority derived from his/her status and experience and knowledge of the law. The judge can and does indicate to the participants the parameters of an adjudicated settlement and guide them to an acceptable private resolution. This takes control away from the parties.[45, 46]

> When the judge offers his view on the matter then the parties will often adopt that just because it is said.
>
> The reality of the thing is a judge trying to get the parties to knuckle under.

The judges and lawyers interviewed by Barry and Henaghan saw this as an advantage.[47] Those surveyed see the judge as a chairman, with knowledge, someone in whom the parties can have confidence and "who will make a decision for them if they themselves cannot reach agreement."[48]

Ludbrook[49] endorses the 'directive' approach believing that "in the forum of the conference these comments would not be judgments."[50] In practice, judicial comments are 'judgments'; participants surrender to the mediator the power to work out solutions to their disputes.

The clients' comments in the Barry and Henaghan research demonstrate this.

(a) All but two of the participants said they perceived the mediator to be a judge.

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43 Above n 42.
44 Above n 42.
45 This has greater impact on women. This is addressed in the discussion of the ideological stance of the judicial direction, below Section IV.
46 N Barry and M Henaghan quoting a lawyer interviewed in their survey for "Mediation in the Family Court" (1986) 1 FLB 84, 85.
47 Above n 46.
48 Above n 46.
49 Ludbrook *Family Law* (Brooker & Friend, Wellington, 1983) chapter 1.
50 Above n 49.

(b) All participants reported that they found it difficult to contradict the suggestions and directions of the mediator.

(c) Most indicated that the general format of the mediator's recommendations constituted the decision reached.

(d) Many said that the mediator imposed his or her own value judgements on the mediation process.

(e) No participants reported that they had control over the conduct of the conference.

(f) Only three participants reported that they had full, fair and equal opportunity to express their views and opinions.

(g) Few participants reported that they assumed an active role.

(h) No participants reported that they had control over the final decision reached in mediation.[51]

In effect, mediation conferences have become pre-trial hearings, with little distinction between mediation and adjudication. Decision-making has been taken out of the hands of the participants. As many of these participants are women, and the judges are men, this is to endorse the Dworkin view of the law as gendered power relations. Mediation has the potential to change that power dynamic, but because the form of mediation developed is close to adjudication, that opportunity has been lost in New Zealand. Consequently, women are disempowered, rather than empowered. That disempowering is ongoing. Only one of the women participants in the Barry and Henaghan analysis reported that mediation had given her the confidence to resolve future conflicts with her ex-husband without turning to the court.

A third controlling factor occurring also in mediation conferences is the role of the lawyer. Women are not empowered when the decision is judge-made, and the arriving at that decision is taken out of their hands by lawyers who lead.[52]

> Good lawyers run mediation conferences. They set up the entire framework of the mediation conference and dictate what is discussed. Lawyers can define the

51 Above n 46, 86–87.
52 Above n 46, 88.

> parameters of the discussions and by cutting out the other person's concerns you are going to promote your client's interests.

On occasion, the lawyer fills a re-empowering role:[53]

> I feel very nervous in the conference with the judge sitting up front. I couldn't have managed on my own . . . . My lawyer made me feel safe . . . .

Its need only serves to underline the disempowering effect of the whole mediation conference.

These problems are not without solutions. I have already argued that counselling currently attempts two tasks—therapy and problem solving—and frequently fails the former. I have suggested therefore that these two processes be separated into counselling and mediation. Mediation should thus become a separate but complementary process to counselling with lay mediators. The current mediation conference should become third stage dispute resolution, operating as informal adjudication. At that point, the adversarial approach of lawyers, and the inevitable judicial role of the Judge, is not inappropriate. It is inappropriate without genuine mediation preceding it.

The problem of the power imbalance between the parties in counselling and the new mediation I propose must be addressed by counsellors/mediators. They must adopt an empowering role for women. Martha Shaffer[54] recommends that mediators be trained to recognize the factors that contribute to power inequality for women—lower earning power, less negotiating experience, less career mobility, less knowledge of family finances, an inability to isolate her needs from those of her children. They must also be trained to accept that part of their role is to rectify power imbalances when they arise.[55]

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53 Above n 46, 88.

