Regulating Family Responsibilities

Edited by Jo Bridgeman, Heather Keating and Craig Lind, University of Sussex, UK

This collection brings together some of the most eminent and exciting authors researching family responsibilities to examine understandings of the day-to-day responsibilities which people undertake within families and the role of the law in the regulation of those understandings. The authors explore a range of questions central to our understanding of 'responsibility' in family life: To whom, and to what, are family members responsible? Is responsibility primarily a matter of care? Can we regulate family responsibilities by paying those to whom we owe responsibility? Or by using others to fulfill our caring obligations for us? In each of these circumstances the chapters in this collection explore what it means to have family responsibilities, what constitutes an adequate performance of such responsibilities and the point at which the law intervenes.

The heart of this collection is an interest in the ways in which a changing family affects people perceive and exercise their family responsibilities and how the law attempts to regulate (and understand) those responsibilities. The chapters range across intact andrated or fragmented families, from lone and shared parenting in single homes to caring as households (and even across international boundaries) to reflect on the actual responsibilities of family members and on the fulfilment of financial responsibilities families. This collection seeks to advance our understanding of the attempts of the law, its limits, in regulating the responsibilities which family members take for each other.

This collection is a work of staggering breadth and is a significant contribution to the most important issues for contemporary family law. Its three parts combine to offer a critical and thoughtful examination of the ever-evolving shape of families and the challenges faced by law in responding to the shifting boundaries of family responsibilities.

Julie Wallbank, University of Leeds, UK

Sonia Harris-Shute, University of Birmingham, UK

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The Court of Motherhood: Affect, Alienation and Redefinitions of Responsible Parenting

Ruth Cain

The judge pounds his gavel on the bench. He is getting larger by the minute and his old white face suffuses with scarlet like a syringe taking in blood. The defendant, meanwhile, is growing smaller and smaller. No bigger than a Barbie doll, she scrambles up on to the edge of the dock and balances there precariously in high heels. When she starts to shout at the judge, her voice is a gerbil squeak:

“All right, you really want to know the truth? Guilty. Unbelievably, neurotically, pathologically guilty. Look, I'm sorry, but I have to go now. For heaven's sake, just look at the time.” (Pearson 2002, 173)

During the ascendance of Western neo-liberal politics and its complex penetration into concepts of the 'good' citizen-self (Rose 1999a; 1999b; 2007; Lister 2003; Reece 2003), issues of affect, emotion and care occupy a rather confusing space within citizenship discourse. As Lynch and others have shown (Lynch 2009; Lynch, Baker and Lyons 2009), the productive citizen is practically 'care-less'; he has no obligations to others which are not fulfilled by someone else (Lynch and Lyons 2009). However, most notably during the Blair era in the UK, a new focus on 'responsible' parenting emerged (Lister 2003), emphasizing that the political burden on parents was now to police themselves effectively as carers and producers of future citizens, with the state stepping in to provide re-education in the form of parenting classes and training and in the more intractable cases, coercive measures such as Parenting Orders and Anti-Social Behaviour Orders targeted at both parents and children (Holt 2008). The movement toward enforcing personal responsibility for children is part of a broader set of powerful communitarian ideals spanning both 'new' Labour and Conservative political spectrums (Giddens 1991; Etzioni 1993; Reece 2003; 2006a; 2009); the new citizen must be the best person he or she can be, embarking on a lifetime project of self-improvement and discovery, in order to show herself worthy of liberal freedoms (Reece 2003; 2006a; 2009). In similar vein, Nikolas Rose describes a 'complex of marketization, autonomization and responsibilization' which absorbs contemporary subjects (Rose 2007, 4). The disproportionate impact of the parental responsibility doctrine on mothers has already begun to be discussed by feminist commentators (Gillies 2005; 2007; Holt 2008). Part of this disproportionality has been theorized by feminists to be a result
of new gendered parenting ideals which might not initially appear detrimental to maternal autonomy or status, as Susan Boyd summarizes:

As the result of a rethinking of paternal responsibility in child welfare and development, and the emergence of new socio-legal norms around shared parenting, understandings about parenthood are being reshaped (Smart 1999). For instance, fatherhood has become a new policy concern, with initiatives to promote "good" fathering and social responsibility on the part of men, whether they are fathers within intact families or outside that structure. As Richard Collier and Sally Sheldon say, "fathers are now seen to have a more direct, unmediated relationship to their children" (2008: 117) than in the past. In other words, paternal relationships with children are no longer mediated by the type or quality of relationship that a father has with the mother. (Boyd 2010, 142)

The cases dealt with in the later part of this chapter tackle exactly this conception of 'involved' fathering in the era of the 'responsible citizen', and demonstrate its considerable impact on constructions of mothering and maternal responsibility. This chapter argues for the importance of a concept of affective (rather than simply socioeconomic, or cultural) inequality in the exercise of law; what amounts to a very old message (mother-blaming versus the valorization of paternal involvement in the lives of children) is couched in new codes, citing persuasive doctrines of "children's best interests", fairness, and progress away from old post-separation norms in which the separated or divorced mother got, or was left with, the children. While Carol Smart (2004) has already written of the disproportionate emotional and social impact on women of 'fifty-fifty' shared custody arrangements, and Susan Boyd notes how women's autonomy may in fact be reduced by the need to facilitate equal or near-equal contact with fathers, it is necessary to consider the affective impact of a post-separation environment in which both maternal autonomy and connectedness appear under threat (Boyd 2010). Given the large numbers of separated parents bringing up children and the amount of policy and media initiatives geared toward encouraging them to do this 'together', this is a huge personal and cultural as well as legal issue.

