In the best interests of the child?
A case study of the psychological discourses of the custody decision-making process in a South African context

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Abstract

This study focuses on the process of custody decision-making in a South African divorce context with the aim of critically examining the operation of the principle of the best interests of the child. A narrative approach is incorporated into Parker and Fairclough's discourse analytic approaches in the context of an instrumental case study. More specifically, the focus falls on moving beyond the understandings of custody embodied within the current psychological literature in order to examine the relationship between theory and practice and to view custody as a dynamic process at both a textual and analytical level. Concepts of dialoguing, context, audience and intertextuality together with a storied approach are central. Further, an attempt is made to provide a disruptive reading of the case through the use of notions of power, ideology and institutional practices embedded within the case and its broader contexts. The analysis demonstrates the need for decision-making to be viewed as a broader process situated across multiple professional, institutional and socio-political texts and contexts. Further, it is argued that in order for the process to uphold the principle of the child's best interests, specialised training must be supplemented with changes at the level of policy, aimed at moving toward a more inclusive, process-oriented approach to custody decision-making.

Preface:
Introducing the principle of the best interests of the child

The principle

Located within a vast body of literature and a range of interpretive lenses, the principle of the best interests of the child remains the central notion in this study and the narrative through which it is constructed. Enshrined within the United Nations Convention of the Rights of the Child (1989), the best interests' principle asserted the centrality of examining the manner in which children had been, and would be, positioned in several contexts over which government and various other institutions had input.

Serving as the most detailed and comprehensive international human rights' instrument of relevance to children, the UN Convention attempted to bridge issues of universalism and cultural relativism in order to foreground the centrality of children's rights (Alston, 1994). However, attempts to facilitate a more nuanced examination of children's rights and interests in specific cultural contexts gave rise to a tendency to overlook the specific content of the principle. While allowing the possibility for the contestation of meaning and an examination of power dynamics within a given context (An-Na'im, 1994), a lack of specificity therefore also resulted in the space for debate remaining a rather empty one.

Child custody and the best interests' principle

One context in which the best interests' principle is of relevance is the custody decision-making process. Encompassing a range of possible legal and other institutional interventions, `custody decision-making' will be used in this study to refer to the procedures surrounding the placement of minor or dependant children whose parents either have already, or intend to, divorce (Barnard, Cronjé & Olivier, 1994). Instances such as fostering, adoption or sexual abuse in which children's physical placement is called into question are therefore excluded from the present analysis.

However, although relevant to custody decisions, the best-interests remains a fairly nebulous principle within local contexts despite its centrality following on South Africa's ratification of the UN Convention in 1994 (see National Programme of Action Steering Committee, 1997). Consequently the principle remains one that is frequently touted, but perhaps more problematically applied. The purpose of the present study will be to attempt to consider both the ideological and pragmatic constraints that form the context for this reality, and that therefore inform the implementation of the principle in South Africa's custody decision-making process.

Chapter 1 -
Knowledge bases and lenses:
Broaching the question of the best interests of the child

Examining the literature

The body of literature in which the present study is located that may potentially be drawn upon in informing custody decisions, is broad and diverse in nature. Accordingly what will be attempted is a critical overview and, ultimately, a statement regarding the gaps and silences that need be addressed. Central to this examination will be a critical gaze regarding the potential relationships (implicitly) set up between academia and practice. Although an artificial dichotomy, academia refers to the space of academic institutes in which theory and research in the field of developmental psychology is produced, while practice refers to the more applied context(s) in which this knowledge is put to use in making decisions. Such contexts include the work of clinical psychologists as well as lawyers and judges involved in custody work and thus faced with the opportunity to draw on the knowledge bases generated within a more exclusively theoretical setting. The central argument is that custody work should be informed by attending to children's best interests as they operate in theory *and* practice, rather than merely in theory.

Attachment literature

Despite the absence of a unified, coherent perspective (such as would be desired in legal circles), the contentious nature of the maternal bond reinforces the status of the quality of the parent-child relationship as an important contribution made by the attachment literature. Within the view of several authors (Bowlby, 1952; Winnicott, 1964, 1965), the maternal bond is of central importance during critical periods of child development, particularly prior to two-and-a-half to three years of age. This continuous contact is associated with healthy gains in physical, intellectual, emotional and social development, and the absence thereof with various degrees of pathology, from an impaired ability to

form intimate relationships to an 'affectionless and psychopathic character' (Bowlby, 1952; Winnicott, 1965). Therefore during critical periods in particular, even a neglectful home may be preferable to an institution in which the developing child is denied access to a stable, maternal figure (Bowlby, 1952).

However, while the need for some measure of direct, intimate and continuous care remains a fairly stable contention, several caveats have been added to it. For one, the child may be capable of multiple attachments to an extent that is highly adaptive (Ainsworth, 1973) and, secondly, it is the quality, rather than the absolute quantity, of care that determines the nature of attachments formed (Ainsworth, 1973; Rutter, 1972). It has thus been argued that a single figure is not necessary provided mothering is of a high quality and provided by persons remaining constant in the child's life (Rutter, 1972). Stability and continuity of both the human and physical environment is crucial in order to ensure the predictability that allows the child's internalisation of a dependable world-view (Goldstein, Freud & Solnit, 1973; Rutter, 1972; Winnicott, 1965). Thirdly, continuous care need not be provided by the mother so long as a process of identification occurs sufficiently to ensure sensitivity to the child's developmental needs (Winnicott, 1965). In Goldstein, Freud and Solnit's (1973) terms, the child requires a `psychological parent' - a daily available adult who provides the need for bodily comfort as well as companionship and affection, and with whom there is a reciprocity of feelings.

Post-divorce adjustment literature

One of the most definitive findings within the broader body of literature and post-divorce adjustment literature in particular, is the correlation between children's development and the degree and duration of conflict between parents (Hetherington, Bridges & Insabella, 1998; Kelly, 1998; Pruett & Hoganbruen, 1998; Roseby & Johnston, 1998; Sorensen & Goldman, 1990; Tschann, Johnston, Kline & Wallerstein, 1990). Thus an increase in the

degree and duration of conflict between parents has been shown to adversely affect children's psychological adjustment. Further, the effect of any given factor or feature such as socio-economic status or family composition is mediated via the parent's response to stress and the related disruption to intrafamilial relationships, including the capacity for child rearing (Hetherington et al., 1998). Therefore what is termed family processes or proximal mechanisms is the largest contributing factor to children's adjustment, suggesting that the presence of a stable, available parent able to provide for the child's needs may serve as a buffer (Hess & Camara, 1979; Wallerstein, 1987).

Nonetheless, there is fairly consistent empirical (and anecdotal) evidence that children from divorced families are at greater risk for adjustment problems than those from never-divorced families - even if the differences are statistically small (Amato & Keith, 1991; Hetherington et al., 1998; Kelly, 1998). While a fairly well regarded longitudinal study (Wallerstein & Kelly, 1980) indicated that children experiencing divorce in their latency years were significantly less well adjusted than those in their preschool years, other studies point to increased risk in younger children (Kelly, 1998; Roseby & Johnston, 1998). Greater risk is also associated with children (and parents) with pre-existing vulnerabilities such as a history of anxiety (Hetherington et al., 1998; Kelly, 1998; Wallerstein & Kelly, 1980). Moreover, risk for behaviour problems tends to be attributed to factors such as distress or instability present *prior* to the parents' separation, while emotional adjustment is the consequence of the presence of such factors *after* the separation (Tschann et al., 1990). It may also be that risks tend to manifest more potently during adolescence, including loneliness, a sense of deprivation and neediness, anxiety regarding opposite-sex relationships and commitment (Wallerstein & Kelly, 1980), as well as academic problems, substance abuse and lower socio-economic achievement (Hetherington, Bridges & Insabella, 1998). Such findings therefore highlight the necessity of examining children's adjustment in relation to the "extended aftermath of the marital

disruption" (Wallerstein & Kelly, 1980, p. 303), throwing into question the conceptualisation of divorce (and custody) as a discrete and linear process.

Specific criteria

Moving beyond general trends in research, others have examined more specific criteria for consideration in custody determinations in terms of what constitutes the child's best interests. With respect to overall areas of concern, a statistically-derived assessment model ranks the developmental needs of the child as the most important issue in custody determinations, followed by the parent-child relationship, parent-parent relationship and the parents' abilities (Jameson, Ehrenberg & Hunter, 1997). More narrowly, a continuum of factors were identified and ranked from the most important factor mitigating against a parents' custody to the least important one of less relevance in the custody decision. Sexual abuse by a parent was rated as the single most important criterion followed by physical abuse, the preferences and views of a child 15 years or older, the child's emotional needs, and each parent's ability to understand and separate the child's needs from his/her own. Near the lower end of the scale were keeping a young child and mother together followed by each parent's financial sufficiency, the degree of each parent's responsibility for the marital breakdown, keeping same sex parent and child together, and each parent's religious orientation. While 15 years was deemed the age at which children's wishes were given the most credence, the deterministic value of preferences decreased incrementally with age from 15 down to less than 5 years (Jameson et al., 1997).

In two further studies, corroboration for these general findings is evident. In particular, the wishes of the older child, the ability to separate interpersonal from parental issues, and each parent's psychological stability (indicated, for example, by active substance abuse or the presence of physical or sexual abuse) were found to be significant factors in the

decision-making process (Ackerman & Ackerman, 1997; Keilin & Bloom, 1986). While decisions were unlikely to be made on the basis of a single issue, additional factors were the quality of the respective child-parent relationships, parenting skills, conflict between parents, and attempts to alienate the child from the other parent. Several evaluators also stipulated that siblings not be separated in the event of sole custody determinations (Keilin & Bloom, 1986), while others mentioned geographical distance between parents as a consideration.

Critiquing the gaps within the literature

Despite the vast and diverse body of literature available, several gaps exist. This is particularly true of the manner in which divorce and custody are conceptualised and, partly related to this, the manner in which particular research questions are addressed. Both in incidental and intentional ways, divorce and custody have largely been construed as a static, linear process and thus the task of exploring it has been to focus on and operationalise `endpoints' as the site for investigation. Accordingly, the attachment literature explores the *consequences* of maternal deprivation, while another important body of literature focuses on children's *post*-divorce adjustment. Further, specific criteria tend to inform decision-making at a given point in time rather than within the broader context of the life of the families concerned.

Thus while some acknowledgment has been given to custody as part of a process, this has largely not been reflected within actual research. Moreover, the empirical work that has been undertaken has largely been quantitative in nature, involved in measuring variables, deriving scales, or conducting factor analyses using fairly large sample sizes. Even Wallerstein and Kelly's (1980) extensive longitudinal study that attempts to move beyond typically narrow conceptualisations of divorce adopted within quantitative research, juxtaposes terms that this study holds to be inconsistent, if not contradictory.

Divorce and custody is, as the authors point out, an "extended" process (Wallerstein & Kelly, 1980, p. 303). However, it must therefore consist of more than simply an "*after*math" (Wallerstein & Kelly, 1980, p. 303; emphasis added) - a realisation that demands a particular (and different) theoretical and methodological approach.

It is also of significance that little attempt has been made to address the fundamental question of the relationship between theory and practice that may similarly be consequent on the methodological approach typically adopted. Just as divorce and custody are construed as static and linear in nature, they are implicitly constructed as occurring in a closed system existing independently of a range of other variables. While some caveats or confounding variables may be named, the fact that several issues beyond the strength of the maternal bond, the age of the child, and the parents' continued capacity for child rearing might influence the process, has warranted minimal attention. This gap is symbolised most clearly by the fact that the relationship between theory and practice has yet to be systemically addressed. Indicative of a broader silencing within psychology as a whole, psychological knowledge regarding custody has tended to be produced within a vacuum thus obscuring a more informed and holistic perspective (see Rose, 1985, 1990). Both for practical and philosophical reasons it is argued that a shift in gaze toward the relationship between theory and practice is warranted and necessary in order to address the silences.