54 M Shaffer "Divorce Mediation: A Feminist Perspective" (1988) 46 University of Toronto Faculty of Law Rev 181.

55 However, to encourage this empowering role for the mediator is to turn women into the problem. It is not women, but the social and economic position of women which create problems of power imbalance in mediation. Hence Catharine Mackinnon's stance that before gender power imbalance can be rectified, the patriarchal structure of society itself has to be abolished.

If that is not possible, the mediator has an ethical responsibility to suspend the mediation.[56]

A fourth controlling factor is the mandatory nature of some counselling under section 10 of the Family Proceedings Act 1980. In the Maxwell Research, some counselling occurred in 94 per cent of cases.[57] In 64 per cent of cases, both the man and the woman attended at least one joint session. I submit it is wrong in principle that a process that is intended to be self-empowering requires this step. Rhonda Pritchard writes:[58]

> I would now wish to assert that if we continue to require or urge that everybody should have counselling we are, at best, misunderstanding the purpose and process of counselling and, at worst, running a risk of procedure abuse.

If a woman wishes to avoid counselling, especially conjoint counselling, that is her right. In the trauma of separation, in the midst of emotional crisis with its consequent low self esteem, a measure of control by the participant is vital. To insist on counselling before a mediation conference or hearing is "as disempowering as making an order without hearing evidence".[59]

The principle of choice is essential in empowering women who have been subjected to violence. The inappropriateness of mediation of the battered women and their abusers has already been referred to.[60] Psychological characteristics common to battered women include learned helplessness resulting in passivity, low self-esteem, lack of self-confidence, a tendency to withdraw, discomfort when interacting with others. Such women are depressed, shy, introverted and have difficulty with self-expression.[61]

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56 J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossy-Bass, San Francisco, California, 1984) cited in J Wade "Forms of Power in Family Mediation and Negotiation" (1994) 8 Australian Journal of Family Law 57.

57 "Family Court Counselling Services and the Changing Family" (Family Court Counselling Research Report 1, Department of Justice, Wellington, 1989).

58 R Pritchard "Access to the Family Court—Meeting the Needs and Finances of the Consumer—A Counsellor's Perspective" (paper presented to "The Family Court 10 Years On", New Zealand Family Law conference, Wellington, 1990) 210.

59 Above n 57.

60 Above n 39.

61 C Jermane, M Johnson, N Lemon "Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence" (1985) 1 Berkeley Women's LJ 175, 186.

One woman in the United States sent by the court to mediation reported:[62]

> I was forced to sit down with the man who for the past twelve years has abused me, intimidated me, controlled me by threats and scare tactics, emotionally torn me down and whom I truly fear.

The fear is well founded. The Lapsley and Robertson research details instances of women killed by their husbands after attending court-ordered counselling.[63]

Refuge workers emphasize that the woman who has just separated from a violent partner, and who is in physical danger, is not ready for negotiating decisions. The Hamilton Family Court follows the practice of empowerment counselling for women *before* they make agreements.[64] Women attend six weeks of counselling designed to build self-esteem before any dispute resolution is attempted.[65]

The Lapsley research also suggested that Family Court counselling fails to confront the violence directly. The model focuses on family dysfunction, rather than on the violence of the abuser. Counselling values the relationship more than ending the violence. Victims may be blamed for their victimization. One informant commented:

> The system basically tells (the victim) there is something wrong with her by the mere fact that she has to go to counselling. Counselling presumes that you have a problem. That is what the system is saying to her: you have a problem. Come in—you need some counselling.[66]

While Family Court Judges may dispense with a counselling referral where a separation order has been applied for and there is a history of violence,[67] they cannot if one partner seeks counselling. An abusive partner frequently does. Iain Johnston suggests that where custody and access are issues there

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62 A Gagnon "Enduring Mandatory Divorce Mediation for Battered Women" (1992) 15 Harvard Women's LJ 272, 279.

63 H Lapsley, N Robertson and R Busch "Battered Women and the Justice System" [1993] Butterworths Fam LJ 31.

64 Above n 58, 10.

65 H Lapsley, N Robertson and R Busch "Domestic Protection Study: Family Court Counselling" [1993] Butterworths Fam LJ 9, 16.