This chapter follows a previous article (Cain 2009) which theorized maternal depression and its 'biological' coding as, in part, a manifestation of a disturbed maternal affect which combines the biological with the social, legal and political, engendered by a complex of toxic factors such as the dominance of 'gender-neutral parenting' discourses, the economic pressures of the neo-liberal economy, and the continuing force of psychoanalytic and developmental assumptions about the fundamental role of mothers in the lives of children. This could be simplistically summarized as the formalization of a 'do-it-all' model of responsible motherhood, in which the mother is increasingly expected to manage the increasingly valorized role of the father in the child's upbringing and difficult emotional issues which result from parental separation. While it is maternal 'hostility' or 'implacability' rather than depression which is the topic here, I suggest that this complex of damaging factors must be considered when assessing any form of negative maternal affect which is posited in legal reasoning and policy initiatives. It will be my argument here that legal scholars cannot examine maternal responsibility without taking account of the affective context of mothering, whether we describe the affective burdens of mothering as maternal depression, stress, or 'hostility', and connects these to new and frequently coercive legal conceptions of good mothering. These are examined in the specific context of two recent UK Family Court cases where mothers were presented as failing to fulfill the role of the good gender-neutral parent in the fraught context of family break-up. My argument is that we must specifically connect the rise of legal scapegoats such as the 'no-contact mother' who frustrates or blocks paternal access to children (Rhoades 2002) with the difficult affective environment of neo-liberal or 'new capitalist' motherhood (Pitt 2002; Quiney (Cain) 2007). We must also take note of how the longstanding failure of the liberal, entrepreneurial subject to encompass mothering and, indeed, all forms of unpaid caring work is creating new disciplinary forms of 'bad parent', and that the majority of these 'bad parents' are women. I also argue that the function of law in producing 'bad mothering' from 'gender-neutral parenting' discourses demonstrates both the impossibly and the unfairness of excluding gendered affect from legal reasoning on family issues. As Richard Collier has recently written (2009: 366), the intensive study of 'emotion, gender and law' has never been more pertinent or necessary than in the era of 'responsible citizenship'.

Motherhood, Affect and Neo-Liberalism

In order to examine maternity in law as a specific repository (and source) of negative affects, we need to explore two interconnected fields of scholarship before approaching some case law in detail. These are, first, the concept of the 'neo-liberal subject/citizen' as one determined by (to summarize a vast range of relevant factors briefly) vast consumer choice, increasing inequalities of wealth, corporatization, globalization and therapeutic culture (Rose 1999a; 2007), and the important and relatively critically neglected field of affect theory, most recently and originally expounded by Teresa Brennan (2004). Both fields of study help us to understand a Western world in which it is increasingly the psychological self which is perceived as the source of every problem. Responsibility to the self

1 This chapter lacks space to discuss the detailed applications of affect theory to transdisciplinary work in the social and 'hard' sciences, and recent attempts to address and include the biological in cultural and social theory; nonetheless, I write on the assumption that to reference the biological is not essentialist, but rather essential to a nuanced appraisal of contemporary subjectivity (see further Cain 2009, Papoulias and Callard 2010).
and to others, conceptualized as self-control and self-knowledge, is of central importance to therapeutic and confessional public cultures (Curtin 2011). In such cultures, the ‘feminized’ emotional self may be encouraged to ‘open up’ for catharsis, examination and judgement, but its less controlled, destructive elements must be continually assessed and repressed by the responsible citizen-worker. The ‘healthy’ self-controls its own emotions efficiently and does not burden others, and certainly not the economy/citizenry/state, with them (Swan 2008a).

Despite (or perhaps because of) the apparent emotional openness of media and literary cultures, it has been noted that workplaces and business locations remain areas of strictly limited and controlled affect in which ‘feminized’ expressions of emotion or personal openness are frowned upon (Swan 2008a; 2008b). In these contradictory environments, and under economic and social conditions which press women back to work while simultaneously valorizing intensive and perfectionist ‘stay-at-home’ motherhood (Hays 1998; Warner 2005; Quiney (Cain) 2007; Barker and Lamble 2009), women with children are placed in an exceptionally difficult and confusing position. They are in some circumstances urged to give vent to the emotions engendered by motherhood, its undoubtedly massive life changes, satisfactions and traumas; and at others they must forcibly repress such evidence of feminized affect (in many public arenas, but specifically in the workplace: see further Adkins 1995; 2005; Duxbury and Higgins 2001; Lewis 2001; Correll et al. 2007). In my previous article on post-natal depression I focused on depression as a contemporary ‘habititus’; the ways of being and feeling oneself to be a mother, good or bad (Cain 2009, 124). Here I expand discussion of ways of feeling and being a mother to encompass those feelings and identities which may lie beyond the mother herself, in the social, cultural and legal attitudes to her which she can never ignore or entirely exclude.

Love Labour, Caring and Maternal Affective Inequality

Affect theory starts with mothers. Teresa Brennan’s concept of affect transmission has the maternal body as its foundation; what she calls the ‘foundational fantasy’ is an early act of mother-blaming, originally performed by the infant:

[T]he mother, especially, is seen as the natural origin of rather than the repository for unwanted affects. It is not that we dump on her (all our screaming rage and pain). It is rather that she dumps on us. For her occasional irritation or distraction she is held culpable, made the cause of our rage and pain. We project onto her our helpless and unbearable passivity, our lack of agency. ... Situating the mother as the passive repository for the child’s unwanted raging affects is, perhaps, the first powerful instance of the transmission of affect. (2004, 12-13)

Thus the mother is the first taken-for-granted carer and dumping-ground for feelings the child-subject does not want to own (see also Kristeva 1982). As Brennan notes (2004, 13), the ‘foundational fantasy’ positions the mother as producing negative effects rather than suffering them. (This is strikingly reproduced in the literature on maternal depression, which focuses almost exclusively on the potential damage to the child of the depressed mother (Kuretsjen and Wolke 2001; Peterson and Albers 2001; Newport et al. 2002). Kathleen Lynch’s (2009) analysis of the uncommodifable, inalienable nature of ‘love labour’ gives a more positive view of maternal and other caring work (in that the male and female carers she surveyed were proud to identify themselves as carers and saw caring work as fundamental to their identities; but still she emphasizes the extent to which carers are devalued and disrespected (and thus feminized) in neo-liberal economies (Lynch 2007; Lynch 2009; Lynch and Lyons 2009). ‘The idealised rational economic actor ... model of the citizen, that valorises the entrepreneurial self, has taken hold and with it a new macho-masculinised public sphere has emerged’ (Lynch and Lyons 2009), 92). In a context where caring is so frequently perceived as feminised and able, while paid work partakes of ‘masculinised’ cultural cachet, the status of the ‘gender-neutral parent’ is particularly fraught, as discussed below.

