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ORIGINAL ARTICLE

Uncertainty in Child Custody Cases After Parental Separation: Context and Decision-Making Process

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Abstract

Context factors (e.g. a family's developmental crisis) can affect the child custody decision-making process and the child's best interests after parental separation. But what are these context factors, and how can they vary across different cultures and legal systems? This paper reports a cross-cultural qualitative study funded by the Brazilian Ministry of Education and was carried out under a Naturalistic Decision-making approach. This study addresses context factors that impact the decision-making of experienced legal actors working in child custody cases. Interviews were conducted with 73 legal actors (judges, prosecutors, lawyers, psychologists, and social workers) in Brazil and England. The data gathered were analysed employing a reflexive thematic analysis that generated seven themes addressing how uncertainty is structured by context factors in child custody cases after parental separation. The themes generated encompassed three domains ('family', 'family court', and 'legal-psychosocial') that draw attention to the sources of uncertainty in child custody cases, especially to the role of contextual players (family and children) in the child custody decision-making process.

Keyword Child custody · Decision-making · Divorce · Uncertainty · Thematic analysis

Cases in which divorced parents cannot reach a settlement and therefore need to go to trial, are estimated to be about 5% of the total of divorces (Baker, 2012; Kelly, 2007; Wallace & Koerner, 2003). Despite being a small part of the total of divorces,

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these cases pose a challenge to family court professionals as such cases tend to be very complex and involve different factors that will impact the decision-making process and the child's best interests.[1]

Extensive scholarship has addressed divorce-related factors that can affect the decision-making process. For instance, some studies addressed the application of 'the best interests of the child' standard (Eekelaar, 2015; Mendes & Ormerod, 2019), procedures for evaluation (Goldstein, 2016), judges' attitudes (Stamps et al., 1996), psychologists' and lawyers' views (O'Neill et al., 2018) as well as 'child and family features' that can influence the judges' decision-making (Wallace & Koerner, 2003). These issues reinforce the assumption that a decision-making process carried out in natural settings (i.e. in the real world) is affected by uncertainty (Klein et al., 1993; Lipshitz & Strauss, 1997; Lipshitz et al., 2001; Lipshitz, 1993a, b). However, there is still a lack of scholarship focused on how context factors can play a role in the decision-making process in child custody cases – especially factors that are not related to mental health issues, personality traits, intimate partner violence, child abuse and neglect.

We understand 'context factors' as issues and/or dynamics regarding individual, organizational and system factors that can influence the decision-making process, especially by prompting uncertainty into this process. In general, two core domains constrain most of these factors' variance: 1) type of legal system (e.g. laws, legal and technical guidance/practices); and 2) contextual issues (e.g. family's developmental struggles) (Mendes & Bucher-Maluschke, 2017; Mendes & Ormerod, 2021).

In this study, our exploration of context factors considers differences across two nations that differ according to their underlying legal systems: the common law approach of England, and the civil law approach of Brazil. The English family justice system bounces between two contrasting practice approaches: (1) behaviour-focused and (2) outcome-focused (Eekelaar & Maclean, 2013). The former refers to the emphasis on settlements made by the parties through the modification of their expectations/behaviours rather than through proceedings and adjudication—in this scenario, whatever encompasses the settlement is less important than the parties' agreement and closing the case. The latter approach refers to the idea that family justice works as an 'impartial spectator' that can provide fair outcomes throughout a fair process.

In Brazil, since the enactment of the New Code of Civil Proceedings in 2015, the family justice system has specific routes that aim to promote consensual settlements or self-composition.[2] However, the Brazilian legal system still is very litigation-driven and, in most cases, these routes are there just *pro-forma* (Mendes & Ormerod, 2021). In addition, the Brazilian family justice system has a child custody

[1] Despite legal and definitional differences, 'divorce' and 'parental separation' will be referred to as the same thing throughout this paper: the relationship breakdown between two people that had a child together.

[2] This is related to processes in which both parties (parents) find a functional way to communicate their differences, interests and goals regarding the matter under dispute and to thereby reach an agreement by themselves, without judicial mediation.

decision-making process that is 'closed-ended' as the law points out only two possible outcomes: (1) joint custody (preferably); and (2) sole physical custody.[3]

Context factors, tend to define and frame "the space in which decision-making processes operate" (Jones et al., 2014, p. 203). In this sense, the task of understanding context factors that surround the process of making a decision is crucial (Lipshitz, 1993a)—especially because uncertainty is the main impediment to an effective decision-making process (Lipshitz & Strauss, 1997). This task is challenging for legal actors because family struggles are more related to psychosocial issues than legal ones, which leads to more uncertainty in such cases.

Within the legal scholarship, the role of uncertainty is largely addressed as 'legal uncertainty' and it is seen as a consequence of generic legal standards that make it difficult to say, *ex ante*, if certain actions are legal and what legal officials might do (Lang, 2017). However, the legal literature neglects other factors that can lead to uncertainty within family justice and its decision-making processes.

Some scholars have addressed how legal actors use heuristics to deal with uncertainty in child custody cases (e.g. Enosh & Bayer-Topilsky, 2015), noting that uncertainty is a key player in such cases. However, the literature in this field is lacking studies that investigate context factors in child custody cases that build and sustain the levels of uncertainty as well as the consequences of it. This is concerning as uncertainty "affects real-world decisions by interrupting ongoing action, delaying intended action, and guiding the development of new alternatives" (Lipshitz, 1993b, p. 173). Hence, family justice and its professionals should be aware of context factors because they can lead to errors and biased judgments during the decision-making process, which can impair the quality of the decisions made, affecting the child's best interests as well as the family's well-being.

In an attempt to draw attention to context factors (especially those not related to mental health issues, personality traits, intimate partner violence, child abuse and neglect and the like) and how they are structured within the child custody decision-making process, this study presents results from a qualitative inquiry that identified key context factors responsible for producing and sustaining uncertainty in child custody cases after parental separation.[4]

[3] For further discussion regarding the Brazilian family justice and child custody after parental separation, please see Mendes and Ormerod (2021).

[4] These results are part of a larger research project that has identified cognitive strategies used by legal actors to cope with uncertainty prompted by context factors. The project had a naturalistic and cross-cultural design that approached legal and cultural issues in Brazil and England, and aimed to understand: 1) how the decision-making process is structured in terms of its contextual dynamics and constraints; 2) the role of legal actors in the decision-making process; 3) how 'the best interests of the child' is understood and applied; and 4) how the type of legal system (civil law in Brazil, common law in England) affects the decision-making process.

Method

This study's design incorporated a Naturalistic Decision-Making research methodology, which aims to understand and describe how individuals make their decisions in the real world. This approach highlights "how expert practitioners perform cognitively complex functions in demanding, real-world situations characterized by uncertainty, high stakes, and team and organizational constraints" (Patterson et al., 2016, p. 229).

Instruments, Participants, and Procedures

This study used semi-structured interviews with open-ended and closed questions – to check the interview questions, please see Online Resource 1.[5] The first author conducted the interviews, which were held for 40 to 70 min, with an average interview time of 55 min. Seventy-three Brazilian and English participants (judges, prosecutors,[6] lawyers, psychologists and social workers) took part in this study. The main inclusion criterion for all participants was to have at least two years of experience in child custody cases after parental separation. To check participants' demographics, please see Online Resource 2.

In both countries, we recruited participants in three ways: a) through the researchers' existing network; b) by sending participation invitations via email and mail; and c) through snowball recruitment[7]: each participant was asked if they knew someone meeting the inclusion criteria, whom they could recommend to take part in the study. Access to English participants was difficult because applications to approach magistrates and social workers (from CAFCASS[8]) were not granted. Exclusively in England, we also reached participants via: i) LinkedIn; ii) inviting eligible lawyers by email invitation based on the list available at http://www.resolution.org.uk[9]; iii) inviting eligible psychologists by email (we used the list available at the British Psychological Society's Directory of Expert Witnesses—https://www.bps.org.uk/lists/EWT/search); iv) emailing authors with papers published on child custody cases and/or the best interests of the child—they were asked if they would like to take part in the study or if they would nominate anyone else eligible. Nevertheless, due

[5] The questions are based on prior studies that focused on: 1) law, procedures and judicial process regarding parental separation and child custody and contact/access in Brazil and England—see Mendes and Ormerod (2021); and 2) a systematic review on 'the best interests of the child' in English and Portuguese—see Mendes and Ormerod (2019).

[6] In Brazil and England, divorce and child custody are a private law matter. However, in Brazil, there are some cases in which the State is seen as an interested party and non-criminal prosecutors can be involved. For more clarification, see Mendes and Ormerod (2021).

[7] See Sadler et al. (2010) for further information.

[8] Stands for Children and Family Court Advisory and Support Service. It is the English "evaluation service" and they advise family courts about what is safe for children and what are the child's best interests in child custody cases.

