

[This chapter will be published in Jacqueline Heaton and Barbara Stark (eds), *Routledge Handbook of International Family Law* (Routledge 2019)]

Child Custody and Cognate Concepts: The Challenges

Elaine E. Sutherland

Professor of Child and Family Law, Stirling Law School, University of Stirling (elaine.sutherland@stir.ac.uk) and Distinguished Professor of Law, Lewis and Clark Law School, Portland, Oregon (es@lclark.edu).

Abstract:

Decision-making authority in respect of a child in an intact family is allocated using the concepts variously known in different jurisdictions as custody, parental responsibility (or responsibilities) or guardianship, with visitation, contact and parenting time acquiring significance where the parents separate or have never lived together with their child. Set in the context of international norms and using selective, comparative examples, this chapter addresses the evolution and contemporary application of these concepts. The child's participation rights, historically-marginalised parents and the challenge posed by the intersection of continuing parental involvement and domestic abuse receive particular attention.

Key terms:

child; parent; multiple parents; best interests; participation rights; custody; parental responsibility, shared parenting; parenting time; domestic abuse; parental alienation.

Introduction

Many legal systems have long used the term "custody" to denote having overall responsibility for a child, sometimes distinguishing legal custody, the right to make decisions about the child's life, from physical custody, the right to have the child in one's care. The word has unmistakable possessory overtones and reflects an adult-centred approach to family relationships. In disputed cases, it is burdened by the historical baggage of commodifying children as a prize to be fought over, with parents being cast in the role of winners and losers, something that does nothing to encourage co-operative parenting in the future.

For these reasons, many jurisdictions have abandoned the term altogether, preferring a discourse that talks of parental responsibility (or responsibilities) or guardianship. These terms will be used in in this chapter, alongside custody, to

reflect its comparative nature. Where the child's parents live together with the child in what is known as an "intact family", the divisible nature of custody or parental responsibility is not usually significant, separability acquiring greater significance in respect of never-together or separated parents.

Custody and the cognate concepts do not tell the whole story since parents and others who do not have custody of a child may still have a legally-recognised role in the child's life through visitation, contact or parenting time and, while they are discussed in depth elsewhere in this volume,¹ mention will be made of them here. As ever with international comparisons, similar terminology may mask differences in the content of the concepts at play and, of course, the law must be understood in the social, political and economic context in which it is operating.

Set against the backdrop of international standards, this chapter addresses how domestic legal systems allocate custody of a child, in the first instance, before moving on to examine the resolution of disputes. The focus will be on what might be described as developed Western jurisdictions, different approaches will be illustrated by the use of selective examples and particular attention will be devoted to issues that are controversial or challenging in many jurisdictions.

The international context

Any international examination of a child-related issue necessarily begins with the United Nations Convention on the Rights of the Child (CRC),² the gold standard for children's rights, ratified by all the countries of the world except the United States.³ Three of its general principles are of particular importance for our present enquiry: Article 3, according primacy to the child's best interests; Article 12, guaranteeing the child's right to participate in the decision-making process; and Article 2, prohibiting discrimination on a range of grounds, including the child's or the parent's birth or other status.⁴

Beyond these principles, the CRC recognises the important role of parents and, sometimes, the wider family group, in providing direction and guidance to the child in a manner consistent with the child's evolving capacity,⁵ noting the common responsibilities of both parents for the child's upbringing.⁶ Anticipating the possibility of parental separation, the Convention emphasises the child's right to maintain personal relations and direct contact with both parents, save where such a course

¹ Frederik Swennen, "Personal Relations and Contact Concerning Children".

² 1577 U.N.T.S. 3; (1989) 28 I.L.M. 1448, in force 2 September 1990. For a discussion of how children's rights play out in specific contexts, see, Geraldine van Bueren, "Children's Rights Within the Family" in this volume.

³ This is not the place for a discussion of the peculiar position of the United States. Suffice to say that it has signed the Convention and many of the values embodied therein are respected in the law of the various US jurisdictions.

⁴ *General Comment No 5: General measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para. 12.

⁵ Article 5.

⁶ Article 18(1). Reflecting the era in which it was drafted, the Convention proceeds on the basis of a child having two parents, not anticipating the recognition of multiple parents, discussed below.

would be contrary to the child's best interests.⁷ In addition, states are placed under an obligation to protect the child from all forms of physical or mental violence.⁸

Given its child-centred nature, it is unsurprising that the CRC does not use the term custody, although it is found in other international instruments including the Hague conventions governing international co-operation in respect of child abduction⁹ and on jurisdiction, and enforcement of parental responsibility.¹⁰

Numerous regional instruments are relevant to child custody in the countries where they apply. For the member states of the Council of Europe, the European Convention on Human Rights is of particular importance despite making no express mention of children or parents. Unsurprisingly, it is regional instruments dedicated to children, like the African Charter on the Rights and Welfare of the Child,¹¹ the European Convention on the Exercise of Children's Rights¹² and the European Convention on Contact concerning Children,¹³ that are most explicit in addressing many of the issues explored in this chapter.

The starting point

Developed, Western legal systems have long since abandoned the notion of the *paterfamilias* with almost unfettered authority over his children and, often, his wife.¹⁴ Spousal equality is now the order of the day and custody and parental responsibility now vest in both married, different sex parents in the intact family. Despite legal parity, mothers continue to provide more childcare than do fathers,¹⁵ something that may become significant in the event of a future parenting disputes. The child's participation rights, guaranteed by article 12 of the CRC, apply to the family setting as they do elsewhere,¹⁶ but the extent to which they are respected, in law or in fact, varies between legal systems and, in all probability, between families.¹⁷

⁷ Article 9(3). See also Article 8(1), where preservation of family relations is one of the facets of the child's identity mentioned expressly.

⁸ Article 19(1).

⁹ Hague Convention on the Civil Aspects of International Child Abduction 1980, HCCH, No. 28.

¹⁰ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996, HCCH, No. 34.

¹¹ OAU Doc CAB/LEG/24.9/49 (1990), in force 29 November 1999.

¹² E.T.S. No. 160 (1996), in force 1 July 2000.

¹³ E.T.S. No. 192 (2003), in force 1 September 2005.

¹⁴ Mary Ann Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (1989, University of Chicago Press, Chicago, IL): 97-98.