Similarly, as Maureen O’Brien writes, ‘the taken-for-grantedness and intangibility of love labour and the emotional work it includes have meant that the resources and energies required for its production have been overlooked’ (O’Brien 2009, 159). Lynch, however, makes clear that care is not an optional value in any society: ‘[w]hether people subscribe to other-centred, solidarity-oriented norms or not, their own existence is dependent on the successful enactment of such norms’ (2009). The compulsoriness of care seems to entail women’s compliance in particular, and the ingrained nature of intensive mothering norms (alongside a vast complex of gender-forming factors, including the education of young girls in caring behaviours and interpersonal relating) has much to do with this (Warner 2005; Quiney (Cain) 2007). Following the ideas of Carol Gilligan, O’Brien argues that ‘[t]hrough the internalisation of caring ideologies, and a moral imperative to care, mothers’ identities, regardless of positioning and resources, become inescapably bound to emotional caring’ (2009, 160). Although clearly it is important to ‘avoid generating essentialist and romanticised’ (2009, 160) images of maternal love, the emotional and iconic pull of maternal status within the culture of the neo-liberal individual remains striking (representing, I would argue, an area of experience in which all the unacceptable feminized affects which may not be expressible in other areas of life, such as the social, sexual or work-related, may be collected, shared and valorized). The private (and frequently unpaid) carer is more extensively required than ever, to clean up after and care for the bodies of the elderly, children, and the sick, to service the unmet domestic needs of ‘higher-level’ workers in the neo-liberal society (see Kittay in this volume), yet she is arguably less respected than ever.

As love, care and solidarity involve work, affective inequality also occurs when the burdens and benefits of these forms of work are unequally distributed, and when this unequal distribution deprives those who do the love, care and solidarity work of important human goods, including an adequate livelihood and care itself (Lynch 2009).
Affective inequality thus appears to entail not only being ignored, but often actively devalued: as the novelist Elizabeth Troop wrote in _The Woolworth Madonna_ (1980), it is too often assumed that 'people who love people are the sickest people in the world' (37). This assumption also recalls the 'abjection' of the originary mother-figure, cast into a realm of non-signification in order that the subject may form in language, as theorized by Julia Kristeva (1982). To deploy a highly inelegant but accurate term, the 'dumppee' of difficult affects, particularly the working or single mother, receives a negative image of herself from media, employers and others, as well as suffering the general strain of circumstances, dual work burden, time famine, and so on. Previously, I have explored the connection of depression not just with the immediate post-natal period but with maternity as a whole experience or identity (Cain 2009, see further Nicolson 1998; Thompson 2006). The evidence for depression in working mothers is particularly striking (Brown and Bifulco 1990).

The Impossibility of the Gender-Neutral Parent

Thus, the overlap of unaccommodating 'love labour' with economic labour appears to be causing particular problems for mothers of young children, problems which may be treated as 'post-natal depression' but which clearly have a more complex aetiology than hormonal or endocrine disturbance, as per the dominant medical model. I have previously (Cain 2009) mentioned the interactions of maternal distress with issues pertaining to the 'new economy', such as the need for two-worker families to support inflated household and personal debt, particularly in high-density urban areas, and the increasingly extreme demands of twenty-first century work environments in terms of hours, 'commitment', training and availability, which affect both women and men (Adkins 1995; 2005; Sassen 1998; Standing 1999). Any list of toxic cultural factors affecting mothers must now include the ascendance of the 'perfect', near-obsessive parent who utterly devotes herself to producing a 'rounded individual' and successful, adaptable future citizen-worker (Lister 2003; Warner 2005). UK parenting policies of the New Labour era, specifically the organization of parenting orders and classes, manifest these contradictions and anxieties, appearing to intrude into the lives of 'problem families' without providing either adequate economic support or a coherent social strategy for workable, affordable childcare (Holt 2008). These inadequacies inevitably affect mothers more than fathers (despite the rhetoric of 'gender-neutral parenting' in which they are generally couched (Gillies 2003)) since a welter of statistics shows that mothers, whether they work or not, and whether or not the male partner works, continue to shoulder the majority of childcare and domestic work (National Statistics 2000; Crompton 2006; Crompton et al. 2007). There has recently been a new popular focus on the differentiation normally made in Family Court residence proceedings between a mother who stays at home and is thus recognized as the 'primary carer', and a mother who works (see further Reid 2009 for a typical media-spotlighted story; briefly, a mother who has stayed at home with her children all their lives and never worked is far more likely to be recognized as the primary carer of the children, with subsequent impact on decisions made about whether and how much they will reside with her). So while working mothers still tend to 'do it all', the partner of a full-time working mother will tend to have a far stronger claim to shared residence and possibly 'equal shares' of the children (Smart 2004).