[9] Resolution' is an organisation promoting constructive resolution of family disputes and has over 6,500 members among family lawyers and other professionals.

to the circumstances described, the number of participants in England was smaller compared to Brazil, but as diverse as the Brazilian group.[10] Informed consent was obtained from all individual participants included in the study and the interviews were conducted either in person, via Skype or by telephone in both countries, and recorded with a Sony ICDBX140 Digital Voice Recorder. The study and its materials (e.g. information sheet and consent form) were approved by the University of Sussex's Social Sciences & Arts Research Ethics Committee under the Certificate of Approval number ER/JA454/2. The authors have no competing interests to declare that are relevant to the content of this article.

Data Analysis

This study adopted thematic analysis as its theoretical framework to understand and analyse the data gathered. A thematic analysis aims to search for patterns within qualitative data. Thematic analysis is a process that identifies, organises, and interprets these patterns, leading to analysis and final reporting on those patterns through the use of 'themes' (Boyatzis, 1998; Braun & Clarke, 2006, 2013).

A theme can be seen as a 'wall' composed of a lot of 'bricks' (codes) connected by a strong 'cement' (meanings). Both 'bricks' and 'cement' are distinguished and understood by the researcher's subjectivity and active role in the data analysis process, which is organic and interactive, going beyond the first round of coding, and extending throughout the whole process of analysis (Braun & Clarke, 2022a; Braun et al., 2019).[11]

We propose an Integrative Data-driven Thematic Analysis (IDDTA) that integrates inductive and abductive (theoretical) layers of analysis, revealing manifest and latent levels of content.[12] IDDTA assumes that: (a) neither the data nor the meanings derived from it are given; both are detected and distinguished as such by

[10] In Brazil, three cities were selected: 1) Brasília—it is Brazil's capital and its court has a large and solid system for the evaluation of child custody cases; as such it is treated as a reference in Brazil; b) São Paulo—it is the biggest city in South America, has the biggest court in the world (considering the number of cases per year) and also has the biggest family court in South America (where participants were recruited); and 3) Porto Alegre—it has a court known for launching case laws concerning family law that have spread to other courts, and has also inspired the enactment of acts in this field. Selecting these three cities enabled this study to economically but effectively achieve a representative sample of the 'Brazilian child custody field'. We intended to take the same approach in England by selecting participants from London, Brighton (southern) and one northern city. However, gathering participants in England was a herculean task that took over eight months. Hence, we decided to recruit participants from all over England.

[11] Thematic analysis is a highly flexible methodology, and does not prescribe procedures of data collection, or limit the theoretical or epistemological perspectives possible within it (Braun & Clarke, 2006, 2013; Braun et al., 2019; Nowell et al., 2017). Boyatzis (1998, p. 1) refers to thematic analysis as a "way of seeing", meaning that different people can see different things by looking at and analysing the same data. Moreover, different people can conceive and use thematic analysis in different ways (Braun et al., 2019).

[12] A similar approach was proposed by Urquhart (2013) for Grounded Theory. She referred to the 'middle-range' coding process in which the coding would emerge from inputs based on the raw data and on the literature, thus combining induction and abduction processes.

an observer[13]; (b) qualitative research is inevitably underpinned by the researcher's subjectivity, hence no knowledge is neutral[14]; and (c) qualitative research is a process that analytically organises, interprets and reveals patterns of meanings within the data by means of analytic inputs and outputs that interact in a recursive way. Braun and Clarke (2022b) reflect on the key role of the researcher's subjectivity during the data analysis process and how the researcher's work should generate and report themes that go beyond a 'topic summary' by portraying 'interpretative stories' concerning consolidated meaning. We agree with this idea but we understand that it is also important to consider that: a) it is the researcher's unique views, perspectives, experience and understanding (therefore, their subjectivity) that will guide them in the process of organising and describing the data. Hence, the researcher's subjectivity is present and is pivotal in the accomplishment of these tasks, even though these tasks' outcomes might seem less complex and sophisticated than "interpretative stories built around [a] uniting meaning" (Braun & Clarke, 2022b, p. 3); and b) qualitative research can be relevant for poly-making (Sale & Thielke, 2018; Tracy, 2010) and decision-making (Mendes, 2022). In this sense, whenever the outcomes of a qualitative study are aimed at or relevant for policy-makers and decision-makers, it is important to ensure this audience's readership and grasping. Sometimes, this means providing results that are a little bit more 'structured' and descriptive.

Taking these assumptions into account, and based on the assertions of Braun and Clarke (2022a) and Braun et al. (2019), IDDTA is a reflexive thematic analysis as it assumes and highlights the researcher's active role in the process of outlining the generated themes; it also highlights the meaning rather than quantity of data. This study's IDDTA had five phases inspired by and adapted from models in Braun and Clarke (2006, 2013, 2022a), Braun et al. (2019) and Nowell et al. (2017): Phase I—*Familiarisation* (before starting coding, the first author read the interview transcripts, intending to get 'closer to the data', its depth and breadth. This familiarisation was an active process that looked for meanings and patterns by speed-reading the whole dataset before moving on to Phase II (*open coding*). During this initial phase, the first author used the *memoing tool*[15]); Phase II—*First Level of Analysis:*

[13] In other words, we assume the assertion, given by Second-order Cybernetic theorists Maturana and Varela (1991) and Von Foerster (2003), that 'things' only become *things* when observed, distinguished and pointed out by an observer—i.e. it is the observer and their active perception that give meaning to things. Thus, reality and its contents (as meaningful constructs) emerge from an observer's perspective. In IDDTA, this is set as an essential principle throughout the whole process that leads the observer to identify, interpret, classify and analyse codes and themes.

[14] According to González Rey's (2011) assertions, in qualitative data analysis, it is the researcher's subjectivity, in a dialogic interaction with the data (for extension, with the research participants' subjectivity too), that drives the process of interpretation (i.e., building up meanings and themes). Hence, no knowledge is produced outside of historical, social and cultural contexts; neither is it removed from the researcher's subjectivity, previous knowledge or experiential framework. Therefore, no knowledge is totally neutral, pure or inductive.

[15] The *memoing* tool was fundamental for this phase. It is used to take notes regarding any ideas, insights or interpretations that emerge during the process. This technique was applied throughout the whole analysis, and it was important to identify links that pointed out patterns and resulting themes. The notes were also important to embody the latent (interpretative) character of the process.

open coding[16] (process aimed to organise, describe, sort and synthesise the dataset in a very open way, without restraints—this phase generated 62 codes (see Online Resource 3)[17]; Phase III—*Second Level of Analysis: generating initial themes* (analysis of initial codes to construct themes—this phase generated 12 candidate themes and 25 features; see Online Resource 4); Phase IV—*Reviewing & Setting the Themes: definitions and relationships* (refinement of candidate themes and features and trying to set them in a broader context alongside meaningful themes that also highlighted their connections—this phase generated 7 final themes and 22 features that will be presented in the next section. During the whole process, some themes were split or combined with others to compose other more meaningful themes and/or features); and Phase V—*Anchoring*[18] *& Thematic Map* (pointing out in which participants' data themes and features were based (hence, 'anchored') on; a thematic map to showcase how themes and features are connected and interacting); Phase VI—*Ensuring Trustworthiness: credibility and dependability* (peer review/debriefing[19] and reflexivity (see Online Resource 5)[20]).

For the data analysis process of this IDDTA, the *unit of coding* (the basic segment of raw data assessed that elicits meanings that help to identify patterns related to the studied phenomenon) was a sentence.[21] Also, the *unit of analysis* (the entity considered as the information source upon which interpretation was focused) was the whole transcript concerning each interview.

Figure 1 summarises the whole process of data analysis.

This study was not preregistered. Also, due to the nature of this study, participants did not agree for their data (whole transcripts) to be shared publicly. However, some supplemental material concerning the data analysis process will be available online.

Results

This study gathered data from 48 Brazilian and 25 English participants. Of these, 64% were female. The proportion of females and males in each country and within each category of legal actors was similar. The mean years of experience in Brazil was 14 ($SD = 9.7$) and 16.5 ($SD = 8.9$) in England.

[16] Inspired by the conceptions of 'open coding' by Urquhart (2013) and 'initial coding' by Charmaz (2014).

[17] This coding process was helped by the qualitative data analysis software NVivo 10 for Mac OS.

[18] This strategy is just a tool used to provide the results' confirmability. It **should not** be seen as a quantitative measure in which 'the larger the number of supporters (participants) pointed, the more significant that theme/feature is'.

[19] Four expert practitioners and academics with expertise in child custody cases and/or qualitative research reviewed this study's data analysis process and the themes generated.

[20] To ensure the final results' trustworthiness through 'credibility', 'confirmability' and 'dependability' as asserted by Creswell and Poth (2017), Darawsheh (2014), Flick et al. (2004) and Guest et al. (2012).

[21] The level of analysis can be 'line-by-line', 'sentence-by-sentence', 'paragraph-by-paragraph' or 'incident-by-incident'. The researcher will choose the level of analysis according to their objectives and the data characteristics.