¹⁵ The *Global Gender Gap Report 2016* (2016, World Economic Forum, Geneva), 31-32;

<http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure.htm>

¹⁶ United Nations Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009), CRC/C/GC/12, paras 92-96.

¹⁷ *Law Reform and Implementation of the Convention of the Rights of the Child* (2007, UNICEF Innocenti Research Centre, Florence) (concluding that "laws that expressly recognise the right of children to be heard in the context of the family are rare" since only three of the 52 countries surveyed – the Czech Republic, Romania and Scotland – had such laws in place). There are other examples, including Germany, Hungary, Finland, Norway, Portugal, South Africa, Sweden and Russia. See further, Elaine E. Sutherland, "Listening to the Child's Voice in the Family Setting: From Aspiration to Reality," *Child & Family Law Quarterly* 26, no. 2 (2014): 152.

So much for married, genetic parents, but what of unmarried parents, same sex parents, other family members and the challenges posed by assisted reproductive technology?

Non-marital fathers

Historically, legal systems expressed societal disapproval of extra-marital sex by drawing a distinction between children born to married parents and those who were not, with the latter facing discrimination. As the proportion of non-marital births increased – now exceeding 50% in many countries¹⁸ – and moral policing abated, legal discrimination diminished.¹⁹ Negative perception of non-marital fathers persisted and, while they have achieved equality with mothers and married fathers in some jurisdiction, that approach is far from universal.²⁰ They may continue to face challenges, first, in establishing paternity and, secondly, in the additional test they must pass in order to gain responsibility.

A married man customarily benefit from the (usually rebuttable) legal presumption that he is the father of his wife's child.²¹ In some jurisdictions, male cohabitants benefit from a similar presumption²² and there are often simple administrative procedures for acknowledging paternity where the parents agree.²³ In the absence of such provisions and the requisite maternal cooperation, the father may have to establish paternity in court and DNA testing facilitates that process, provided that the mother agrees to the child being tested or the court has the power to do so.²⁴

Assuming he can establish paternity, the non-marital father has the same custodial or parental responsibilities as mothers and married fathers in some jurisdictions.²⁵ In others, he may have to demonstrate that he is worthy of equal treatment. Echoing

¹⁸ The Organisation for Economic Cooperation and Development reported that, in 2014, just under 40% of births in its 35 member countries occurred outside of marriage. Individual countries showed marked variations, the proportion being below 10% in Greece, Israel, Japan, Korea and Turkey and over 50% in Belgium, Chile, Denmark, Iceland, Estonia, France, Mexico, Norway, Slovenia, and Sweden. See, OECD Family Database, Chart SF2.4.A:
http://www.oecd.org/els/family/SF_2_4_Share_births_outside_marriage.pdf

¹⁹ Exceptions remain. For example, while the Succession to the Crown Act 2013 removed gender discrimination in respect of the monarchy in the UK, it had no effect on birth status, nor on succession to aristocratic titles.

²⁰ For recent developments in particular jurisdictions, see Luise Hauschild, "Germany: Reforming the law on parental responsibility" and Ingerborg Schwenzer and Tomie Keller, "New Rules on Parental Responsibility in Switzerland", both in *The International Survey of Family Law* (2014 ed., Bill Atkin, ed., Jordans, Bristol): 145 and 457, respectively.

²¹ See, for example, Family Law Act 1995, s. 69P (Australia); Uniform Child Status Act 2010, s. 4(1) (Canada); Children Act 1981, §3 (Norway); Law Reform (Parent and Child) (Scotland) Act, 1986, s. 5(1)(a); Children's Act No 38 of 2005, s 20(1) (South Africa).

²² See, for example, Family Law Act 1995 s. 69Q (Australia); Uniform Child Status Act 2010, s. 4(1) (Canada); Children's Act No 38 of 2005, s 21(1) (South Africa).

²³ See, for example, Family Law Act 1995, s. 69R (Australia); Uniform Child Status Act 2010, s. 4(1) (Canada); Children Act 1981, §4 (Norway); Law Reform (Parent and Child) (Scotland) Act 1986, s. 5(1)(b); Children's Act No 38 of 2005, s 21(1) (South Africa).

²⁴ In Scotland, for example, the court has no power to overrule maternal refusal to have the child tested, allowing her to block or, at least, impede the father's progress: Law Reform (Parent and Child) (Scotland) Act 1986, s. 6. In contrast, in Norway, the mother has no such latitude: Children Act 1981, §§ 5 and 25.

²⁵ See, for example, Care of Children Act 2004, s. 18 (New Zealand); Children (Scotland) Act 1995, s. 3.

the words of the US Supreme Court from some two decades earlier,²⁶ the European Court of Human Rights, in 2005, articulated the position up as follows:

The Court does not agree ...that a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, would be regarded as sufficient to attract the protection of Article 8.²⁷

There is a plentiful body of European Court case law on fathers who did²⁸ or did not²⁹ pass that test. In South Africa, blanket paternal equality has been rejected on the basis that a “nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which ‘first-world’ western societies are premised”³⁰ justified a different approach.

Donor children

Development in the various techniques falling under the umbrella of assisted reproductive technology (ART), combined with their increased use, has created new challenges for legal systems, posing fundamental questions about the very meaning of parentage.

Even before the advent of statutory regulation of ART, where a married woman gave birth to a child using donor gametes, her husband benefitted from the statutory presumption of paternity, the donor was excluded, custody vested in the couple and they could conceal the circumstances of conception from the world and, indeed, from the child, if they chose to do so.³¹ For other couples, the position was less clear and disputes were resolved on a case by case basis.

Surrogacy was always more controversial,³² in part, due to its commercial associations³³ and the scope for surrogates to be exploited³⁴ and it is banned in a

²⁶ *Lehr v Robertson*, 463 U.S. 248, 262 (1983). See further, Serena Mayeri, “Foundling Fathers: (Non) Marriage and Parental Rights in the Age of Equality,” *Yale Law Journal* 125, no. 8 (2016): 2292.

²⁷ *Lebbink v Netherlands* (2005) 40 E.H.R.R. 18, [37]. Article 8 of the European Convention on Human Rights guarantees respect for private life and family life.

²⁸ *Sahin v Germany* (2003) 36 E.H.R.R. 43 (the father had lived with his daughter for the first year of her life and continued to have contact with her thereafter for some time) and *Zaunegger v Germany*, (2010) 50 E.H.R.R. 38 (unmarried parents had lived together for the first three years of the child’s life and the father had cared for his daughter for the two years following their separation).