The impressive empirical evidence of the disproportionate impact of working parenthood on maternal rather than paternal lives thus indicates a need to re-examine working life balance debates, which, like so many public debates on parenting issues, are usually couched in gender-neutral terms despite the highly gendered contexts in which they take place (Brown and Bifulco 1990; Duxbury and Higgins 2001; Lewis 2001). Powerful cultural discourses such as that of the selfish, materialist and uncaring working mother placing ‘career’ before children are clearly entrenched by continual media reports and high-profile psychiatric investigations into the ‘damage’ done to children by mothers’ absence at work and increased stress at home (Brooks-Gunn et al. 2002). The chaotic, harassed and internally divided working mother who appears in popular novels such as the bestselling _I Don’t Know How She Does It_ (Pearson 2002) is an exhausted, disappointed and self-hating woman. Pearson’s heroine regularly appears in a fantasy ‘court of motherhood’ to hear her harsh judgements of her own conduct played out, with her maternal ‘consciences’ rather aptly played by an ‘old white’ male judge (72). In the light of evidence that full-time employment actually increases vulnerability to depression in mothers, feminists perhaps need to look not only at the time-famine and stress factors (despite their undoubted contribution to depression) but to take good note of the contempt and anxiety ‘dumped’ on working mothers, who, I would suggest, are victims of forced signification: made to personify and manifest the stresses of socio-economic and cultural transformations of the family, with clear consequences for self-esteem.

Working Mothers and Negative Affect

Consonant with the wage and leisure-time penalties disproportionately suffered by working mothers (Benard et al. 2007), studies suggest that they also suffer from a more general devilment of themselves and their skills as workers and as mothers, by co-workers, employers and other peers (Cuddy et al. 2004). The working mother has become a powerful focus of coerce and confused legal/cultural anxiety, and individual women bear this negative affect. We should note here the splitting of working mothers into two equally coercive representational

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2 On the appropriatity routinely dealt out to single mothers since the Second World War and their popular and political association with poverty and the production of criminality, see further Fineman 1991; Silva 1996; Gillies 2005; 2007; Holt 2008.
strands: the middle class, presumably married mother ‘selfishly’ choosing to work and the working class, often single mother ‘selfishly’ choosing not to (and claiming benefits) (Barker and Lamble 2009). Thus, the opprobrium attaching to working motherhood is organized around access to private funds (generally presumed to be provided by a (male) partner) which determines the ‘appropriate’ style of mothering to be adopted. Changes to the traditional male-breadwinner family thus appear to be forced into the private domain of negotiation within couples or (less frequently) other families members such as grandparents, with little if any governmental or legislative acknowledgment of the enormous and continuing stress and inequality, both at home and at work, faced by women with children. Thus, narratives of her misery and anxiety like I Don’t Know How She Does It compete for public awareness and validation with stereotypical depictions of the working woman as a failed, incompetent mother (frequently in the form of investigations designed to measure deficits in the behaviour or ‘adjustment’ of children who spend time in nurseries or with other carers when their mother is at work: Bowlby 1973; Belsky 1986; Hays 1998; Brooks-Gunn et al. 2002; Leach 2003). Such portrayals clearly only serve to further entrench the marginalization and demonization of ‘failing’ mothers, and thus to pathologyize ‘problems with motherhood’ as signs of weakness and poor citizenship.

New Forms of ‘Bad Mother’

While ‘bad’ mothering in its many forms has always been a focal point for condemning rhetoric and various practices of legal and cultural control (Roberts 1993; Ladd-Taylor and Umanzky 1997; Quiney (Cain) 2007), the predominance of therapeutic culture, neo-liberal ideals of continuous self-regulation, and the rise of new types of gender ‘equality’ discourse such as that espoused by the ‘fathers’ rights’ movement (Smart 2004; Collier and Sheldon 2006; 2008; Wallbank 2007; Collier 2009) are clearly creating new kinds of maternal blame-targets. I now go into some more detail on some examples recently highlighted in media and Family Court reports. These concern shared residence and the rights of each parent to involvement in and responsibility for their children’s day-to-day lives after separation, themes already much discussed by many feminist family law commentators (Kaganas and Piper 2002; Rhoades 2002; Smart 2004; Smart and May 2004; Collier and Sheldon 2006; Wallbank 2007; McIntosh and Chisholm 2008; Smyth 2008; 2009). Each presents a flawed version of (possessive, smothering, hysterical and/or ‘greedy’) motherhood, while at the same time deploying the ‘gender-neutral’ language of shared responsibility most recently favoured by the UK family courts. Current UK family law practice creates an expectation that agents will act rationally and even unemotionally in highly emotional situations (see further Reece 2003 on the expectation of ‘reasonable’ behaviour during divorce; Berns 2000; Cantwell 2004; Smart and May 2004). The reasonable mother thus actively facilitates access and even helps the father to cope with his duties as ‘sharing’ parent (Masando and Newham in this volume; Wallbank 2007; McIntosh 2009).

As Carol Smart writes on the ‘micro-politics of child contact’, the affective burden of residence decisions is undoubtedly greater for mothers because of the pressures of the ‘good mother’ trope which demands constant presence and involvement in the life of the child:

It is empirically established that mothers do most of the caring for children – even if some fathers do a substantial amount. ... For mothers, reducing the amount of caring for children that they do is associated with guilt and loss ... giving up ‘caring time’ has emotional connotations for mothers. For fathers, love may not be so bound up with caring activities and responsibilities ... [T]he demand by fathers for caring time to be taken away from mothers creates emotional pain (especially if it is the father’s new partner or mother who will do the work of caring). (Smart 2006, x)

Smart also notes that ‘while fathers’ anger has found a “legitimizing” political voice [in the fathers’ rights movement], mothers’ anger has not’ (ibid., xi). The lack of maternal ‘voice’ in family law discourse is a disturbing reproduction of traditional constricts of the silenced, sacrificial mother in philosophy, psychoanalysis and developmental psychology (Walker 1998; Quiney (Cain) 2007). The affective burden of repressed, unexpressed anger is thus a resonant one for the study of governmental, legal and cultural constructs of mothers.