66 Above n 65, 10.

67 Family Proceedings Act 1980, s 10(3)(a).

is still an expectation that the mother will enter into counselling with her partner.[68] Women commonly feel obliged to attend counselling, because failing to attend is perceived to count against them. With the custody of children at stake, women are unlikely to risk appearing uncooperative.[69]

Mandatory counselling disempowers; mandatory conjoint counselling of violence victims tells women that a patriarchal society excuses the abuser. This is doubly disempowering. Counselling must be a matter of choice, especially conjoint counselling.

A final aspect of control in mandatory referral is the requirement on counsellors to attempt reconciliation (before conciliation).[70]

If a woman is clear in her own mind that she wishes a relationship to end, it is quite inappropriate for the State to attempt to change that decision. For battered women, this exposes them to further danger. The research reveals that partners can use the guise of reconciliation to keep extending conjoint counselling, which is, in reality, harassment of the abused ex-partner.[71] The legal requirement upon counsellors to attempt reconciliation as a first duty should be removed.

In counselling and mediation as currently practised, gender power relations are perpetuated in two ways. First, women's subordination is maintained by a power imbalance between herself and her partner, and herself and the counsellor/mediator. Second, it is maintained by the denial of divorce in mandatory counselling, and by the requirement that she consider reconciliation with a partner she has already rejected.

For many women, the process is a failure because it fails to empower them.

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68 "Domestic Violence: The Role of Counselling" (1985) 1 FLB 12. In 66 Family Court files, where there was violence, and a custody/access question, a referral to counselling was made. There were no exceptions.

69 While under the Domestic Protection Act 1982 there is no provision for referral to counselling after the order has been granted (s 37), commonly an applicant will want other orders, eg custody, and so counselling may still be directed.

70 Family Proceedings Act 1980, s 12.

71 Above n 65, 12.

IV MEDIATION: GENDER-NEUTRAL STANDARDS: LIBERAL FEMINISM AND RIGHTS

Liberal feminists want formal equality for women—women must be treated the same as men (the sameness theory). So, while cultural feminists support 'special laws' for women, eg special benefits for pregnant women, liberal feminists do not. Women are entitled to rights which men have.[72] I reject this model. I demonstrate that, when applied to mediation/counselling, this model fails women in two respects. First, a facially gender neutral standard applied to custody/access questions favours fathers and the imposition of shared parenting. Secondly, the creation of equal rights (as in 'no fault' divorce) means not the gaining of new rights for women, but the loss of existing rights. Mediation assumes formal equality but does not deliver it. To empower women, it is necessary to recognize this and espouse women's rights.

First, custody/access issues. Custody decisions which go to court are made "in the best interests of the child". Section 23 of the Guardianship Act affirms that the welfare of the child is paramount. This principle was first enunciated in statutory form in the Guardianship of Infants Act 1926, which also stated that neither the father nor the mother would have superior legal claim to the children. This was a move away from the nineteenth-century view that fathers automatically had custody of children by virtue of paternity. However, after 1926, case law evolved certain rules of thumb, which effectively defined what was best for children. A "maternal preference" principle decided that children of "tender years" should be placed in the custody of their mothers; fathers should have custody of older boys; that families should be kept together, if possible.[73]

Today, section 23 is being redefined. The Guardianship Amendment Act 1980 states categorically that there shall be no presumption that placing a

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72 For an explanation of liberal feminism or symmetrical feminists, refer L Lacey "Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute" (1990) 25/4 Tulsa LJ 775.

73 G Hall "The Welfare of the Child: A Literature Review" Family Court Custody and Access Research Report 1, Department of Justice, Wellington, 1989, 15.

child in the custody of either the father or the mother would best serve the welfare of the child.[74] This is an explicit rejection of the maternal preference tradition.

Instead, the court is looking more sympathetically at shared parenting arrangements. As New Zealand law creates joint legal custody as of right in guardianship,[75] shared parenting means shared physical care of the children. This is not reflected in joint custody orders. Although these are increasing, they make up only five to seven per cent of orders.[76] Neither is joint custody Family Court policy. Rather, as Opie suggests:[77]

> My sense is that although there is no legal presumption in favour of joint custody, it nonetheless enjoys a certain privilege within the Family Court system because it appears to meet the need for the child's contact with both parents, and it is this aspect of the arrangement which is given most emphasis.