²⁹ *Söderbäck v Sweden*, (1998) 29 E.H.R.R. 95, [32] (father’s contact with the child had been “infrequent and limited in character”).

³⁰ *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 261 (CC), [29].

³¹ Deception of the child implicates article 7 and 8 of the CRC. In some jurisdictions mandatory disclosure to the adult child of the fact of donor conception, combined with disclosure of the donor’s identity, addresses the problem. See, Eric Blyth and Lucy Frith, “Donor-Conceived People’s Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity,” *International Journal of Law, Policy and the Family* 23, no 2 (2009): 174 and Petra Nordqvist, “The Drive for Openness in Donor Conception Disclosure and the Trouble with Real Life,” *International Journal of Law, Policy and the Family* 28, no. 3 (2014): 321.

³² See, Philipp Reuss, “Surrogacy,” in this volume.

³³ In India, a favourite destination for foreigners seeking a commercial surrogate, if the Surrogacy (Regulation) Bill 2016 passes, commercial surrogacy would become illegal and altruistic surrogacy would only be permitted where the surrogate is a member of the (married) intending parents’ family

number of jurisdictions.³⁵ While it is permitted in most US states, two early surrogacy cases illustrate the consequences of a lack of statutory regulation. In 1988, the New Jersey Supreme Court refused to enforce a traditional surrogacy agreement,³⁶ but gave custody of the child to the intended parents, nonetheless, on the basis of the child's best interests.³⁷ Just five years later, the California Supreme Court upheld a gestational surrogacy agreement.³⁸ While model legislation governing the whole range of ART techniques is available for adoption by the various US states,³⁹ they vary in the extent and manner of regulation.

While same sex couples were sometimes obstructed in accessing ART in the past, it is now widely available to them.⁴⁰ Recognition of the child's second parent can involve a complex intersection of their opportunity to formalise their own relationship, whether they do so, the consequences of that for parental recognition and the regulation of ART itself.⁴¹ That problem is avoided in the many jurisdictions where the legislation in place governing the parentage of donor children includes same sex couples.

The United Kingdom provides a good example of an attempt at comprehensive regulation of ART. While the first statute, passed in 1990, provided for determining the legal parentage of donor children, it was shamelessly heteronormative in character.⁴² Happily, its 2008 successor is very much more inclusive,⁴³ and provides that the woman who gives birth is treated as the child's mother. Her (male or female) spouse or (female) civil partner is treated as the child's other parent. Where the birth mother is not married or civilly enpartnered, the provisions are more complex but, in essence, as long as treatment was undertaken in the United Kingdom by a provider licensed under the statute and the mother consents, the child's second parent will be

and subject to a range of other conditions. See, the Surrogacy (Regulation) Bill 2016:

<http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/>

³⁴ Melanie G. Fellowes, "Commercial surrogacy in India: The presumption of adaptive preference formation, the possibility of autonomy and the persistence of exploitation," *Medical Law International* 17, no. 4 (2017) 249.

³⁵ While surrogacy is prohibited in some European jurisdictions, this has not prevented the European Court of Human Rights protecting the child's Article 8 right to respect for private and family life: *Labassée v France*, Application No. 65941/11 and *Mennesson v France*, Application No. 65192/11, both judgments of the Fifth Section, 26 June 2014. See also, *Paradiso and Campanelli v Italy* (2017) 65 E.H.R.R. 2.

³⁶ "Traditional" surrogacy involves a surrogate being impregnated using donor sperm, often that of the man who plans to raise the resulting child, making the surrogate the child's genetic mother. In "gestational surrogacy" the surrogate is an unrelated host, with the embryo being the product of gametes provided by the intended parents or donors.

³⁷ *In the Matter of Baby M*, 109 N.J. 396; 537 A.2d 1227 (N.J. 1988)

³⁸ *Johnson v Calvert*, 5 Cal.4th 84, 851 P.2d 776 (Cal. 1993).

³⁹ Uniform Parentage Act 2017 which, at the time of writing, has been adopted in the state of Washington. The earlier, 2002 version regulated ART and has been adopted in a number of states.

⁴⁰ See, Nicholas Bamforth, "LGBTQ Relationships" in this volume.

⁴¹ An illustration of this intersection at play can be found in the *per curiam* opinion of the US Supreme Court in *Pavan v. Smith*, 137 S.Ct. 2075 (2017), where it applied its own reasoning in its landmark decision in *Obergefell v. Hodges*, 136 S.Ct. 2584 (2015), in holding the refusal of the state of Arkansas to register the birth mother's wife as the child's second parent, despite the fact that it did so for husbands of married women who has a child in similar circumstance, to be unconstitutional. The Court will revisit this issue if it grants the writ of certiorari (petition No. 17-878, pending at the time of writing) sought in *McLaughlin v. McLaughlin*, 2017 WL 6508408.

⁴² Human Fertilisation and Embryology Act 1990 (UK).

⁴³ Human Fertilisation and Embryology Act 2008 (UK).

the person who agrees to take on that role and gives the requisite formal notice. Thereafter, parental responsibility flows from recognition as a parent for spouses and civil partners, and from registration as a parent for other second parents.⁴⁴ Surrogacy is accommodated by a form of expedited adoption which, subject to a host of conditions, including the consent of the surrogate, allows for recognition of the intended parents. It will be clear from the above summary that this system of bright line rules and state oversight is designed to facilitate the child having two parents and the exclusion of donors.

Challenging the dyad

Thus far, this discussion has been premised on a child having, at most, two custodial parents. Yet legal systems have long provided for more than two people playing significant roles in a child's life in the context of open adoption; through recognition of *de facto* parents; and by permitting other persons like step parents, grandparents and the child's siblings to seek custody or specific responsibilities.⁴⁵

When ART challenged traditional notions of parentage, it focussed attention on a more radical option: the possibility of a child having three or more parents. 2007 was a landmark year for multiple parentage, with courts in Ontario⁴⁶ and Pennsylvania⁴⁷ embracing it, and reports of a similar decision in Brazil in 2014.⁴⁸ More recently, legislatures in British Columbia⁴⁹ and California⁵⁰ have also taken this path. It is reflection of the controversy surrounding multiple parentage that the Canadian model statute, available for adoption by the provinces, makes provision for multiple parentage in the context of ART,⁵¹ while its equivalent in the United States applies the concept more generally and offers states alternative provisions, one allowing for the possibility of multiple parents and the other preserving the dyad.⁵²

Multiple parentage can bring multiple benefits. The child acquires an additional, legally-recognised, champion (or champions) and there may be pecuniary rewards in terms of financial support and inheritance rights. The adults secure legal recognition and all that goes with it and have the opportunity to share responsibility.⁵³ The disadvantage is that there are more adults who may find themselves in dispute, creating the potential for more – and more complex – litigation.