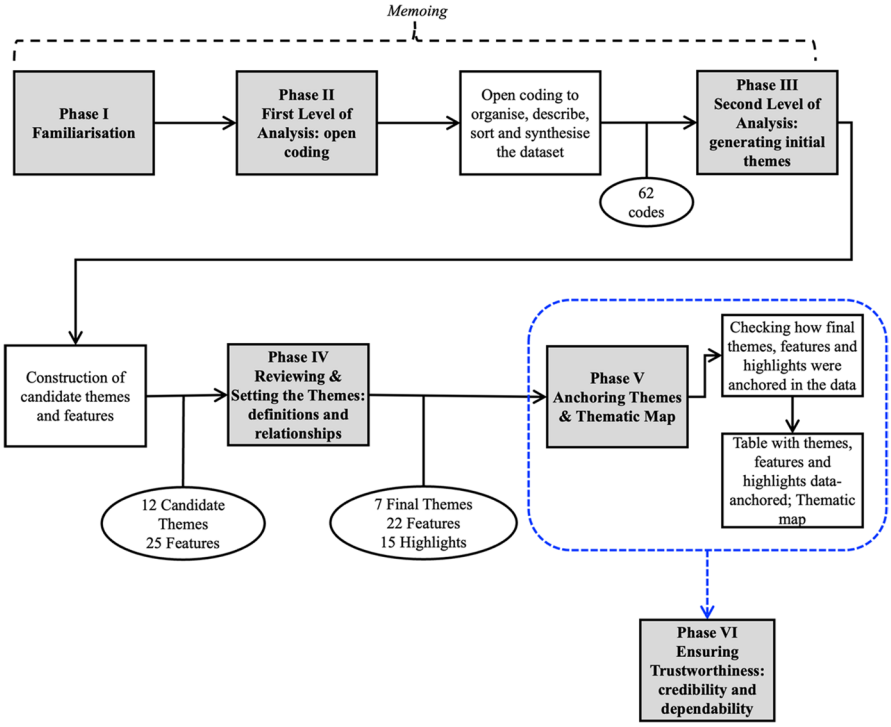

Fig. 1 Data analysis process

The themes below are presented according to a hierarchy of attributes: a) a theme: generated according to meaningful content in the dataset; b) feature: signposts characteristics of the theme; and c) highlight: relevant issues arising within a feature. Each theme is illustrated with participants' quotations that are linked to their ID, which presents their country ('BR'; 'EN') and category ('Jd' = Judge; 'Lw' = Lawyer; 'Pr' = Prosecutor; 'Psy' = psychologist; SW = Social Worker). In Brazil, participants also have their city pointed in their ID (BsB = Brasília; POA = Porto Alegre; SP = São Paulo).

Table 1 presents the themes generated and their features (or subthemes). It also shows how these themes are anchored in the data.

The thematic map presented in Fig. 2 showcases context factors present in child custody decision-making after parental separation. It shows how the seven themes are connected and interacting between and within each another. The map also shows their classification according to specific domains: 1) 'family'; 2) 'family court'; and 3) 'legal-psychosocial'.

Family Domain

Themes that encompass the 'family' domain represent issues strictly related to the family interaction and dynamics after parental separation that can impact the

Table 1 Themes and features generated by the reflexive thematic analysis and their anchoring on the data

Theme	Data anchoring
Theme CT1: Parental Separation: Crisis and Family Life Cycle (CT1.1) *Dysfunctionally coping divorce: family crisis*[1] (CT 1.2) *Misunderstanding and pathologisation of family interactions and coping strategies in the context of custody dispute: perspectives on parental alienation*[2] (CT 1.2.1) Tricks the decision-making (CT 1.2.2) Impairs the child's role (CT 1.3) *Parental separation as part of the family life cycle*[3]	**1 –** P2, P8, P9, P11, P17, P20, P21, P24, P31, P35, P39, P42, P44, P45, P49, P55, P57, P58, P62, P67 **2 –** P1, P2, P3, P4, P5, P11, P16, P17, P22, P23, P24, P30, P32, P36, P40, P42, P43, P50, P54, P60, P62 **3 –** P1, P2, P12, P14, P18, P19, P24, P26
Theme CT2: Hindering the Best Interests of the Child (CT 2.1) *Conjugality Vs. Parenthood*[4] (CT 2.2) *Detaching from the child and attaching to the litigation*[5] (CT 2.3) *Lack of parenting skills*[6] (CT 2.4) *"No 'child maintenance', no contact with the child"*[7] (CT 2.5) *Misunderstanding joint custody*[8] (CT 2.6) *Involving the child in parental conflict*[9]	**4 –** P1, P2, P3, P4, P5, P7, P11, P14, P15, P17, P18, P22, P23, P24, P25, P26, P27, P34, P35, P36, P38, P41, P42, P43, P45, P50, P54, P56, P57, P58, P62, P63, P66, P67, P68, P70, P72, P73 **5 –** P1, P2, P3, P4, P5, P6, P7, P8, P12, P13, P15, P16, P17, P20, P21, P24, P25, P27, P28, P29, P30, P33, P34, P37, P44, P47, P49, P50, P51, P52, P53, P56, P58, P59, P62, P63, P64, P65, P68, P69, P70, P72, P73 **6 –** P1, P2, P3, P14, P15, P16, P36, P46 **7 –** P2, P3, P5, P27, P29, P31, P45 **8 –** P6, P9, P15, P16, P22, P25, P31, P34, P43, P44 **9 –** P1, P2, P3, P5, P8, P11, P12, P13, P14, P17, P24, P34, P35, P36, P37, P39, P40, P41, P42, P43, P44, P47, P50, P54, P56, P57, P60, P62, P66, P68, P69, P73
Theme CT3: The Judiciary's Constraints & Practices (CT 3.1) *"The Law is powerless": legal and epistemological limitations of Law*[10] (CT 3.1.1) Limits of Law (CT 3.1.2) Litigious mindset (CT 3.2) *Organisational issues*[11] (CT 3.2.1) Time & Workflow (CT 3.2.2) Staff & Workload (CT 3.2.3) Judges' career & Courts (CT 3.2.4) Lack of training and knowledge (CT 3.3) *Between fear and bravery: the psychologists' practice in Brazil*[12] (CT 3.4) *An advocate in intractable cases: the psychologists' practice in England*[13]	**10 –** P2, P4, P11, P13, P14, P16, P21, P42, P44, P45, P48, P49 **11 –** P7, P8, P12, P18, P19, P20, P22, P25, P26, P29, P31, P34, P35, P42, P54, P57, P59, P71, P72, P73 **12 –** P9, P12, P36, P38 **13 –** P49, P51, P56, P61, P65, P68
Theme CT4: Applying The Best Interests of the Child Principle (CT 4.1) *Indeterminacy*[14] (CT 4.2) *Idiosyncrasy*[15]	**14 –** P3, P5, P8, P9, P10, P20, P37, P41, P45, P46, P47, P59, P62, P64, P69 **15 –** P3, P5, P6, P7, P14, P15, P17, P24, P27, P36, P39, P40, P42, P43, P44, P47, P51, P56, P57, P59, P63, P64, P71, P72

Table 1 (continued)

Theme	Data anchoring
Theme CT5: Making the Decision-Making Process Harder	**16 –** P2, P3, P6, P9, P13, P16, P18, P24, P25, P35, P36, P37, P38, P44, P45, P54, P56, P57, P59, P62, P63, P65, P66, P67, P71, P72
(CT 5.1) *Misconduct, maltreatment and abuse allegations*[16]	**17 –** P1, P27, P28, P44
(CT 5.2) *Tied Parents: "I cannot pick one"*[17]	**18** – P16, P27, P34
(CT 5.3) *Legal actors' emotional struggles*[18]	
Theme CT6: Assessing the Child's Best Interests in Child Custody Cases: Evaluation Services	**19 –** P2, P3, P4, P8, P10, P12, P13, P21, P22, P23, P24, P26, P35, P36, P39, P41, P42
(CT 6.1) *'Psychosocial Study': the Brazilian model*[19]	**20 –** P49, P50, P52, P53, P54, P56, P57, P59, P60, P69
(CT 6.1.1) Family Firefighters: the role of psychosocial evaluation	
(CT 6.1.2) Interdisciplinarity	
(CT 6.1.3) Non-protocol-based practice	
(CT 6.2) *'Children and Family Court Advisory and Support Service – CAFCASS': the English model*[20]	
(CT 6.2.1) Protocol-based practice: Children Act's Sect. 7 Report	
(CT 6.2.2) Non-evidence-based practice	
Theme CT7: Making a Child's Arrangement Decision Involving Adolescents	**21 –** P1, P15, P16, P21, P23, P27, P43, P44, P49, P50, P51, P52, P55, P66, P69, P71
(CT 7.1) "*It's quite impossible to go against their will"*[21]	**22 –** P2, P35, P42, P43, P44, P45, P47, P73
(CT 7.2) *"They can play the game too": getting into the litigating parents' dynamic*[22]	