Critical perspectives within the literature

While the custody literature per se may largely reflect an historical silencing within psychology and the social sciences more generally, developmental psychologists have sought to embrace a more critical perspective that represents significant ontological and epistemological shifts from mainstream empiricism. Located within a broader shift from the notion of truths attainable through appropriate and rigorous scientific investigation, it has

been argued that the very concepts of `childhood', `parenting' and `family' central within developmental enquiry are socially constructed rather than discovered (Burman, 1994; Kessen, 1979). Thus developmental knowledge and state intervention in the form of legislation and institutional services (e.g. welfare, education, clinical care) reflect culturally and historically-specific discourses of childhood that describe and prescribe in a manner that represents development as a natural and universal process (Burman, 1994; Ingleby, 1974; Rose, 1990). Particularly due to the backing of evolutionary or socio-biological theory, developmental explanations therefore acquire an unassailable status through the absenting of referentiality and thus the context invested in its particular claims regarding the child and family (Burman, 1994). As Rose (1990) and Donzelot (1979) have argued, the appropriation of "scientific" knowledge by state institutional processes facilitates the policing of families and their normality, resulting in the "soul of the young citizen [becoming] the object of government through expertise" (Rose, 1990, p. 131). A critical, social constructionist perspective is therefore concerned with the notion that developmental psychology is a story told by someone for someone for a particular purpose (Morss, 1996) and, in turn, with dismantling the hegemonic nature and effects of developmental claims contained within such stories (Burman, 1994). Criticality also suggests a challenge to positivist quantification as a research methodology, resulting in a shift toward qualitative technologies and approaches such as narrative.

Stories or narratives of childhood

The notion of stories or narratives, as the above-mentioned statement suggests, has further utility within the present review and is clearly situated within critical, social constructionist approaches to developmental psychology. Moving quite close to Parker's (1992) use of the term discourse within a similarly anti-positivist approach, Stainton Rogers and Stainton Rogers (1992) argue that stories of childhood constitute webs of meaning and understanding that may represent shifting agendas of child concern. Stories

are historically located and reflect the views warranted by the ideologically dominant populus. Both psychological and cultural in content, stories constitute claims made to a normative, scientific truth despite the specific local setting within which they are told. Therefore rather than foregrounding uncertainty or the multiplicity of perspectives evident, attempts at systematising "take the form of a simplifying story, justified only for its capacity to create a passing order" (Stainton Rogers & Stainton Rogers, 1992, p. 78). Similarly, King and Trowell (1992) characterise the law as a truth-finding system that is responsible for the production of 'falsely consensual stories'. These are argued to be the stories that enable a perceived maintenance of social cohesion through asserting a universal morality that is ordered and makes sense. In critiquing the gaps and, ultimately, attempting to fill some of the silences, a more critical (developmental) literature that includes the notion of stories will be shown to offer a deepening of understanding to a more limited body of literature addressing custody *per se*. Further, the narrative approach will be supplemented with a discursive approach consistent with its critical, social constructionist roots (see Chapter 2).

Attempting to fill the silences

Taking the above-mentioned factors into account, the present study approaches the topic of custody in a conceptually distinct manner to the large body of literature outlined, moving away from custody as a singular event investigated via the methods of positivist quantification. Further, central to this move are the shifts incorporated in a critical, social constructionist approach suggested above. Drawing on a qualitative and discursive lens, an attempt will therefore be made to address the complexity of the decision-making process and the interrelationship between theory and practice that is largely silenced within narrower quantitative approaches.

Custody is purposively viewed as a decision-making *process* that potentially consists of multiple institutional interventions over a period of time (e.g. legal, psychological). Further, decision-making is viewed as constituted over time by a variety of interested parties all of whom have the potential to make discursive contributions to the process, and story, as a whole. A richer understanding of custody decision-making therefore requires a theoretical and methodological approach that views meaning as open to contestation and as constituted within, and across, multiple contexts with various forms of investment. In attempting to address the gaps and silences within the existing literature, it is thus necessary to draw upon a paradigm that rejects the notions of stasis and linearity. Rather than identifying the consequences of divorce and custody within a singular context, the present study therefore explores the construction and contestation of meaning from a psychological perspective, and an understanding of the multiple contexts in which this process (and story) is embedded. In so doing, the possibility of broadening the critical lens to encompass issues of practice will be facilitated.

Broadening the lens: The study's research context

Beyond attending to issues of theory and method in order to address the gaps within the literature, the present study also draws on, and is embedded within, a larger project. The present study stems from an ongoing project aimed at an in-depth assessment of the operation of the Family Court system in South Africa[1]. The project is multi-disciplinary in nature and has its origins in the University of Cape Town's Centre for Socio-Legal Research. Lawyers, psychologists, anthropologists and sociologists working in the Western and Eastern Cape and KwaZulu Natal have explored several components of the broader institutional system. These have ranged from the functioning of the pilot project Divorce Court in Cape Town, to parenting across cultures, and current practices of mental health professionals participating in custody work. Further, and of particular relevance to

the present study, the project as a whole proposes to move beyond the facilitating of academic debate and the production of academic material. It proposes to inform *practice* through the development of training material for dissemination amongst professionals involved in custody work, an area in which there is a dearth of specialisation and guidelines. Moreover, such guidelines will aim to encompass adequately the directive to address the best interests of the child.

Within the context of such an attempt, the relationship between theory and practice is rendered particularly salient, thus establishing a basis for the present study's goals. In extending upon the ongoing research project, the present study attempts to engage with and participate in an ongoing dialogue between theoretical propositions and the context of institutional practices with regard to custody decision-making in South Africa.

[1] Further details regarding the Family Court of relevance to the present study will be provided in Chapter 2.

Chapter 2 -
Methods, texts and contexts:
An approach to the best interests of the child

Outlining approaches

A central argument in this study is that the use of particular and different methods and texts is essential in order to work toward an engagement with custody that moves beyond current notions embodied within the literature. Along with the concept of the child's best interests, the approach adopted within the present study embraces particular philosophical ideas central to a broadly qualitative paradigm, incorporating the social constructionist notions of discourse and narrative as key epistemological lenses. Further, these lenses will be translated into the more specific forms of methodological praxis proposed by Parker (1990, 1992, 1994, 1997), Fairclough (1992; Fairclough & Wodak, 1997) and Reissman (1993). Finally, an instrumental case study (Stake, 1994) will be employed in order to facilitate the objectives set out, in particular attending to the complexity and process nature of decision-making, and thus the stories both told and untold.

In broad terms, the study therefore aims to embrace two central issues, both at a textual and an analytical level. Firstly, custody will be viewed as a *process* and thus as dynamic in nature. It is constituted over time by a variety of interested parties all of whom have the potential to make discursive contributions to the process as a whole, in the form of multiple legal, psychological and other interventions. Secondly, the *relationship between theory and practice* will be examined, requiring a broadening of conventional lenses and the exploration of multiple contexts informing the process. What Bakhtin terms a dialogical approach (Hitchcock, 1993) will therefore underpin the present analysis in order to explicate the possible ways in which the various texts and contexts might speak to, and with, one another.

Examining discourses

Central to the social constructionist, qualitative paradigm within which discourse analytic approaches are firmly embedded is the notion of language as a representational practice that constructs and positions objects and subjects (Parker, 1992). Rather than a transparent medium that reflects back to an autonomous and unknowing social world, facts and truths that can be intrinsically known, language invents, and is invented by, a particular socio-historical perspective at a moment in time. Thus viewed, language, and the texts that serve as the primary discursive medium through which language may be explored (Parker, 1990; Swartz, 1996), is dynamic. Language and discourses are constructive and constitutive, serving as representations of reality rather than that which fails to capture a truth that exists beyond language.

However, without explicitly engaging with the ongoing debates regarding what constitutes discourse and kinds of discourse analyses, Parker's (1992, p. 5) definition of a discourse as "a system of statements which constructs an object" will serve adequately to ground the present analysis. Discourses represent coherent systems of meaning that are realised in and through texts located within particular historical and ideological contexts. Further, while the process of analysis (necessarily) adopts the Derridean imperative that there is nothing beyond the text (Parker, 1992), there is a contingent awareness of the material practices within which discourses are necessarily produced and reproduced. As Henriques and colleagues suggest:

> Every discourse is part of a discursive complex; it is locked in an intricate web of practices, bearing in mind that every practice is by definition both discursive *and* material (Henriques, Hollway, Urwin, Venn & Walkerdine, 1984, pp. 105-6; emphasis added).

Parker's discourse

As has been suggested, despite an indebtedness to a range of influences that straddle disciplinary boundaries, the present analysis is closest to the works of Ian Parker (1990, 1992, 1994, 1997) and Norman Fairclough (1992; Fairclough & Wodak, 1997). Influenced by post-structuralist or deconstructionist ideas as well as the thinking of proponents of the Critical School such as Althusser and Habermas, Parker argues for the view that "social conditions give rise to the forms of talk available" (Burman & Parker, 1993, p. 3). Social conditions are viewed in hierarchical terms, with discourses reproducing power relations by bestowing rights to speak resulting in subject positions that accord with social structures and related ideologies (Parker, 1990, 1992). In so doing, discourses serve also to naturalise and render invisible that which is constructed along lines of power, thus producing ideological effects. Related to what Parker (1990) terms the `auxiliary criteria' for discourse analysis, discourses also support institutions by serving as a practice which maps out the material basis of an institution and the manner in which it operates. Accordingly, in an attempt to "alter[s] and so permit different spaces for manoeuvre and resistance", Parker's understanding of discourse analysis aims to uncover and disrupt notions of power, ideology and institutions rendered invisible within texts, but highly influential in terms of their respective social consequences (Parker, 1990, p. 201).

Although not followed in a linear or formulaic way, a set of interrogatory questions to be posed to texts/discourses has been suggested by Parker (1992) in an attempt to operationalise a discourse analytic approach critiqued for its rather abstract, inexact nature. In conducting the analysis along the lines suggested above, questions posed would therefore include what objects are referred to, what subject positions are created, and who is bestowed rights to speak (e.g. when psychologists speak, about whom and in what form, judges sum up arguments). Further, consideration would be given to how the discourse reflects on its own manner of speaking, what moral or political stances are

evoked, how the discourses emerged and are located historically, and what the points of overlap are within and between the discourses (e.g. legal and psychological discourses). Finally, the present study shares Parker's (1992) particular concern with issues regarding which institutions are supported or subverted by discourses, who is (dis)empowered through the use of the discourse, what practices are sanctioned, and who is allowed to tell their narrative, when and how. The aims facilitated by Parker's epistemological stance and methodological approach are therefore consistent with the critical agenda set up for the present study. In particular, Parker's approach facilitates an attempt to examine the relationship between knowledge and institutional practices obscured within typically positivist approaches to custody, and thus to examine the operation of power and ideology within this context.

Reframing Parker through Fairclough's discourse

While providing a theoretically and methodologically rich grounding for conducting the present analysis, certain limitations not explicitly addressed in Parker's approach may be overcome through the incorporation of Fairclough's model. While argued to be an attempt to address the overly abstract nature of Foucauldian approaches such as Parker's (Fairclough, 1992), Fairclough's stated intention to shift or disrupt what he terms `orders of discourse' betrays his indebtedness to Foucault. Thus although setting up his approach somewhat in opposition to Parker's, Fairclough's critical agenda is indicative of their differing, but not inconsistent, conceptualisations of discourse analysis. Both Parker and Fairclough attempt to trace contradictory or inconsistent elements within discourses/texts that reveal potential sites for discursive, and ultimately social, change. Moreover, despite a difference in languaging, this common aim is evident in Parker's (1992) concern regarding what discourse analysis can be used to *do* and Fairclough's proposal that discourse analysts should be *working* as "organic intellectuals" engaging in social movements (Fairclough & Wodak, 1997, p. 201).