⁴⁴ Children (Scotland) Act 1995, s 3.

⁴⁵ Haim Abraham, "A Family is What You Make It? Recognition and Regulation of Multiple Parents," *American University Journal of Gender Social Policy & Law* 25, no. 4 (2017): 405.

⁴⁶ *A. (A.) v. B. (B.)* (2007) 278 D.L.R. (4th) 519 (Ont. C.A.).

⁴⁷ *Jacob v Shultz-Jacob* 923 A.2d 473 (Pa. Super. Ct. 2007)

⁴⁸ "Brazilian baby registered with three parents," *BBC News*, 13 September 2014:

<http://www.bbc.co.uk/news/world-latin-america-29195890>

⁴⁹ Family Law Act 2011, SBC, ss. 29 and 30.

⁵⁰ Cal.Fam.Code § 7612. See also, Me. Rev. Stat. tit. 19-a, § 1853(2).

⁵¹ Uniform Child Status Act 2010, s. 9 (Canada).

⁵² Uniform Parentage Act 2017, § 613(c) (US).

⁵³ Abraham, "A Family is What You Make It?" *op. cit.*; Susan F. Appleton, "Parents by the Numbers" *Hofstra Law Review* 37, no. 1 (2008): 11; and Lois Harder and Michelle Thomarat, "Parentage Law in Canada: The Numbers Game of Standing and Status," *International Journal of Law, Policy and the Family* 26, no. 1 (2012): 62

Resolving disputes

Most parting and never-together parents resolve issues over the future care of their children by agreement or, sometimes, by default, with one parent simply ceasing to be a part of the child's life. Whatever they decide, it is to be hoped that they prioritise the child's best interests and respect the child's participation rights. As with decision-making in intact families, the extent to which that is the case will, necessarily, depend on the family in question.

It has long been accepted that courts may not be the optimum setting in which to resolve disputes over the future care of children. The cost and time involved are amongst the shortcomings commonly cited, but the principal criticism is the potential of (particularly adversarial) litigation to generate or exacerbate acrimony. Various forms of alternative dispute resolution (ADR), including mediation, collaborative law and arbitration, have been embraced in the family law context.⁵⁴ Such is the enthusiasm for ADR, in some jurisdictions, that couples are required to attempt to resolve difference in that way before they can take a dispute to court, with exceptions usually being made for urgent cases and those involving domestic abuse.⁵⁵ ADR is not, however, a panacea and the fact that the parents have reached agreement does not necessarily mean that their solution is in the child's best interests,⁵⁶ nor that the child's participation rights have been respected.⁵⁷

The best interests test

Some parenting disputes are not amenable to negotiation and it falls to the courts to resolve them. Consistent with the CRC, in most jurisdictions the courts apply the "best interests test", sometimes known as the "welfare test", in reaching decisions and, indeed, in many of them its use predates the CRC. The Janus-like quality of the test, combining the virtue of flexibility with the vice of vagueness, has long been recognised.⁵⁸ Its flexibility enables courts to engage in individualised decision-making, assessing what will serve the interests of the particular child. The price of flexibility is uncertainty and long ago Robert Mnookin famously described the best interests test as "vague and indeterminate,"⁵⁹ opening the door to, almost unlimited,

⁵⁴ See, Nuria Gonzalez-Martin, "International Family Mediation: Recent Developments," in this volume for a discussion of a number of the forms of ADR used in family disputes.

⁵⁵ See, for example, Family Law Act 1995, s. 60I (Australia); Children and Families Act 2014, s. 10(1) (England and Wales); Marriage Act 1991, s. 26 (Norway).

⁵⁶ Eva Ryrstedt, "Mediation regarding Children - Is the Result Always in the Best Interests of the Child: A View from Sweden," *International Journal of Law, Policy and the Family* 26, no. 2 (2012): 220.

⁵⁷ For promising developments, see, Jennifer McIntosh, Caroline Long and Lawrie Maloney, "Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes," *Journal of Family Studies* 10, no. 1 (2004) 87 (Australia) and Deb Inder, "A comparison of child inclusive and child focused mediation models, their benefits and relevance in the context of family law practice in New Zealand," *New Zealand Family Law Journal* 8, no. 4 (2014): 69.

⁵⁸ See further, Elaine E Sutherland, "Article 3 of the UN Convention on the Rights of the Child: The Challenges of Vagueness and Priorities," in *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Elaine E. Sutherland and Lesley-Anne Barnes Macfarlane, eds, Cambridge, Cambridge University Press, 2016): 21, 36.

⁵⁹ Robert H Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy," *Current Legal Problems* 39, no. 3 (1976): 226, 229. For a reappraisal of his earlier thoughts, see, Robert Mnookin, "Child Custody Revisited," *Law and Contemporary Problems* 77, no. 1 (2014): 249.

judicial discretion.⁶⁰ Since indeterminacy leads to unpredictability, it is argued, the incentive for the parties to negotiate a settlement is reduced, resulting in increased resort to litigation.⁶¹

The challenge lies in identifying the content of “best interests”. What is relevant in assessing what is beneficial or detrimental to a child? Many jurisdictions have sought to clarify the content of the concept and to curtail judicial discretion by devising statutory welfare checklists, enumerating the factors that are relevant. A sufficiently broad-ranging checklist can provide guidance a court without diminishing the scope for individualised assessment,⁶² but whether they limit judicial discretion has been doubted and they have been criticised for being incomplete and for failing to attach relative weight to different factors or prioritise potentially conflicting factors.⁶³

These criticisms did not trouble the United Nations Committee on the Rights of the Child (UNCRC) when it recommended the use of a “non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment”,⁶⁴ something it saw as accommodating flexibility and individualised assessment. It went on to provide full discussion, not only of the elements it saw as central,⁶⁵ but also of how the assessment and determination should be carried out, requiring evaluation to be by means of a “transparent and objective formal process”⁶⁶ that incorporates “child-friendly procedural safeguards”.⁶⁷

Presumptions – and a rule

While they are sometimes incorporated into welfare checklist, presumptions depart from the ethos of the UNCRC recommendations. Whereas a checklist operates with “the weight of each element depending on the others”,⁶⁸ a presumption – even one that is rebuttable – starts from the assumption that one factor outweighs other considerations. While that may not render all presumptions incompatible with the CRC, it suggests that they warrant particular scrutiny.