The position of 'privilege' has recently been boosted by the formula adopted in the Child Support Act 1991. If a child does not spend 40 per cent of their time with a liable parent, the amount of financial support levied from that parent rises. Indications are that liable parents are seeking greater access to their children.[78] Before considering how this apparently gender neutral status works against women, it is necessary to consider why the court's decisions impact on what occurs in counselling/mediation.

First, in a court-based alternative dispute resolution system, parties bargain "in the shadow of the law".[79] The participants know that if they cannot resolve their custody dispute in counselling/mediation, the court will. So the stance of the court proper is always looming.

Second, as already discussed, many counsellors and mediators adopt a 'directive' stance. Indeed, agreements from judge-led mediation may not

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74 Guardianship Amendment Act 1980, s 23(1A).

75 Parents jointly make decisions concerning the child's upbringing, eg matters of religion, education.

76 A Lee, A Harland, G Hall "Custody and Access Issues" in *New Zealand Suffrage Centennial Women's Law Conference Papers* (Conference Publishing, Wellington, 1993) 277, 279.

77 A Opie "It's All Sort of Tied Up—A Critique of Joint Custody" in *New Zealand Suffrage Centennial Women's Law Conference Papers* (Conference Publishing, Wellington, 1993) 250.

78 *Sunday Star Times*, Auckland, 17 April 1994.

79 RH Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) Yale LJ 950.

reflect participants' choice at all. Therefore, the ideological stance of the counsellor and especially the judge is most significant:[80]

> A party who wants to do something which is unreasonable or which a judge would not allow in court, or which is perhaps unconventional in that it doesn't fit in with the mainstream view on family law, will be put under fearful pressure from a judge virtually to the stage of a firm rebuttal from the judge, and certainly an indication of a lack of support.

So the trend is towards shared parenting, or at least maximum contact with both parents. Why is the adoption of this model not necessarily in the interests of women?

First, it represents a rejection of sole maternal custody, and endorses the widespread belief that such custody was damaging to the welfare of the children. The research[81] into maternal custody claimed that the children suffered in terms of emotional development, behaviour and schooling.[82] Hall's review of the literature, however, concludes that a more significant cause of the children's problems was the material circumstances of many women after separation. A problem identified as the "feminization of poverty". The solution is not shared parenting, but adequate provision for mother-headed households following marriage break up.[83, 84]

Further, the Hall literature review found that, as well as vindicating sole maternal custody, joint custody/shared parenting was not necessarily ideal.

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80 N Barry and M Henaghan, quoting a lawyer interviewed in their survey for "Mediation in the Family Court" (1986) 1 FLB 84.

81 Most of it in the United States and sponsored by Fathers' Rights groups who objected to child maintenance. The research also reflected the US legal situation, which denied guardianship to a father once custody was awarded to a mother, and left him only limited visitation rights.

82 A Lee, A Harland, G Hall "Custody and Access Issues" in *New Zealand Suffrage Centennial Women's Law Conference Papers* (Conference Publishing, Wellington, 1993) 282.

83 V Ullrich in her examination of the Matrimonial Property Act 1976 (in "The Family Court 10 Years On", New Zealand Family Law conference, Wellington, 1990) 108 argues for reforms that take account of the way that child caring responsibilities are to be managed after marriage break up. She recognizes the societal gendered inequality in which the Act operates (the reduced earning capacity of women as the result of their broken careers because of the child care responsibilities and the lack of equal pay and employment equity) but says that the Act does not.

84 It is hardly a gender-neutral concept to emphasize women's need of male support in effective child rearing. This is to make the woman 'lesser'. In reality, many women in partner relationships are effectively raising children as solo parents.

It worked only "in the right circumstances"[85] and it required a cooperative relationship between the parents. Yet half the judges surveyed[86] said they sometimes awarded joint or shared custody to settle disputed cases![87] Thus, shared custody is a dubious arrangement.

Its preference undermines women's choice of sole custody. In doing so, the court is also undermining the women's maternal role—the one which our gendered society has traditionally valued.