Nonetheless, differences to be put to use in the present analysis are particularly apparent in the methodologies proposed by Parker and Fairclough respectively. Proposing to move beyond viewing and analysing discourses in broadly social terms, Fairclough's (1992) approach incorporates a narrower focus on linguistic and organisational aspects of the text, examining the manner in which texts are produced. Fairclough considers any discourse to be "simultaneously a piece of text, an instance of discursive practice, and an instance of social practice" (Fairclough, 1992, p. 4), thus viewing discourses as operating at multiple levels within a text. In particular, explicit attention to issues of text production, reader reception and the linguistic construction of text(s) are added to an existing Parkerian framework. Operating from the micro level of textual practice to the macro levels of discursive and social practices, discourses need thus be interrogated with a broader set of questions. An analysis drawing on Fairclough's (1992) approach thus begins with questions regarding who speaks the most (akin to Parker's notion of bestowing rights to speak), what are the grammatical features of the text, what vocabulary is employed, and whether there is contestation regarding the meaning or use of particular words. Further, at a higher level of analysis, one would question which discourses are drawn upon, how discourses construct phenomena (or subject positions), and whether there are links to prior texts. Finally, at the level of social practice, Fairclough is concerned, as is Parker, with the social and ideological matrix within which the text is situated, the hierarchical relations of power constituted, and the particular systems of knowledge reproduced.

For the purposes of the present analysis, it is significant that Fairclough's explicit focus on textual production in particular broadens the notion of texts, moving beyond Parker's fairly narrow focus despite potentially encompassing written, spoken, visual and physical forms (Parker & The Bolton Discourse Network, 1999). In contrast to Parker's selection of a specific passage, Fairclough's methodological approach to the relationship between

discourses and texts facilitates the use of a broader set of texts such as will be employed in the present analysis. In more explicit ways, the incorporation of Fairclough's work therefore facilitates an examination of context(s) as well as texts in relation to other texts. In contrast to a Parkerian approach in which discourses are examined in a single text through which they operate, Fairclough's approach allows history to be read and told across and between texts. While Parker's contribution to the notions of text and context is focused on the recognition that discourses are produced at particular historical moments, Fairclough's approach extends this to the possibility of explicitly examining the history *within* and between texts. Drawing on Kristeva's notion of intertextuality, Fairclough therefore shifts the idea of texts referring to other texts from an epistemological to a methodological approach (Fairclough & Wodak, 1997).

It is argued that the use of both Parker and Fairclough's not inconsistent conceptualisations of discourse analysis and context facilitates the construction of a theoretical/methodological approach appropriate to the task and texts at hand. Within such an approach, an engagement with both the narrow and broader textual and historical context(s) is central, as well as the multiple possibilities for dialoguing and interrelationships. Texts are constructed out of, and make reference to, snatches of other texts (Fairclough, 1992), and history is both within the text and that within which the text is located. The text both constitutes, and is constituted within, a story told and a story not told. As Foucault has suggested, history never stops and thus discourse analysis must address the "histories of the present" (Kendall & Wickham, 1999, p. 4). Embracing the above-mentioned ideas, the study draws on a range of texts, explicating and examining inter- and intra-textual connections as well as the role of power, ideology and institutional practices.

Examining stories and narratives

Further broadening the scope of the present analysis, the notion of stories or narratives[2] implicit within the epistemological stance of social constructionist/discourse analytic approaches will be extended into a methodological approach. Despite examining broadly the stories or perspectives told versus those silenced, the discursive frameworks set out above view the concept of story as fairly linear. While necessarily a simplification, as both developmental psychologists and social constructionists have espoused (Burman, 1994; Stainton Rogers & Stainton Rogers, 1992), the narrating of the (custody) story serves as an attempt to foreground and give voice to the multiple perspectives encompassed within the broader narrative.

While the notion of narrative and story (Crossley, 2000; Gergen, 1988; Reissman, 1993) employed will examine the critical perspective adopted by the producers of the texts, an attempt will also be made to use it in a more constructive, and less deconstructionist, manner. The position that narrative is that which might lend coherence will therefore be drawn upon (Crossley, 2000), alongside a call for the presentation of whole narratives (Reissman, 1993). The story or narrative of the custody decision-making process will therefore be that which simplifies, but also that which highlights what is otherwise obscured by linear institutional practices and the typically discontinuous nature of discourse analytic approaches. The incorporation of a narrative approach despite its determinedly non-specific methodology therefore facilitates the present study's aim to view custody as a decision-making *process*, and thus both to deconstruct *and* narrate the events that potentially address the question of the best interests of the child.

[2] While there is a politics surrounding the use of the terms `narrative' and `story', they will be used interchangeably for the purpose of the present analysis and in accordance with much of the literature reviewed (Crossley, 2000; Gergen, 1988).

Source material: A case study approach

In order to engage with the notions of story, history, text and context considered central in addressing the complexity of the decision-making process, a case study approach will be adopted. The case[3] to be employed was identified from a larger sample since it was judged to capture many of the dynamics within the custody process in a particularly rich manner, thereby serving as a useful reference point for ongoing research.

In accordance with Stake's (1994) typology, the present material is classified as an instrumental rather than an intrinsic or collective case study. Rather than the case itself being the primary focus, it is "of secondary interest; it plays a supportive role, facilitating our understanding of something else" (Stake, 1994, p. 237). The issue at hand, namely the constitution and enactment of the principle of the best interests of the child, is one broader than the case per se although an attempt will be made to maintain the tension between exploring the unique facets of the case and situating it within broader contexts. In so doing, attention will be given to notions of validity in qualitative research such as the distinction between analytic practice that *tells* or *shows* its insights (Wood & Kroger, 2000). Drawing on the methodological approach detailed, an attempt will be made to demonstrate the issues at hand through direct engagement with the case material, while drawing on the instrumental case study approach and the focus on (broader) contexts in order to narrate a larger story regarding custody. As Kvale (1996) suggests, validity within a social constructionist approach concerns contextualisation rather than generalisation. Valid claims require an examination of sources of invalidity, particularly through the adoption of a critical attitude toward the analysis, consideration of alternate

[3] McCall v McCall, 13788/92. While the case details have been provided for reasons of validity (and sound research practice), all names within the body of the text have been altered. This includes both the first names and surnames of the family, the judge as well as all psychologists and lawyers involved. This was done to reflect the fact that the analysis was concerned with institutional rather than individual practices or professional conduct, as well as a sign of respect for the family and professionals concerned. Accordingly, any similarity to the names of living persons is coincidental.

interpretations, the use of a theoretical framework, and reasoned judgements regarding the similarity of contexts about which suggestions might be made.

In order to achieve these ends, the identified case has been selected from a range of texts gathered as part of a larger project detailed previously (see Chapter 1). As one of several researchers participating in the project, I was responsible for collecting a sample of forty custody reports from psychologists involved in custody work in the Cape Town area. Of the forty reports, five were derived from an additional source, namely the Centre for Socio-Legal Research at the University of Cape Town. It is these five psychologists' reports together with further material obtained from the Centre and one of the psychologists contacted that constitutes the present case study (see Appendix A).

The total of eleven texts collected form part of a divorce and custody case conducted between 1989 and 1994 that tells the story of what will be called the Brodie family. The texts that will be drawn upon include: five reports from three court-appointed clinical psychologists; a confidential report by the family's private clinical psychologist; a report submitted by the Family Advocate; the legal heads of argument submitted by the parents' respective lawyers; and the judge's final order. Further, written commentary regarding the case sent by Mrs Brodie to a researcher at the Centre for Socio-Legal Research is also included. Except for the judge's final order that was obtained from Professor Gustav Fouché, a clinical psychologist and retired academic currently in private practice in Cape Town and experienced in the area of custody work, all texts formed part of the archives of the Centre for Socio-Legal Research at the University of Cape Town.

Acknowledging embeddedness: The legal and judicial context [4]

One aspect of the broader context that requires further explication is the legal and judicial practices that inform custody work within a South African context. Central to such institutional practices is what has already been referred to as the Family Advocate's Office.

Established by the Mediation in Certain Divorce Matters Act of 1987, the Family Advocate's Office represents one initiative provided to address the escalating divorce rate in South Africa, and thus the interests of a large number of children affected by custody processes (Burman & Derman, 1997). As part of the broader recommendation of the Hoexter Commission (1983)[5] that a family court system be implemented in South Africa, the Family Advocate's Office was empowered to institute enquiries into the welfare and interests of minor or dependant children in divorce matters (McCurdie, 1994). Through both the nature of the process and the reports compiled making recommendations to the court regarding custody and access, the role foreseen for the newly established Office was to reduce conflict in settlements and thus to safeguard the children's best interests. Further, rather than being restricted to the parties of South Africa's High Courts, legal activities regarding divorce, custody and access to children became the realm of an Office accessible to a broader cross-section of the population (and social class), thus potentially reaching and assisting many more of the children concerned.

In order to fulfil its role of reducing conflict and safeguarding children's best interests, the Family Advocate's Office attempts to function in an interdisciplinary manner by facilitating dialogue between legal and mental health professionals. A state-appointed advocate, the

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[4] Although a matter for debate, the differences and similarities between legal and judicial practices and context s do not form a focus of this study. Therefore the terms will simply be used to denote either the subject positions and institutional practices of lawyers and judges respectively or the broader context in which these practices might co-exist.

[5] See the South African Law Commission (1998) for a summary.

Family Advocate, serves as the child's legal representative and is empowered to request the input of either a Family Counsellor, a state-appointed social worker, or other relevant mental health professionals as required. The Office thus proposes to function as the "child's legal team", undertaking and managing an investigative process that attempts to protect children through making appropriate child-centred recommendations (McCurdie, 1994, p. 12). In so doing, the Office is ultimately able to assist the Court in its role as the upper guardian, or *parens patriae*, of minor children.

In examining the relationship between theory and practice within the present case, one of the aims of the study will therefore be to employ the methodological tools detailed in order to engage with the legal and judicial practices implicit within the operation of the Family Advocate's Office.

Chapter 3 –
Narrative activity:
Storying the question of the best interests of the child

The narrative as a whole begins not with the activities of professionals regarding what constitutes the best interests of the child, but with the parent's decision to separate for any number of potential reasons. Thus although typically not *the* origin of a linear process, the decision to separate provides a useful and appropriate starting point for an examination of the discursive activity which serves to construct the custody decision-making process.

The custody narrative

Constructed from a reading within and between a range of texts (cf. Fairclough, 1992), this narrative has therefore been begun with Mr Michael and Mrs Sharon Brodie's decision to separate in December 1989 after 17 years of marriage, following which Mrs Brodie moved from the family home into a hired house with the couple's children. Early in the following year, the couple was reconciled and Mrs Brodie and the children, Kim and Andrew, moved back into the family home in February 1990. However, the attempted reconciliation failed and in April 1990 Mrs Brodie repeated her earlier actions and left the family home with the children.

A few weeks later on 22 April 1990, Mr Brodie removed both children from their mother's care, resulting in Mrs Brodie making an urgent application to the court by means of which she was awarded interim custody of both Kim and Andrew. Mrs Brodie was then subsequently able to have her husband evicted from the family home in which he had continued to reside, and to return there with the children in May 1990. This home would be both Kim and Andrew's place of physical custody until the Judge's order would finally bring a degree of closure to the custody dispute almost four years later on 14 January 1994.