Two issues dominate legal and political discourse on parenting disputes. The first is ensuring that both parents continue to be involved in the child’s life, an approach endorsed by the CRC.⁶⁹ Presumptions favouring joint custody and shared parenting have emerged in many legal systems in response to this imperative and we shall return to each presently.

⁶⁰ Helen Reece, “The Paramountcy Principle: Consensus or Construct?” *Current Legal Problems* 49 (1996): 267, 273; Stephen Parker, “The Best Interests of the Child – Principles and Problems,” *International Journal of Law and the Family* 8, no. 1 (1994): 26.

⁶¹ Mnookin, “Child Custody Adjudication”, *op. cit.*, 262; Reece, “The Paramountcy Principle”, *op. cit.*, 273.

⁶² Robert A. Warshak, “Parenting by the Clock: The Best Interests of the Child Standard, Judicial Discretion, and the American Law Institute’s ‘Approximation Rule’,” *University of Baltimore Law Review* 41, no. 1 (2011): 83, 98.

⁶³ John Eekelaar, *Regulating Divorce* (1991, Clarendon Press, Alderley), 125.

⁶⁴ *General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, para. 50.

⁶⁵ *Ibid*, paras 52-79.

⁶⁶ *Ibid*, para. 87.

⁶⁷ *Ibid*, paras 85-99.

⁶⁸ *Ibid*, para. 80.

⁶⁹ Articles 5, 8, 9 and 18.

The second dominant issue is the need to protect children from exposure to domestic abuse, something identified long ago as harmful to children, leading to problems with behaviour, in school and in forming relationships⁷⁰ and, in some cases, to post-traumatic stress disorder.⁷¹ More recent research has highlighted the impact of trauma on children and the long-term impact of witnessing domestic abuse on brain development.⁷² As we have seen, the CRC places states under an obligation to protect the child from all forms of physical or mental violence.⁷³

These two imperatives – continuing parental involvement and protection from domestic abuse – pose a significant challenge to legal systems. Their intersection has resulted in, sometimes ferocious, lobbying and debate that often takes on a very gendered dynamic with groups supporting (largely female) abuse victims clashing with fathers' rights organisations. Presumptions that operated in the past are noted below before the various modern presumptions that seek to secure continuing parental involvement in the child's life are assessed.

Historical presumptions

In the past, parenting by separated and never-together parents often proceeded on the basis of one parent being given custody of the child while the other was awarded visitation or access. The older presumption that gave the married father primacy, post-divorce, disappeared. In some jurisdictions, it was replaced, for a time, either in law or in practice, by a maternal preference, particularly where the child was of "tender years". The explicit gender bias embodied in that presumption resulted in its consignment to the history books as well.⁷⁴

Another approach that found favour in a small number of US states in the 1980s is the, facially gender-neutral, "primary caretaker presumption" under which the parent who discharged parenting functions in the past was preferred in awarding custody of the child, always provided that parent was deemed "fit".⁷⁵ While it has been criticised

⁷⁰ Peter G. Jaffe, Nancy K.D. Lemon & Samantha E. Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (2003, Sage Publications, Thousand Oaks, CA): 23.

⁷¹ Sandra A. Graham-Berman and Alytia A. Levendosky, "Traumatic Stress Symptoms in Children of Battered Women," *Journal of Interpersonal Violence* 13, no. 1 (1998): 111; Peter Lehmann, "The Development of Posttraumatic Stress Disorder in Children who Witnesses Mother Abuse," *Journal of Family Violence* 12, no. 3 (1997): 241.

⁷² Areti Tsavoussis, Stanislaw P. Stawicki, Nicoleta Stoicea and Thomas J. Papadimos, "Child-witnessed domestic violence and its adverse effects on brain development: a call for societal self-examination and awareness," *Frontiers in Public Health* 2 (2014): 178; Robert F. Anda, Vincent J. Felitti, J. Douglas Bremner, John D. Walker, Charles Whitfield, Bruce D. Perry, Shanta R. Dube & Wayne H. Giles, "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology," *European Archives of Psychiatry & Clinical Neuroscience* 256, no. 3 (2006): 174.

⁷³ Article 19(1).

⁷⁴ Warshak, "Parenting by the Clock," *op. cit.*, 90-93.

⁷⁵ The presumption was famously articulated in *Garska v McCoy*, 167 W.Va. 59; 278 S.E.2d 357 (W.Va. 1981). See, Richard Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed," *Yale Law and Policy Review* 3, no. 1 (1984): 168.

as a backward-looking, thinly-disguised maternal preference,⁷⁶ it lives on as one factor in welfare checklists in some states.⁷⁷

Joint custody

At first glance, joint custody is the most conceptually unambiguous way to endorse continuing parental involvement in the child's life. Like custody itself, it may mean different things depending on the jurisdiction in question, and the extent to which parental involvement is equal may vary. It usually anticipates shared or joint parental decision-making, at least in respect of significant decisions, with courts often having the power to allocate authority over specific decisions to one parent. It may also denote the right to determine the child's residence. As one US commentator observed, "the joint custody-sole custody distinction is best viewed along a continuum, not as a sharp divide."⁷⁸

Joint custody emerged in the United States in the 1970s, becoming the preferred option in many states in the 1980s. In the constantly shifting tableau of state laws, generalisations should be offered with caution, but all states now permit joint custody, with some having a presumption in its favour.⁷⁹ Parental consent is often, but not always, a prerequisite. Following the 1990 Congressional resolution supporting a statutory presumption against giving custody of a child to a spouse-abusing parent,⁸⁰ all states now require domestic abuse to be considered in the context of custody decisions, with many having a presumption against joint custody where it is present.⁸¹

Sweden embraced joint custody earlier than many other European jurisdictions and provides a good example of it being adjusted to meet emerging concerns. In 1976, married and unmarried parents were given the option of joint parental responsibility, with the court acquiring the power to impose it, despite the opposition of one parent, in 1998.⁸² It is anticipated that parents will take all major decisions (everything beyond everyday care) jointly, although the court retains the power to determine residence and contact. In 2006, the law was amended further to take account of the parents' ability to cooperate, the need to protect children from domestic abuse and to reinforce the child's participation rights.⁸³ Denmark and Norway followed the Swedish approach and have their own local variations.⁸⁴

⁷⁶ Sheri A. Ahl, "A Step Backward: the Minnesota Supreme Court Adopts A 'Primary Caretaker' Presumption in Child Custody cases: *Pikula v Pikula*," *Minnesota Law Review* 70, no. 6 (1986) 1344.