Second, the process of arriving at that joint custody/shared parenting arrangement in mediation also reflects an undervaluing of the role society has traditionally endorsed for women. The rhetoric of joint custody of gender-neutrality assumes previous equal experience of parenting. This assumption does not accord with current gendered roles and divisions of labour. Research shows that a father's willingness to change nappies is commented upon as laudable, when the same care is taken for granted in women.[88] A 10 per cent investment of time by a father is evidence of paternal commitment, but a mother's wish to work to support her children (which still gives her a greater investment of quality time with them than 10 per cent) throws doubt on her parental commitment. Opie points out that a mother who, in mediation, is concerned about her child's well-being if left to the care of the father in a shared parenting/joint custody arrangement is considered over-anxious, being unnecessarily protective. She has "an illegitimate motive".[89] But the woman may know that the father has minimal

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85 Above n 82.

86 Above n 82.

87 Current indications are that the court is becoming more circumspect on awarding shared arrangements. For example, in *R* v *R* (High Court, Invercargill Registry, 4 July 1994, FR 393/91), a father unsuccessfully appealed a Family Court order for custody of the two children in favour of the mother with school holiday access for the father. the father sought shared custody with the children, alternating for larger periods. The High Court held there was insufficient cooperation and communication between the two parents for this to be in the best interests of the children.

88 Above n 77, 251. A Opie, in her 1989 PhD thesis undertook a qualitative investigation of eight families with voluntary joint custody arrangements. She concluded that shared parenting should be regarded as one possible mode of custody but not necessarily "the best", and it certainly should not be used to try to resolve difficult custodial situations. G Hall "The Welfare of the Child, a Literature Review" (Family Court Custody and Access Research Report, Department of Justice, Wellington, 1989).

89 MA Fineman "Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-Making" (1988) 101 Harv LR 735.

experience in caring for his children. In a different setting, a mother's anxieties about leaving (young) children over several days with limited knowledge of the child and experience in childcare would be unlikely to be represented in this way and would instead be seen as part of a legitimate concern.[90]

Fineman in discussing the joint custody as an outcome of mediation in the United States concludes that the use of facially neutral rules has worked to perpetuate the gender inequality faced by women. [91]

There are more far-reaching dangers to this ideology of equality. As a corollary of assuming equal input of fathers into child care, the real impact of being the primary caregiver on women's private lives, careers, financial power during the marriage can be ignored. Divorced women are assumed not to face job and salary discrimination. So the ideology of equality "diverts attention away from structural inequalities which shape the lives of employed women".[92]

The third problem with defining "best interests of the child" as a shared parenting arrangement is that it denies women the 'clean break' in their emotional and daily lives that the law seeks to grant a divorcing couple in their financial arrangements.[93]

In fact, it forces a continuance of contact they may have sought to stop through divorce. Ex-partners will have to negotiate and make decisions about many practical matters eg the frequency and logistics of movement between homes, the financing of the children, notification of school events, managing holidays, birthdays, Christmases, information exchange about the children.

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90 Above n 77, 246–247.

91 MA Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press, Chicago, 1991).

92 SB Boyd "Child Custody, Ideologies and Employment" (1989) 3 CJWLR 111.

93 J Johnston and I Johnston "Marriage Breakdown: 'Clean Break' or Compound Fracture?" (1985) 1 FLB 3, 4 argue that the Matrimonial Property Act 1976 aims to allow the partners in a divorcing couple sufficient capital from their combined property to restart their lives independent of each other. However, this fails for women.

The ideology of shared parenting assumes a level of cooperation which, as Opie points out, amounts almost to a denial of the reality of divorce.[94] But in extreme circumstances, shared parenting can enable very controlling and violent behaviour to continue. Refuge workers saw three stages in the Family Court process as exposing abused women—counselling, the Court case, and his access to the child.[95]

I therefore recommend, first, training be given to counsellors and mediators in recognizing when joint custody—free access is appropriate; and secondly, that shared parenting should be regarded as one form of custody rather than the most desirable form. Where the marriage has been marked by violence or power imbalance, joint custody is regarded as unsuitable. An unwilling parent should never be pressured into accepting a joint custody agreement, and not held against them in terms of custody.[96]

The second issue raised by liberal feminism in relation to mediation/counselling concerns rights. Liberal feminists argue that women need only the same rights as men for their equality to be achieved. Unfortunately, the effect of the gender neutral standard discussed above is to deprive women of rights they once had, while delivering new rights to men.