In the first of a series of maneuvers that would constitute the legal proceedings surrounding the Brodie family, Mr Brodie formally initiated divorce proceedings in January 1991 after nine months of separation, and a court date was set for 24 February 1992. As part of the resulting court order, an award of custody was made to Mrs Brodie with respect to both Andrew and Kim. However, on 11 February 1992 Mr Brodie indicated for the first time that he wished to have custody of one or both of his children. Accordingly, the custody matter was subsequently referred to the Family Advocate's Office who appointed clinical psychologist, Dr Samantha Kessel, to investigate. In the first of several reports she would submit over a period of the next twenty months, Dr Kessel recommended that custody of the children be split between the parents, with 13-year-old Kim to be placed in her mother's custody and 11-year-old Andrew in his father's.

In response to Dr Kessel's recommendations and apparently at Mrs Brodie and her lawyer's request, Mrs Michelle Croft, a private clinical psychologist with whom the family had had extensive contact, was requested to submit a report to the Court. In this report dated 23 February 1992, Mrs Croft was critical of Dr Kessel's investigation and recommended that the children remain in Mrs Brodie's custody until a more informed recommendation could be made to the Court with respect to Andrew's custody in particular. Nonetheless, on the basis of Dr Kessel's reports, Mr Brodie launched an application on 24 February 1992 to postpone the divorce action set for that date and to obtain interim custody of his son. However, for reasons that remain unclear, both the divorce action and above-mentioned custody application were settled in terms of a consent paper only four days later, and Mrs Brodie retained custody of both Kim and Andrew. Further, the Family Advocate appointed a second independent clinical psychologist, Mr André Smit, to counsel the Brodies and to monitor the family on an ongoing basis. This appointment also encompassed a mechanism whereby Mr Smit was

required to make a written recommendation to the Court at any time that he deemed it to be in Andrew's best interests to be placed in his father, rather than mother's, custody.

Approximately six months later on 7 September 1992, Mr Smit submitted a report to the Court as part of this mechanism in which he recommended such a variation in the custody order to take place from 1 January 1993. However, refusing to accept Mr Smit's recommendation that Andrew reside with his father, Mrs Brodie launched a counter application on 15 October 1992. On the basis of both Mr Smit and Dr Kessel's reports, the Family Advocate, Mr Alan Lombard, finally published his report on 16 November 1992 in which he accordingly recommended to the Court that that the final divorce order be varied and Andrew placed in his father's custody. The award of maternal custody for Kim was to remain unchanged and an undisputed issue with respect to the ongoing custody matter.

Reflecting her similar dissatisfaction with Dr Kessel's earlier report, Mrs Brodie and her lawyer subsequently requested an expert report from a third independent clinical psychologist, Mr Paul de Villiers, in order to dispute the now two-fold recommendation that Andrew be removed from his mother's custody. In a report dated 7 April 1993, Mr de Villiers was critical of aspects of Mr Smit and Dr Kessel's previous reports and recommended that both Kim and Andrew remain in their mother's custody. However, in contrast to Mr de Villier's recommendation and reiterating their previous findings, both Dr Kessel and Mr Smit submitted further reports dated 8 and 11 May 1993 respectively, recommending paternal custody for Andrew. Dr Kessel's report consisted largely of a commentary regarding an incident in July 1992 in which Mrs Brodie took Andrew to the police station to lay a charge against his father after Mr Brodie had caned Andrew twice. Only a few weeks later on 27 and 30 May 1993, Mrs Croft submitted two reports at Mrs Brodie's request that included the psychometric testing she had earlier recommended as a necessary addition to Dr Kessel's (inadequate) investigation. Representing the final of a

series of reports submitted by the four clinical psychologists involved in the custody dispute, Dr Kessel conducted a further investigation and submitted her final report. Consistent with all her earlier findings and those of Mr Smit, she recommended that Andrew be placed with his father.

In lieu of the pending court date to settle Andrew's custody, both Mr and Mrs Brodie's lawyers submitted their respective formal arguments dated 8 and 7 December 1993 respectively, arguing the reasons for each of their client's status as the most suitable custodial parent. Finally, on 14 January 1994 following a private meeting with Andrew to discuss his wishes, Judge Evan Mitchell delivered his judgment ordering that Andrew be placed in his father's custody and that such arrangements be made prior to the commencement of the new school year. More specific details regarding Mr Brodie's access to Kim and Mrs Brodie's access to Andrew were to be finalised later. Further, in a move that would keep the custody arrangement open to investigation (and potentially further contestation), the Judge ordered that the Family Advocate's Office continue to monitor Mr Brodie's custody of Andrew, and submit a report to the Court on or before 1 August 1994 in this regard.

As the above-mentioned exposition begins to suggest, while the custody narrative is one involving a variety of parties apparently driven by the question of the child's best interests, numerous other factors potentially come into play. Beginning with the parent's decision to act on the intent to separate and, by implication, restructure the *family* unit due to difficulties within the *marital* sub-system, the narrative is one that crosses boundaries. Further, the act of one parent making a request regarding custody and the other parent making a second independent request in direct opposition, is a process indicative of a deeper quality of interaction and dialoguing that will be argued to characterise the

decision-making process as a whole. Decision-making thus encompasses a range of sub-narratives, discourses and investments that require closer analysis.

The sub-narratives and their related discursive activities

Moving into the larger narrative in order to conduct such an analysis, layers of narratives constructed both within and beyond the context of the broader story can be read from the relevant texts. Further, these discourses will be considered through a variety of lenses, in particular, psychological, legal and judicial.

Mr Brodie's temper

Perhaps one of the instances in which the quality of the narrative and the discursive activity is most apparent is with regard to the issue of the father's temper and its role in informing the various professionals' decision-making process. What is described by Mrs Brodie as her husband's "ungovernable temper" (text 1, p. 3)[6] thus has bearing on the question of Mr Brodie's psychological adjustment and the extent to which this would affect his proposed parental role in particular.

Describing Mr Brodie as having a "volatile temperament" (text 6, p. 2) and an "eruptive temper" (text 6, p. 4), Dr Kessel maintains that his temper "does not appear to be unmanageable or destructive" (text 6, p. 4). Further, she reports that he is able to "acknowledge it to be a problem that he has been working on" when confronted (text 1, p. 6) and that Andrew "[claims] that his father's temper is not a problem to him" (text 6, p. 4). However, while Dr Kessel makes reference to the issue of Mr Brodie's anger in all reports submitted, including discussing an incident in which he disciplines Andrew by "caning him on the buttocks" (text 6, p. 2), no final comment is made regarding its significance in terms of the custody decision.

[6] See Appendix A for table of relevant texts

In contrast, Mr De Villiers reports that the "consistency and also the intensity of [Mr Brodie's] temper and the way he utilises it in relationship [sic] is a matter of concern to me and of course the first thing that comes to mind is how he will respond if he should have [Andrew] in his care and custody" (text 5, p. 3). Thus while similarly referring to the fact that Mr Brodie "admits that he has had a bad temper for as long as he can remember" and that "[Andrew] does not experience his father as a short-tempered man" (text 5, p. 3), Mr de Villiers also draws attention to further factors that he considers relevant. For example, it is reported that those in close contact with Mr Brodie are all very "aware of his temper as an important part of his personality" (text 5, p. 3) and that there are "very few contacts between [Mr and Mrs Brodie] that do not lead to him losing his temper" (text 5, p. 2). Thus Mr de Villiers concludes that he is "perturbed about [Mr Brodie's] temper as a factor which will most probably inhibit [Andrew's] psychological development" (text 5, p. 6). This is particularly true since there is no indication that Mr Brodie "had benefited from previous psychological assistance in dealing with his bad temper over the years" (text 5, p. 5).

Extending upon the above-mentioned indications that different sides present different perspectives, it is evident that the lawyers' use of different terms to refer to Mr Brodie's disposition suggests potentially different interpretations and constructions of his character and parenting capacity. Mr Brodie's lawyer describes Mr Brodie as having "occasional outbursts of temper" (text 9, p. 24) and "respectfully submit[s]" that "[all] the instances of violence, rage, uncontrolled temper, et cetera ... and the possibility of harm to [Andrew] as a result are wildly exaggerated" (text 9, p. 27). Further, he maintains that the "evidence placed before the Court indicates that [Applicant's temper] does not extend to the children" (text 9, p. 27).

Mrs Brodie's lawyer, however, draws on a different discourse, making reference to "Applicant's discontrol syndrome" (text 8, p. 13) and "clinically tested lack of impulse

control" (text 8, p. 43). He maintains that while Mr Brodie "has contrived to suggest that his temper is only a problem vis-à-vis [Andrew's mother] ... [it] is a facet of his domestic behaviour and of his character" (text 8, p. 42). Thus an "incident observed by ... [Andrew's] teacher, in which Applicant became enraged with [Andrew] over a relatively minor incident indicates that his problem of impulse control and rage also manifests vis-à-vis [Andrew]" (text 8, p. 42). In addition, concern is raised regarding the fact that "[Andrew's] behaviour has manifested signs of anger and aggression consistent with those which he has apparently observed in his father" (text 8, p. 45). Thus an alternate perspective is offered to the one proposed by Mr Brodie's lawyer who characterised Mr Brodie's temper as being exaggerated and consisting of only an "occasional outburst".

Rendering the final view in the narrative, Judge Mitchell states that incidents in which "this anger has been directed at [Andrew] ... did nothing to impair the relationship between [Andrew] and his father and I do not regard applicant's temper as an impediment to his suitability as [Andrew's] custodian" (text 10, p. 8). Thus the Judge's opinion contains an implicit suggestion that Andrew's perception of the effects of his father's temper on him have been taken as an accurate reflection, in contrast to Mr de Villier's less taken-for-granted developmental approach. Further, Judge Mitchell concludes that "Respondent is a good woman and a good mother. She can *also become angry* at times, both in the home and at school" (text 10, p. 8; emphasis added) and thus "both parents are in good health mentally" (text 10, p. 9). As mentioned above, there is again a move beyond explicit reference to the issues in the case that nonetheless informs the conclusions that will ultimately finalise the decision-making process. Further, while Mrs Brodie's lawyer points to Mr Smit's failure "to formally assess Applicant's temper, or conduct any psychometric testing ... [e]ven although he was aware of Applicant resorting to violence" (text 8, p. 13), Judge Mitchell refers simply to Mr Smit as constituting two out of the three psychologists who do not regard Mr Brodie's temper as "a factor which negates [his] claim to custody"

(text 10, p. 6). Thus the perception that Mr Smit "failed to factor [Applicant's temper] into his assessment" (text 8, p. 13) precedes Judge Mitchell's conclusion based on the balance of probabilities or views, suggesting a clear lack of explicit engagement with a potentially contradictory view.

Andrew's wishes

Over and above Mr Brodie's temper, Andrew's wishes become the source of potential contestation and narrative activity. Further, they serve as a reflection on the significance of the child's wishes within the context of the case as a whole.

According to Dr Kessel's account, "[Andrew] said that he knew where he wanted to stay and he wanted to be asked. He wanted to stay with his father" (text 6, p. 3). Further, listing several reasons apparently provided by Andrew, she finds that "his reasons for wanting to live with his father cannot be faulted" (text 7, p. 3). Portrayed in a similar light, Kim is apparently also decided and "[w]hile she wants to see her father, she does not wish to stay with him" (text 1, p. 7).