⁷⁷ See, for example, Ore. Rev. Stat. § 107.137(1).

⁷⁸ J. Herbie DiFonzo, "From the Rule of One to Joint Parenting: Custody Presumptions in Law and Policy," *Family Courts Review* 52, no. 4 (2014): 213, 217.

⁷⁹ Linda Elrod, *Child Custody Practice and Procedure* (2017 ed, Thomson Reuters, Eagan, MN), § 5.1.

⁸⁰ 136 Cong. Rec. H11777 (1990).

⁸¹ Elrod, *Child Custody Practice and Procedure*, *op. cit.*, § 5.14.

⁸² Anna Singer, "Parenting issues after parental separation: A Scandinavian perspective," in *Routledge Handbook of Family Law and Policy* (2014, John Eekelaar and Rob George, eds, Routledge, Oxford): 235, 236-7.

⁸³ Maria Eriksson, "Contact, Shared Parenting and Violence: Children as Witnesses of Domestic Violence in Sweden," *International Journal of Law, Policy and the Family* 25, no. 2 (2011): 165.

⁸⁴ Singer, "Parenting issues after parental separation," *op. cit.*, 237.

Shared parenting – and the element of time

Shared parenting seeks to ensure the continuing involvement of both parents in the child life, something supported wholeheartedly by the CRC, provided that course is in the child's best interests. While proponents of shared parenting claim that it is beneficial to children,⁸⁵ others present a more nuanced picture, highlighting the importance of the child's developmental stage and the degree of parental co-operation or conflict.⁸⁶

What distinguished some current law reform initiatives from the CRC and the UNCRC recommendations lies in the preoccupation with the amount of time each parent spends with the child, with some fathers' rights groups calling for equal – that is, a 50-50 division of – parenting time. Allocation of time is about quantity and discloses nothing about the quality of the resulting child-parent interaction,⁸⁷ leading commentators to warn that “a preoccupation with time as such might reflect parental feelings of entitlement rather than benefits for children.”⁸⁸

With the exception of the approximation rule, discussed below, statutory models for shared parenting do not normally quantify the time to be spent with each parent. There is reference in some of the academic literature to the child spending at least 35% of the time with each parent.⁸⁹ That figure is significant in some jurisdictions in calculating child support liability,⁹⁰ raising questions over the motive of some parents in seeking extensive time with the child.⁹¹

Australia is often cited as the poster child for shared – or, erroneously, for equal – parenting time. The 2006 reforms there created a presumption of “equal shared parental responsibility”.⁹² When it became apparent that this had resulted in inadequate protection against the child being exposed to domestic abuse,⁹³ the legislation was amended further, in 2011, emphasising that the presumption does

⁸⁵ Linda Nielsen, “Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements,” *Psychology, Public Policy and Law* 23, no. 2 (2017) 211.

⁸⁶ Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells and Caroline Long, “Post-separation parenting arrangements” *Family Matters* 86 (2011) 40.

⁸⁷ Mary Jean Dolan and Daniel J. Hynan, “Fighting over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions,” *Law and Psychology Review* 38 (2014): 45.

⁸⁸ Bryan Smyth, Richard Chisholm, Bryan Rodgers and Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” *Law and Contemporary Problems* 77, no. 1 (2014):109,145.

⁸⁹ Linda Nielsen, “Re-examining the Research on Parental Conflict,” *op. cit.*, 211: Smyth *et al*, *Legislating for Shared-Time Parenting*,” *op. cit.*, 125.

⁹⁰ See Margaret Brinig, “Child Support,” in this volume.

⁹¹ See, Karen Czapskiy, “*The Shared Custody Child Support Adjustment: Not Worth the Candle*,” *Family Law Quarterly* 49, no. 3 (2015): 409 (US); Courtney Palmer, “Child Support and Shared Parenting in Canada: A Reality Cheque,” *Dalhousie Journal of Legal Studies* 22 (2013): 101; and Smyth *et al*, “Legislating for Shared-Time Parenting,” *op. cit.*, 125-126 (Australia).

⁹² Family Law Act 1975, s. 61DA, as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006.

⁹³ Richard Chisholm, *Family Courts Violence Review* (2009); Social Policy Research Centre, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* (2010).

not apply to cases where child abuse or family violence is present.⁹⁴ Abuse and violence aside, courts are directed to do no more than “consider whether the child spending equal time with each of the parents would be in the best interests of the child” and practicable.⁹⁵ There is no presumption of equal parenting time. It seems, however, that the legislative developments created very real confusion in the country, with many people believing that “equal or shared care was the default presumption.”⁹⁶ Recent research demonstrates that courts ordered equal parenting time in only 3-10% of disputed cases in the years following the reforms.⁹⁷

Shared parenting has found academic support in Europe⁹⁸ and, while many European jurisdictions provide for separated parents to have shared responsibilities, there is reluctance to legislate for the amount of time the child should spend with each parent. For example, despite extensive lobbying by fathers’ rights groups in England and Wales in support of a presumption of equal parenting time, the 2014 reforms there secured nothing more than the addition of a rebuttable presumption that parental involvement in the child’s life “will further the child’s welfare,” subject to an exception where such involvement would put the child at risk of suffering harm.⁹⁹ “Involvement” is defined as “involvement of some kind, either direct or indirect, but *not any particular division of a child’s time.*”¹⁰⁰ This reluctance to mandate equal parenting time may be no more than a reflection of the fact that families are infinitely varied and that individualised decision-making requires a degree of flexibility. In contrast, calls for a presumption of “equal parenting time” continue in a number of US states and, to date, they have had mixed success.¹⁰¹

The approximation rule

The American Law Institute sought to provide parents and courts with a predictable method of calculating how parenting might be shared when it proposed the “approximation rule”, allocating custodial responsibility “so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions” in the past.¹⁰² It differs from the

⁹⁴ Family Law Act 1975, s. 61DA, as amended by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011. See, Bruce Smyth *et al*, “Legislating for Shared-Time Parenting,” *op. cit.*, 120.