Theoretically, mediation avoids appeals to rights. As already discussed, first, in spite of the wording of the Guardianship Act 1968 which describes custody as a "right" to "care and possession" (s 3), it is not that parental right which is the focus of care arrangements but the best circumstances for the "welfare of the child".

Second, no blame is attached to marriage breakdown. So no rights attach to being the 'innocent' party.

However, as already seen, gender-neutrality, equality, is superficial only. Men's rights may not be endorsed but are maintained in the move to

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94 A Opie "Women and the Politics of Custody" in A Opie and B Morris (eds) *Women and the Politics of Custody* (Centre for Continuing Education, Victoria University of Wellington, Wellington) 8.

95 H Lapsley, N Robertson, R Busch "Domestic Protection Study: Family Court Counselling, Part II" [1993] Butterworths Fam LJ 9, 10.

96 This view has received recent endorsement from the report of Davidson CJ into the granting of custody or unsupervised access to violent men. The report recognizes the statistical link between battering of wives and children. It advocates a presumption that violent spouses should not be given custody of children or unsupervised access unless they can demonstrate children would be safe with them.

shared parenting and liberal access. I submit that rights discourse was abandoned in relation to custody because the rights that existed were maternal, not because 'rights talk' was no longer politically correct.[97] In fact, rights discourse has seen a revival in the 'Father's Rights' movements which make it clear how thin gender-neutrality is. Shared parenting may enable fathers to control their property, the maintenance, and how it is spent. Similarly, 'no fault' divorce allows the violent or adulterous husband to escape recrimination. The battered wife must compromise and tolerate relationship counselling when she has been subjected to criminal acts (assaults or threats of assaults) by her partner.

One mediator states: "Mediation emphasizes the personal responsibility of each party rather than the narrow assessment of legal fault. . . . Mediation is more effective in making each party accept his or her share of the responsibility for the violence."[98]

Thus, mediation is still rights-based—even when pretending it is not. However, does that mean rights discourse is inappropriate, or a tool which feminism should reject? I submit it is not equal rights but women's rights which need to be asserted to empower women, gender-neutral equal rights having already failed.

McCormick's theory of rights[99] is useful in this context. The theory states that having a 'right' means that one's interests are protected by imposing legal or moral constraints on the acts of others with respect to one's interests. Once it can be shown that there is an interest which should be protected, then that interest is recognized by giving a right to individuals or groups who have that interest. Such a right then places obligations and duties on others to ensure that interest is protected.

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97 M Fineman and A Opie "The Uses of Social Science Data in Legal Policy-making: Custody Determinations at Divorce" (1987) Wisconsin LR 107, 116–117 discuss the men's groups of the 1970s and their opposition to maternal rights as giving women preferential treatment. They locate the rise of shared parenting in the groups' attempts to counter the image of the 'dead-beat dad'.

98 LG Lerman "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harvard Women's LJ 72, 75.

99 McCormick *Legal Rights and Social Democracy* (Clarendon Press, Oxford, 1984) 155.

The right is the primary caregiver principle which stems from the interest —an ongoing relationship with the child cared for. I advocate that where parental input is clearly unequal, and custody is in dispute, custody be awarded to the parent who has been the child's primary caregiver, ie feeds, bathes, dresses the children, changes their nappies, and performs other basic childcare tasks. Stability of care is more likely to be guaranteed to the child when there is no change in the person who is the primary caregiver, and if a woman has assumed that role during marriage, she is entitled to continue, if she wishes.[100]

According to Dworkin, rights can only be challenged when there is a clear competing right.[101] That right might be the right of the child, where the child's interest does not lie in the mother having custody (eg neglect, abuse, or in the case of an older child, the child's own choice), that right overrides the primary caregiver principle.

Horowitz[102] concedes that rights give "entitlement to the weak and powerless far beyond their actual political power."[103]

Radical feminists deny the value of rights. Mackinnon argues that appeals to rights (and to recognition of Gilligan's voices) blur the viewpoint so that we "cannot see that male supremacy is a complete societal system for the advantage of one sex over another".[104] While this is true, simply identifying it does not advance women. Logically, that societal system must be dismantled. Asserting women's rights and appealing to different rights enables women to fight the system within the system and to work for its disman-

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100 M Henaghan in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 125, distinguishes between the child's affective relationship and the relationship with the provider of care. I submit that the two are likely to coincide.