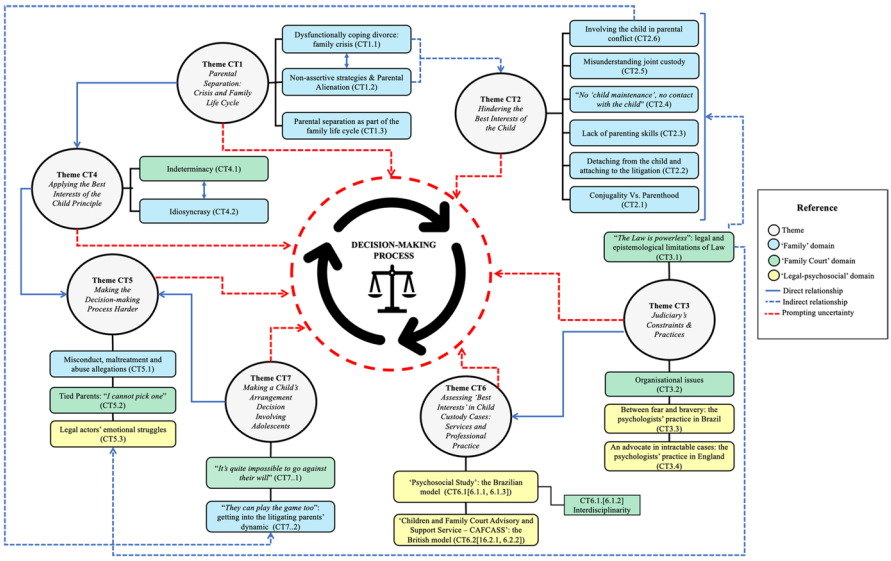

Fig. 2 Thematic map

decision-making process. For instance, this domain comprises issues concerning family life, family development, family member roles, parenting, co-parenting, litigation and coping strategies after the divorce.

Theme CT1: Parental Separation: Crisis and Family Life Cycle

The feature *Dysfunctionally coping with divorce: family crisis* (CT1.1) captures dysfunctional strategies used by families to cope with times of hardship after parental separation:

> I understand that [parents are] going to court and asking the judge what are the best interests of the child is a dysfunctionality in the family itself (**BR_SP.Psy.01**)
> Generally, what tends to happen is that there is a lot of heat when it comes to [parental] separation and that kind of tends to cloud a lot of the judgements when it comes to contact [with the child] (**EN_Lw.03**)

Some legal actors see family dysfunctionality whenever a family goes to court for the purpose of delegating to a third party (the judge) the power to solve their problems. This dynamic might be driven by multiple difficulties that the whole family endures during a separation. The intensification of these difficulties can lead a family—especially the parents—to become blind to the child's interests and the family's well-being. This process can be characterised as a family crisis moment:

> Everyone is very hurt, and there is no communication. Making a decision regarding child custody at this moment is very complicated (**BR_Pr.01**)
> [the parents need to] cope and overcome this moment of crisis so they will be able to see and care for their child again (**BR_POA.Psy.01**)

The feature *Misunderstanding and pathologisation of family interactions and coping strategies in the context of custody dispute: perspectives on parental alienation* (CT1.2) captures legal actors' and the judiciary's conceptions and understandings regarding the family crisis, which see some of the family dysfunctional coping strategies as examples of 'parental alienation'. This is considered to be a frequent issue in judicial custody disputes. For some legal actors, its presence will make decision-making more difficult and impair the child's role within it, as it is likely that the child will be co-opted by one of the parents:

> I see as more difficult cases, those in which there is a clear Parental Alienation Syndrome already installed because we have the practice of alienation already installed (**BR_BsB.Jd.01**)
> Parental alienation [is a situation] in which the child is in service of the adult's desire (**BR_POA.Psy.04**)

Other legal actors do not rely on parental alienation assumptions or accept its relevance to the decision-making process, due to its broad definition and gratuitous use within child custody cases:

> I don't like to use the term 'parental alienation' because it has a number of connotations which don't necessarily help (**EN_Jd.02**)
> I think that parental alienation has become fashionable, when in fact you have to value how this was built, how the other took part, and not whether or not there is parental alienation (**BR_SP.Psy.02**)

The feature *Parental separation as part of the family life cycle* (CT1.3) captures conceptions that see parental separation as part of the family's developmental cycle, and that non-assertive behaviours might happen in such situations due to the moment of crisis typical in parental separation:

> It is a phase of life transition and that is how I see it. It is a phase of going through transitions, and sometimes they are very emotional and people, maybe, do not know how to deal with it in a positive way (**BR_POA.SW.03**)
> Some people sometimes ask me: *Does divorce destroy families?* It depends on the family; some get destroyed, others do not, and some [families] understand that it is something temporary and that time will heal those wounds and the children need to be protected (**BR_BsB.Jd.01**)

Theme CT2: Hindering the Best Interests of the Child

The feature *Conjugality vs. Parenthood* (CT2.1) captures a frequent issue faced by separated parents involved in high-level litigation: they cannot distinguish parental issues from conjugal ones:

> Well, quite frequently my experience is that when there's still hostility between parents about why their marriage is broken down that can influence greatly influence their attitude towards either visiting contact… to be able to see the other parent, to be able to facilitate that (**EN_Psy.09**)
> I think that [separating parenting from conjugality issues] it is something that, many times, [must] pass through strong psychological support. I think the judiciary is not always prepared for that (**BR_Pr.02**)

These excerpts highlight the risk of unsolved and problematic conjugal issues overlapping with parental performance, at which point the child's well-being is jeopardised. Hence, for some interviewees, the acrimony between parents is based not on the child's interests but rather on issues stemming from the broken relationship.

The feature *Detaching from the child and attaching to the litigation* (CT2.2) captures issues related to situations in which the parents are so involved in their own matters, and within which they keep up the conflict, that they can neglect and harm the child's well-being:

> Parents go deep into the dispute and forget the child and the main aim, which is to protect and ensure a healthy development for the child and promote a positive familial coexistence (**BR_POA.SW.01**)
> It's about winning a case and not about what is best for the child at all. You know, to the extent of completely ignoring what the child wants (**EN_Lw.06**)

The feature *Lack of parenting skills* (CT2.3) captures issues regarding parents who do not have the necessary parental skills to protect their child:

> I am going to call it the emotional immaturity of the parents, you know? This is when there is no pathology involved (**BR_Pr.05**)
> Sometimes a parent does not have the slightest ability to look after the child, for various reasons, people who have problems with drugs, with alcohol, so we have several cases like this (**BR_BsB.Jd.01**)

The feature *"No 'child maintenance', no contact with the child"* (CT2.4) captures parents' perspectives that misunderstand the best interests of the child by making the contact between the child and the non-custodial parent conditional upon receipt of maintenance payments:

> Those with lower-wage parents misunderstand a lot the issue of alimony and the issue of coexistence. So, if the father does not want to pay alimony, the mother says: *ok, then I will also not let you see my child*. The child becomes a bargaining chip (**BR_BsB.Jd.02**)
> They [parents] associate alimony with the right to have contact with the child. It happens especially amongst people who have very little education, this is rare in the middle class, but it happens there too (**BR_BsB.Jd.03**)

Conflating child maintenance and the right to keep contact with both parents was seen only in Brazilian interviews, as in England child maintenance is not a judicial matter at first. This issue is commonly associated with low-income families in Brazil.

The feature *Misunderstanding joint custody* (CT2.5) captures misunderstandings regarding this type of arrangement:

> Sometimes the person says: *Ah, I want joint custody because I want to see my son every day*. This is not joint custody. The joint custody is joint care, co-responsibility (**BR_BsB.Lw.02**)
> The parents see the joint custody as a kind of mystery, it is something that "everybody likes" but they do not have a clear notion about what this kind of arrangement really is (**BR_SP.Lw.04**)

This issue was reported only by Brazilian participants, possibly because Brazilian law contributes to this misunderstanding:

> The law does not define well what this joint custody would be, because, you see, in truth, family power [i.e. parental responsibility] was already enshrined in the law beforehand (**BR_Pr.02**)

The feature *Involving the child in parental conflict* (CT2.6) captures issues related to high-level litigation situations in which the parents involve the child in their conflict, by either co-opting them to one side, forming alliances or neglecting the children who are forced to assume roles and functions more suited to adults or parents:

> [the parents can harm the child's best interests when] putting pressure on the child, or, first of all, by exposing the children to the conflict, by negative talk about the other parent (**EN_SW.01**)

> The child feels in the middle of it and is often put in a position of mediating this dispute between parents. It demands from the child a psychological basis and structure that are not there. I have seen cases in which the child ends up somatising these struggles (**BR_SP.Psy.03**)
> Some children become carers for parents who are facing a really difficult marriage breakdown. They take on too much responsibility, emotionally they're not really ready for (**EN_Psy.09**)

These excerpts highlight how reckless parental litigation can prove prejudicial towards children caught up in such situations, as they can either get triangulated within their parents' conflicts (pushed to pick sides and form alliances) or be forced to assume parental roles and functions that they should not have to.

Theme CT4: Applying the Best Interests of the Child Principle

The feature *Idiosyncrasy* (CT4.2) captures characteristics that make the assurance of the best interests of the child principle (BIC) very idiosyncratic:

> It [BIC] will depend on the customs, moral and cultural values of each family, because we know that each family has its principles, its morality, and this will vary from family to family (**BR_BsB.Lw.01**)
> Therefore, I consider that [BIC] is extremely subjective from case to case because it varies so much, the way that the guidelines are interpreted (**EN_Psy.04**)

These idiosyncratic characteristics indicate that assuring the best interests of the child depends on moral and cultural variations between families, and consequently for each child in their respective circumstances. Therefore, this principle cannot be generalised for all cases.