However, while reporting not dissimilar accounts of Andrew's wishes, both Mr de Villiers and Mr Smit also provide additional commentary regarding the broader context for such expressions of intent. Mr de Villiers reports both that Andrew "proceeded to tell his mother in a very straight forward way that he wants to live with his father" (text 5, p. 2) and that Andrew's account differed according to with which parent he attended a particular consultation. Similarly, Mr Smit reports that "[Andrew] avers that he wishes to be in the custody of the parent who accompanies him to his consultation with me" (text 3, p. 1). Further, as noted in Mrs Brodie's lawyer's report, Mr Smit conceded during testimony that "he could not say whether [Andrew's] utterances reflect his own opinion and circumspection is required" (text 8, p. 63). According to Mr Smit, since "[Andrew's] opinion

should not be weighed very highly ... [he] did not and does not rely on the wishes of [Andrew] insofar as his opinions were concerned and conceded that [Andrew] could have been influenced by [his father]" (text 8, p. 17). Elaborating upon such a view, Mrs Brodie's lawyer himself states that Andrew "himself is experiencing a conflict of loyalty as a result of this dispute and does not wish to choose between his parents" (text 8, p. 38). The point is raised that it is "Applicant who has advanced [Andrew's] alleged wishes as a prominent ground for awarding him custody, and it appears that on a number of occasions [Andrew] was taken to his father's expert witnesses for the specific purpose of recording these wishes" (text 8, p. 62). Further, it is noted that Dr Kessel, the strongest proponent of Andrew's unequivocal wishes amongst the psychologists concerned, "omitted from her reports Andrew's statement that he `would like to bring some good friends with for questioning [to] help him to make up his mind'..." (text 8, p. 62). Thus in moving beyond the simplified account that Andrew has expressed a wish to be with his father, a degree of dissension and the possibilities for further examination of such a wish become evident.

However, in contrast to the above-mentioned perspective, particularly that espoused by Mr Smit and Mr de Villiers, Mr Brodie's lawyer and Judge Mitchell characterise Andrew's wishes and their impact on the decision-making process in fairly simplistic terms. The former reports that Andrew has more recently "unequivocally stated his preference" (text 9, p. 25) and that he has "both sub-consciously and consciously made his choice. He has ... expressed, vehemently, his wish to be with his father" (text 9, p. 27). Further, it is contended that "[t]he harm that would be occasioned to [Andrew] should his wish, desire and the bonding be ignored is such that a real risk to [Andrew's] wellbeing exists..." (text 9, p. 27). Thus, once again at an implicit level, Andrew's wishes are constructed as an influential factor, the contravening of which will result in the undermining of the supposed objective of the process as a whole, to facilitate the protection of Andrew's psychological wellbeing.

Similarly, Judge Mitchell refers to "[Andrew's] strong desire, indeed longing, to go / and live with his father" (text 10, pp. 6/7), stating that Andrew had "persistently expressed to *anyone who cared to listen to him* an emphatic preference for living with his father" (text 10, p. 10; emphasis added). In the context of "a talk, tête-a-tête" held with Andrew, this preference was reportedly "repeated to me explicitly and positively by an intelligent, articulate, persuasive, sincere and candid child who displayed to me a degree of maturity and / that he is capable of forming and expressing an intelligent and informed judgement on what he subjectively perceives to be in his best interests" (text 10, pp. 10/11). Thus, in contrast to the reasons espoused both in the aforementioned reports and the lawyer's summation regarding why "little reliance should be placed on [Andrew's] expression of opinion" (text 8, p. 63), both Mr Brodie's lawyer and Judge Mitchell construct the child's wishes as pivotal in rendering their respective opinions. The question raised then becomes one of the degree to which the particular professional has engaged with the role of what Andrew "*subjectively* perceives" (text 10, p. 11; emphasis added).

Andrew's regressive behaviour in Mrs Brodie's presence

A further influential narrative pertains to the issue of Andrew's (arguably) regressive behaviour in his mother's presence, and the extent to which this has bearing on the broader question of the child's best interests. Stemming from an observation made by Dr Kessel during an early interview, the matter of the extent to which Andrew's reportedly regressive behaviour reflects upon Mrs Brodie's parenting skills and the quality of the parent-child relationship, becomes an influential one.

Describing Andrew as regressing into "snuggling up to [his mother] on the couch, making little noises and sucking her thumb" (text 1, p. 3), Dr Kessel initially contended that Andrew's mother is "maintaining him in an infantile manner of relating to her, which is harmful for his emotional adjustment" (text 1, p. 8). This is supported by (unqualified)

evidence that Andrew had "asked for and been given a babies [sic] feeding bottle" the previous year (text 1, p. 3). Further, it is held that in contrast to his behaviour with his mother, Andrew's behaviour with his father is age-appropriate as indicated by the fact that he "sat far back in his chair and touched his father's foot from time to time" (text 1, p. 5). Later, Dr Kessel contends that while the father "impressed as affirming [Andrew's] masculinity and encouraging him to deal with life in a direct, assertive manner, there have been indications that [his mother] might have a weakening influence on him" (text 6, p. 5). Thus while no direct reference is made to the above-mentioned incident that occurs in Dr Kessel's presence, it would appear that Andrew's sucking of his mother's thumb is equated with her "weakening influence". Further, this is juxtaposed with his father's manner that apparently supports qualities of assertiveness considered implicit in the development of age-appropriate masculinity.

In a separate, independent report, Mr de Villiers concurs with Dr Kessel's observation of Andrew's regressive behaviour in his mother's presence, citing evidence of further behaviour observed during his own consultations with the family. According to Mr de Villiers, the fact that Andrew "[put] his head on her shoulder and had a bit of a moan about having to speak to [Mr de Villiers]" constitutes evidence for this conclusion (text 5, p. 6). However, the report also contains reference to Mr de Villier's questioning of Mrs Brodie regarding such behaviour in which she states her awareness of Andrew's need to regress in the face of significant emotional stressors. As Mrs Brodie herself states in a letter written subsequent to the custody proceedings as a whole, she "allowed it to happen as [she] felt that he was trying to satisfy a basic need to be nurtured and to feel secure in this time of tremendous fear and insecurity" (text 11, p. 1). Similarly, with regard to Andrew's request for a bottle, she adds that she believed that he "needed to work through that need [for security] in order to satisfy it, and let it go" and that after using the bottle for a while, "he lost interest in it" (text 11, p. 2). Thus, in contrast to Dr Kessel, Mr de Villiers

concludes that Mrs Brodie is aware of such regressive tendencies in her son and is "capable of taking remedial action" (text 5, p. 6).

It is perhaps noteworthy that Mr de Villiers' discussion precedes Dr Kessel's comment on Mrs Brodie's "weakening influence" on her son, thus suggesting a lack of (explicit) engagement with the alternate prospective provided by his analysis and its significance to the decision-making process. Further, Dr Kessel subsequently informed the Court that Andrew should be "transferred immediately `in view of the pathological relationship that he has with his mother'" [in testimony]" (text 8, p. 58), therefore reiterating the view espoused in her report and contested by Mr de Villiers. However, upon further questioning, she noted that Mrs Brodie's handling of the situation would not be a significant issue should it represent an isolated incident. Thus there is move within the narrative toward the understanding derived from Mr de Villiers' exploration of the incident in question.

Nonetheless, concurring with the "pathological view", the opposing counsel's summation states that "promoting regression is therefore far more harmful to [Andrew] than occasional outbursts of anger", making reference to Applicant's potentially problematic temper (text 9, p. 24). Finally, this particular concern is brought to an end by the contribution of Judge Mitchell that, as suggested above, implicitly but not explicitly addresses the question of Andrew and Mrs Brodie's respective behaviour. The Judge states that Andrew "has reached the stage of his development, at the doorstep of puberty, where his need for the discipline of a father is greater than his need for the *protectiveness* of a mother" (text 10, p. 8; emphasis added). Thus a degree of closure results once again from an implicit simplification of a fairly contentious issue within the narrative, in which notions of regression, pathology and insecurity are referred to in terms of the perceived dichotomy between the father's discipline and the mother's protectiveness.

Sibling rivalry between Kim and Andrew

With bearing on the child's basic and developmentally-related needs, in particular the need for relationships with siblings, the extent of sibling rivalry between Kim and Andrew is a source of potential debate amongst the professionals contributing to the custody narrative. According to Dr Kessel, the children "interact in a destructive manner with each other" (text 1, p. 9) and "there was excessive sibling rivalry. When the one child was talking the other child would contradict" (text 1, p. 5). Thus Dr Kessel's view is that "[w]ith the break up of the family, they do not provide support for each other, rather they appear to undermine each other further" (text 1, p. 6). Elaborating upon this perspective, Mr Smit expresses the belief that the lack of a strong bond [between Kim and Andrew] ... is underpinned by the fact that they have different personalities, there is a reasonable age difference and they are of different sexes" (text 3, p. 2).

In a separate report following the opinions expressed both by Mr Smit and Dr Kessel, Mr de Villiers indicates that "their relationship was certainly no worse than what I observed to exist between brothers and sisters many times in the past" (text 5, p. 5). Moreover, in opposition to what the remaining parties had suggested, and would ultimately suggest, he stated that "[t]he relationship between the children is also not such that I see any good reason why they should be separated" (text 5, p. 5).

In support of Mr de Villiers view and despite recommending, as does Dr Kessel, that custody of the children be split between the parents, Mr Smit ultimately "concede[s] in cross-examination that if the children were separated ... their relationship would in fact deteriorate and may even cease to exist" (text 8, p. 16). Further, Mrs Brodie's lawyer suggests that the "relationship between the two children ... has been adversely influenced by the present custody dispute" (text 8, p. 48) and that "sibling rivalry ... was in no small measure attributable, and is exacerbated, by the conduct of Applicant who prefers

[Andrew] over [Kim]" (text 8, p. 47). Thus an attempt to situate such rivalry within a specific context and historical framework results in the view that factors other than the relationship between the siblings *per se* may account for the present quality of their relationship and should thus be considered in terms of the decision-making process.

Nonetheless, allowed the final word, if not discursive contribution, on the matter, Judge Mitchell concludes that the "relationship between [Andrew] and his sister [Kim] is not good, it has apparently been worse, but the desirability of not splitting siblings / is definitely *not* a factor in this instance. [Andrew's] attitude towards his sister is negative and [Kim's] attitude towards her brother is at best neutral" (text 10, pp. 9/10; emphasis added). Accordingly, the narrative is constructed as ending with the perspective that sibling rivalry is sufficient to split Kim and Andrew indefinitely.

Andrew's need for a male role model

A further narrative with bearing on the child's basic and developmentally-related needs is Andrew's need for a male role model. Quoting Andrew, Dr Kessel reports that "[my father] teaches me men's things that a mother cannot do like wood splicing and carpentry'" (text 7, p. 2) and concludes that Andrew "longs for his father who affirms his masculinity" (text 1, p. 9):

> [Mr Brodie] involves him in masculine activities ... Many boys have a very strong need to have day to day exposure to their fathers and [Andrew] appears to fall into this group. When he is with his father he is more able to behave like a boy of his age... (text 1, p. 8).

Similarly, Mr de Villiers states that "[h]e clearly has a strong need to be with his father in terms of the masculine things that they do together..." (text 5, p. 4). Taking up the issue in his final judgment, Judge Mitchell both stays with, and moves beyond, the specifics of the narrative in suggesting that "the premise that boys as they grow older should be placed

with their father ... is a well-established proposition" (text 10, p. 12). Further, "[i]n my view it is of particular application here" (text 10, p. 12).

While Mr Smit himself states that the principle of same-sex matching "dictates that [Andrew's] projected needs would be optimally catered for by being in his father's custody" (text 3, p. 2), his contribution is taken up further in the argument made by Mrs Brodie's lawyer. Thus prior to Judge Mitchell's narrative contribution and subsequent to Dr Kessel's, Mr Smit reportedly concedes that "this principle [on which he places considerable emphasis] only applies if all else is equal" (text 8, p. 16). Providing a less linear perspective, the lawyer "therefore submit[s] that [Mr Smit's] adoption of same-sex matching as an independent criterion was misplaced both on the facts of the case and as a matter of principle" (text 8, p. 17), and that the matter of Andrew's placement with his father should remain open to contestation beyond the present issue.