101 A Dworkin "Taking Rights Seriously" in Simpson (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1972).

102 L Horowitz "Rights" (1988) 23 Harvard Civil Rights-Civil Liberties Law Review 393, 395.

103 P Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harvard Civil Rights-Civil Liberties LR 401 recognizes the importance of rights assertion in the struggle of black men and women. In New Zealand, the rights inherent in the Treaty of Waitangi and their assertion are proving a powerful weapon in the empowering of Maori. Such rights can deliver political power as in the return of land or granting of fishing rights.

104 Quoted in E Kingdom *What's Wrong with Rights?—Problems for Feminist Politics of Law* (Edinburgh University Press, Edinburgh, 1991) 5.

tling also. While women work for the degendering of society, why not gender the rules in women's favour to equal the imbalance.

Gilligan says that the assertion of rights helps women see the interest of self as moral.[105] The process of mediation is to deny self in the quest for compromise. Rights are necessary to restore to women an entitlement to self, and to empower them.

V MEDIATION AND PRIVATE LAW

One final area of feminist criticism remains to be addressed. Mediation raises the issue of the private–public dichotomy. Historically, the law has regarded the home as beyond the law's province. What was domestic was also private. Wife-battering or spousal abuse were treated less seriously than assault on a stranger which introduced a public element. The law concerned itself in divorce because society was affected. Public interest required stable families to constitute a stable society. Modern divorce allows dissolution to be private law, with no public attributing of blame.

Mediation is a private, confidential process. it has taken marriage dissolution out of the public arena. The only requirement is that both parties agree. The Family Proceedings Act 1980 (s 18) protects the confidentiality of client's disclosures during counselling and in mediation conferences. In *Lawson* v *Lawson* Judge Mahoney commented that:[106]

> The confidentiality of counselling carried out under the Family Proceedings Act is absolute. It is important to the integrity of our system that there can be no exceptions.

But feminist analysis suggests there are benefits to women in public adjudication—where courts can clearly signal to society the obligations of ex-spouses to each other and their children.[107]

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105 C Gilligan *In a Different Voice* (Harvard University Press, Cambridge, Massachusetts, 1982) 149.

106 (1986) 4 NZFLR 380.

107 Lapsley, Robertson and Busch demonstrate that confidentiality also puts safety at risk, eg disclosures which indicate the possibility of child abuse cannot be conveyed to either the other parent or the court. Some counsellors use 'code words' in standard reports, eg the counsellor is not al-

Thus, as Astor and Chinkin point out, the danger of increased use of Alternative Dispute Resolution is that women's issues would fade from the public agenda and "decisions about issues of importance to women could be made according to norms which are unarticulated and unable to be challenged."[108] I submit that this is exactly what is happening.

I therefore consider that mediator's reports should contain detailed content, not simply a tabulated agreement (assuming counselling and mediation are separated, as discussed above). Further, if the current process is retained, it is quite wrong for the same judge who chaired a mediation conference to subsequently hear the case. This is a clear breach of confidentiality, as material presented in mediation will be known to the judge. Even worse, one of the parties has already rejected the judge's 'directive'. This must make a fair hearing of the issues untenable. Specifically, if a process is to empower women, it cannot be taken out of public scrutiny claiming confidentiality, and then be selective about the confidentiality it protects.

CONCLUSION

This paper has reviewed women's experience of mediation/counselling , and related it to the various schools of feminist legal analysis. It found the comfortable assumptions, upon which belief in the 'success' of the Family Court is based, to be erroneous. 'Success' eludes women when the system fails to meet the feminist objective of empowering women. The benefits for women are simply not there.

The confusion over what counselling ought to do means the cultural feminists 'voice' is not heard; the dynamic of counselling and mediation means women are controlled, inequalities between the participants cannot

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lowed to state that access should not be recommended. She is only allowed to report whether an agreement has been reached between the parties and the terms of that agreement. However, by stating that she believes there is a need for appointment of counsel for the child, the counselling coordinator knows automatically that there is some concern. This is unsatisfactory. "Family Court Counselling" [1993] Butterworths Fam LJ 3.