⁹⁵ *Ibid*, s. 65DAA(1) (emphasis added).

⁹⁶ Smyth *et al*, “Legislating for Shared-Time Parenting,” *op. cit.*, 119.

⁹⁷ *Ibid*, 135-140.

⁹⁸ Katharina Boele-Woelki, Frédérique Ferrand, Christina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny and Walter Pitens, *Principles of European Family Law Regarding Parental Responsibilities* (2007, Intersentia, Antwerp), Principle 3.10.

⁹⁹ Children Act 1989, s. 1(2A) and (6), as amended by the Children and Families Act 2014.

¹⁰⁰ *Ibid*, s. 1(2B), emphasis added.

¹⁰¹ In Arkansas, the court is empowered to award joint custody, that being defined as “the approximate and reasonable equal division of time with the child by both parents”: Ark. Code Ann. § 9-13-101(a)(5). In Florida, equal parenting time legislation passed by the legislature was vetoed by the governor: Alexandra Fernandez, “Florida Legislature Passes Bill on Shared Parenting,” *WUFT-FM*, March 16, 2016: <https://www.wuft.org/news/2016/03/16/florida-legislature-passes-bill-on-shared-parenting/> See also, Michigan House Bill No. 4691, introduced in 2017 (presumption favouring “substantially equal parenting time”, meaning not in excess of 200 nights with either parent) and Kansas Senate Bill 257, introduced in 2018 (creating a presumption that equal or approximately equal time with each parent is in the best interests of the child.).

¹⁰² American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), § 2.08(1).

older primary caretaker presumption, since it allocates time *between* the parents, rather than “time spent” being the tie-breaker in a custody decision. The drafters made clear that their goal was “to clarify and define the best-interests standard rather than to eliminate it”,¹⁰³ albeit some commentators question that is the effect of their proposals.¹⁰⁴

The rule permits of a host of exceptions, *inter alia*: to permit the child to have a relationship with each parent; to accommodate the firm and reasonable preferences of a child who has reached a specific age; to keep siblings together; to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability.¹⁰⁵ Other exceptions address abuse of the child by the parent, domestic abuse, parental drug or alcohol abuse and persistent interference with the other parent’s access to the child.¹⁰⁶

Supporters of the approximation rule argue that it serves the child’s need for stability and continuity.¹⁰⁷ Others raise many of the criticisms that were levelled at the primary caretaker standard: the conflation of quantity and quality of time spent with the child; its backward-looking nature; and its potential for gender bias.¹⁰⁸ While one commentator condemned it as representing a “19th century mechanistic view of the universe”,¹⁰⁹ something that is the antithesis of individualised decision-making, another observed that considerable judicial discretion is introduced by the exceptions.¹¹⁰ The rule was adopted first in Virginia and it is under active consideration in a number of other states.¹¹¹

Continuing challenges

As we have seen, legal systems increasingly support the involvement of both parents in a child’s life, sometimes employing presumptions to secure that end. Most are alert to the danger of exposing children to domestic abuse, and seek to protect them from it, again using presumptions, this time against giving custody of children to an abuser or by making special mention of abuse as a factor that might warrant departure from other presumptions.¹¹² Yet the intersection of these two issues continues to be problematic for legal systems, with lobbying for law reform often taking on a very gendered dynamic.

¹⁰³ *Ibid.*, § 2.02.

¹⁰⁴ Warshak, “Parenting by the Clock,” *op. cit.*, 118.

¹⁰⁵ *Principles of the Law of Family Dissolution*, *op. cit.*, § 2.08(1).

¹⁰⁶ *Ibid.*, § 2.11(1).

¹⁰⁷ Katherine T. Bartlett, “Prioritizing Past Caretaking in Child-Custody Decisionmaking,” *Law and Contemporary Problems*, 77, no. 1 (2014): 29, 33.

¹⁰⁸ Warshak, “Parenting by the Clock,” *op. cit.*

¹⁰⁹ *Ibid.*, 162.

¹¹⁰ Robert J. Levy, “Custody Laws and the ALI Principles: A Little History, a Little Policy and Some Very Tentative Judgments,” in *Reconceiving the Family: Critique of the American Law Institute’s Principles of the Law of Family Dissolution* (2006, Robin Fretwell Wilson, ed., Cambridge University Press, Cambridge): 67, 76-77.

¹¹¹ W. Va. Code § 48-9-101 *et seq.*

¹¹² For a fresh examination of how such cases can be managed, see, Peter G. Jaffe, Claire V. Crooks and Nicholas Bala, “A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes,” *Journal of Child Custody* 6, no.3 (2009): 169.

As a wealth of case law in numerous jurisdictions demonstrates, some parents, motivated by nothing other than resentment or anger stemming from their own relationship with the child's other parent, seek to damage or destroy the child's relationship with that parent, obstructing their attempts to maintain involvement in the child's life. While it is sometimes associated with the largely-discredited work of late Richard Gardner,¹¹³ there is no denying the existence of what is variously known as "parental alienation" or "implacable hostility".¹¹⁴ Two qualifications are important to note in this context. First, children sometimes evince what appear unduly negative attitudes toward one parent for a range of reasons, some having more to do with the dynamic of family breakdown than with the conduct of the other parent.¹¹⁵ Respecting the child's rights requires that legal systems listen to the child rather than assuming a particular cause for the child's position.