Conflict between Mr and Mrs Brodie

While, unlike the above-mentioned narratives, not considered explicitly by either the lawyers or the judge party to the custody case, the issues of Mr and Mrs Brodie's agreement on parenting decisions and the degree of conflict between them are two further stories within the larger narrative.

With regard to the latter, both Dr Kessel and Mr de Villiers refer to, and agree upon, the fact that "[t]here is a bad relationship between Mr. and Mrs. [Brodie]" (text 1, p. 2). Providing evidence for this, Mr de Villiers reports that "[Mr Brodie] has assaulted her a number of times and also on one occasion attempted to rape her and tore off some of her clothes" (text 5, p. 3). Examining the context outside of the marital relationship, Dr Kessel cites the fact that "Mrs [Brodie] is not prepared to be in the same room as [Mr Brodie] and will talk to him over the telephone only about arrangements for the children" (text 1, p. 2).

With regard to the extent to which their relationship has bearing on the custody narrative, the psychologists also similarly comment that "the children have to a certain extent become victims of their [parents'] relationship struggle" (text 5, p. 2). Thus the parents' "bad relationship ... is repeated in the behaviour of the children who ... interact in a destructive manner with each other" (text 1, p. 9). The level of conflict, and thus the quality of the parents' parental/martial relationship, therefore forms a less considered, but potentially significant component of the narrative as a whole.

Agreement on parenting decisions

With regard to the parents' history of and attitude toward shared parenting, Mr de Villiers in particular draws attention to the fact that the parents "have divergent views about child rearing that they both sincerely believe in" (text 5, p. 2). Moreover, he adds that "[Mr Brodie's] frequent angry outbursts against [Mrs Brodie] and ... [Mrs Brodie's] spirited defence in such situations, has caused considerable insecurity in the children" (text 5, p. 2). Accordingly, he concludes by contributing to the narrative the hope that "the bruising contest between the parents about child rearing practice will cease and that the method preferable to the custodial parent, be respected by both parents" (text 5, p. 7).

However, in contrast to Mr de Villiers' account of a conflictual process between the parents, Dr Kessel, in an earlier, independent report requested by the Family Advocate's Office, makes reference to Mr Brodie's agreeable and acquiescing nature. She cites the example that "although [Mr Brodie] was totally opposed to [Kim] being moved [schools] ... he became supportive and participated in school activities, in spite of the fact that his wishes had been ignored" (text 1, p. 5). Thus while both accounts point to a general difference of opinion between the parents, they clearly lend a different quality to the narrative and the possibilities for contestation both within and beyond the context of this particular issue.

Chapter 4 -
Discursive activity:
An analysis of the question of the best interests of the child

While the narrative activity delineated may have been usefully begun within the familial context, the discursive activity, for reasons that will be explored, is located more firmly within the professional context. Accordingly, the discursive activity (re)produced within the narrative told, will be examined from a psychological perspective as well as the broader professional and other contexts within which psychological discourses are situated.

Constructing particular criteria

Both in its form and formulation, the narrative activity set up in an attempt to story the question of the best interests of the child illustrates the tendency to construct the decision-making process around particular criteria. The stories within the story constitute criteria either implicitly or explicitly drawn upon in the evaluation process, and thus embedded within the texts employed in the present analysis.

Mr de Villiers, for example, discusses a range of criteria in his report considered to be of relevance to the assessment, while ultimately attempting to make "general comments" and "recommendations" of bearing on the set of stories as a whole. In particular he makes reference to the issues of child rearing style, Mr Brodie's temper, rivalry between Kim and Andrew, and the question regarding Andrew's regressive behaviour in his mother's presence and thus the quality of the parent-child relationship and her parenting skills. With regard to the latter, Mr de Villiers states that his "interpretation is that [Andrew] knows that his mother is inclined to be protective and allows some regression", but that she is "now aware of this tendency and is capable of taking remedial action" (text 5, p. 6). In making his final recommendations, incidents of Andrew's regressive behaviour are therefore

considered insufficient to militate against Mrs Brodie as a suitable custodian for Andrew in particular.

However, in contrast, the story regarding Mr Brodie's temper constitutes a criterion about which Mr de Villiers is "perturbed" since he argues that it is likely to "inhibit [Andrew's] psychological development" (text 5, p. 6). In so arguing, several aspects of Mr Brodie's temper are examined, including his wife's experience of him as "aggressive and bullying" (text 5, p. 2), and the awareness of those close to him of "his temper as an important part of his personality" (text 5, p. 3). Further, the apparent "consistency and also the intensity of [Mr Brodie's] temper and the way he utilises it in relationships" is taken into account (text 5, p. 3). Drawing the above-mentioned factors together in weighing up the evidence and relevant significance of the criteria employed (Ackerman & Ackerman, 1997; Jameson et al., 1997; Keilin & Bloom, 1986), Mr de Villiers finally concludes by stating his (professional) recommendation that "the custody of [Andrew] remain with his mother" (text 5, p. 6).

Although with a contrasting focus, Dr Kessel similarly discusses at some length the issue of Mr Brodie's temper and its impact on his parenting capacity, devoting an entire report to a commentary regarding "an incident where Mr [Brodie] disciplined [Andrew] by caning him on his buttocks" (text 6, p. 2). However, in two reports submitted both prior and subsequent to the above-mentioned commentary, additional consideration is given to criteria such as the children's wishes, their respective needs for a same-sex role model, and the quality of the parent-child and parent-parent relationships. Particular weight is given explicitly to Andrew's "reasons for wishing to live with his father" and his need to "[become] a man like his father" (text 7, p. 3) together with the fact that he is apparently "oppressed by his sister and regresses with his mother" (text 1, p. 9). In weighing up the above-mentioned factors, Dr Kessel therefore recommends "on the basis of this

investigation" that "[Kim] remain with her mother / ... [and] that [Andrew] move to live with his father and that father have custody of [him]" (text 1, pp. 9-10). Thus even where the focus may fall on different criteria (cf. Mr Smit's focus on the principles of "same-sex matching" and "non-splitting of siblings" (text 3, p.2)), the approach adopted within the texts remains one of identifying a series of points and psychological discourses of relevance, and positioning them alongside one another. Although situated within the context of a psychological and clinical rather than legal framework, the decision-making process therefore appears broadly to follow the legal directive that the function of a psychologist is to be "balanced" and systematic (text 8, p. 11; see Hoffman & Pincus, 1989).

While potentially constructing decision-making as a static process, the above-mentioned approach, however, simultaneously facilitates the foregrounding of crucial discourses to be opened up for question and debate. The approach adopted by the psychologists petitioned either by the Court or Mrs Brodie therefore renders it evident that Mr Brodie's temper and parental history, Andrew's wishes, and his developmental need for a male role model are of crucial significance in formulating recommendations. These issues or stories and the discourses regarding parenting and children's wishes and developmental needs woven through them are therefore given a place of importance within the textual construction of the decision-making process.

Writing in parallel: The silencing of dialogical potential

However, while a narrative approach has been suggested to have both constructive and deconstructive effects (cf. Reissman, 1993), a closer analysis of the texts through a discursive lens suggests that the critical, deconstructionist potential has largely been silenced in lieu of the construction of a narrative of relevant discourses. Thus while it is fairly apparent which issues are most salient for each of the three psychologists, the

rhetorical process, and thus the possibilities for debate and contestation both within and across reports, is less so (cf. Fairclough, 1992).

Reflecting back on the narrative told (in Chapter 3), it is apparent that the approach of constructing an argument or position around particular criteria tends to occur in parallel, resulting in minimal spaces in which debate and contestation happen. The (psychologist's) reports that constitute the decision-making process are reproduced in isolation, written alongside one another just as the criteria and stories within them have been shown to be positioned. As will be discussed further later, potential points of interface therefore are fabricated between psychologists and a broader context rather than within a psychological community or set of competing psychological discourses.

These dynamics are especially apparent with regard to the issue of Andrew's (arguably) regressive behaviour in his mother's presence. First noted by Dr Kessel, Andrew was described as regressing into "snuggling up to [his mother] on the couch, making little noises and sucking her thumb" (text 1, p. 3) resulting in the contention that Andrew's mother is "maintaining him in an infantile manner of relating to her, which is harmful for his emotional adjustment" (text 1, p. 8). However, Mr de Villiers' later discussion regarding this behaviour renders it apparent that evidence for Dr Kessel's contention has not been opened up for debate, either in the consultation room or in the report that serves as the discursive construction of these events. Her inference, and later conclusion, that Mrs Brodie is a "weakening influence" on her son (text 6, p. 5) is based on the fact that Andrew had "asked for and been given a babies [sic] feeding bottle" the previous year (text 1, p. 3). However, there is no evidence of Dr Kessel's acknowledgement of, or attempts to engage with or contest, the alternate interpretation provided by Mr de Villiers in an interim report. He suggests that that Mrs Brodie is aware of Andrew's need to regress in the face of significant emotional stress and accommodated him only in such a context. Thus while

Dr Kessel's discursive construction of the events and their meaning within the custody process as a whole represents a silencing of dialogical potential both within and across (her) texts, Mr de Villiers' texts render such possibilities more salient. Of less significance than the fact that an alternate conclusion is reached on the basis of such contestation, is the fact that Mr de Villiers' direct reference to, and engagement with, "the report by Dr [Kessel]" results in the *voicing* of alternate possibilities (text 5, p. 6). While some spaces for contestation have therefore been opened up, the weight afforded Dr Kessel's conclusions within the narrative further highlights the tendency for professionals constructing (and constructed by) discourses to talk past one another, just as discourses themselves do at times. In addition, a strong tendency toward stasis is indicated by the fact that the first text produced historically, that of Dr Kessel, both achieves and maintains primacy within the decision-making process as a whole.

Similarly demonstrating a lack of intertextual engagement and dialoguing, the three psychologists make independent, although at times similar, comments regarding Andrew's wishes. While reporting not dissimilar accounts to those of Dr Kessel, both Mr Smit and Mr de Villiers engage implicitly with her assertions as well as the broader (developmental) context in which in which such expressions of intent need be situated. Thus while Dr Kessel reports that "[Andrew] said that he knew where he wanted to stay ... He wanted to stay with his father" (text 6, p. 3), both other psychologists make reference to Andrew's tendency to provide differing accounts depending on which parent brought him to a consultation. Further, it is later made apparent (upon cross-examination) that Andrew's confusion expressed in his wish "to bring some good friends with for questioning [to] help him to make up his mind" (text 8, p. 62) might have been insufficiently opened up for debate in Dr Kessel's reports. Her decision to omit the aforementioned statement in her reports therefore mirrors the omission of dialoguing between the professionals within the decision-making process as a whole as well as the silenced possibilities consequent on

this. The process is one in which texts, discourses and narratives are represented in isolation - largely, but not exclusively, written in parallel forms that represent a lack of direct and significant engagement with alternate meanings and possibilities. The possibility of engaging with alternate perspectives or resolving points of dispute through explicit intertextual dialoguing is therefore limited, although not silenced altogether.

Colluding with structures

When beginning to examine the process more broadly, it is apparent that there is a structure that reflects and supports the writing in parallel. What occurs within the psychological terrain is more than simply a function of the issues considered; it is a function of how those issues are situated within a broader structure or context and what that system facilitates and silences.