‘Parental Alienation Syndrome’ as ‘Evidence’

In this highly emotional context, and when women’s unexpressed anger has so frequently been associated with the higher preponderance of psychiatric diagnoses such as depression and ‘borderline personality disorder’ (Chesler 1972; Ussher 1991; 1997), the deployment of psychiatric testimony in Family Court cases is an area of particular interest and concern for feminist analysis. Since the 1980s,

1 of which is concerned with facilitating and monitoring contact and with enforcing it if the residential parent fails to comply with court orders for contact (Wallbank 2007, 190). No duty is imposed on the non-residential parent who fails to comply with a contact order (Bainham 2003, 74–5; Wallbank 2007, 192).
syndromes have formed part of evidential arguments which postulate certain types of ‘difficult’ defendant or litigant, such as the battered wife (Downs 1996; Raitt and Zeedyk 2000). These defendants become legally comprehensible as representatives of a specific set of (frequently gendered) reactions, responses or actions. In family law contexts, ‘syndrome evidence’ can appear to provide a ‘scientific’ explanation for the apparently inexplicable behaviour of a parent or child, which will provide a gloss of objectivity to any judgement based upon that explanation. The so-called ‘Parental Alienation Syndrome’ (PAS – a term coined in 1985 by an American psychiatrist, Richard Gardner, to describe his clinical impressions of cases he believed involved false allegations of child sexual abuse; see further Brush 2001, 383; Johnston 2005) has not received official recognition as a psychiatric disorder, and has been deemed inadmissible by the British courts (Sturge and Glaser 2000; Fortin 2003, 263; Bainham 2005, 161). Nonetheless, its definitions and terminology recur frequently in high-conflict residence and contact cases. According to Gardner, PAS supposedly involves the effective ‘brainwashing’ of a child through a campaign of denigration of one parent by the other to which the child contributes in order to gain the ‘alienating’ parent’s approbation (Gardner 1998). Gardner’s recommended treatment for serious cases is to transfer custody of the child from the “beloved” custodial parent to the “hated” parent for deprogramming. This may entail institutional care for a transitional period, and all contact, even telephone calls, with the primary caregiver must be terminated for “at least a few weeks”. Only after reverse brainwashing may the child slowly be reintroduced to the earlier custodian through supervised visitation. (Brush 2001, 385 quoting Gardner 1991, 16–17)

The series of events described in TE v SH and the judicial remedies eventually adopted closely follow Gardner’s description of PAS and his suggested ‘cure’ (TE v SH, S (by his guardian ad litem, the National Youth Advocacy Service) [2010] EWHC 192 (Fam)) despite the fact that, as already noted, PAS has been explicitly rejected as evidence in British courts. The suggestions of alienation and the recommendation to remove S from his mother’s care came initially from the child and adolescent psychiatrist in the case, Dr W, in a report which Bellamy J preferred to the opposing one of the National Youth Advocacy Service.

4 Raitt and Zeedyk (2000) discuss a number of ‘syndromes’ in their combined psychological and legal contexts and versions, arguing that the ‘implicit relation’ of psychology and law creates formats for legal actors into which individuals are inevitably forced, and that both disciplines reinforce each other’s ‘objective’ hegemony in this process.

5 See further TE v SH, S (by his guardian ad litem, Ms J) [2010] EWHC B2 (Fam) and In the matter of S (A Child) [2010] EWCA Civ 325, two subsequent hearings in the case, in which counsel for S argued against his forcible removal from his mother’s home and suggested that he might self-harm if transferred directly to his father. An order was eventually made for an interim 21-day stay with foster carers, after which S would be transferred to reside full-time with the father.

The case gives an insight into the hegemonic force of psychiatric testimony, even in a form that has been specifically barred from evidential use; an effect which, as Raitt and Zeedyk argue, is particularly likely where judgements about women and mothering are being made (2000). It would take another chapter to productively discuss the ‘implicit relation’ (Raitt and Zeedyk 2000) which so effectively enmeshes psychiatric testimony with the operations of law, and the specific authority of scientific expertise which imposes ‘syndrome’ and ‘disease’ models on supposedly dysfunctional personal behaviour. Ultimately, and as Raitt and Zeedyk note, productive shifts in the treatment of gendered individuals in the courts will not be achieved until psychiatrists and psychologists produce workable definitions of ‘normal’ behaviour in traumatic situations, such as sexual assault, abuse or family break-up, which impact upon women in specific, gendered contexts and ways (2000, 178–9). Until that time, it can fervently be hoped that legal practitioners will take increasing note of the ‘medical models’ well-publicized tendency to pathologize women, in a much-needed step toward the ‘epistemological transformation’ for which Raitt and Zeedyk call (179).

Bearing in mind the affective burdens I have already mentioned, their primary impact upon mothers, and the inadmissibility of Parental Alienation Syndrome in the British courts, I turn to a recent case in which residence was transferred to the father of a child described as at risk of emotional harm due to his mother’s apparent failure to facilitate contact with his father. The recent case of TE v SH is a particularly interesting example of the insidious gendering of ‘gender-neutral’ judgements about parents which, I suggest, illustrates the complex affective burden held by mothers and the peculiar power of ‘syndrome’-based reasoning in high-conflict disputes where psychiatric evidence is introduced. 4 It is not my point here to claim that all or even a majority of mothers are thus treated in court, to argue on behalf of the mother in the case, or to claim that her behaviour was in any sense ‘right’, but to point out the strikingly contradictory ways in which this behaviour and her responsibilities were constructed by the court. The facts of the case are distressing. S, an 11-year-old boy, had grown up with his mother (M) who had separated from his father before he was born. Contact with his father, which had never been more than alternate weekends and shared holidays, had not occurred since 2006 because of the child’s apparent wish not to see the father (F). There had been two previous orders for contact, but S refused to engage with them. The presiding judge, Bellamy J, noted ‘a consistent theme of concern’ about M’s hostility to contact between S and F ([110]). Although Bellamy J’s judgment criticized both parents, the assessment of M is far more detailed. M claimed to be open to contact, but failed to convince the judge of this.