Theme CT5: Making the Decision-Making Process Harder

The feature *Misconduct, maltreatment and abuse allegations* (CT5.1) captures situations in which there are allegations of abuse, violence or maltreatment against the child that make the custodial decision-making process even harder:

> They [hardest cases] are those in which there are allegations of violence of any kind (**BR_SP.Psy.02**)
> Cases involving allegations of sexual abuse [are the hardest]. Because they are almost impossible to prove always. It is very difficult to find pieces of evidence to support them because they sound more like made-up narratives (**BR_SP.Psy.04**)
> Whether there are domestic violence allegations, true or not, whether there is a sexual abuse allegation or not… that causes problems, whether it's true or not

> because the court doesn't know how to deal with it, only the parties know or only God knows whether that is true (**EN_Lw.02**)

Cases with allegations of maltreatment and violence seem to be the most difficult because they bring into play two essential elements to consider during the decision-making: 1) jeopardy regarding the child's physical and psycho-emotional integrity; and 2) allegations without proof. This can be a dilemma for decision-makers as, although they value safeguarding the child's physical and psycho-emotional well-being, they are committed to making decisions based on concrete and provable facts.

Theme CT7: Making a Custodial Arrangement Involving Adolescents

The feature *"They can play the game too": getting into the litigating parents' dynamic* (CT7.2) captures legal actors' perceptions that adolescents can consciously and intentionally involve themselves in the parental conflict:

> They tend to make alliances with one or the other according to their own interests (**BR_Pr.06**)
> The chances of the child finding they can play one off against the other are massively enhanced and … that's quite often the case that leads to the kind of private law proceedings in which I end up getting involved (**EN_SW.05**)

Apparently, adolescents are not only more capable of expressing their voice and voting with their feet, they also get involved intentionally in their parents' conflict to take advantage or to adjust themselves to the litigation dynamic within their family.

Family Court Domain

The 'family court' domain regards themes that comprise factors related to legal issues that constrain the decision-making process. These issues refer to the application of the law and its limits and procedural issues as well as how the court addresses the child during the decision-making process. Based on the participant's accountings regarding law limitations and legal mindset, we understand that these issues, alongside the family domain ones, are what most pressurize the decision-making process in child custody cases.

Theme CT3: the Judiciary's Constraints and Practices

The feature *"The Law is powerless": legal and epistemological limitations of law* (CT3.1) captures issues that the law cannot affect or control, such as domestic dynamics, parents' behaviours outside the court, and daily routines involving the child. Also, law limitations would refer to the impossibility of preventing the child from suffering during parental separation:

> I think in every divorce, or almost every divorce to some degree, the child suffers, that is my perception. But I think the law is powerless to solve this kind of problem (**BR_BsB.Jd.04**)
> We can make orders about what should happen to a child, but judges have no power to make sure it will happen (**EN_Jd.01**)
> The [family's] reality often does not fit into legal guidelines (**BR_BsB.SW.01**)

Another factor that constrains the legal work in child custody cases is the intrinsic adversarial *modus operandi* of law practice, which tends to lead parents into acrimonious litigation by encouraging a 'litigious mindset':

> If people want to fight, they will be able to and they will continue to fight whether the judgment has closed the case or not, because usually in a case like this, one parent wins and the other one loses (**BR_Pr.03)**

Theme CT4: Applying the Best Interests of the Child Principle

The feature *Indeterminacy* (CT4.1) captures legal and conceptual limitations that make 'the best interests' an unclear and vague construct:

> I have no way of giving you a definition [for BIC]. If you are going to look into the doctrine that underpins it, there is no specific definition for that principle (**BR_BsB.Lw.01**)
> I think it's a very fluid concept, the best interests of the child. I think it's open to interpretation (**EN_Lw.07)**

Although the vagueness of 'the best interests' can be an issue for some legal actors, it seems a good thing for others:

> So it [BIC] being broad allows us to do this analysis case by case. […] If it was rigid, we would not be able to interpret it well. I prefer it to be open (**BR_BsB.Jd.03**)

In this sense, the 'best interests' indeterminacy can highlight the legal actors' discretionary power by allowing them to freely interpret what are the best interests of the child according to each case.

Theme CT5: Making the Decision-Making Process Harder

The feature *Tied parents: "I cannot pick one"* (CT5.2) captures perceptions regarding situations in which both parents present similar contexts:

> In situations where there is no clarity about who has the best conditions to protect or at least to take better care of the child [it is hard to make a decision] (**BR_BsB.Jd.01**)

> What is more difficult are those cases in which both parents want the custody and both have similar conditions to be awarded the custody (**BR_Pr.03**)

Theme CT7: Making a Custodial Arrangement Involving Adolescents

The feature "*It's quite impossible to go against their will"* (CT7.1) captures legal actors' perceptions that it is impossible to force an adolescent to comply with a legal custody decision:

> The older the children, the judge becomes increasingly powerless (**EN_Jd.01**)
> They [adolescents] are going to vote with their feet; in other words, the adolescent will go to live with whichever parent he or she wants to live with (**EN_Jd.03**)

No judge or legal measure is capable of determining what an adolescent should do regarding their custody because, at the end of the day, they can do whatever they want once they leave the court. The older the adolescent, the weaker are legal custody measures.

Legal-Psychosocial Domain

The 'legal-psychosocial' domain comprises themes that regard the evaluation services in Brazil and England. It also refers to some legal actors' practices and their emotional struggles during the decision-making process.

Theme CT3: the Judiciary's Constraints and Practices

The feature *Between fear and bravery: the psychologists' practice in Brazil* (CT3.3) captures Brazilian psychologists' perceptions on the edges of their work:

> It has happened to me that a lawyer questioned my competency and attached my résumé to the case transcripts in order to question my work. He had his own retained expert, then he used my résumé to claim that I was not good enough. […] This aspect, this characteristic of private family law cases makes us [staff] quite reluctant (**BR_SP.Psy.04)**

In Brazil, the work of psychologists bounces between the fear of being targeted by the litigating dynamic (as pointed out by BR_SP.Psy.04) and the bravery to act as the child's advocate.

The feature *An advocate in intractable cases: the psychologists' practice in England* (CT3.4) captures English psychologists' commitment to safeguarding the child's welfare in intractable cases:

> [I see myself as] an advocate for the child. So, you are working for... If you're working with the child you're working for the child (**EN_Psy.02)**

In England, the work of psychologists is required only on complex or intractable cases. This policy might be justified by the fact that the services of a psychologist in a child custody case tend to be more expensive than the services of social workers. Nonetheless, some psychologists see themselves as an advocate for the child in such cases.

Theme CT6: Assessing the Best Interests of the Child in Child Custody Cases: Evaluation Services

The feature '*Psychosocial study': the Brazilian model* (CT6.1) captures the Brazilian evaluation process carried out by psychosocial staff, called a 'psychosocial study'. It is similar to the idea of the 'case study' common within psychology and social work. However, understandings about the goals of such a study can vary amongst psychosocial staff:

> Whenever the case goes to psychosocial study, it is because the parental conflict is very serious (**BR_BsB.Jd.03**)
> So not all cases go to a psychosocial evaluation. Only cases in which we notice a conflict; cases in which the parents agree do not go to psychosocial evaluation (**BR_Pr.01**)

Judges and prosecutors tend to see psychosocial staff as 'family firefighters', the only solution for intractable cases. In turn, some psychosocial professionals see their role as a mediator:

> I think when I help adults to reflect on what is best for a child, on how the child will be better, I am doing something the judiciary should do, which is to protect the child. I think that protection should be present in all instances (**BR_BsB.SW.01**)
> [The psychosocial staff role] is to promote reflection, and intervention in some cases, where we perceive cases of vulnerability or risks that are spotted and referred to the support network (**BR_BsB.SW.02**)

The lack of guidelines and protocol surrounding the evaluation is another characteristic of the Brazilian system:

> We do not have a standard, a rigid methodology (**BR_POA.Psy.03**)
> We do not use any protocol (**BR_BsB.Psy.03**)
> I think professional freedom is important, but I think it is also important to build a methodology of service, something that is consistent and incorporates some principles (**BR_BsB.Psy.05**)

The feature '*Children and Family Court Advisory and Support Service – CAFCASS': the English model* (CT6.2) captures characteristics of the assessment carried out by English social workers from CAFCASS:

> In most of those cases, there will be a report on section 7 of the Children Act, prepared either by a CAFCASS office or, if local authorities social services are involved, by a social worker." **EN_Jd.01**

Unlike the Brazilian 'psychosocial study', the evaluation process in England is a more structured assessment with clear guidelines both from the Children Act 1989 (Sect. 7) and CAFCASS. However, there is a lack of evidence-based practice in England[22]:

> Reading through [the report], it was just absolute nonsense, it was just the CAFCASS officers' views, it wasn't based on facts, or logic or reasonableness (**EN_Lw.02**)
> I would say that a lot of the guidance we used to follow in CAFCASS was based on opinion, as opposed to hard research or based on evidence, and I think that could be a criticism that you might level at the system (**EN_SW.01**)

Also, there is 'risk-avoidance'[23] related to the CAFCASS officers' work:

> I do think that they are a very risk-averse organization. They certainly have become that. So, for instance, they will always take the safest route, safest route even if it means that a child potentially might suffer by not having a relationship (**EN_Lw.04)**

Discussion

We understand that context factors displayed throughout the themes resemble what Wells (1978) called 'estimator variables' in eye-witness testimony within criminal justice. This type of variable affects the legal process but is not under its control. In the case of eye-witness testimony, they are part of the context in which the person witnessed a crime, and which consequently can influence a person's testimony. Similarly, context factors constrain child custody cases and influence the decision-making process but they are not under the control of the legal system or decision-makers.[24] Therefore, context factors produce uncertainty.