108 H Astor and C Chinkin *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) 112.

be addressed without turning women into the problem rather than the gendered society that creates women's powerlessness; the mediator/counsellor is 'directive' and his/her direction reflects the thinking of the court which, while espousing gender-neutral rules (which liberal feminists advocate), may work to further men's interests; mandatory counselling and reconciliation counselling deprive women of choice and force many to tolerate attempts to restore relationships and understand the violence of an abuser they may never wish to see again; mediation, under the guise of confidentiality, occurs beyond the scrutiny of public review.

The result is a system which, as radical feminists maintain of law, perpetuates gender inequality.

Finally, I have recommended some changes to degender the process. They include the separation of counselling and mediation, the training of lay mediators to actively redress power imbalances, the use of Judge-led mediation conferences only as a third stage, the retention of sole custody as an equally desirable option, the recognition of women's rights in the primary caregiver principle and public review of mediation.

Mediation/counselling is a form of alternative dispute resolution. But the structure and thinking of the Family Court in New Zealand are denying women the flexibility the term "alternative" promises.

APPENDIX ONE
THE LEGISLATIVE FRAMEWORK

1 The Family Proceedings Act 1980

The irreconcilable breakdown of the marriage is the only ground for its dissolution, and it can be established only by the couple living apart for two years.

A marriage cannot be dissolved unless the court is satisfied that suitable arrangements have been made for the care of the children of the marriage.

To assist separating parents, the Family Court is a conciliation service with court proceedings as a last resort.[109] The two stages of conciliation are counselling and mediation.

A *Counselling*

There are three categories of reference for counselling:

(a) on request—by one of the spouses (s 9). Prior to the filing of proceedings or the commencement of negotiations for a separation agreement. The majority of requests come from people seeking to persuade a spouse to accept a separation decision or, conversely, to dissuade a spouse from such a decision.[110]

(b) mandatory referral—after an application for a separation order or an application for custody (s 10).

(c) discretionary counselling (s 19)—when the Court considers at any stage in the proceedings that such counselling may promote reconciliation or conciliation. Increasingly, conditions are being attached to custody/access orders requiring parties to attend counselling to facilitate the implementation of the orders.

There is provision in the Act for a Family Court judge to direct that the matter not be referred to counselling if there has been violence (s 10(3)(a)). This applies only to mandatory counselling. But if one party requests counselling, then counselling must occur. It is at the discretion of the counsel-

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109 M Henaghan and W Atkin *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1992) 87.

110 L Beatson "Shifting Gears: Counselling in the Family Court" (1985) 1 FLB 19.

ling coordinator as to whether counselling will be individual or conjoint, regardless of whether it is requested or directed.

The counsellor's role is to explore whether the relationship is at an end, and then to help the parties see the available options (s 11). The first duty is to attempt reconciliation, then conciliation.

The growth in the number of counselling referrals from under 4,000 in 1982 to 11,778 in 1988 to 14,117 in 1990–1991 has resulted in an expansion of couple counsellors.[111] There are now at least 500 private counsellors or agencies who accept Family Court referrals.

B *Mediation*

Mediation follows the failure to reach agreement in counselling. The mediator's role is to help the parties identify the matters in dispute and to try to obtain agreement on them (s 14). The mediator is a Family Court judge. Lawyers are present at mediation conferences. Judges have the power to make consent orders and it is possible for the judge who was the mediator to ultimately hear a defended hearing.[112]

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111 EM Maxwell, R Pritchard and J Robertson *A Counsellor's Perspective on the Family Court and Its Clients* (Family Court Counselling Research Report 2, Department of Justice, Wellington, 1990) 11.

112 Above n 109.

2 The Guardianship Act 1968

A *The Guardianship Amendment Act 1980*

If parents are living together, or married, at the time of the child's birth, they both have automatic legal rights—a right of control over the upbringing of the child and a right to care and possession of the child.[113] The right of control over upbringing is entrenched, it is a fundamental right of legal parenthood. The right to care and possession is custody. It can be given away by agreement as well as taken away by court order.[114]

Section 23 affirms that 'the welfare of the child' is the first and paramount consideration in custody decisions.

The Guardianship Amendment Act 1980 provides that the gender of the parent must not be taken into consideration in custody and access proceedings. It also provides that the conduct of any parent should be taken into account only when it is relevant to the welfare of the child.

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113 Section 3.
114 Sections 11 and 18.

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