As ontological and epistemological shifts within and beyond psychology have rendered evident (Rose, 1990), particular subject positions and paradigms allow particular languages and modes of interaction. It has been suggested, for example, that while psychology and professionals concerned with the welfare of children promote continuity, legal interventions have a distinctly episodic quality (King & Trowell, 1992). Stated differently, a recognition of the divergence between law and psychology has been located within the child-centred nature of mental health in contrast to legal professionals' participation in "the world of litigating adults" (Cumes & Lambiase, 1987, p. 129; see also Lambiase & Cumes, 1987). Further, of significance for the present analysis is the fact that such differences are based within the epistemological status of psychology and the manner in which it is positioned in a legal and judicial context in which the law serves as "a truth-finding system and the court as the final arbiter of what is right and just" (King & Trowell, 1992, p. 2).

Operating at multiple levels, this separatism is clearly reflected in the language employed to construct and define the function of each profession within the broader system (cf. Fairclough, 1992). While children are "*asked*" (text 5, p.4; text 6, p. 3) and psychologists "*recommend*" (text 1, p. 10; text 5, p. 6; text 6, p. 4) or state their "opinion" (text 3, p. 3) in order to assist the law and Family Advocates, Family Advocates "*recommend*" in order to assist the "Honourable Court" (text 4, p. 1). Further, lawyers or attorneys "respectfully submit" within their "Heads of *Argue*-ment" (text 8, p. 64; text 9, p. 28), while judges "*order*" (text 10, p. 13). The words depicting the respective professional activities therefore depict the relative position of each on the hierarchy, from those who are "asked" and effectively positioned beyond the limits of power to those at the head of the system who are bestowed the right to speak and "order". Positioned at the lower end of the hierarchy, psychologists (as a subject position) and the profession of psychology therefore exist at the margins of the system structuring the custody narrative - offering views in a parallel, but subordinate manner to the legal discourses and texts afforded greater status.

The language of recommending, arguing and ordering therefore serves as a discursive tactic that maps an institutional structure in which each profession and their related subject positions/activities tend to occur above or below, rather than interacting with, one another as equals. What has been shown to occur within psychology's multiple discourses and discursive positions in the present case, is therefore reflected and maintained at a broader, structural level. The silencing of dialogical potential between and within the reports of Dr Kessel, Mr Smit and Mr de Villiers occurs also at a further level of analysis in moving from psychology to the legal and judicial framework which (historically) dictates the mechanisms of the custody decision-making process. The dearth of dialoguing is thus shown to be a function of a system rather than merely a (psychological) approach or absence or silence. Knowledge is passed along a chain that must recommend, argue or order according to the rules of the "truth-finding system" (King & Trowell, 1989, p. 2).

It is also of significance to note the further effects of these hierarchies in moving beyond the level of textual practice to the more macro levels of discursive and social practices (cf. Fairclough, 1992). In particular, both within and across the layers of this hierarchy are relative positions of power that infuse discursive positions that naturalise ideologically specific beliefs (cf. Parker, 1992; Rose, 1990). Thus it is possible for judges such as Judge Mitchell to make potentially problematic statements while disguising them within a veil of credibility afforded them by virtue of the status and rights of the speaker:

> Respondent is a good woman and mother. She can also become angry at times, both in the home and in the school. What she offers [Andrew] is the loving, nurturing rearing of a child which is *the traditional and natural role of a mother* and respondent has done it well. I believe, however, that [Andrew] has now reached the stage of his development, at the doorstep to puberty, where *his need for the discipline of a father is greater than his need for the protectiveness of a mother* (text 10, p. 8; emphasis added).

Juxtaposing what are implicitly constructed as the natural and opposite roles of a mother and father – "protectiveness" and "discipline", Judge Mitchell applauds Mrs Brodie for fulfilling the traditional role required of her. However, Andrew is considered to be at a developmental stage when he has grown beyond the need (at 12 years) for his mother's natural role. Forming the foundation for the Judge's final order that Andrew be placed in his father rather than mother's custody, the above-mentioned statements reflect the infusion of normative psychological sentiments with judicial power thus allowing them to appear to meet the legal criteria of logic, relevance and reliability (Bonthuys, 2000; Goldstein, Freud, Solnit & Goldstein, 1986). That which the Judge incorporates as natural and traditional, particularly with regard to mothering, is "contested terrain" (Glenn, 1994, p. 2). Although most prominent at the time of the order within social science thinking, the

taken-for grantedness of ideas of mothering[7] within the maternal preference has more recently been questioned and eroded within legal circles too (Bonthuys, 2000).

While the views of the dominant can clearly also be expressed as universals within psychological discourses, it is the relative status afforded legal and judicial discourses within the custody decision-making process that renders them more powerful and thus problematic. As has already been demonstrated, it is within the power of psychologists to employ professional expertise to create simplified stories that serve as a "veil for uncertainty and even disagreement" (Woodhead, 1991, p. 39). The points of disagreement between Dr Kessel, Mr Smit and Mr de Villiers, for example, with regard to the interpretation of Andrew's regressive behaviour reflect this possibility, as well as the need to provide a set of recommendations that indicates a coherent professional view regarding Andrew's best interests.

However, as an examination of professional activities suggested, it is the lawyers that argue and the judges that order, and thus it is ultimately the law that has the power to produce 'falsely consensual stories' (King & Trowell, 1992). These are the stories and discourses that convey the views of what the ideologically dominant are prepared to warrant (Stainton Rogers & Stainton Rogers, 1992), obscuring the boundary between the personal and professional/social and asserting the possibility and value of objective truths. Contrary to Allan's (1990, p. 10) suggestion that the law and psychology are "two interacting subsystems which reciprocally influence one another", psychological discourses appear to be located within a legal and judicial context in which reciprocal or dialogical interaction is limited. Rather it is the institutional structures that place psychological discourses beneath or within the legal and judicial context that dictate the parameters of the decision-making process. Thus the practice of talking in parallel both

[7] For example, see Pruett & Pruett (1998) on fathers and divorce, and Duran-Aydintug & Causey

within and beyond psychologists' activities, ultimately reflects back on, and colludes with, a broader structure.

Narrow positions, best interests and the silenced audience

Despite the legislated directive that the concern of the Court and all those involved in its practices is for the child's best interests, it becomes apparent that the best interests' principle and subject positions enforced by institutional guidelines are not necessarily synonymous and may at times dominate or pass one another. Moreover, this possibility is fuelled and maintained by professional's perceived relationships to, and interactions with, an existing institutional structure rather than an independent indebtedness to the best interests' principle.

Psychologists might, for example, fail to negotiate a specific referral question relevant to an investigation of the child's best interests in a given case, thereby allowing the investigation to be incorporated into an existing structure. Indicative of this broad approach, Mr de Villiers' evaluation is headed "REPORT ON MR AND MRS [BRODIE] AND CHILDREN [KIM AND ANDREW BRODIE]" (text 5, p. 1), while perhaps displaying a subtly more specific approach, Dr Kessel states that she has "investigated the disputed custody and access of [Kim and Andrew Brodie]" in accordance with instructions provided by the Family Advocate (text 1, p. 1). However, both approaches are indicative of a lack of engagement with the particular referral issues shown to be relevant to the Brodie family, thereby facilitating, although not creating, the possibility that the lawyers would incorporate the professional recommendations into their respective legal strategies (Burman & Derman, 1997). While the reports may in other ways take cognisance of their audience, in particular through the use of non-technical language, the deeper implications of the audience remain largely unacknowledged.

(1996), Falk (1994) or Fowler (1996) on lesbian mothers in custody disputes.

Further, in presenting evidence tailored specifically towards the end of their clients, lawyers might display a similar tendency toward interacting with the existing adversarial system in which the custody process is about "the world of litigating adults" rather than the best interests of the adult's children (Cumes & Lambiase, 1987, p. 129). In the context of the present case, Mr Brodie's lawyer submits that his client has "occasional outbursts of temper" (text 9, p. 24) and that "[*all*] the instances of violence, rage, uncontrolled temper, et cetera ... are *wildly exaggerated*" (text 9, p. 27; emphasis added). This despite evidence put forward by psychologists and opposing counsel suggesting that a more subtle interpretation might be warranted.

At the level of the judiciary, collusion through a narrow definition of subject positions may manifest in a judge's tendency to follow broad rules regarding the use or role of expert testimony, in particular the directive to follow precedents set by legal statutes (Sorensen et al., 1997). In the context of the present case, Judge Mitchell orders an "arrangement [that] is new and uncharted", suggesting that it "be monitored by the Family Advocate" (text 10, p. 13). However, moving to a broader level of practice, the possibility of "uncharted" decisions may be undermined by particular judge's use of the guideline, especially in instances in which the circumstances framing considerations of the child's best interests are unique or novel and therefore by their very nature uncharted. As has been suggested with regard to lawyers, such instances may contribute toward the closer discursive prescription or surveillance of positions of each professional concerned in favour of historically located institutional practices. Even in cases in which professionals such as Dr Kessel and Mr Smit are called upon by the supposedly neutral Family Advocate's Office, it is therefore highly suggestive that they should ultimately be referred to as "psychologists called on behalf of" either the mother or father rather than as adjudicators of the best interests of the child (text 10, p. 6).

Whether psychologists, lawyers or judges, perceiving one's role as fitting within the system is indicative of a technicist orientation in which each professional acts out their respective technical function dictated by current institutional practices and their perceptions thereof[8]. Psychologists conduct broad evaluations in the absence of specifically negotiated referral questions; lawyers present arguments wholly in favour of their respective clients; judges render judgments that lean toward statutes and precedents; and professionals are called on behalf of the litigants, potentially thwarting attempts to protect the interests of the children concerned. Within such a system, subject positions are of necessity more narrowly defined and tend to reflect a working within existing structures, resulting in a lack of explicit attention to issues of context and audience.

As has already been argued, the paradigm that dictates the operation of custody decisions is a modernist one – asserting the reality of a truth that the law is empowered to find. Preferring order and closure to the "contradictions and ambiguities of the psychological world", the law is endowed with epistemic authority (Bonthuys, 2000), and is thus able to influence powerfully the decision-making process in ways that maintain a lack of reciprocity (Burman & Derman, 1997, p. 11). Oriented to technical functions, professionals may fail to perceive and engage with the broader context of their activities and thus the audience for their texts and discourses. An evaluation is conducted and a text constructed without attention to how that report will be received and used and thus the nature of the links between the particular professional activity and broader institutional practices.

As the present case indicates, Dr Kessel, Mr Smit or Mr de Villiers' respective reports ultimately form part of a broader legal process in which the authors may be called upon in

[8] Personal communication, Andy Dawes, 18 December 2001.

legal proceedings such as "Rule 57 meetings" (text 11, p. 4) or become the "expert witnesses" called to testify in a court of law (text 8, p. 7). Further, the party or office to which the reports are submitted is similarly located within a broader framework, resulting in the party's need to "respectfully submit" or make "recommendations" in an attempt to assist the Court in its role as the upper guardian of the child (McCurdie, 1994). While further contextual issues will be explicated later, it is apparent that narrow approaches tend to result in a silencing of the broader audience and thus a lack of dialogical engagement. In so doing, professionals tend to miss or pass one another in their supposed attempts to ensure that the best interests' principle remain central.

Disembodied and disconnected: The story not told

Mirroring the paradigm that frames it, the custody process lacks transparency both at a content and structural level. As has been suggested, professional reports tend not to be explicit regarding referral issues and thus their starting point is one in which the content of the evaluation process and the recommendations made on that basis lack transparency. Further, at a structural level, reports, information and knowledge tend to move in a fairly linear manner along a chain, without a deeper acknowledgement that the parties concerned are theoretically driven by an overriding narrative to resolve the custody dispute in (Andrew's) best interests.