Secondly, one parent's opposition to the continuing involvement of the other may be motivated by the valid desire to protect the child (and herself) from the very real dangers posed by further exposure to domestic abuse. Domestic abuse is not solely a male-on-female phenomenon, sometimes being perpetrated by women against men and in same sex relationships, but that is how it manifests most frequently. Respect for equality is rightly valued highly, but that is no reason to ignore reality. Nor should legal systems be blind to the inherently controlling nature of domestic abusers¹¹⁶ who use presumptions favouring the continuing involvement of both parents in the child's life to ensure that they remain present in the lives of their children and, thereby, their adult victims long after parental separation.¹¹⁷

There is emerging evidence of abusers who create a narrative that uses the allegation of abuse itself as evidence that the survivor is engaging in parental alienation: that is, to characterise the survivor "as a pathological or vengeful liar who is severely 'emotionally abusing' her children by falsely teaching them to hate and fear their father".¹¹⁸ A recent empirical pilot study in the United States found that abusers have employed this tactic successfully, with some courts appearing to show bias against mothers who report abuse and sympathy for fathers who claim parental

¹¹³ In his self-published work, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (2nd ed., Creative Therapeutics, 1998), he described what he claimed was a "syndrome" whereby mothers so denigrated the child's father that the child developed an irrational hostility towards, or fear of, the father and refused to have contact with him. His assertions have been rejected by numerous commentators. For an overview, see, Joan S. Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation," *Journal of Child Custody* 6, nos. 3-4 (2009) 232. The American Psychiatric Association never accepted the existence of the so-called syndrome. Its highly-influential, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., 2013, American Psychiatric Association Publishing, Arlington, VA): 715-716, discusses "Parent-Child Relational Problem" and "Child Affected by Parental Relationship Distress".

¹¹⁴ *V v V (contact: implacable hostility)* [2004] 2 F.L.R. 851 (England).

¹¹⁵ Joan B. Kelly and Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome," *Family Court Review* 39, No. 3 (2001): 249; Nicholas Bala, Barbara-Jo Fidler, Dan Goldberg and Claire Houston, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts," (2007), *Queen's Law Journal* 33, no. 1 (2007): 79.

¹¹⁶ Evan Stark, *Coercive control: The entrapment of women in personal life* (2007, Oxford University Press, New York).

¹¹⁷ Allen M. Bailey, "Prioritizing Child Safety as the Prime Best-Interests Factor," *Family Law Quarterly* 47, no. 1 (2013-2014): 35 (US); Adrienne Barnett, "Contact at all costs? Domestic violence and children's welfare," *Child and family Law Quarterly* 26, no. 4 (2014): 439 (England).

¹¹⁸ Joan S. Meier and Sean Dickson, "Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation," *Law & Inequality* 35, no. 2 (2011): 311, 317.

alienation,¹¹⁹ findings that are consistent with earlier qualitative research in England.¹²⁰

Another way in which domestic abusers exploit the legal system is by misuse of the legal process, a phenomenon that has attracted growing academic attention comparatively recently. This manifests itself when the abuser uses the courts or other state agencies as a means of continuing to harass the survivor, and tactics include “a range of behaviors such as filing frivolous lawsuits, making false reports of child abuse, and taking other legal actions as a means of exerting power, forcing contact, and financially burdening their ex-partners.”¹²¹ Again, a facet of the coercive control dynamic at play in domestic abuse, it is also known as “abusive litigation”,¹²² “paper abuse”,¹²³ “custody stalking”¹²⁴ and, rather more dramatically, “judicial terrorism”.¹²⁵ While much of the research and scholarship comes from the United States, the issue has garnered attention in Canada¹²⁶ and a recent study from New Zealand highlighted the problem there.¹²⁷

Conclusions

Making generalisations about legal systems is a perilous, if not foolhardy, business. These concluding observations simply highlight some of the key themes to emerge from this chapter using the CRC as the lens.

When they allocated responsibility for a child, legal systems should accord primacy to the best interests of the child, the fundamental principle that sits alongside the child’s equality and participation rights. Identifying what will serve the interests of children generally is challenging, but most will benefit from the involvement of both – or sometimes more – parents and other family members in their lives. In a dispute case, however, the court is not making a decision about an abstract, general child. It is addressing the needs of a particular child, something that warrants individualised assessment of that child’s circumstances and listening to that child’s views.

Respecting equality is important, of course, but it requires no more than treating what is the same in a like manner. It does not require treating different situations in the same way. In this context, it is crucial not to conflate adult equality rights with those of children. Sometimes the two coincide and legal systems are increasingly

¹¹⁹ Meier and Dickson, “Mapping Gender,” *op. cit.*.

¹²⁰ Barnett, “Contact at all costs?,” *op. cit.*.

¹²¹ Susan L. Miller and Nicole L. Smolter, “‘Paper Abuse’: When All Else Fails, Batterers Use Procedural Stalking,” *Violence Against Women* 17, no. 5 (2011): 637, 637-8

¹²² David Ward, “In Her Words: Recognizing and Preventing Abusive Litigation against Domestic Abuse Survivors,” *Seattle Journal for Social Justice* 14, no.2 (2015): 429. See also Emmaline Campbell, “How Domestic Violence Batterers Use Custody Proceedings in Family Court to Abuse Victims, and How the Courts Can Put a Stop to It,” *UCLA Women’s Law Journal* 24, no. 1 (2017): 41.

¹²³ Miller and Smolter, “‘Paper Abuse’,” *op. cit.*.

¹²⁴ Vivienne Elizabeth, “Custody stalking: a mechanism of coercively controlling mothers following separation” *Feminist Legal Studies* 25, no. 2 (2017): 185.

¹²⁵ Nancy J. King, “Naming the Judicial Terrorist: An Exposé of an Abuser’s Successful Use of a Judicial Proceeding for Continued Domestic Violence,” *Tennessee Journal of Race, Gender & Social Justice* 1, no. 1 (2012): 153, 153.

¹²⁶ Esther L. Lenkinski, Barbara Orser and Alana Schwartz, “Legal Bullying: Abusive Litigation within Family Law Proceedings,” (2003) *Canadian Family Law Quarterly* 22, no. 3 (2004): 337.

¹²⁷ Elizabeth, “Custody stalking,” *op. cit.*

appreciating that the gender, marital status and sexual orientation of parents are not significant markers. Parental hostility and domestic abuse create a different dynamic since the presence of either can have a negative impact on the child. If presumptions are to be employed in decision-making, they must be crafted carefully in order to accommodate important distinctions.

In the past, children were too often commodified, with their time being given to adults on the basis of custody and visitation. Employing a presumption that favours equal parenting time risks repeating that mistake by portioning out the child's time in a manner that is deemed fair to the parents. It is only by having a child-centred focus – putting the child's best interests first, examining the impact on the child of a particular course of action and listening to the child – that legal systems will meet their obligations to children.