[22] The CAFCASS website states that "practitioners use the Child Impact Assessment Framework (CIAF) when carrying out their analysis. The CIAF is a structured framework that sets out how children may experience parental separation and how this can be understood and assessed at Cafcass. It builds on our existing knowledge and guidance and follows a consistent and evidence-informed approach helping practitioners to find an outcome that is in the best interests of the children involved. The framework is informed by external research and our experience of supporting 140,000 children per year". In regards to 'risk-avoidance practice', the CAFCASS website also outlines the process by which CAFCASS are asked to advise the court on what is best for the child, who are ultimately required to make a decision based on all of the information that is presented to them.

[23] Idem 22.

[24] Sometimes, the judiciary has the power to exercise control over these issues but it is impeded by micro or macro issues that limit powers or make them impossible to exercise. Examples are the number of cases that reach the judiciary, and financial limits on the number of legal civil servants available to tackle cases.

These estimator variables can impact the making of a decision in child custody cases as well as the child's best interests. On one side, the family uses dysfunctional strategies to suppress the emotional distress caused by the divorce – these can blur the way legal actors perceive and understand the context in which the child's interests shall be safeguarded. On the other one, the laws and legal actors' practices, shape how these interests will be understood and assured in such cases. Hence, the outcome for what is best for the child will depend on how both families and legal actors found themselves in each side as well as the quality of the interaction between them amongst those uncertainty factors.

Every decision-making process that occurs in a natural setting will be surrounded by uncertainty (Klein et al., 1993). In general, 'uncertainty' in real-life decision-making refers to the doubts generated by the perception of a certain problem and that struct and shape the search for a solution (Lipshitz & Strauss, 1997; Lipshitz, 1993b). We understand that the assembling of 'estimator variables', and interactions between and within them, is what structures the uncertainty in child custody cases after parental separation. However, we believe that context factors prompted by the family are the main source of uncertainty in such cases.

'Family': the Foremost Domain of Uncertainty in Child Custody Cases

We believe that context factors in the family domain tend to produce most of the uncertainty in the decision-making process. The harder it is for the family to deal with the developmental crisis that parental separation prompts, the more uncertain the case shall be. That is because individuals and families going through a crisis are expected to act erratically, in a disorganised way, and usually employ non-assertive coping strategies (Mendes & Bucher-Maluschke, 2017; Sá et al., 2008). In this sense, it is possible that law professionals might have more difficulties in dealing with the families' struggles than dealing with issues regarding the 'family court' and 'legal-psychosocial' domains because the family's struggle relates more to psychosocial issues than legal ones.

Features that encompass the family domain portray some interesting dynamics. For instance: a) family developmental crisis after parental separation (CT1.1; CT1.3); b) conjugal vs parental issues (CT2.1; CT2.2); c) triangulations and collusion inside the family (CT1.2; CT7); and d) maltreatment and abuse allegations (CT5.1).

It is known that parental separation is linked to the family's development, being part of its life cycle and representing a crisis moment to the family system (McGoldrick et al., 2014; Mendes & Bucher-Maluschke, 2017). The Family Life Cycle, in which parental separation occurs, is paced by developmental steps marked by uncertainty, instability and disorganisation, that push family interactions towards a change of patterns that will lead it to the next step of its development (Mendes & Bucher-Maluschke, 2017). However, a lot of families struggle with this transitional process and try to cope by means of dysfunctional and non-assertive strategies. This is a key point in the child custody decision-making process because this dynamic can shape

not only the parents' attitudes and behaviours throughout proceedings but can also shape the characteristics of the information that shall be evaluated and taken into account to make decisions.

Those non-assertive coping strategies displayed by the family can misdirect the decision-making and hinder the child's role during a child custody dispute (CT1.2 [CT1.2.1; CT1.2.2]). An example is what some legal actors label as 'parental alienation'. This is a very fragile concept if one considers its conceptual, scientific, ethical and technical dimensions (Barbosa et al., 2021; Barnett, 2020; Bruch, 2001; Mackenzie et al., 2020; Meier, 2020; Mendes & Bucher-Maluschke, 2017; Neilson, 2018; Pepiton et al., 2012; Shaw).

'Parental alienation' is a label that derives from the incomplete, imperfect, ambiguous and/or simplistic information available in child custody cases. Information in this scenario is fed and blurred by developmental struggles that the family display after parental separation. When legal actors are not aware of that, labelling can be an 'easy way' to go through a complex, erratic, multidetermined and dynamic scenario. This is a problem, as overly simplistic labels like 'parental alienation' can engender a 'rebound effect', as they tend to produce more of what they should tackle: uncertainty and litigation. That is because the type, amount and shape of uncertainty with which decision-makers must deal with will depend on the decision-making strategies they are applying (Lipshitz & Strauss, 1997). Hence, by applying over-simplistic uncertainty-coping strategies, legal actors might face even more uncertainty. Therefore, these labels can increase the families' struggles (Barbosa et al., 2021; Mendes & Bucher-Maluschke, 2017), which might enhance the uncertainty and impair the child's interests. In sum, what labels such as 'parental alienation' do is create a vicious cycle of uncertainty in child custody cases, as the uncertainty prompted by a family's developmental struggles might lead to procedures and decisions that worsen the family's developmental struggles and, therefore, add more uncertainty to the decision-making process.

Adolescents are significant players in the child custody scenario as they might be consciously involved in parental conflict (CT7.2). This triangulation on the part of the adolescent in the parents' conflict shows that adolescents are not only active players in such cases but that they are also active in similar ways inside their family. Triangulation and collusion dynamics are common in child custody cases after parental separation. These dynamics are not necessarily dysfunctional or even permanent and they can be a way in which the family can go through and adjust itself to transitional developmental stages, especially very challenging ones (Emery, 2012; Juras & Costa, 2017). In this sense, some triangulations can even benefit the family. The problem is when the dynamic of a triangulation loses its transitional and adaptive character and becomes a long-lasting transactional structure, highlighting fixed and rigid oppositions that increase tension between family members. This can lead to coalitions, inflexible loyalties and triangulated conflicts that impede the family's progress through its functional development (Barbosa et al., 2021; Juras & Costa, 2017; Mendes & Bucher-Maluschke, 2017).

The Main Difference Between Brazil and England

We have observed interesting legal and cultural differences between Brazil and England that can impact the decision-making process.[25] For instance, there is the way legal actors perceive divorce/parental separation. Families going through parental separation and child custody disputes seek judicial aid when they are facing a crisis moment (Mosten & Traum, 2017). However, only Brazilian participants acknowledged that and the dysfunctional dynamic it brings about. Only 11% of the total participants (Brazilian) referred to parental separation as part of the family life cycle. These frequencies yield that Brazilian legal actors might be more aware of the uncertainty caused by those context factors than English ones. Nevertheless, only a few of Brazilian legal actors see the separation as a potential phase for the family's development.

There are also differences regarding the way professional evaluation is carried out in each country. It tends to be non-protocol based in Brazil and non-evidence based in England. In the psychosocial evaluation, the safeguarding of the child's interests can be weakened if one considers that the work carried out by psychologists and social workers in Brazil tends to be non-protocol-based (CT6.1[CT6.1.3]) and non-evidence based in England (CT6.2[CT6.2.2]). These results are surprising since we expected the Brazilian evaluation process to be stricter and structured due to its civil law system, which relies on written law rather than case law and customary practice. We also expected the English evaluation process to be more loose and marked by workarounds due to its common law system. However, we saw the opposite. Some Brazilian participants indicated that "the [family] reality often does not fit into legal guidelines" (BR_BsB.SW.01), so their practice needs to be more open and workarounds need to be applied so they can properly approach the case and cope with uncertainty. Even though English participants were working in a more open and customary system, they indicated that they rely heavily on protocols: "I tend, certainly, on a difficult case, to go through each element of the welfare checklist [from Children Act 1989] quite slavishly" (EN_Jd.01). Based on this, we understand that the nature of the legal system itself (civil or common law) is not what makes the tackling of uncertainty easier or harder for legal actors. In fact, this reinforces our belief that context issues, especially those regarding family developmental struggles are the greatest source of uncertainty in child custody cases.