Although reference is given to the words of various participants in the psychological, legal and judicial texts, the decision-making process as a whole is disembodied and disconnected. While there are moments when texts speak to other texts (see p. 41 – for example, text 5, p. 6), persons neither speak to nor with one another. Texts embedding psychological discourses pass along a chain to offices and other legal or judicial spaces. However, until the process reaches the courtroom, bodies involved with the Brodie family do not appear to meet or speak (except for a legal briefing which was held in the absence

of Mrs Brodie's lawyer's "prior knowledge or consent" (text 11, p. 5)). In terms of the opportunities for contestation and dialogue, this is particularly significant in light of estimations that an average divorce case in South African courts lasts less than five minutes (Barratt, 2000).

The approach exemplified within the case is therefore a fairly static one despite the rich opportunities for contestation demonstrated. A critical reading of the texts suggests that the process is constructed as a series of textual moments over a four-year period, 'starting' with Mr and Mrs Brodie's decision to separate in December 1989 and `ending' with the Judge's final order in January 1994. Although parties do "refer" to either their own or others' prior reports, a sense is evoked that the decision-making process is continually reconstituted in a series of episodic interventions (cf. King & Trowell, 1992). Accordingly, the story that is most salient is one of the relevant psychologists, lawyers and judge's professional activities rather than an overarching engagement with what constitutes Andrew (and Kim's) best interests. Moreover, it is crucial that over and above the mechanisms of power, ideology and institutions that are silenced, a story that pertains directly to the child's best interests and how these might shift is also not told.

While debate regarding Andrew's wishes and need for a same-sex role model have been shown to represent significant issues within the broader narrative, the fact that he begins the process at 7 years and ends it at almost 12 years is never explicitly mentioned in any of the texts. However, research evidence clearly demonstrates that the importance of particular role models and children's ability to directly express their wishes in custody matters is a function of their age and developmental needs (Ackerman & Ackerman, 1997; Jameson et al. 1997; Keilin & Bloom, 1986; Powell & Downey, 1997; Wallerstein & Kelly, 1980). Therefore a change in Andrew's age represents a significant shift in the psychological basis for determining his best interests, rendering the question of his

interests a subtly different one at the onset and ending of the dispute. While this factor may be implicitly attended to in the respective evaluations conducted, the final word on the matter suggests otherwise:

> On the afternoon of 20 December 1993, after judgment had been reserved, [Judge Mitchell] had a talk, tête-à-tête with [Andrew]. ... [Andrew] had persistently expressed to *anyone who cared to listen to him* an emphatic preference for living with his father. As expected, this preference was repeated to me explicitly and positively by an intelligent, articulate, persuasive, sincere and candid child who displayed to me a degree of maturity and / that he is *capable of forming and expressing an intelligent and informed judgement* on what he subjectively perceives to be in his best interests (text 10, pp. 10/11; emphasis added).

Rather than indicating that at that particular moment in time Andrew's wishes were clearly expressed and his needs readily apparent, Judge Mitchell implies that it would have been apparent at any moment to "anyone who cared to listen" thus positioning himself as the one who has cared. Further, diverging from the evidence that the deterministic value of children's preferences decreases incrementally with age (Jameson et al., 1997), he fails to comment on the role of Andrew's (changing) age suggesting a reliance on human experience rather than established knowledge (Melton, 1983a). Instead, decision-making is constructed as static and the fact that the judge's "tête-à-tête" is situated within an historical process remains unacknowledged despite mention of the date of the conversation. The story not told is therefore one that reproduces in powerful ways the failure to construct custody decision-making as a process occurring within a broader context of professional activities and institutional practices. Judge Mitchell's act of arranging a talk with Andrew after four years of indecision serves both as an act of beneficence and constraint (see Kendall & Wickham, 1999; cf. Parker, 1992), as well as an example of what might be unspeakable and invisible within a static decision-making model. Although the clearest instance of an embodied rather than disembodied process,

the tête-à-tête or physical meeting between Andrew and the Judge therefore serves to further maintain the lack of connectedness in the narrative.

The literature specifically addressing the issue of custody points to the need to consider the relevance of relationships, factors impacting on children's post-divorce adjustment, and specific criteria such as the presence of physical or sexual abuse or the quality of parenting. However, while the above-mentioned factors are of crucial significance, the more critical literature together with the dynamics exemplified within the present case suggest that the parameters of the custody process are broader and must therefore be examined at a broader level too. Even from a psychological perspective, custody decision-making is not simply about what one psychologist considers the relevant psychological discourses and the recommendations made on that basis. Rather, it also incorporates the professional background and training of that psychologist (Davis & Stolberg, 1988), whether s/he negotiates and engages with referral question(s), and the particular judge's perception and reception of expert testimony. Further, moving more broadly into the level of discursive and institutional practices, the politics surrounding the issues at a given moment in time, paradigmatic conflicts between psychology and the law, the nature of the adversarial system (Saayman & Saayman, 1989), temporal constraints on the judicial process, and the socio-economic status of the litigating adults may all make similarly powerful contributions to the process as a whole.

While it is beyond the scope of the present study to examine such factors in a more exhaustive and systematic manner, the narrative of the Brodie family indicates the extent to which many of these factors serve as niches within which the practices of the custody process are embedded. Further, the process has been shown to be constituted over a period of time by multiple parties each variously positioned in their professional, socio-political and institutional context(s). Perhaps predictably, the understanding and

application of custody decision-making therefore demands an examination of both theory and practice as well as the multiple points of interface between them.

Criticisms and implications: Policy and process

What the above-mentioned argument suggests is that for the custody process to be a more effective one, the literature must inform decision-making at the level of *policy* and not simply at the level of individuals considering issues within particular psychological reports. Shifts must ultimately occur within structures, systems, contexts and institutions, for the alternative represents a compartmentalised approach that slips and/or fails because of the broader dynamics delineated above. Desired outcomes in the process of decision-making frequently do not occur precisely because of contextual or practical issues (such as class or finances). However, these have been shown to be the very issues typically sidelined within the literature as well as in the practices of professionals involved in the process.

The dissemination of specialised knowledge relevant to custody work is clearly of central importance and represents an area in which there is a marked absence within the South African context (Louw & Allen, 1996). In contrast to other nations in which guidelines exist in order "to promote proficiency in using psychological expertise in conducting custody evaluations" (American Psychological Association, 1994, p. 677), South African professionals lack such guidelines and information regarding professional ethics. However, it is argued that training aimed at empowering psychologists (and other) professionals to address the directive of the best interests' principle must go beyond an examination of current thinking within academic literature. Professionals equipped to meet the best interests of the children with whom they come into contact should also be informed regarding the broader contextual and institutional practices of the system in which they operate – practices that must ultimately shift in and of their own.

While it has been argued that discourse analysis, and perhaps case study approaches in particular, form an insufficient basis for generalised statements regarding change, discourse analysis is capable of disrupting accepted notions of practice and case studies of "exten[ding] ... experience" (Parker & Burman, 1993; Stake, 1994, p. 245). Further, the present study has incorporated an instrumental (rather than intrinsic) case study as well as Parker and Fairclough's approach that demands moving between texts and contexts. While neither possible nor desirable to close the text to alternative readings, a sustained attempt has been made to engage with both the literature and the specifics of the case material in order to construct a sound and valid interpretation (Kvale, 1996; Parker & Burman, 1993; Wood & Kroger, 2000).

Thus on the basis of its own merits, the reading I have constructed indicates a need to attend to contextual factors and to acknowledge that "every practice is by definition both discursive *and* material" (Henriques et al., 1984, pp. 105-6; emphasis added). There is something "beyond the text", particularly in the manner in which texts are typically constructed and used. However, perhaps of greater significance is that the approach exemplified within the case of the Brodie family tends to pay heed to the best interests' principle only at the discursive level. Securing Andrew (and Kim's) best interests is that which the psychologists and other professionals promise to do. However, despite the best intentions of all parties concerned, the litigious and arduous nature of the case (text 10) suggests that the process has fallen short of achieving its aim – not necessarily because of the actions of well-meaning individuals, but because of the system. The system that constitutes the decision-making process therefore serves as a politically correct half-measure that is insufficiently powerful as an institutional practice to secure the best interests of the majority of children. It may be that policy serves as an important bridge between rights and practice, thus providing an opportunity to revise the current approach to custody decision-making in order to give effect to children's rights in more meaningful

ways. While changes to children's rights at the level of legal status is unlikely to impact on their experience of autonomy (Melton, 1983b), changes at the level of policy and systems might.

Although not within the parameters of the present study to make explicit statements regarding policy, case studies can be useful in setting agendas at the level of policy formation (Susman-Stillman et al., 1996). Thus it is suggested that future researchers and practitioners should look toward creating policies that incorporate a more *process-oriented* approach to custody work. As the present use of stories and narratives has attempted to demonstrate, custody is a process and the adoption of a process-oriented model would facilitate the incorporation of crucially important issues of context and audience. A process-oriented approach might be used to produce greater transparency and the opportunity to work with, and within, disciplinary boundaries. Rather than producing texts in separate places at separate moments in time, psychologists and the professionals who constitute the audience for their texts could come together and dialogue, thereby foregrounding, rather than silencing, the possibilities for contestation central to informed decision-making. Although important to acknowledge the limits and limitations of one's sphere of professional expertise (Goldstein et al., 1986), the process is ultimately one that incorporates a range of spheres of expertise from the psychological to the legal and judicial. Thus, in the context of this recognition, a process-oriented approach might give effect to a working with, if not diffusing of, institutional constraints allowing shifts to occur at the level of institutional practices.

Practices that incorporate this process create the possibility of embodied stories dialoguing with one another and challenging the structures that tend to separate them in their endeavours to secure children's best interests. While the importance of further research into the implementation of policy and its later evaluation must be emphasised

(Masters, 1984; Susman-Stillman et al., 1996), the first steps toward a process-oriented model are equally important ones. Although not referring to custody per se, Zigler & Muenchow (1984) provide a useful reflection on the present recommendations: that a forum for dialogue serves the purpose of breaking down old lines, in the realm of policymaking and in the service of children and their best interests.

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APPENDIX A -
The texts and their related professional context

	Date	*Document*	*Author's professional status*	*Addressee and/or signatories*
1.	19/02/92	Dr Samantha Kessel's 1st report	Psychologist	Addressed to FA's office
2.	23/02/92	Ms Michelle Croft's (confidential) report	Psychologist	Addressed to Mrs Sharon Brodie's lawyer, Ms Cathy Peters
3.	07/09/92	Mr André Smit's report	Psychologist	Addressed to FA's office
4.	16/11/92	Mr Alan Lombard (FA's) report	Family Advocate	(Copy addressed to Mrs Sharon Brodie)
5.	07/04/93	Mr Paul de Villier's report	Psychologist	Addressed to Mrs Sharon Brodie's lawyer, Mr Kevin Mills
6.	08/05/93	Dr Samantha Kessel's 2nd report	Psychologist	Addressed to Mr Michael Brodie's lawyer, Mr Thacker
7.	16/10/93	Dr Samantha Kessel's 3rd report	Psychologist	Addressed to Mr Michael Brodie's lawyer, Mr Thacker
8.	07/12/93	Mrs Sharon Brodie's lawyer's heads of argument	Lawyer	Addressed to Cape Town Supreme Court Signed by Mrs Sharon Brodie's lawyer, Mr J.P. McDermott
9.	08/12/93	Mr Michael Brodie's lawyer's heads of argument	Lawyer	Addressed to Cape Town Supreme Court Signed by Mr Michael Brodie's lawyer, Mr William Johnson
10.	14/01/94	Judge Evan Mitchell's Final Order	Supreme Court Judge	Addressed to Cape Town Supreme Court Signed by Judge Evan Mitchell
11.	15/07/97	Mrs Sharon Brodie's comments re. Dr Samantha Kessel's reports	Respondent & mother	Addressed to Ms Minnie Lewis, legal researcher at Centre for Socio-Legal Research, UCT Law Department