S’s mother had ‘significant influence and power’ ([111]) in his life according to S’s guardian ad litem, who expressed surprise that M ‘had not been able to persuade S to even look at a letter from his father’ ([ibid]). S claimed that his mother

6 A similar case, In the Matter of R (A Child) [2009] EWCA Civ 1316, was distinguished in TE v SH.
had in fact given him the choice whether to read it or not, but for the guardian ad litem this was not sufficient evidence of ‘tough love’, which (she suggested) would have meant making S write to his two half brothers and to F (ibid.). Thus, M had an obligation actively and even forcibly to encourage and facilitate contact, not merely to allow it. The judge made it clear that F did not fit contemporary ‘bad’ father stereotypes, and presumably was therefore deserving of better treatment by the mother of his child: he was ‘not one of these fellacious fathers often referred to by way of justification for the existence of the Child Support Agency’ ([11]). The fact that M refused child support for S was regarded as ‘specious’ (ibid.) and as another attempt to cut F out of the boy’s life by undermining the economically supportive actions of a normatively ‘good’ father.

Bellamy J conceded that F did not have insight into his own more troubling actions. These were mostly attempts to gain control of some kind, such as asking for a DNA test to be carried out on S, to change his surname and to have him privately educated. Bellamy J noted that it was ‘unfortunate that the father did not have the foresight to contemplate the damage that might be caused by making these applications’ ([7]). He also noted that the father’s single-minded pursuit of contact is blind both to the risk of failure and to the potentially adverse impact on S of continuing the fight ([8]). However, the judge’s exploration of F’s lack of insight into his actions ended in a favourable comparison with M, who, since she did in fact possess insight into her actions, could thus be expected to have done more to facilitate contact. Thus, the father was shown as impulsive and aggressive in his ‘fight’ for his son, but not as malignant, while M was calculating and immanent in her passive resistance to contact. M also appears as devious, while F is straightforward: ‘her efforts have been intended to persuade the court that she has tried her best to make contact work’ ([12]); ‘I am not wholly convinced that she means what she says’ ([11]).

M was assessed by various professionals, the most damning assessment being by a Dr W, a consultant psychiatrist specializing in high-conflict disputes. The phrase ‘parental alienation’ was specifically used by Dr W to explain S’s intolerance of his father ([17]). S’s expressed wishes to stay with his mother were ruled ‘irrational’ ([20]) by Dr W and implicitly by Bellamy J, and not expressive of his real needs and wishes; a conclusion the latter reached in the teeth of the report of the National Youth Advocacy Service representative who firmly believed it would be damaging for S to be moved to live with his father. (According to Bellamy J, this (female) officer had become ‘emotionally involved’ in the case and had lost objectivity ([21])). In his final decision, the judge said that M had ‘behaved wilfully’ in creating an antipathy to the father in S ([38]) (although, importantly, the court did not actually find that S had been exposed by M to distorted belief systems or false allegations ([45])). Bellamy J justified his decision to transfer residence to F by reasoning that permanent emotional damage would occur to S if he did not re-establish a relationship with F; that F, unlike M, was likely to maintain appropriate contact with the other parent; and that M admitted having ‘lost control’ of S in the matter of maintaining contact with F ([93]). In an intriguing and strongly worded assertion of the importance of the biological/genetic tie between father and son, Bellamy quoted from an earlier judgment stating that ‘[S] needs to be helped to come to terms with the fact that his father’s DNA is in every cell of his body and what that implies for his own self-identity’ ([73]). He also commented that ‘both parents bear responsibility for … mistrust and tension … whereas in the father’s case that was the result of lack of insight and empathy … in the mother’s case it was more wilful’ ([80]).

I have discussed TE v SH in detail, since it gives such an interesting description of the mother’s responsibilities and failings in the context of ‘responsible parenting’. As noted in the judgment, S had never actually lived with his father, and the parents had separated before he was born. In the judge’s summation of the case, it was, however, clearly M’s maternal duty actively to foster a contact relationship that would aid S’s development as a full individual – conceptualized as a ‘balanced’ relationship with both parents, and one that would acknowledge the genetic link between himself and his father. Particularly striking is the portrayal of the mother throughout the judgment as quietly and cunningly duplicitous, ‘Wilful’, and complacent. The father’s unempathetic, insensitive but implicitly forthright attitude to the ‘fight’ is clearly preferred. The gendering of the portrayal is subtle but clear: the mother who has looked after the child from birth exerts a rather sinister power over S, which the nonplussed and excluded F is driven to battle against in order to re-establish the primal, genetic link to his son. The judgment resonates strongly with the arguments of critics such as Wallbank (2007), Rhodes (2002) and Featherstone (2010) who suggest that arguments for greater parental equality in the form of shared residence orders conceal a number of difficult gendered assumptions, including the image of the ‘gatekeeping’ mother. This mother holds too much (feminizing?) power over the children and tends to resist correct facilitation of relationships with the father until forced or persuaded by higher authorities (Featherstone 2010, 214). Brid Featherstone’s recent research with fathers involved in contact disputes uncovered representations of mothers as ‘powerful unpredictable women who were supported by feminized services’ (ibid., 223). The portrait of M in TE v SH presents a similar picture: M could not be relied upon to enforce previous contact orders with the ‘tough love’ apparently required. ‘Feminized services’ are strikingly represented by the NYAS worker who supported S’s right to choose to stay with M, and was judged to be acting in a feminine, ‘emotional’ and unobjective way.7