What to Make of These Results: a Preliminary Evaluation

We understand that context factors are contingencies that impact legal actors' performance throughout the decision-making process by influencing the cognitive strategies they choose to cope with uncertainty (Mendes & Ormerod, 2022). However,

[25] Brazil is the most catholic country in the world. Hence, religious beliefs are likely to play a role in all matters concerning society, families and the justice system. However, religious beliefs were not pervasive or salient within the data. We believe further studies focused on legal actors' religious issues are needed to properly investigate the role of these issues in child custody cases after parental separation.

context factors can also cue strategies that generate errors and biased judgements. Being aware of these factors, and properly interpreting them, might be the first step in assertively handling uncertainty in child custody cases as the understanding of contextual issues is an important part of the decision-making process (Ben-Haim, 2019).

In a scenario of decision-making under uncertainty, any approach to tackling uncertainty is welcome, especially when ignoring uncertainty is more attractive and easier than recognising it and properly coping with it (Marchau et al., 2019). There are three typical strategies used to cope with uncertainty during a decision-making process (Lipshitz & Strauss, 1997): (1) reduce uncertainty; (2) acknowledge uncertainty; and (3) suppress uncertainty.

The strategies to reduce uncertainty are mainly anchored in collecting additional information before making a decision. Whenever further information is not available, the decision-maker can make some extrapolations based on the information available and then make a decision/take an action. In child custody cases, the strategy to reduce uncertainty would start with the collection of all relevant and available information that might influence the decision-making process. This includes the information about the context factors presented in this paper. In principle, the themes presented in this paper can be used as an informal checklist by legal actors to ensure that they have considered all possible sources of uncertainty. Even though some of them might not be very novel for part of the readership, we believe that having them structured and organised and published, alongside pertinent discussions, is an important step for an informed and evidence-based practice within the family justice system (Danser & Faith-Slaker, 2019).[26] Moreover, providing evidence is also important to provoke relevant changes and policy-making within organisations like the judiciary (Sanderson, 2002).

Another strategy to handle uncertainty is to acknowledge and properly manage the sources of uncertainty. One cannot control or promote 'harm reduction' of what one does not know. Hence, legal actors cannot properly tackle uncertainty if they do not acknowledge it and how it can affect their decision-making process. In this sense, we believe this paper can promote awareness regarding the importance of acknowledging the uncertainty in child custody cases and, therefore, be able to select better courses of action that can avoid or handle risk factors (Lipshitz & Strauss, 1997), especially for the child's interests and the family well-being.

The 'suppression strategy' regards actions that either deny (e.g. ignoring or distorting information that is unwelcome) or rationalise the uncertainty within the decision-making process. Our data suggest that this is a strategy invoked by some legal actors—e.g. CT1.2. We do not believe this is a good strategy to cope with uncertainty in child custody cases as this can lead to increasing uncertainty and, therefore, can put children and families in jeopardy. Instead, we believe that the best course of action is to acknowledge the sources of uncertainty (like the ones presented in this paper), map how they might affect the decision-making process in that specific case

[26] Qualitative evidence is important for an evidence-based practice—See Sale and Thielke (2018).

and then, based on evidence-based practice, reduce uncertainty and make decisions that really are child-centred.[27]

Limitations and Future Directions

This study's design and the data gathered do not allow us to determine the optimal ways with which one can cope with uncertainty in child custody cases.[28] They also do not allow us to properly approach the role of legal actors' systems of beliefs in acknowledging and dealing with context factors and the uncertainty they produce. However, we believe this paper can help legal actors to understand how uncertainty in child custody cases constrains their performance and, thus, make them more aware of it—which is an important step in the tackling of uncertainty as mentioned before.[29]

Even though the results of this study make progress in understanding how context factors structure uncertainty in child custody cases, there are still processes that need to be investigated, such as how context factors are measured or weighed by legal actors when making a decision in a specific case and the role of 'system of beliefs'—as mentioned. Also, future work should examine the strategies used to cope with uncertainty and whether there are optimal ways to cope with uncertainty in such cases, taking into account the child's best interests.

Final Considerations

This paper allowed us, for the first time, under a 'naturalistic decision-making' approach, to identify and organise issues that shape uncertainty in child custody cases after parental separation. This is important, both to draw the attention of legal actors and academia to the role of the context in child custody cases and also to initiate research into ways of coping with uncertainty, aiming to avoid or diminish errors and biased judgments. We understand that the results presented in this paper not only further the knowledge in an underresearched field but they can also help legal

[27] This is especially needed in Brazil, where family justice tends to adopt non-evidence based as well as ethically and scientifically questionable practices to mediate and solve conflicts/litigation within family courts—e.g. 'systemic constellation work' or 'family constellation': a mediumistic pseudo-psychotherapy imported from Germany without any sort of transcultural adaptation and/or scientific probe towards its efficacy within the family justice.

[28] In the major study from which these results were extracted, we identified eight cognitive strategies used by legal actors to cope with uncertainty in child custody cases. Like context factors, we identified two domains for these strategies: (1) heuristics: *strategic knowledge* used to search the environment and set up shortcuts to make a decision; and (2) metacognition: referring to *metacognitive knowledge* that serves to monitor the decisions made and to make sure those decisions abide by the goal state. These domains are further explored by Mendes and Ormerod (2022).

[29] The results from this study were also pivotal to helping us develop an experiment that might allow us further the discussion regarding ways to better cope with uncertainty and arrive at better decisions. It is a verbal protocol analysis based on a decision-making experiment with legal actors from Brazil and England. Currently, we are writing the results to then submit them for publication.

actors to be more aware of the sources of uncertainty in child custody cases that can impact their performance during the decision-making process.

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Data Availability Data not available due to ethical restrictions.Due to the nature of this research, participants of this study did not agree for their data (whole transcripts) to be shared publicly. However, some supporting material concerning the data analysis process will be available for both reviewers and readers.

Declarations

Ethics Approval This study was approved by University of Sussex's Sciences & Technology C-REC under the Certificate of Approval ER/JA454/1.

Informed Consent Informed consent was obtained from all individual participants included in the study.

Consent for Publication All participants gave consent for their data to be used in publication.

Conflict of Interest The authors declare no competing interests.

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References

Baker, K. K. (2012). Homogenous rules for heterogeneous families: The standardization of family law when there is no standard family. *University of Illinois Law Review, 2012*(2), 319–372. https://doi.org/10.2139/ssrn.1782051

Barbosa, L. P. G., Mendes, J. A. A., & Juras, M. M. (2021). Dinâmicas disfuncionais, disputa de guarda e alegações de alienação parental: uma compreensão sistêmica. *Nova Perspectiva Sistêmica, 30*(69), 6–18. https://doi.org/10.38034/nps.v30i69.612

Barnett, A. (2020). A genealogy of hostility: Parental alienation in England and Wales. *Journal of Social Welfare and Family Law, 42*(1), 18–29. https://doi.org/10.1080/09649069.2019.1701921

Ben-Haim, Y. (2019). Info-Gap Decision Theory (IG). In V. A. Marchau, W. E. Walker, P. J. Bloemen, & S. W. Popper (Eds.), *Decision making under deep uncertainty: From theory to practice* (pp. 93–116). Springer Nature.

Boyatzis, R. E. (1998). *Transforming qualitative information: Thematic analysis and code development*. Sage Publications.

Braun, V., & Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology, 3*(2), 77–101. https://doi.org/10.1191/1478088706qp063oa

Braun, V., & Clarke, V. (2013). *Successful qualitative research: A practical guide for beginners*. Sage Publications.

Braun, V., & Clarke, V. (2022a). *Thematic Analysis: A practical guide*. Sage.

Braun, V., & Clarke, V. (2022b). Toward good practice in thematic analysis: Avoiding common problems and be(com)ing a *knowing* researcher. *International Journal of Transgender Health*, 1–6. https://doi.org/10.1080/26895269.2022.2129597

Braun, V., Clarke, V., Hayfield, N., & Terry, G. (2019). Thematic analysis. In P. Liamputtong (Ed.), *Handbook of research methods in health social sciences* (pp. 843–860). Springer.

Bruch, C. S. (2001). Parental alienation syndrome and parental alienation: Getting it wrong in child custody cases. *Family Law Quarterly, 35*, 527.

Charmaz, K. (2014). *Constructing grounded theory*. Sage Publications.

Creswell, J. W., & Poth, C. N. (2017). *Qualitative inquiry and research design: Choosing among five approaches*. Sage Publications.

Danser, R., & Faith-Slaker, A. (2019). Moving from evidence-light to evidence-based practice: Randomized control trials in family law. *Family Court Review, 57*(4), 491–500. https://doi.org/10.1111/fcre.12442

Darawsheh, W. (2014). Reflexivity in research: Promoting rigour, reliability and validity in qualitative research. *International Journal of Therapy and Rehabilitation, 21*(12), 560–568. https://doi.org/10.12968/ijtr.2014.21.12.560

Eekelaar, J. (2015). The role of the best interests principle in decisions affecting children and decisions about children. *International Journal of Children's Rights, 23*(1), 3–26. https://doi.org/10.1163/15718182-02301003

Eekelaar, J., & Maclean, M. (2013). *Family justice: The work of family judges in uncertain times*. Bloomsbury Publishing.