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7 It should be noted that in contexts where paternal conduct is considered to be less than ideal, a non-resident father’s voicing of the assumptions named by Featherstone (that the mother has brainwashed his children, and that judges and other involved professionals are biased toward women/mothers) will tend to be sharply dismissed as ‘obsessive behaviour’; see further the damning judicial remarks in Re O (Children, Contact: Permission to Appeal), Re B (A Child) (Contact: Permission to Appeal) [2006] EWCA Civ 1199.
The case of A v A (Shared Residence and Contact) (2004), a case cited approvingly by fathers’ rights groups, demonstrates a slightly more measured judicial approach to the apparently possessive and manipulative mother (A Father Mr A) v A Mother (Mrs A), their Two Children (B and C) (Represented by the National Youth Advocacy Service (NYAS) and their Guardian Mrs P) (2004) EWHC 142 (Fam) 2004). The case concerned two children, B and C, a boy aged 11 and a girl aged 9, who were living with their mother, Mrs A. Mr A had made an application for a joint residence order and defined contact order in 2002, complaining that Mrs A was making unilateral decisions about the children’s health and education. Mr A asserted that following his objection to a change of school for C, Mrs A informed him that C was frightened of him, and contact between Mr A and C ceased in March 2002. A consultant psychiatrist, Dr L, noted that C had previously been very fond of her father but had now turned against him and did not want any contact. Mr A then applied for a sole residence order in his favour, arguing that Mrs A would abuse a shared residence order. Wall J was not complimentary to either parent in his judgment, describing

a virtual state of war ... going on for over 5 years. It appeared that the first response of both parents in the event of even the most minor disagreement was to rush to solicitors or to make applications to the court ... the bundle [of court papers] was a sad testimony that two intelligent people had lost all perspective and common sense in their hatred of each other and their need to battle and win over their ex-partner. I was clear that they had lost the focus on their primary role, which was to raise their children to adulthood ... as best they could. ((23))

This warring couple represent vexatious divorce litigants, the antithesis of responsible agents in contemporary family law discourse (Reece 2003; 2006a; 2006b). Since the court made a finding of fact that Mrs A’s allegations of sexual abuse were unfounded, Wall J decided to impose an order for shared care of the children with equal time in both parents’ care. Although the judgment, including quoted sections from the report of Mrs P, the National Youth Advocacy Service representative involved in the case, criticized the parents both individually and jointly, and ‘alienation’ was not specifically mentioned as it was in TE v SH, it is still clear who is most at fault in creating the schism between father and daughter:

Parents can impose their own wishes and feelings onto children and thus frustrate the formation or maintenance of a proper and loving relationship between the children and the other parent. C had been persuaded by her mother that she did not love her father and did not want to see him, when the opposite was the truth. ((24))

8 See, for instance, the Families Need Fathers website’s review of case law on shared residence and responsibility: <http://www.fnf.org.uk/law-and-information/shared-residence>.

In addition, ‘some of Mrs A’s actions were particularly inappropriate and damaging to the children’ ((25)). Once again, the circumstances surrounding the initial split and the events that led to Mrs A’s initially having sole residence of the children are unclear, but Wall J does allude to the divorce being ‘defended’ initially; Mrs A is said to have ‘distorted and misinterpreted entirely innocent activities’ because of ‘the intensity of her feelings towards her former husband’ ((24)). In a particularly ironic twist, Mrs A is described as withholding C from contact with her father after she had heard Woman’s Hour on Radio 4 debating the issue of children forced to continue to have contact against their will after disclosures of abuse.

With each party acutely aware of their own ‘rights’, Wall J makes it clear that responsibilities have been shirked on both sides. Over-emotionalism is seen to be rife: the judgment takes a disapproving tone when it describes Mr A’s continued attempts to achieve ‘an acceptance that Mrs A had significant psychological problems, which were the primary causal factors in the family’s previous difficulties’ ((100)). Mr A is described as stating ‘in an increasingly temperate fashion’ that he found Mrs A ‘revolting’, ‘flesh-creeping’ and ‘a monster’ ((102)). His antipathy represented a failure to ‘focus primarily on the needs of the children’, although it was noted that ‘a man in Mr A’s professional position would inevitably feel intensely bruised and battered by the allegations of sexual impropriety’ ((103)). So, while Mr A is accused of untemperate behaviour, it is rendered at least partly explicable by the severity of the allegations Mrs A has made. No such mitigation is possible for Mrs A, who is portrayed as acting out of intense hatred for Mr A and a misguided sense of victimization which cannot be contextualized by the facts given in the judgment. In this context, Mr A’s demands for her to acknowledge that she has a psychiatric disorder seems rather consonant with the tenor of the case as a whole. In the final parts of the judgment Wall J stresses further the need for each parent to relinquish their personal battle for control in favour of shared parenting practice in which ‘the home offered by each parent [is] of equal status and importance to the children’ ((121)). Wall J notes that he has ‘no doubt at all that [Mr A] wishes to be in control’ ((125)) and that ‘this case has been about control throughout: Mrs A sought to control the children, with seriously adverse consequence for the family. She failed. Control is not what this family needs. What it needs is co-operation. By making a shared residence order the court is making that point’ ((126)). Once again, although both parents are criticized as ‘control freaks’, stronger criticism falls on Mrs A as the instigator of the trouble.

It can be clearly seen that suffocation, excessive intimacy, hysterical imagination, possession, alienation, and selfishness are represented as specifically maternal affects in these high-profile residence and contact cases. For holding on too tightly to the children whose care is indisputably ‘dumped’ on them in broadly social terms (since they are women and the care burden falls more heavily on them in many ways), they may risk (at worst) imprisonment for defying contact orders (see, for example, Re Y (2008) EWCA Civ 635). As noted, while fathers in high-conflict disputes certainly receive their share of criticism in the recent
case law, it is far more muted than that meted out to mothers;