Emery, R. E. (2012). *Renegotiating family relationships: Divorce, child custody, and mediation*. The Guilford Press.

Enosh, G., & Bayer-Topilsky, T. (2015). Reasoning and bias: Heuristics in safety assessment and placement decisions for children at risk. *The British Journal of Social Work, 45*(6), 1771–1787. https://doi.org/10.1093/bjsw/bct213

Flick, U., Kardoff, E., & Steinke, I. (2004). *A companion to qualitative research*. Sage Publications.

Goldstein, M. (2016). Best interest factors in child custody evaluations. In M. Goldstein (Ed.), *Handbook of Child Custody* (pp. 11–15). Springer. https://doi.org/10.1007/978-3-319-13942-5_2

González Rey, F. L. (2011). *Pesquisa qualitativa em Psicologia: Caminhos e desafios*. Cengage Learning.

Guest, G., MacQueen, K. M., & Namey, E. E. (2012). *Applied thematic analysis*. Sage Publications. https://doi.org/10.4135/9781483384436

Jones, R. N., Patwardhan, A., Cohen, S. J., Dessai, S., Lammel, A., Lempert, R. J., et al. (2014). Foundations for decision making. In C. B. Field, V. R. Barros, D. J. Dokken, K. J. Mach, M. D. Mastrandrea, & T. E. Bilir (Eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (pp. 195–228). Cambridge University Press. https://doi.org/10.1017/CBO9781107415379.007

Juras, M. M., & Costa, L. F. (2017). He was neither a good father nor a good husband: Marital and parental roles in low-income separated families. *Psicologia: Teoria e Pesquisa, 32*(5), 1–9. https://doi.org/10.1590/0102-3772e32ne215

Kelly, J. B. (2007). Children's living arrangements following separation and divorce: Insights from empirical and clinical research. *Family Process, 46*(1), 35–52. https://doi.org/10.1111/j.1545-5300.2006.00190.x

Klein, G., Orasanu, J., Calderwood, R., & Zsambok, C. E. (Eds.). (1993). *Decision-making in action: models and methods*. Ablex Publishing Corporation.

Lang, M. (2017). Legal uncertainty as a welfare enhancing screen. *European Economic Review, 91*, 274–289. https://doi.org/10.1016/j.euroecorev.2016.10.007

Lipshitz, R. (1993a). Converging themes in the study of decision making in realistic settings. In G. A. Klein, J. Orasanu, R. Calderwood, & C. E. Zsambok (Eds.), *Decision-making in action: models and methods* (pp. 103–137). Ablex Publishing Corporation.

Lipshitz, R. (1993b). Decision making as argument-driven action. In G. A. Klein, J. Orasanu, R. Calderwood, & C. E. Zsambok (Eds.), *Decision-making in action: models and methods* (pp. 172–181). Ablex Publishing Corporation.

Lipshitz, R., & Strauss, O. (1997). Coping with uncertainty: A naturalistic decision-making analysis. *Organizational Behavior and Human Decision Processes, 69*(2), 149–163. https://doi.org/10.1006/obhd.1997.2679

Lipshitz, R., Klein, G., Orasanu, J., & Salas, E. (2001). Taking stock of naturalistic decision-making. *Journal of Behavioral Decision Making, 14*(5), 331–352. https://doi.org/10.1002/bdm.381

Mackenzie, D., Herbert, R., & Robertson, N. (2020). 'It's not OK', but 'It' never happened: Parental alienation accusations undermine children's safety in the New Zealand family court. *Journal of Social Welfare and Family Law, 42*(1), 106–117. https://doi.org/10.1080/09649069.2020.1701942

Marchau, V. A. W. J., Walker, W. E., Bloemen, P. J. T. M., & Popper, S. W. (2019). Introduction. In V. A. Marchau, W. E. Walker, P. J. Bloemen, & S. W. Popper (Eds.), *Decision making under deep uncertainty: From theory to practice* (pp. 1–20). Springer Nature.

Maturana, H. R., & Varela, F. J. (1991). *Autopoiesis and cognition: The realization of the living* (Vol. 42). Springer Science & Business Media.

McGoldrick, M., Carter, B. A., & Preto, N. A. G. (2014). *The expanding family life cycle: Individual, family, and social perspectives*. Pearson.

Meier, J. S. (2020). US child custody outcomes in cases involving parental alienation and abuse allegations: What do the data show? *Journal of Social Welfare and Family Law, 42*(1), 92–105. https://doi.org/10.1080/09649069.2020.1701941

Mendes, J. A. A. (2022). *The decision-making process in child custody cases after parental separation: a cross-cultural study between Brazil and England [unpublished doctoral dissertation]*. University of Sussex.

Mendes, J. A. A., & Bucher-Maluschke, J. S. N. F. (2017). Destructive divorce in the Family Life Cycle and its implications: criticisms of Parental Alienation. *Psicologia: Teoria e Pesquisa, 33*(2), 1–8. https://doi.org/10.1590/0102.3772e33423

Mendes, J. A. A., & Ormerod, T. (2019). The best interests of the child: An integrative review of English and Portuguese literatures. *Psicologia em Estudo, 24*, 1–22. https://doi.org/10.4025/psicolestud.v24i0.45021

Mendes, J. A. A., & Ormerod, T. (2021). A comparative look at divorce, laws and the best interests of the child after parental separation in Brazil and England. *Revista da Faculdade de Direito UFPR, 66*(2), 95–126. https://doi.org/10.5380/rfdufpr.v66i2.74001

Mendes, J. A. A., & Ormerod, T. (2022). *Making sense out of uncertainty: cognitive strategies in child custody decision-making process [Unpublished manuscript]*. School of Psychology, University of Sussex.

Mosten, F. S., & Traum, L. (2017). The family lawyer's role in preventive legal and conflict wellness. *Family Court Review, 55*(1), 26–37. https://doi.org/10.1111/fcre.12260

Neilson, L. C. (2018). *Parental alienation empirical analysis: child best interests or parental rights?* FREDA Centre for Research on Violence Against Women and Children.

Nowell, L. S., Norris, J. M., White, D. E., & Moules, N. J. (2017). Thematic analysis: Striving to meet the trustworthiness criteria. *International Journal of Qualitative Methods, 16*(1), 1–13. https://doi.org/10.1177/1609406917733847

O'Neill, A. T., Bussey, K., Lennings, C. J., & Seidler, K. M. (2018). The views of psychologists, lawyers, and judges on key components and the quality of child custody evaluations in Australia. *Family Court Review, 56*(1), 64–78. https://doi.org/10.1111/fcre.12323

Patterson, E. S., Militello, L. G., Su, G., & Sarkar, U. (2016). Characterizing a naturalistic decision-making phenomenon: Loss of system resilience associated with implementation of new technology. *Journal of Cognitive Engineering and Decision Making, 10*(3), 229–243. https://doi.org/10.1177/1555343416652524

Pepiton, M. B., Alvis, L. J., Allen, K., & Logid, G. (2012). Is parental alienation disorder a valid concept? Not according to scientific evidence. A review of parental alienation, DSM-5 and ICD-11 by William Bernet. *Journal of Child Sexual Abuse, 21*(2), 244–253.

Sá, S. D., Werlang, B. S. G., & Paranhos, M. E. (2008). Intervenção em crise. *Revista Brasileira de Terapias Cognitivas, 4*(1), 1–10.

Sadler, G. R., Lee, H. C., Lim, R. S. H., & Fullerton, J. (2010). Recruitment of hard-to-reach population subgroups via adaptations of the snowball sampling strategy. *Nursing & Health Sciences, 12*(3), 369–374.

Sale, J. E., & Thielke, S. (2018). Qualitative research is a fundamental scientific process. *Journal of Clinical Epidemiology, 102*, 129–133. https://doi.org/10.1016/j.jclinepi.2018.04.024

Sanderson, I. (2002). Evaluation, policy learning and evidence-based policy making. *Public Administration, 80*(1), 1–22. https://doi.org/10.1111/1467-9299.00292

Stamps, L. E., Kunen, S., & Lawyer, R. (1996). Judicial attitudes regarding custody and visitation issues. *Journal of Divorce & Remarriage, 25*(1–2), 23–37. https://doi.org/10.1300/J087v25n01_02

Tracy, S. J. (2010). Qualitative quality: Eight "big-tent" criteria for excellent qualitative research. *Qualitative Inquiry, 16*(10), 837–851. https://doi.org/10.1177/1077800410383121

Urquhart, C. (2013). *Grounded theory for qualitative research: A practical guide*. Sage Publications.
Von Foerster, H. (2003). *Understanding understanding: Essays on cybernetics and cognition*. Springer.
Wallace, S. R., & Koerner, S. S. (2003). Influence of child and family factors on judicial decisions in contested custody cases. *Family Relations, 52*(2), 180–188.
Wells, G. L. (1978). Applied eyewitness-testimony research: System variables and estimator variables. *Journal of Personality and Social Psychology, 36*(12), 1546.

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