and as Wallbank (2007) notes, while mothers may be harshly punished by imprisonment or transfer of residence for disobeying contact orders, no such punishments exist for fathers who do not facilitate contact, implying that the law places less weight on paternal ‘recklessness’ than maternal ‘gatekeeping’. A particularly disturbing facet of recent case law involving high-conflict separations and children is the relative frequency of recorded claims by fathers that mothers have ‘boundary personality disorder’ (claims which are by no means always given psychiatric support (see, for example, V v V [2009] EWHC 1807 and V v V [above]). Boundary personality disorder is the notorious ‘dustbin’ diagnosis for difficult women who do not appear to be respecting established social or sexual boundaries (Ussher 1991; 1997). In this context, Teresa Brennan’s remarks on an apparent increase in mother-blaming occurring in times of acrimony with boundaries and the loss of them are very pertinent. ‘Boundaries, paradoxically, are an issue in a period where the transmission of affect is denied’ (2004, 15). The child’s boundaries are clearly portrayed as easily invaded in the PAS scenario, whereby its individuality and emotionality can be effectively possessed by the ‘beloved’ parent/mother. Since mothers, and especially the sinister and possessive caricatures that can be made of them, threaten the loss of subjective boundaries, it is perhaps small wonder that we see their relationships with children in particularly emotionally fraught scenarios portrayed in this way, just as the negative affects actually borne by divorcing or separating mothers (women who have probably shouldered the main burden of childrearing and its associated low status, even before separation or divorce) in particular are ignored.10


10 Wallbank (2007, 196) elaborates upon the situation in which a mother may in fact be in fear of actual abuse: ‘[t]he need to prove the violence sets a high bar for women’. She also notes that in all the cases she examines, where abuse is alleged by the mother, ‘there is very little detail provided on the fathers’ conduct or personalities’. '[t]here may also be a range of significant forms of behaviour that women identify as placing children at risk such as substance abuse or mental health problems, yet they are not necessarily taken as sufficient cause to negate the presumption of contact.’ In such cases it could be argued that the mothers involved bear the burden of sometimes well-founded anxiety for their children as well as that of being portrayed as ‘difficult’, since the mere risk of violence is not sufficient to offset the presumption of contact with the father (Kaganas and Piper 2002).

On feminist strategies for dealing with the problem of violence, abuse and parental conflict in divorce and separation, see further Reese 2006b.

Conclusion

It is not the point of this chapter to claim that it is only mothers, or indeed women, who suffer the impact of abject affects such as to cause depression or excessive stress; such states are not restricted by gender, age, class or ethnicity. Nonetheless, they clearly tend to collect in the dumping-grounds of neo-liberal subjective hierarchies, where people perform low-status work, fail to ‘create wealth’, or bear the stigmatizing legacies of sexism, racism, colonialism and heteronormativity. I have tried to show here some of the ways in which women and particularly mothers may be left unable to give back ‘what doesn’t belong to them’ (Caputi 2003) – to refuse the affective burdens of feminization and the care vacuum in neo-liberalism – and how legal language and assumptions around post-separation parenting are contributing to this. Mothers are being too often portrayed as the suffocating agents of negative-affect, modern-day Medeas destroying with too much misdirected ‘love’. I would argue that such authoritative negative portrayals will inevitably feed back into affective disturbance: women are left with only impossible and contradictory maternal and other self-images to identify with (since previous self-images, as ‘liberated’ consumerist single woman or valued worker, will very likely suffer serious blows after having children: Cusk 2001; Quiney (Cain) 2007). There must be a point for practical legal reform to be made here: the family law courts would doubtless do a fair farer and more effective job of adjudicating disputes between separated parents if they dropped the pretence of gender-neutrality which creates distorted and frequently impossible expectations of parents, particularly, I would argue, the inevitably gendered mother. Sadly, with the concepts of the gender-neutral ‘good parent’ and responsible ‘shared parenting’ holding such powerful political sway across the world, such change seems far off.

The almost complete exclusion of maternal suffering and even of maternal welfare11 (Lister 2006) from legal and critical consideration (except in the ‘disease model’ format of depression validated by high-status psychiatric evidence)

11 See, for example, in Australia, The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (‘Shared Parental Responsibility Act’ creating a presumption in favour of broadly equal ‘shares’ of time to be spent with each parent after separation; amending the Family Law Act 1975 (Cth), s 61DA (McIntosh and Chisholm 2008). See also outlines for reform of current Australian shared parenting policy, which has been heavily criticized (Rhoades 2010); for a therapeutic approach to high-conflict post-separation disputes over children in which alienation is alleged, see further Zeitlin 2007.

12 Smart (2004) argues that the overwhelming emotionality of divorce and separation is in fact denied to both parents by the legal process (as Reese (2003) emphasizes in her book on the construction of the reasonable and rational ‘good divorce’), and that law must find a way to tackle the very gendered hatreds and entrenched positions fostered by relationship break-up (see further Berns 2000; Cantwell 2004; Featherstone 2010.). I emphasize maternal affect here since, as Smart notes (2006), mothers’ disappointment and anger are given so much less public expression at the current time.
revolves around its immeasurability and formlessness; the same deadening
depersonalization, the sense of feelings impossible to expose and express to
others, emerges in women’s personal narratives (Cain 2009). The particular
neoliberal edge of perfectionism, competing demands and compulsory self-criticism
which I have noted here is, I suggest, an inevitable accompaniment of forms of
social organization which ignore and denigrate ‘love labour’ and caring relations,
even as they demand them in order to operate profitably. Images of suffocation and
alienation pathologize the too-powerful, alienating mother shown as seeking to
monopolize her children. The negative affect attributed to such a mother represents
her failure of responsibility to children, society and law and effectively negates
possibilities for more open, productive narratives of care and relationality in the
lives of adults and children. The ‘dumping’ of affect on mothers perceived as too
powerful, devious and hysterical represents a dangerous further step toward the
normalization of a destructive cycle of ‘bad’ maternal images. It is exceptionally
difficult under current social and legal conditions for a mother to resemble the
good gender-neutral parent beloved of responsible citizenship discourse. Too
close, and she risks excluding the necessary paternal involvement; too distant,
even at work, and she has forgone the few traditional privileges of maternal love
labour – that is, the assumption of greater entitlement to the domestic care (and
implicitly, love) of children.

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